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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JULIA GORMAN,

APPELLANT

APPELLATE CASE NO. 2011-203707

FINAL BRIEF OF APPELLANT

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A. The court erred in admitting the statement made by Appellant prior to officers advising Appellant of her Miranda rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.

B. The court erred in admitting the statement made by Appellant subsequent to the officer advising her of her Miranda rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officers questioned Appellant in the same interview room and in close temporal proximity to the prior unwarned interrogation.

C. The court erred in admitting the statements made by Appellant because the statements were not the product of a voluntary waiver of Appellant's rights due to Appellant's lack of sleep, state of shock and grief over the loss of her grandson, lengthy detention for interrogation, and ingestion of a prescription anti-anxiety drug during the interrogation.

II. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any direct or substantial circumstantial evidence that Appellant committed the alleged criminal acts.

STATEMENT OF THE CASE

During its September 2008 term, the Horry County Grand Jury indicted Appellant for homicide by child abuse (2008-GS-26-3756). In its February 2010 term, the Horry County Grand Jury indicted Appellant for unlawful conduct toward a child (2008-GS-26-00841). Finally, during its May 2010 term, the Horry County Grand Jury indicted Appellant for aiding and abetting homicide by child abuse (2010-GS-26-02194). Indictments. Appellant and her co-defendant, Robert A. Palmer, were jointly tried before the Honorable Larry B. Hyman and a jury on November 14-18, 2011. James C. Galmore and J. Andrew Ritner represented Appellant. Carla F. Grabert-Lowenstein represented the co-defendant. Candice A. Lively and Nancy G. Cote prosecuted the cases. R. 1.

The jury found Appellant and the co-defendant guilty of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child. R. 875, line 6 – R. 876, line 4. Judge Hyman sentenced Appellant to thirty-five years for homicide by child abuse, ten years for unlawful conduct toward a child, and twenty years for aiding and abetting homicide by child abuse. R. 886, lines 5-16; sentence sheets.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. Appellant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments was violated by the introduction of her statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of her *Miranda* warnings and the second statement was tainted by the initial violation and was the product of an involuntary waiver.

On July 2, 2008, Appellant's daughter provided temporary guardianship over Appellant's grandson, minor, to Appellant and co-defendant, Appellant's boyfriend, for an unspecified amount of time. Appellant's daughter planned to go home to Arizona to pack her belongings, return to Horry County to pick up minor, and then settle into her new residence in Beaufort. R. 250, line 21 – R. 256, line 3.[1] The prosecution alleged that on July 14, 2008, minor suffered severe head trauma. R. 13, line 20 – R. 14, line 3; Indictments. On July 16, 2008, minor died as a result of the head trauma. R. 270, lines 4-5.

Prior to the start of trial, the court convened a hearing pursuant to Jackson v. Denno[2] regarding the admissibility of Appellant's videotaped statement to police. R. 21, lines 9-10. Detective Timothy Troxell, an employee of the Horry County Police Department testified that he accompanied Detective Weaver to the Medical University of South Carolina (MUSC) to investigate the injuries sustained by the victim. R. 22, lines 6-25. The testimony revealed Troxell and Weaver attempted to video record the interviews, but the equipment malfunctioned. R. 29, line 25 – R. 30, line 10; R. 91, lines 8-14.

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[1] Appellant uses the abbreviation Hrg. to refer to the transcript of the hearing on October 31, 2011. Appellant uses the abbreviation Tr. to refer to the trial transcript.

[2] 378 U.S. 368 (1964).

Then, on July 18, 2008, Troxell and Weaver interrogated Appellant and her co-defendant. R. 23, lines 1-6; R. 69, lines 22-25. Troxell explained they initially interviewed co-defendant, and then interviewed Appellant. R. 23, lines 11-12. The interview of co-defendant began at 9:07 a.m. R. 24, lines 21-24. The video[3] of the interview of co-defendant, which was thirty nine minutes long, was played for the court. R. 28, lines 2-10.

The co-defendant reported that neither he nor Appellant slept the night before the interviews and had very little sleep over the last four days. R. 28, line 23 – R. 29, line 4; R. 29, lines 7-18; R. 68, lines 19-23. Troxell noted that co-defendant had not slept, probably had not eaten, over the course of the week. R. 68, lines 6-11.

