STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-001753

THE STATE,

Respondent,

v.

TIMMY EUGENE RICE, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

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

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648-0516

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly admitted the forensic interview video of Victim when the video statement provided particularized guarantees of trustworthiness, by the totality of the circumstances, as required by S.C. Code § 17-23-175. In any event, any error in admitting the victim's forensic interview video was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Appellant was indicted on November 8, 2013, by a Newberry County grand jury for criminal sexual conduct, first degree. He was tried July 7, 2014, before the Honorable Eugene C. Griffith, Jr. Appellant was represented by Charles Verner, Esquire, and Solicitor David Stumbo and Assistant Solicitor Taylor Daniel represented the State. The jury was unable to reach a verdict. A second trial was held August 4, 2014, again before Judge Griffith. Mr. Verner represented Appellant and Senior Assistant Solicitor Lance Sheek and Assistant Solicitor Daniel Taylor represented the State. The jury found Appellant guilty of criminal sexual conduct, third degree, and Judge Griffith sentenced Appellant to twelve years' imprisonment, suspended upon the service of six years, with forty-eight months' probation and 200 hours of community service. This appeal follows.

STATEMENT OF FACTS

The victim (Victim) in this case was six years old at the time the crime was committed. (R. p. 129, line 10.) Victim's mother, Willie Mae Wright, and Appellant's mother, Rose Rice, were friends for many years. (R. p 138, lines 21-25.) Ms. Wright lived in the same town as Ms. Rice, and the two stayed in touch even after Ms. Wright moved to North Carolina in 2003. (R. p. 138, lines 24-25 and p. 139, lines 1-25.) Victim was born in North Carolina while her mother lived there. (R. p. 68, lines 5-7.) At some point, Ms. Wright and Victim moved back to Whitmire, South Carolina, after she asked Ms. Rice to help her get a job at the Sterilite factory. (R. p. 142, lines 17-24.) When Ms. Wright returned to South Carolina, she and Victim lived with Ms. Rice for a few days. (R. p. 129, line 4.) Also living in the house were Ms. Rice's husband, brother, and her two sons, including Appellant. (R. p. 129, lines 15-23.)

Ms. Wright and Victim moved out of the Rice's home several days later, and into their own home. (R. p. 129, lines 1-3.) She became employed with Sterilite, and worked twelve hour shifts for alternating three and four day weeks. (R. p. 130, lines 20- 25.) Ms. Wright relied on Ms. Rice to give her a ride to work because she did not own a car. (R. p. 132, lines 5-11.) Ms. Rice also suggested Ms. Wright use her son Appellant to babysit Victim while Ms. Wright worked her shifts at the factory. (R. p. 131, lines 9-18.)

Appellant would arrive at approximately 6:15 am, when Ms. Wright left for work. (R. p. 132, line 1.) Victim would be dressed and ready for school and Appellant would help her get on the school bus at 7:10 am (R. p. 60, lines 16-21.) Appellant would be waiting for her to return home on the bus after school and watch her until her mother came home. (R. p. 133, lines 1-4.) This arrangement lasted approximately two months,

until Ms. Wright's boyfriend moved down and took over care of the child. (R. p. 133, lines 7-18.)

Sometime in July, Victim told her mother Appellant had "put his finger in her vagina." (R. p. 134, lines 5-6.) Appellant was no longer caring for the child as of the end of June. (R. p. 134, lines 9-10.) Ms. Wright, Victim, and Ms. Wright's boyfriend went to Appellant's house to talk to him and his mother. (R. p. 134, lines 12-25.) When asked about Appellant's response to the accusation, Ms. Wright testified "He was sitting there holding his head and he was like, I did it, yes I did it." (R. p. 135, lines 4-6.) Ms. Wright further testified she went to the police station to report the incident after the confrontation at Appellant's home. (R. p. 135, lines 22-25.) Ms. Wright had no further contact with Appellant after going to the police, and her friendship with Appellant's mother ended. (R. p. 136, lines 9-19.) Because she no longer had a ride to work with Appellant's mother, Ms. Wright lost her job at Sterilite. (R. p. 137, lines 11-15.)

