

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

RECEIVED

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Appeal from Williamsburg County

JAN 14 2016

Clifton Newman, Circuit Court Judge  
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JIM EDWARD FEAGIN,

APPELLANT

APPELLATE CASE NO. 2015-000752  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err admitting Appellant's econd statement to law enforcement, in violation of the Fifth and Fourteenth Amendments, where the judge erroneously concluded (1) Appellant was not subject to custodial interrogation such that advisement of rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) was not required, and (2) that if an advisement of rights were required, then law enforcement's advisement five days prior was sufficient?

## STATEMENT OF THE CASE

On July 31, 2014, a Williamsburg County grand jury indicted Appellant for criminal sexual conduct in the third degree (2014-GS-45-168). R. 368 - 369. The state, represented by Kimberly V. Barr, called the case to trial on October 20, 2014 before the Honorable Clifton B. Newman and a jury. R. 1. When Appellant did not appear for trial, he was tried in his absence. R. 64, lines 2-11; R. 82, lines 2-9. The jury found Appellant guilty as charged. R. 307, lines 12-13. Judge Newman imposed a sentence, which was sealed. R. 313, line 24 – R. 314, line 3. On October 24, 2014, Appellant appeared before the court for imposition of the sentence. On that date, Judge Newman imposed the sealed sentence of ten years' imprisonment. R. 315, lines 1-2; R. 317, lines 10-13.

Appellant filed a motion for reconsideration of sentence and a motion for new trial. R. 367; R. 366. The motions were heard on April 2, 2015. R. 323. Judge Newman denied the motion for new trial. R. 343, lines 15-16. Additionally, Judge Newman denied the motion for reconsideration of sentence. R. 364, line 24.

Appellant filed a notice of appeal. This brief follows.

## ARGUMENT

Violating Appellant's Fifth and Fourteenth Amendment rights, the trial judge erred in admitting his second statement to law enforcement where the judge erroneously concluded (1) Appellant was not subject to custodial interrogation, such that advisement of rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) was not required, and (2) that if an advisement of rights were required, then law enforcement's advisement five days prior was sufficient.

### **Relevant facts**

On June 20, 2013, Amanda Graham was at her boyfriend's father's house enjoying a night of socializing with friends. R. 163, lines 1-10. Appellant and his girlfriend were there too. R. 163, lines 8-10; R. 164, lines 23-25. Between 11 p.m. and 1 a.m., Appellant and others, including Graham and her cousin, Charles R., went to Appellant's house to go swimming in his pool. R. 163, lines 11-14; R. 163, lines 19-22; R. 164, lines 1-16; R. 194, lines 22-25. Graham continued to drink moonshine while at Appellant's house. R. 165, lines 18-25. Graham went swimming in her clothes – jean shorts and a t-shirt – because she did not have a swimsuit. R. 165, lines 9-12; R. 167, lines 17-18; R. 184, lines 3-18; R. 197, lines 2-5. Graham and her boyfriend got into a heated argument. R. 167, lines 1-6; R. 197, lines 6-8. Angry, Graham's boyfriend left. R. 167, lines 1-2; R. 197, lines 8-12.

Graham's next memory was of waking up at 6 a.m. on the couch in Appellant's living room and realizing she was undressed "from the bottom down." Tr. 168, lines 13-24; R. 170, lines 15-20 R. 173, lines 4-10. She found her underwear and shorts on the floor. R. 169, lines 8-14. After waking, she got dressed and found Appellant and his girlfriend in the kitchen. R. 170, lines 21-25. At Graham's request, Appellant's girlfriend gave her a ride

home. R. 173, lines 10-23. Prior to leaving, Graham woke Charles, who was sleeping on the living room floor, to go home too. R. 171, lines 12-16; R. 173, line 12.

When Graham arrived home, she took a shower. She noticed some bruises on her left shoulder, knee, and hip. R. 174, lines 19-25. Later that day, she went to Charles' home. R. 175, line 16 – R. 176, line 1. Based on information she received from Charles, she told the police that Appellant sexually assaulted her. R. 176, lines 7-11.