The officers questioned co-defendant regarding what transpired in the days preceding the minor's death and in the days after his death. On camera, Troxell stated "[w]hat we need to do is kind of like I said when we talked to you in the hospital my tape recorder died … And we kind of need to go back over and … some of the things that happened." R. 29, line 25 – R. 30, line 10. Then, Troxell remarked

> But being that [minor] has passed away, or whatever, and this investigation has taken more of a serious note instead of just trying to get information we've got to advise everybody that we talk to from this point forward of their Miranda rights. It doesn't mean you're under arrest or anything like that; it's just before we talk we've got to advise everybody of these, okay.

R. 30, lines 15-23. Troxell then explained the rights and co-defendant agreed to waive those rights. R. 31, line 23 – R. 32, line 1. After obtaining co-defendant's account of the days preceding minor's death, the officers questioned him regarding whether Appellant had any problems at work. Officers inquired if Appellant was agitated and upset at home. R. 44, line 4 – R. 45, line 5.

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[3] This exhibit is on file with the Court.

When co-defendant offered no explanation that fit within the medical evidence of what happened to minor, the officers continued to press him to inculpate Appellant. R. 52, line 25 – R. 53, line 1; R. 54, lines 19-21; R. 56, lines 9-10; R. 60, line 24 – R. 61, line 6; R. 64, lines 11-19. Suggesting that co-defendant was covering for Appellant, the officers asked if Appellant were worth going to jail over. R. 56, lines 1-6. The officers told co-defendant they were questioning him first because he showed compassion for minor and had positive character, whereas Appellant "was stone cold and straight faced." R. 61, line 7 – R. 62, line 1. Officers noted that co-defendant had been unable to see his five-year old son and probably would not see him "until this is resolved." R. 48, line 25 – R. 49, line 12; R. 56, lines 17-25. He even told co-defendant "you're going to end up going to jail for this." R. 51, lines 23-24; R. 54, lines 7-11.

When co-defendant stated that his story had not changed in over forty hours and he would not change it then, Weaver declared "[t]his interview's over, buddy." When co-defendant attempted to rise, Weaver stated "sit down, you ain't going anywhere just yet, we've gotta get a set of handcuffs for you." R. 68, line 25 – R. 69, line 5.

At 10:06 a.m., Troxell and Weaver "initiated an interrogation with [Appellant] at the Horry County Police Department." R. 70, lines 1-7. According to Troxell, he provided Appellant with "the standard police department form for the advisement of one's Miranda rights." R. 70, lines 11-18. Troxell testified the form contained Appellant's signature. R. 71, lines 3-6. Additionally, Troxell read the statement of rights to Appellant. R. 71, lines 7-21. According to Troxell, he asked Appellant to initial after each warning indicating that the line had been read to her. R. 71, line 22 – R. 72, line 3. Troxell did not recall any impairment due to alcohol or drugs on the part of Appellant. He had no concerns about

Appellant's ability to understand. He claimed that he did not coerce Appellant to give a statement. Finally, Troxell indicated that he observed no indication of educational or mental incapacity. R. 72, lines 4 – 25.[4]

The video[5] of the interview, which was transcribed by the court reporter, was played for the court. The video was one hour and twenty-two minutes. R. 28, lines 7-10.

When Troxell escorted Appellant into the interview room, and when he told her to take a seat, she responded "I don't like this." R. 75, lines 10 – 14. Initially, Troxell noted that Appellant looked exhausted. R. 76. lines 15 – 18. Appellant responded that she had no sleep the night before. R. 76, lines 19 – 20. Although no one had advised Appellant of her rights, Troxell continued to question Appellant regarding the circumstances surrounding the victim's injuries. R. 77, lines 5 – 6. Appellant engaged in an almost stream of consciousness response to Troxell's questioning. R. 77, lines 7 – R. 83, line 5. In response to statements made by Appellant, Troxell and Weaver continued to question her, and Appellant continued to discuss the circumstances of the victim's injuries with the officers. R. 83, line 6 – R. 89. line 6.

Only after obtaining substantial information from Appellant did officers advise Appellant of her rights and ask for her to waive those rights. Troxell said:

> I hate to interject but now that we've, we've kind of got to the point where [minor] is deceased. Before we talk and this is just standard practice with everybody, we did it with [codefendant] earlier, you've got to be advised of your Miranda rights, the investigation as, you know, has taken a turn into now a death investigation.