Appellant presented himself to the police station on the morning of July 15, 2013. (R. p. 179, lines 6-15.) He was read his Miranda rights, which he then waived. (R. p. 180, lines 15-25 and p. 181, lines 1-8.) Once the officers began to discuss the allegations, Appellant requested they go somewhere more private to talk. (R. p. 181, lines 15-20.) He agreed to give a written statement, which read:

> I started to keep the child around the end of the school year 2013. I would play with her a lot, balls, dolls, and such that little girls play with. As with the other children, I tried playing fighting games, tag and tickling. I later found that the girl was ticklish on her legs and thigh area. I will try tickling her up and down her thigh. I had urges that I was not used to coming to mind constantly. I had tried fighting them but at times they did get the best of me. I do recall that my hands had touched the girl in an inappropriate way at times. I did not, however, show myself or penetrate the girl at any time. I even protested to my mother about

> keeping the child any longer. I had to distance myself from such things. Her mother approached me about the indecent acts I committed in front of her. And now later, officers, I've told them that, yes, I did commit some inappropriate acts upon the child but that is all, that, but that is also the reason I tried to limit the one-on-one time that I had with the child. The time I had with the child, excuse me. I tried, although futively at times to combat such thoughts. Anything I have done is something I can't undo.

(R. p. 186, lines 23-25 and p. 187, lines 1-19.) Appellant also indicated in a drawing of a "gingerbread man" figure where he touched the child by initialing three areas: under the arm, the inner thigh, and the bottom of the feet. (R. p. 189, line 2- p. 190, line 18.)

After Appellant's arrest, the case was referred to the Children's Advocacy Center. (R. p. 199, lines 18-21.) Victim was physically examined by a pediatrician with the South Carolina Children's Advocacy Medical Response System. (R. p. 204, lines 8-10 and p. 206, lines 15-20.) Although there were no physical findings of injury or trauma, the pediatrician testified that she wouldn't expect to see any in this type of crime. (R. p. 207, lines 2-17.)

Victim was also interviewed by forensic interviewer Wiley Garrett with the Children's Advocacy Center in Spartanburg. (R. p. 114, lines 8-21.) Mr. Garrett has been a clinical social worker in the state of South Carolina for twenty years, and has spent the last twenty-five years interviewing and assessing children. (R. p. 114, lines 24-25 and p. 115, lines 1-7.) He has worked for the Advocacy Center for twelve and one-half years and interviews children on a weekly basis and provides therapy for those children with trauma symptoms. (R. p. 115, lines 1-7.) He interviews clients of varying ages, from four years old to older adults with developmental disabilities. (R. p. 116, lines 3-6.) Mr. Garrett testified that he takes no part in the criminal investigation of the incident leading

interview, and he typically knows nothing about the case until he is assigned the file of the child he is interviewing for the day. (R. p. 135, lines 19-25 and p. 116, lines 4-5.) The case file usually contains basic information about the child, the allegations that were made, and the incident report, if there is one. (R. p. 117, lines 9-14.) The interviews are conducted in the upstairs of the Child Advocacy Center in one of three rooms equipped with recording capabilities and furnished minimally with markers, paper, and a Kleenex box. (R. p. 117, lines 16-21.)

Mr. Garrett testified only he and Victim were in the room and the entirety of the interview was captured on the recording. (R. p. 118, lines 1-16.) In the beginning of these interviews, as with Victim, he asks simple questions to ensure they can speak English and he can understand what they are saying. (R. p. 119, lines 18-24.) He then asks questions to gauge memory recall, such as asking children their grade in school, their age, and their birthday. (R. p. 120, lines 1-8.) Finally, before discussing the allegations with the child, he clarifies the rules, which are "tell the truth," say "I don't know" if the child does not know the answer, and "don't guess" if the child is unsure. (R. p. 120, lines 11-14.)

The video recording focuses entirely on Victim. She says her full name and spells her middle name. Realizing she has made a mistake, she spells her middle name again. (State's Exhibit 2, 00:20.) She knows her age and her birthday. State's Exhibit 2, 00:59.) When asked what year she was born, she responds, "I don't know." (State's Exhibit 2, 1:12.) She indicates she will be in second grade when school starts, but says she does not remember when asked what school she will attend. (State's Exhibit 2, 01:48.) She also remembers her teacher's name (State's Exhibit 2, 01:58.) Mr. Garrett explains the rules to Victim about telling the truth. (State's Exhibit 2, 02:55-7:10.)