Charles claimed that after Graham and her boyfriend argued, Graham went into Appellant's home and locked herself in the bathroom. R. 197, lines 18-19. Appellant and his girlfriend got her out of the bathroom and tried to calm her. R. 197, lines 19-23. Eventually, they got her on the couch where she fell asleep. R. 197, lines 24-25; R. 199, lines 21-24; R. 200, lines 7-10; R. 200, lines 21-25. Charles saw Appellant and his girlfriend go to bed shortly thereafter. Tr. 201, lines 8-9. Charles claimed he went to sleep on the floor beside Graham. R. 197, line 25 – R. 198, line 1; R. 201, lines 1-7. At some point, Charles heard Appellant cough and then heard the couch squeak when Appellant sat down. R. 201, lines 11-17. Charles pretended to be asleep with his eyes "barely cracked." R. 201, lines 18-19. He claimed Appellant's girlfriend then turned on the lights. R. 201, lines 17-18. Appellant's girlfriend also sat on the couch. R. 201, lines 19-21. According to Charles, Appellant unzipped Graham's pants and began having sexual intercourse with her while Appellant's girlfriend held down her arms. R. 201, line 19 - R. 202, line 3; R. 202, line 21 – R. 203, line 1. At first, Charles claimed he was aware of the sexual intercourse "because of the noises," but later he claimed he saw Appellant's penis enter Graham's vagina. R. 202, lines 4-6; R. 213, lines 1-18. The intercourse lasted for approximately thirty minutes during which Graham was never conscious. R. 205, lines 9-13. Afterwards,

Appellant and his girlfriend went to bed without re-dressing Graham. R. 205, lines 14-25.

Charles went to sleep. R. 206, lines 4-6.

The next morning, Graham woke him and asked what happened. R. 206, lines 6-7. Charles told Graham about the alleged sexual intercourse after he arrived home. R. 206, lines 9-10; R. 208, lines 11-14.

Sherill Pressley with the Williamsburg County Sheriff's Office was the lead officer on the case. After obtaining statements from Graham and Charles, Pressley stopped Appellant while he was in a car on June 21, 2013. R. 131, lines 1-19. Pressley claimed she "detained" Appellant at that time. R. 132, line 20 – R. 133, line 1. She advised Appellant of his rights pursuant to Miranda. R. 132, lines 2-11. Appellant denied that "anything happened," said that Graham was "drunk" and denied "touching her." R. 133, lines 9-19. Thereafter, Pressley took Appellant to jail. R. 133, lines 20-21.

Five days later, on June 26, 2013, Pressley went to the jail to speak to Appellant again. R. 134, lines 12-15. Pressley claimed she only asked Appellant if he would give a DNA sample and did not advise Appellant of his rights. R. 134, lines 16-18; R. 135, lines 5-8; R. 137, lines 13-17; R. 148, lines 2-6; R. 71, lines 12-15. According to Pressley, Appellant agreed to provide a DNA sample and said he wanted to tell the truth. R. 135, lines 9-10; R. 137, lines 18-21; R. 138, lines 1-3; R. 148, lines 7-8. He then stated that while he was lying on the floor, Graham straddled him, but he "could not get on hard." R. 137, lines 22-24; R. 138, lines 4-11. Pressley interpreted this to mean he could not get an erection or aroused. R. 138, lines 12-14.

Prior to trial, Appellant moved to suppress the alleged statement given to Pressley on June 26.<sup>1</sup> During the pre-trial hearing, Pressley testified to her initial encounter with Appellant wherein she advised Appellant orally of his rights. R. 67, lines 9-22. She further testified to her asking Appellant for a DNA sample on June 26, 2013 while he was incarcerated. R. 68, lines 14-23; R. 69, lines 5-8. During the hearing, it was clear that Pressley initiated this encounter with Appellant. R. 71, lines 16-19. Appellant moved to suppress the second statement because Appellant was in custody when Pressley questioned him and Pressley failed to advise him of his rights. R. 83, line 7 – R. 84, line 23. The state argued two alternative arguments. First, the state argued the advisement of rights on June 21 was sufficient to enable Pressley to interrogate Appellant five days later. R. 86, lines 8-11; R. 87, lines 14-17. Second, the state argued Pressley had not interrogated Appellant by asking for a DNA sample because DNA evidence is non-testimonial and the Fifth Amendment privilege extends only to testimonial evidence. R. 87, lines 3-10; R. 87, lines 17-24. The state likened the request for a DNA sample to the booking process. R. 90, line 3 – R. 91, lines 14. Appellant countered by noting that Pressley went to the jail specifically to ask Appellant to provide evidence to be used in the investigation and the request was by its nature interrogation. R. 88, lines 14-22. Further, Appellant argued the advisement of rights on June 21 was not sufficient to warn Appellant on June 26. R. 88, lines 22-25; R. 89, lines 3-25.

The judge ruled the initial statement was made after Appellant was advised of his rights and voluntarily waived them. R. 91, lines 15-16. According to the judge, the “initial

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<sup>1</sup> Appellant renewed his objection contemporaneously with the testimony. R. 135, lines 13-16.

voluntary statement continued until or unless the defendant invoked his right to remain silent, which he did not.” R. 91, lines 17-19. Additionally, the judge held the second statement was not the product of custodial interrogation. R. 91, lines 20-23. Likening the request for DNA to “routine booking administrative proceedings,” the judge held that Miranda v. Arizona, 384 U.S. 436, 444 (1966) did not apply. R. 91, line 23 - 6.