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[4] On cross-examination, Troxell admitted that he had previously interviewed Ms. Gorman at MUSC. He was unaware if Weaver had interviewed Appellant at Conway Medical Center. R. 74, lines 12 – 21.

[5] This exhibit is on file with the Court.

R. 89, lines 7-13. Troxell also stated, "Just an advisement standard policy and procedure I've got to advise you of the ease." Troxell then read the rights to Appellant, and she signed indicating she wanted to "continue to make a statement and stuff." R. 89, line 7 – R. 91, line 25.

Just as with co-defendant, Troxell reminded Appellant that she had discussed the matter previously with the officers, but he wanted her to do it again because the "tape recorders malfunctioned." R. 91, lines 8 – 14. When Appellant did not implicate herself or codefendant in the injuries to minor, Troxell confronted her with the current day's newspaper's headline, which read "Abused Child Dead." He threatened "tomorrow's headline is 'Arrest Made in Abused Child's Death.'" R. 103, lines 2-4. Troxell then challenged Appellant that the first tear he saw from her was when she was confronted with jail. He told her that her statements to police would determine whether she went home or if she went to jail. R. 103, lines 9 – 19. Later, following his theme of the newspaper's headlines, Troxell informed her that tomorrow's headline would read "Couple Arrested in Child's Death." R. 107, lines 13 – 14. Troxell again accused her of showing no remorse and told her she was going to jail. R. 109, lines 14 – 20. Despite Appellant's repeated protestations and claims of innocence, Troxell repeatedly accused her of knowing what happened to the minor. He even accused Appellant of killing minor. R. 109, line 21 – R. 111, line 12.

Weaver then interrogated Appellant, asking her repeatedly what happened and offering various scenarios, such as her taking her frustrations with work or with the codefendant out on the minor. R. 112, line 1 – R. 113, line 16. Weaver also repeatedly threatened Appellant with jail. R. 119, lines 16 – 18; R. 128, line 23 – R. 129, line 2. At one

point, Weaver asked Appellant what she thought was going to happen from that point forward. Appellant responded she was not going home. R. 120, lines 16 – 18. During the interview, Appellant requested permission to take her medication.[6] After examining the bottle, Troxell agreed to allow Appellant to take her medication. R. 131, lines 1 – 17. Additionally, Troxell confronted Appellant with numerous pictures of minor. R. 132, lines 4 – 8; R. 135, lines 14-19; R. 137, lines 2-7.

Troxell offered that "another explanation" for the minor's injuries was "he was shook." Appellant denied ever shaking minor. R. 134, lines 5-8. Despite her denials, officers pressed this area. Weaver asked if she got a little frustrated and shook him a little hard. Appellant responded, "I don't think hard." R. 135, lines 5-9. Officers had her so confused she said "I don't know anymore." R. 135, line 23. She then stated, "I don't believe I've ever shook him." Finally, officers got her to admit "it's possible." R. 136, line 8 – R. 137, line 1. She repeatedly said she did not know if she shook him hard and said she did not recall shaking him at all. R. 138, lines 11-24; R. 140, lines 2-5; R. 143, lines 11-13; R. 144, lines 2-5. Officers provided a leprechaun for Appellant to use to demonstrate how she allegedly shook the minor. R. 145, lines 5-8. However, she denied shaking minor on Monday. R. 145, lines 14-20; R. 147, lines 24-25; R. 151, line 23- R. 152, line 2.

Weaver continued to suggest that Appellant injured minor because "the little guy's crying, whimpering" and this frustrated Appellant when she "didn't know how to help the little guy." R. 151, lines 16-22. He again asked how hard she shook him and Appellant demonstrated how she did <u>not</u> shake him. R. 157, lines 6-22. Weaver knew that

[6] Appellant testified at trial that she took Xanax, an antianxiety medication. R. 827, lines 7-17.

Appellant's alleged shaking of minor could not have caused the injuries and confronted her with this information. R. 158, line 13 – R. 159, line 17. At the end of the interview, Appellant stated "I don't think I did that either. I'm just, fuck it, say it, do whatever. No one's going to go down with me, and I'm not going to let anyone else take the fall." R. 165, line 23 – R. 166, line 1.[7] As Appellant explained to Weaver, "I'm broken." R. 140, line 18.