As a memory exercise, Mr. Garrett asks Victim what house she woke up in, and she replies, "my house." (State's Exhibit 2, 09:36.) Victim recalls the events of the day leading to the interview. (State's Exhibit 2, 10:00 - 11:12.) When asked the reason for the interview, Victim replies, "because Junior put his hand in my private spot." (State's Exhibit 2, 12:56.) She then indicates Appellant did this more than one time, and that no one else had ever done that. (State's Exhibit 2, 13:23.) Mr. Garrett then draws a gingerbread "girl" outline and asks her to draw a circle on the gingerbread girl indicating her "private spot." (State's Exhibit 2, 15:00.) Mr. Garrett asks what the private spot does and clarifies, "does anything come out of it?' to which she responds, "only when I go to the bathroom." (State's Exhibit 2, 15:32.) When he asks what comes out when she goes to the bathroom, she says, "pee pee." (State's Exhibit 2, 15:50.) Mr. Garrett then draws another gingerbread man to represent Appellant and asks her to circle where he touched her in her private spot. (State's Exhibit 2, 16:25.) He then asks her how it felt when Appellant put his hand in her private spot. She says, "it was hurting." (State's Exhibit 2, 18:01.)

Mr. Garrett asks Victim which house she was in when Appellant put his hand in her private spot, and she says. "mine." (State's Exhibit 2, 18:41.) He asks her what room she was in, and she says, "living room." (State's Exhibit 2, 19:00.) Victim says she told her mother, but not at first because she was afraid she would be punished for not telling her mother when "he first did it." (State's Exhibit 2, 20:12.) He then asks Victim where she was in the living room when Appellant touched her, and she says, "in the chair" (State's Exhibit 2, 20:53.) He asks her to describe the chairs, and she discusses how the chairs have been moved around the room and that they are yellow with flowers. (State's Exhibit 2, 21:32.) She then draws the chair. (State's Exhibit 2, 23:38.) He asks her to

show him where they were when this happened, and she indicates she is one side of the chair and Appellant was on the other. (State's Exhibit 2, 24:27.) Victim discusses the last time the touching happened, but doesn't remember what she wore or what he wore. (State's Exhibit 2, 26:00.) When asked for any details she can remember, Victim states she does recall when Appellant started touching her, and it was the third day he babysat her. (State's Exhibit 2, 27:09.) When Mr. Garrett asks her to describe the incident, she indicates she was sitting in the chair and states, "then he came over and put his hand in my private spot." (State's Exhibit 2, 27:59.) Mr. Garrett tries to restate what she said, "He came up and put his hands in your privates?" (State's Exhibit 2, 28:00.) Victim, however, is quick to correct him: "Hand," she says, indicating only one hand, not both of his hands as Mr. Garrett said. (State's Exhibit 2, 28:05.)

Though the interviewer continues to press her on what she was wearing, Victim maintains she does not recall those details. She is asked how Appellant touched her, and she flattens out her into a palm, and then makes a cupping motion downward with her fingers. (State's Exhibit 2, 29:27.) She then circles a portion of a hand drawing indicating what Appellant put inside her. (State's Exhibit 2, 30:45.) Next, Victim shows Mr. Garrett she understands prepositions such as "inside," "beside," "on top of," and "underneath." (State's Exhibit 2, 31:30.) When asked how she felt about Appellant before he touched her, Victim responds, with her head down, "I thought he wouldn't do nothing like that." (State's Exhibit 2, 33:53.) Mr. Garrett asks Victim if she was changed by what happens, and she responds, "It made me walk funny cause some days I walked funny, and then I won't walk funny anymore. That was when he did it." (State's Exhibit 2, 35:19.) As a final question, Mr. Garrett asks about the games they played, and if Appellant ever tickled the child. She says no. (State's Exhibit 2, 36:40.)

Judge Griffith ruled on the admissibility of the video and Appellant's statement before Appellant's trial on July 7, 2014. (R. p. 69, lines 7-14 and p. 40, 14-25.) After that trial was declared a mistrial, those motions and rulings were preserved and incorporated therein the record of the trial of August 4, 2014. (R. p. 93, line 7.)

ARGUMENT

The trial judge properly admitted the forensic interview video of Victim when the video statement provided particularized guarantees of trustworthiness, by the totality of the circumstances, as required by S.C. Code § 17-23-175. In any event, any error in admitting the victim's forensic interview video was harmless beyond a reasonable doubt.

Appellant argues on appeal that the trial judge erred in admitting the forensic interview video of Victim because the video did not meet the statutory requirements set forth in S.C. Code § 17-23-175 (B). Specifically, Appellant contends the statement was elicited by leading questions and it failed to represent a detailed account of the alleged offense. To the contrary, the judge did not commit error by admitting the forensic interview video of Victim because the totality of the circumstances surrounding the making of this victim's prior statement provided particularized guarantees of trustworthiness. The spontaneous and at times surprising responses of the Victim are particularly persuasive of the statement's trustworthiness and leave little room for doubt of her credibility.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citations omitted). The Court does not "re-evaluate the facts based on its own view of the preponderance of the evidence but

simply determines whether the trial judge's ruling is supported by any evidence." Id. at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). In this case, the trial judge's finding that the video contained particularized guarantees of trustworthiness was supported by significant evidence.