Appellant objected to the introduction of the statements and the video recording. Appellant noted the repeated "reference to forty hours without sleep" and Appellant taking medication during the interrogation. Appellant argued the statement was not "knowingly and voluntarily given." R. 167, lines 13-24. Nevertheless, the judge admitted the statement finding Appellant was not intoxicated and was advised of her Miranda rights. He did not find the interview, which was about an hour and a half long, to be overly lengthy. The judge saw no use of any threats or punishment for Appellant's answers. He saw that the interview took place in an area "like an office," which he found "nothing coercive about that." Thus, he found the statement to be voluntary and admitted it into evidence. R. 168, line 20 – R. 169, line 13.

A. The court erred in admitting the statement made by Appellant prior to officers advising Appellant of her Miranda rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees

[7] During the prosecution's cross-examination of Appellant during the trial, the prosecutor described the officers as "scream[ing] in [her] face and [telling her] that [she was] going to jail." R. 850, lines 22-23.

against federal infringement. Malloy v. Hogan, 378 U.S. 1, 8 (1964); see also U.S. Const. amend. XIV. In Denno, 378 U.S. at 376, the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." See also, Brown v. Illinois, 422 U.S. 590, 604 (1975). To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

As explained by the United States Supreme Court, "[p]rior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. "Law enforcement must state the Miranda warnings 'after a person has been taken into custody or otherwise deprived of his freedom of action in any way.'" State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003)(quoting Miranda, 384 U.S. at 444). However, the use of these safeguards is required only when the accused is in custodial interrogation. Miranda, 384 U.S. 445; see also State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 445; see

also Stansbury v. California, 511 U.S. 318, 322 (1994); Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The inquiry is based upon an objective assessment of the facts and circumstances surrounding the questioning.

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995); see also Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." Evans, 354 S.C. at 583, 582 S.E.2d at 410 (citing Berkemer v. McCarty, 468 U.S. 420 (1984); United States v. Helmel, 769 F.2d 1306 (8th Cir. 1985); Robert Kaupp v. Texas, 538 U.S. 626 (2003)).

In Evans, 354 S.C. at 584, 582 S.E.2d at 410, our Supreme Court held the defendant was in custody where the evidence demonstrated an officer accompanied her at all times, including escorting her to the restroom, the exclusion of the defendant's family members from the interview room, the interview was conducted in a back office of the police station, the interview lasted three hours, and the officer's stated purpose for questioning the defendant was to challenge her story.

Clearly, Appellant was in custody when she officers interrogated her on video. She was in an interview room where officers were questioning her about the death of minor. Immediately preceding her interrogation, officers placed co-defendant under arrest. As the interview progressed, officers threatened her with jail and accused her of killing minor. The court erred in permitting introduction of the statement due to the officer's failure to inform Appellant of her rights and obtain a waiver. The statement was obtained in a clear violation of Appellant's rights.

B. The trial court erred in admitting the statement made by Appellant subsequent to the officer advising her of her Miranda rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officers questioned Appellant in the same interview room and in close temporal proximity to the prior unwarned interrogation.

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986).

In Missouri v. Seibert, 542 U.S. 600 (2004), The United States Supreme Court confronted a case very similar to the one presented in the instant matter. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her Miranda warnings. During this discussion, the officer obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was set to cover up

the death of Seibert's disabled child. After obtaining this admission, the officer permitted Seibert a twenty-minute break. Id. at 604-605.

The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert by confronting her with her prewarning statements. Again, the officer obtained the answer he wanted – that Seibert knew the teenager was supposed to die in the fire. Id. at 605.

At trial, the officer testified that he used an interrogation technique in which he questioned the witness first, then gave the warnings, and then repeated the questioning until he got the answer that the witness had already provided once. Id. at 605-606. The trial judge suppressed Seibert's prewarning statements, but admitted the postwarning statements. Id. at 606. The United States Supreme Court held this was in error.

The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611. Thus, the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-614 (quoting Moran, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with

psychological skill." Officers paused only for twenty minutes before resuming questioning and providing the required warnings. Officers "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." Through the style of questioning employed which included repeated references to prior responses, the officers fostered the impression that further questioning was a mere continuation of the earlier questions. Id. at 616. Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, he gave a statement at the hospital to police, but was very upset and officers thought the statement was incomplete. Officers learned from the pathologist that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839. The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted

to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree

to which the interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

The interrogation of Appellant presents a similar factual scenario as in Seibert and Navy. Officers engaged in a lengthy exchange with Appellant for an extended period of time prior to advising Appellant of her rights. After obtaining a written waiver of those rights, the same officers continued questioning Appellant. There was no break between the unwarned statements and the warned statements. The setting did not change. The officers did not attempt to cure the error by information Appellant that her prewarned statements could not be used against her.

C. The court erred in admitting the statements made by Appellant because the statements were not the product of a voluntary waiver of Appellant's rights due to Appellant's lack of sleep, state of shock and grief over the loss of her grandson, lengthy

detention for interrogation, and ingestion of a prescription anti-anxiety drug during the interrogation.

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

Appellant's waiver of rights was involuntary. The officers were aware she had very little sleep prior to the initiation of the interrogation. She stated repeatedly she was exhausted. She was detained for at least almost two hours during the interrogation. Officers failed to advise her of her rights and seek a waiver until a significant time after the interrogation began. Officers threatened her with jail if she failed to provide them with the answer they wanted. At one point during the interrogation, she described herself as "broken." During the interview, Appellant ingested a prescription anti-anxiety drug. Based on the totality of the circumstances, Appellant's waiver of rights was not voluntary.

II. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any direct or substantial circumstantial evidence that Appellant committed the alleged criminal acts.

During a pretrial motion hearing on May 26, 2011, the prosecutor stated she indicted Appellant and co-defendant for both homicide by child abuse and aiding and abetting homicide by child abuse because she had "two individuals who were the only two people who could have had access and contact with this child and the child ends up dead, that's it. So it could have been either one of them and that's where we are." R. 7, line 14 – R. 8, line 3.[8] The prosecutor clarified that in her view, "the case law of the Supreme Court of South Carolina clearly allows us to proceed under that theory that we do not know which one was necessarily the principal aiding and abetting, that's why I charged them with both." R. 9, lines 5-13. The prosecutor was "proceeding that either one of them had access and could have inflicted the blow that killed the child, there you go." R. 9, lines 16-18.

In addition to the statements made by Appellant and co-defendant while in police custody discussed supra,[9] the prosecution relied primarily upon medical evidence to support its theory that either Appellant or co-defendant inflicted the fatal injury and aided and abetted the other in inflicting the fatal injury on minor.

Timothy Rainbolt, an employee with Horry County Fire and Rescue, testified that he arrived at Appellant's home on July 14, 2008 at 6:13 p.m. in response to a 911 call. He observed minor actively seizing. R. 330, lines 21-24; R. 332, lines 2-8; R. 333, lines 17-19;

[8] Appellant refers to the May 26, 2011 hearing using the abbreviation May Hrg. to distinguish it from the October 31, 2011 hearing.

R. 335, lines 8-15. Rainbolt transferred minor to the medic unit in the ambulance. R. 337, lines 2-6. He saw no bruises on minor's body and observed no injuries to minor's head. R. 343, lines 10-11; R. 345, lines 15-20.

John Cacace, a medical doctor at Conway Medical Center's Emergency Department, testified about treating minor on July 14, 2008 in the emergency room. R. 359, line 24 – R. 360, line 3; R. 363, lines 13-17. Dr. Cacace described observing minor "exhibiting classical signs of intracranial injury, extensive posturing of the arms." R. 364, lines 15-20. Dr. Cacace's review of scans of minor's head revealed "gray-white matter junction loss and blood." R. 367, lines 2-21. Based upon the severity of minor's injuries, Dr. Cacace ordered minor transported to MUSC for further care. R. 369, lines 17-22. He gave a "ball park figure" of thirty-six hours for when the injury to minor occurred. R. 388, line 25 – R. 389, line 4.

Dr. Donna Ray Roberts, a neuro-radiologist, at MUSC testified regarding her review of the C.T. scans of minor's brain. R. 392, lines 15-19; R. 394, lines 10-18. She saw "blood around the brain ... severe swelling of the brain ... loss of the gray-white differentiation ... and ... severe fractures." R. 397, lines 9-13. She opined the injury was recent. R. 395, lines 17-20. According to Dr. Roberts, a patient with the injuries on the scans "would not be able to walk, eat, function normally." R. 406, lines 8-13. "A person with this type of injury would be immediately severely symptomatic ... [including] an alteration or loss of consciousness, alteration in breathing, likely seizures ... [inability] to walk, move, play." R.