S.C.Code Ann. § 17-23-115

Section 17–23–175 allows an out-of-court statement of a child under twelve to be admissible under certain circumstances. In interpreting §17–23–175, the Court of Appeals concluded the section was not penal in nature but rather "deals with procedural, evidentiary matters." State v. Bryant, 382 S.C. 505, 512, 675 S.E.2d 816, 820 (Ct.App.2009). State v. Stahlnecker, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010)

Subsection (A)(4) of S.C. Code § 17-23-175 states that an out-of-court statement of a child is admissible if "the court finds, in a hearing conducted outside the presence of the jury, that *the totality of the circumstances* surrounding the making of the statement provides particularized guarantees of trustworthiness." (emphasis added). Subsection (B) states as follows:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court *may* consider, *but is not limited to*, the following factors:
> (1) whether the statement was elicited by leading questions;
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
> (3) whether the statement represents a detailed account of the alleged offense;
> (4) whether the statement has internal coherence; and
> (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code § 17-23-175 (B) (emphasis added). The language of the statute makes it clear: before admitting a prior out of court statement of a child, a trial court **must** consider the "totality of the circumstances" surrounding the making of the statement, and **may consider,** but is not limited to, the factors contained in subsection (B). Significantly, the language of the statute does not indicate a child's out-of-court statement would *necessarily* be inadmissible if some leading questions were used, if the statement was less detailed than it could have been. In that vein, the fact that the "totality of the circumstances" must be considered gives the trial court flexibility to consider the out-of-court statement in full context and allows the court to consider the optional, non-exhaustive list of factors in subsection (B) in light of the age and abilities of the particular child in question.

The State believes the following points should be considered when evaluating the forensic interview in this case. First, a small child is unable to communicate and relate information on the same level as an older child or adult, particularly when discussing very personal and perhaps shameful occurrences. As a result, the degree of internal coherence and detail will generally decrease the younger the child. Second, it is also important to remember that "[a] leading question is one which suggests to the witness the desired answer." State v. McHoney, 344 S.C. 85, 99, 544 S.E.2d 30, 37 (2001). There is a difference between leading questions and questions geared toward focusing a young child on a particular topic. Third, subsection (B)(1) of the statute states one of the factors a judge may consider is "whether the statement was *elicited by* leading questions" (emphasis added). Thus, even if leading questions are used in a forensic interview, if the leading questions do not result in incriminating responses from the child, the statement

was not "elicited by" leading questions.

In Appellant's case, the totality of the circumstances surrounding the making of Victim's forensic interview video provided particularized guarantees the statement was trustworthy. Victim was only seven years old at the time of her interview. (R. p. 119, line 15.) While it is certainly true the child had to be focused and directed to the relevant topic at times, the questions asked by the interviewer were generally not "leading" in the sense that they suggested a particular desired answer. For example, at minute 12:15 in the State's Exhibit 2, the interviewer asks Victim "What's the reason your mom brought you here today?" Victim replies, "Because... uh...this boy, Junior, put his hand in my private spot." (State's Exhibit 2, 12:50.) Mr. Garrett then asks, "Is this something that happened one time or more than one time?" (State's Exhibit 2, 13:13.) Victim responds, "More than one time." (State's Exhibit 2, 13:16.) His first question broaching the subject of the allegations was completely open-ended, and Victim was neither led nor directed to a specific response. His follow up question, though more directed, did not lead the child to allege multiple incidents; she could have answered either way.

In some instances, the questions are vague and Victim responds with unexpected, though telling, answers. For example, the interviewer asks her, "when he put his hand in your private sport, what did you feel in your body?" and she responds, "it was hurting." (State's Exhibit 2, 18:00.) When prompted for any detail she can remember about the incident, she says, "I ***can*** remember when he started doing it," and goes on to say it was the third day he babysat her. (State's Exhibit 2, 27:14.) (emphasis added) When asked how she felt about Appellant before he touched her, instead of saying she "liked" him or she "trusted" him, she says, "I thought he wouldn't do nothing like that." (State's Exhibit 2, 33:53.) Victim, despite her young age, seems to have a well-developed concept of right

and wrong behavior from her babysitter and manages to articulate her disappointment with him. The interviewer did not lead her to that response; she fully volunteered her assessment of his character in that simple phrase.