[9] During the trial, the prosecution presented the video statements of Appellant and co-defendant during Troxell's testimony. R. 608, line 6 – R. 647, line 20; R. 648, line 10 – R. 739, line 16.

410, lines 3-11. In her opinion, it was not possible that the injuries were inflicted two or three days before minor reported to the hospital. R. 425, line 20 – R. 426, line 3.

She testified that the fractures to the head could not have been caused by shaking minor. R. 426, lines 14-16; R. 427, line 25 – R. 428, line 4. She further testified that she could not say whether the fractures were intentional or accidental. R. 426, lines 17-19. She testified she would not expect to see a fracture from a fall from standing. R. 407, lines 22-23. She also would not expect the fractures like those sustained by minor based upon a fall from a stroller. R. 407, line 24 – R. 408, line 2. However, she was unable to testify regarding "the mechanism of injury" and could say only "it was some type of severe force." R. 412, lines 16-17. She further testified she was unaware of any naturally occurring condition that could result in the injuries. R. 414, lines 12-15.

Dr. Cynthia Schandl, a forensic pathologist employed by MUSC, performed the autopsy on minor on July 19, 2008. R. 432, lines 7-15; R. 438, lines 19-23. She found no evidence of injury on the surface of the scalp during her external examination. R. 449, lines 7-10. However, her internal examination revealed "very patchy light bleeding around those structures cover the skull," fractures to the skull on both sides of the head, and separation of the skull itself where the bones fuse together. R. 449, line 18 – R. 450, line 24. She was unable to say whether the injuries were the result of one impact or two impacts. R. 455, lines 13-21. She also could not state the amount of force used to inflict the injuries. R. 455, line 22 – R. 456, line 5. Dr. Schandl opined that the "damage occurred within a week." R. 458, lines 19-20. She later clarified her opinion – "this injury took place somewhere between three days and a week from when [she] saw him." R. 459, lines 1-3; R. 466, lines 21-24. In short, the injuries occurred sometime between July 11 and July 14. R. 468, lines

1-14. In fact, she testified that the injuries could have occurred at different times within the timeframe of three to seven days. R. 467, lines 7-15. According to Dr. Schandl, she and the solicitor had "gone back and forth about" the time of the infliction of the injuries. R. 459, line 24 – R. 460, line 2. The cause of death was "subdural and subarachnoid hemorrhage with global cerebral edema, due to inflicted blunt head trauma." R. 461, lines 2-16.

Dr. Ann Abel, a physician at MUSC, testified that she consulted on minor's case on July 15, 2008. R. 478, lines 13-14; R. 484, lines 18-20. Appellant and co-defendant provided Dr. Abel with the same history of minor as they provided to police, including that Appellant was at work during the day and did not touch minor until she found him having a seizure. R. 487, line 14 – R. 488, line 13. Dr. Abel opined that the degree of force that was applied to both sides of minor's head to cause the fractures would have rendered minor unconscious immediately. R. 490, lines 17-24; R. 504, lines 1-8. She concluded that the head injuries were inflicted on the day minor presented to the emergency department, which was July 14, 2008. R. 505, lines 1-7; R. 527, line 14 – R. 528, line 20.

On cross-examination, she admitted she was unable to confirm co-defendant's claims that minor had eaten breakfast and lunch on the day the injuries were allegedly inflicted. R. 518, line 21 – R. 519, line 8. She also agreed that minor was underweight. R. 522, line 13 – R. 523, line 19. She testified that if a child had a head injury and the person who inflicted the head injury did not tell others, then "it's very difficult for another observer who doesn't know about the head injury to realize the child is unconscious." R. 532, lines 4-12. According to Dr. Abel, "a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn't know that they had had the head injury to realize it until later, until something more

started happening." R. 533, lines 3-11. Along the same lines, she testified that if the minor had been struck in the head and lost consciousness and was not seizing or posturing, then the child would appear to be asleep.

At the conclusion of the prosecution's case, Appellant moved for a directed verdict. Appellant argued the state failed to produce any direct or substantial circumstantial evidence that Appellant committed the crime charge.

> They've established that an injury was inflicted upon [minor]; they have not established, they have not connected that injury to [Appellant]. What they've done is said, well statistically we're the only two people who could have done it but they have not produced any evidence that said either he is the person that inflicted this injury or she was the person that inflicted this injury.

R. 769, lines 5-15. When the judge inquired about the "evidence of shaking," Appellant responded the evidence was questionable because the cause of death was not due to shaking. R. 769, lines 16-19. Appellant argued co-defendant's denial of guilt likewise failed to provide any direct or substantial circumstantial evidence of Appellant's guilt. R. 769, line 20 – R. 770, line 12.

The judge found that the prosecution "presented a substantial amount of circumstantial evidence that really puts forth just in my view two scenarios. Number one, that [codefendant] injured the child and the child was unconscious when [Appellant] came home and she found him that way." R. 772, lines 1-6. Appellant noted that in that scenario, there was no evidence that Appellant failed to act. R. 772, lines 7-8. "[t]he other [scenario] is that [Appellant] came home and as [co-defendant] said the child was fine and that she injured the child, who knows, I don't right now, but that's what a jury is for and I think this should go to the jury." R. 772, lines 9-14. The judge later stated a third scenario was

possible "Or both could have been involved in it, so there's three scenarios." R. 772, lines 21-22.

During the defense's case-in-chief, Appellant testified that on July 14, 2008, she got up at 4:15 a.m. to get ready for work. R. 789, lines 16-22. According to her work time card, she clocked in at 6:00 a.m. and clocked out at 3:45 p.m. R. 791, lines 1-9. She then drove home, arriving between 4:30 and 4:45. From the bedroom door, she observed the minor sleeping. R. 793, lines 2-6; R. 793, lines 13-19. She then left to pick up food at IGA to cook for dinner. R. 795, lines 1-2. She produced a cancelled check showing she had been at IGA on July 14, 2008. R. 795, lines 15-25. The check was stamped by the store at 3:52 p.m. R. 799, lines 3-7. In light of Appellant leaving working at 3:45 and it being physically impossible to arrive at IGA by 3:52 p.m. from her workplace, Appellant surmised that the IGA computer stamp was off by approximately one hour. R. 799, lines 10-17. She then stopped by the video store and went home. R. 799, line 18 – R. 800, line 18. As soon as she arrived home, she began cooking dinner. R. 400, lines 22-25.

Appellant and co-defendant sat down to dinner. After the two ate, Appellant prepared a plate for minor. R. 802, lines 13-18. Appellant then went to get minor. When she walked into the room, she noticed he "was breathing really funny." She observed "saliva hanging out of his mouth." Believing he was choking, she flipped him over her arm. Then minor began seizing. She called for co-defendant who took minor from her. Appellant then called 911. R. 803, lines 4-15.

Appellant denied striking minor and causing the injuries; she denied shaking minor. R. 826, lines 17-19; R. 827, lines 2-6. She explained that any statements in her interview about shaking minor were because she was so tired and the officers had "messed with [her]

head" for so long. R. 826, lines 12-16. She emphatically denied abusing minor or permitting anyone else to abuse minor. R. 834, lines 3-17.

At the conclusion of the presentation of the defense case, Appellant renewed her motion for a directed verdict. Specifically, Appellant argued that prosecution failed to produce any direct or substantial circumstantial evidence of her involvement either as the person who inflicted the injuries or the person who aided and abetted and failed to act in co-defendant's infliction of the injuries. Appellant argued the evidence "[a]t best [] raises a mere suspicion of her guilt." R. 873, lines 4-23. The judge denied Appellant's motion. R. 873, line 24 – R. 874, line 1.

Appellant moved for a new trial based upon the insufficiency of the evidence after the jury returned its verdicts. Appellant explained the motion was based in part upon the "inconsistent theories." Appellant described the verdicts as "mind boggling" because the jury found Appellant guilty "of being the principal and being the accomplice." As expressed by Appellant: "It's just not possible for her to be the person that inflicted the blow and for her to be the person that aids and abets him inflicting the blow at the same time." In light of Appellant's convictions for both charges, "the jury could not have understood their obligations and responsibilities as jurors." Appellant further explained the state presented "no direct evidence" in the case, and the circumstantial evidence presented was not substantial. According to Appellant, the "evidence must be logically connected to each other and it must be to the exclusion of any other reasonable hypothesis." Obviously, the evidence presented was not to the exclusion of the "serious other hypothesis" presented to the jury. R. 877, line 4 – R, 879, line 18. Nevertheless, the judge denied Appellant's motion. R. 882, lines 13-22.

During the sentencing proceeding, the judge expressed some of his reasoning behind his decision to deny Appellant's directed verdict motion.