Finally, on numerous occasions Victim responded with "I don't know" when questioned by Mr. Garrett. When asked what he was wearing when Appellant touched her, she says she does not know. (State's Exhibit 2, 28:26.) When asked what she wore, she pauses and thinks for some time, then says "I think I was wearing...hmm...hmm... I don't know. I thought I did." (State's Exhibit 2, 28:55.) Clearly, when she does not know an answer to a question, she feels comfortable telling the interviewer so. If interviewer was leading her responses, as Appellant asserts, she would not have answered "I don't know." Moreover, when Mr. Garrett repeats her statement about Appellant putting his "hands" in her private spot, she corrects him. (State's Exhibit 2, 28:05.) This is not a child who is unduly influenced by the interviewer. She feels comfortable expressing uncertainty and clarifying Appellant's actions so she is not misunderstood.

Defense counsel conceded at trial Victim was not coached by the interviewer. (R. p. 61 lines 17-20.) "My problems with it were that, one, the child didn't really narrate any answers ...she didn't really narrate the allegations of the abuse. She responded entirely to questions of stimuli." (R. p. 61, line19 – p. 62, line 2.) Appellant's argument is without merit, however, as § 17-23-115 does not require Victim to narrate the events of the crime without any stimuli from the interviewer. The term "leading questions" §17-23-115 (B)(1) contains the assumption questions are asked by the interviewer. The extent to which those questions are leading, if at all, is only one of the factors a trial court judge may consider in finding the statement contains particularized guarantees of trustworthiness under the totality of the circumstances.

Additionally, Victim's statement represented a "detailed account" of the alleged offense in multiple instances. Victim provided details about where and when the touching took place: "I was sitting in the chair" (State's Exhibit 2, 27:27.) and on the "third day" Appellant babysat her. (State's Exhibit 2, 27:09.) She was able to identify which hand Appellant used to touch her when she circled the "one" hand of the gingerbread man. (State's Exhibit 2, 30:45.) She explained the physical discomfort she felt when he touched her: "it was hurting." (State's Exhibit 2, 18:00.) Finally, and most persuasively to the trial court judge, she described and demonstrated the manner in which the physical discomfort caused her to alter the way she walked for days after the touching occurred: "It made me walk funny." (State's Exhibit 2, 35:19.)

This last detail provided a substantial guarantee of trustworthiness for the trial court. The judge said:

> [The interviewer's] methodology of questioning the child was very open-ended and non-suggestive in my opinion. And toward the end he asked a particular question about, how did this affect you, after the events happened. And her answer was quite telling of someone who wasn't coached in my own opinion. I was expecting an answer of, she cried or it made her sad and I did not get that. And so the question in particular had inherent trustworthiness in that response by her. That was candid by her, it was surprising to me.

(R. p. 61, lines 6-15.)

In sum, based upon the foregoing, the State submits the trial court did not abuse its discretion in admitting the forensic interview video of Victim when the totality of the circumstances surrounding the interview provided particular guarantees the statement made was trustworthy as required by S.C. Code Ann. § 17-23-175.

Harmless Error

In the event this Court finds the trial judge erred in the admission of the video statement, any error was harmless beyond a reasonable doubt. The victim testified at trial and the jury was fully capable of assessing her testimony. (R. pp. 156–170.) The investigating officer testified Appellant asked to "go somewhere more private to talk," implying he had forthcoming incriminating information to give the officers. (R. p. 181, lines 15-20.) Victim's mother lost her ride to work, and therefore her job, after she brought her concerns to the police. (R. p. 137, lines 8-15.) Finally, Appellant's own statements provided damning testimony against him, and the jury could consider his incriminating statements on the stand and his written statement to the police. (R. pp. 264 – 324.) Thus, there was overwhelming evidence of Appellant's guilt such that any trial error, including the admission of the forensic interview video, was harmless beyond a reasonable doubt. See e.g., State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (it is well-settled that error is harmless where there is overwhelming evidence of the defendant's guilt).

CONCLUSION

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

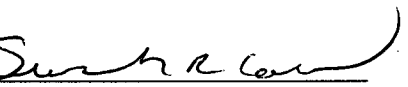
Respectfully submitted,

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648-0516

BY: 
Susannah R. Cole
Bar # 68383

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

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648-0516

BY: S R Cole

Susannah R. Cole
Bar # 68383

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tiffany L. Butler, 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 14th day of July, 2015.

Anne Mueller

ANNE MUELLER
Legal Assistant

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