> On review, it is my job to determine whether or not essentially if there's any evidence to support the jury's verdict. In this case there is no doubt, no doubt that this child died and that this child died violently at the hands of one or both of you, no question about that. This jury has determined that this was the act of both of you. There's evidence certainly to support conviction of either of you. You essentially both pointed the finger at each other, directly or indirectly, you have done so. This jury has obviously struggled with this case and it has handed it to me with verdicts of guilty on all charges and that is what I am left with. It's not my decision to go back and review the evidence and say what I would have done. That would not be appropriate. The question on your attorneys' motions is whether or not there was evidence, direct evidence, circumstantial evidence, a combination of the two, that would support the verdict of the jury. This jury found that beyond a reasonable doubt this was the correct verdict, the verdict that I'm holding.

R. 883, line 16 – R. 884, line 9.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely

raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems

was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

In State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), the defendant's fingerprint was found on a coffee cup in a car borrowed by the victim. The victim disappeared after leaving his office in Savannah, Georgia, and his body was found

three days later in Colleton County. Id. at 388, 605 S.E.2d at 530. The borrowed car was found in Johnson City, Tennessee near where the defendant called another witness the day after the crime. Id. at 388-89, 605 S.E.2d at 530. The defendant and the victim had been sexual partners. Id. The Supreme Court held that a directed verdict should have been granted because the fingerprint only established that defendant "was in the borrowed [car] on the same day the victim was last seen alive." Id. at 390, 605 S.E.2d at 531. The fact that the car was found in Tennessee near the defendant only raised "a suspicion of guilt." Id.

The homicide by child abuse statute provides:

> A person is guilty of homicide by child abuse if the person (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse results in the death of a child under the age of eleven.

S.C. Code Ann. § 16-3-85(A). Thus, the prosecution was required to prove the minor died as a result of abuse or neglect by Appellant under circumstances manifesting extreme indifference to human life. This Court held "that in the context of homicide by child abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). In State v. McKnight, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (S.C. 2003), our Supreme Court likened extreme indifference to "reckless disregard for the safety of others" and "a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard therof."

In State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004), this Court affirmed the convictions of homicide by child abuse and aiding and abetting child

abuse where the evidence indicated the injury to the child occurred during a time period when Smith and his co-defendant, Celeste Durant, were the only two persons who could have possibly caused the injury. Smith and Durant took the child to the beach on July 14, 2000. The next day, the two took the child to the emergency room because she began acting strangely. Id. at 483, 597 S.E.2d at 889. The scan revealed an old skull fracture, but no recent trauma. The doctor believed she had a viral infection. Id. at 484, 597 S.E.2d at 890.

The child's condition did not improve, and the following afternoon, Durant found blood coming from her mouth. The child was transported to the hospital where a second scan revealed significant bleeding in the child's brain and swelling of the brain. Id. at 485, 597 S.E.2d at 890. The doctor testified that the difference in the two scans helped determine when the injury occurred – within several hours of the first scan. Id. at 485, 597 S.E.2d at 891-892. The evidence presented was that Durant was with the child the entire time on the day when the injury occurred, and Smith's statement indicated he was with Durant the entire time on that day. Therefore, the evidence presented was that both Smith and Durant were with the child when the injury was inflicted. Id. at 491, 597 S.E. 2d at 893.

Another doctor testified it would take tremendous force to cause the area at the back of the head to fracture because of its thickness, that there was no way the child or her sister could have caused the injury, and there was evidence the child had been shaken. Id. at 486, 597 S.E.2d at 891. Police investigation revealed bed linens were missing from the room where the group stayed while at the beach. Id. at 487, 597 S.E.2d at 891-892.

No substantial circumstantial evidence exists that Appellant injured minor. The evidence presented by the prosecution was that the injury to minor occurred sometime on July 14, 2008. Although the state claimed that Appellant and co-defendant cared for minor at all times on that day, this was not correct as demonstrated by the evidence. In fact, the evidence showed Appellant was at work for most of the day when the injury may have been inflicted. She could not have injured minor during a substantial portion of the day. This substantial factual distinction from Smith, supra, requires this Court to direct a verdict in Appellant's favor.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and sentences. As to Ground I, Appellant requests this Court reverse her case and remand for a new trial. As to Ground II, Appellant requests this Court direct a verdict of acquittal.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 26, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JULIA GORMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of August, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.