### **Discussion**

The Fifth Amendment to the United States Constitution provides, “No person shall be ... compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This privilege is made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the Constitution. Malloy v. Hogan, 378 U.S. 1, 6 (1964)(“We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.”).

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme Court held “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” The Court explained that “custodial interrogation” meant “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.” Id. Thereafter, the Court required that

[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id. This is because “in-custody interrogation[s]” place “inherently compelling pressures” on the persons interrogated. Id. at 467.

In light of Appellant’s arrest and detention at the local jail, there was no contention that Appellant was not in custody at the time of the alleged statements to police. Instead, the inquiry focused on whether law enforcement interrogated Appellant. Further, questions arose of whether law enforcement was required to advise Appellant of his rights in light of the officer’s request for a DNA sample and, if the rights were required, whether law enforcement’s advisement five days prior were sufficient.

*Custodial interrogation*

The Supreme Court concluded “the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). According to the Court, “[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” Id. at 301. “[T]he definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” Id. at 302 (emphasis in original).

Appellant acknowledges the Supreme Court’s opinion that the Fifth Amendment’s privilege against self-incrimination “protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature.” Schmerber v. California, 384 U.S. 757, 761 (1966); see also Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990)(holding that any “slurring of speech and other evidence of lack of muscular coordination” revealed by a

suspect's responses to an officer's direct questions are not testimonial); Doe v. United States, 487 U.S. 201, 210 (1988)("[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."); United States v. Wade, 388 U.S. 218, 222 (1967)(holding a suspect could be compelled to participate in a lineup and repeat a phrase); Gilbert v. California, 388 U.S. 263, 266-267 (1967)(holding a suspect could be compelled to provide a handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 7 (1973)(holding suspects could be required to read a transcript in order to provide a voice exemplar); Holt v. United States, 218 U.S. 245, 252-253 (1910)("[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.").

However, the direct questioning by law enforcement asking his consent for a DNA sample to permit DNA testing with evidence in the case was express questioning on the part of a law enforcement officer that the officer should have known was reasonably likely to elicit an incriminating response. The United States Supreme Court explained that "[w]henver a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component." Muniz, 496 U.S. at 597. The questioning directed toward Appellant on June 26 about his DNA sample, which implicated the crime and the allegations that Appellant had committed the crime, asked for a response with a testimonial component. Although the DNA sample itself would not be testimonial

evidence, the questioning to obtain the sample by law enforcement sought testimonial evidence from Appellant. The questioning by law enforcement of Appellant on that date did not fall within the “booking exception” to Miranda, as the trial judge found. See United States v. Avery, 717 F.2d 1020, 1024 (6<sup>th</sup> Cir. 1983). In order for the exception to apply, the questions asked must be “part of a routine procedure to secure biographical data to complete the booking process.” Id. A request for a DNA sample is not routine in all cases and is not necessary to secure biological data to complete the booking process. See United States v. Yan, 704 F.Supp. 1207, 1211-1212 (S.D.N.Y. 1989); State v. Britain, 752 P.2d 37, 39 (Ariz. Ct. App. 1988); contra United States v. Shlater, 85 F.3d 1251, 1256 (7<sup>th</sup> Cir. 1996); United States v. Hidalgo, 7 F.3d 1566, 1568 (11<sup>th</sup> Cir. 1993); United States v. Smith, 3 F.3d 1088, 1098 (7<sup>th</sup> Cir. 1993); United States v. Rodriguez-Garcia, 983 F.2d 1563, 1568 (10<sup>th</sup> Cir. 1993); Cody v. Solem, 755 F.2d 1323, 1330 (8<sup>th</sup> Cir. 1985); United States v. Faruolo, 506 F.2d 490, 495 (2<sup>nd</sup> 1974); State v. Morato, 619 N.W.2d 655, 662 (S.D. 2000); State v. Crannell, 750 A.2d 1002, 1009 (Vt. 2000) overruled on other grounds by State v. Brillon, 955 A.2d 1108 (Vt. 2008).

Thus, law enforcement’s request for a DNA sample constituted interrogation. Law enforcement’s interrogation of Appellant coupled with Appellant’s obvious custodial status, which was undisputed, triggered the requirement for advisement of rights pursuant to Miranda. Law enforcement’s failure to advise Appellant of his rights required exclusion of his second statement. The trial judge’s failure to exclude the second statement violated Appellant’s rights pursuant to the Fifth and Fourteenth Amendments.

*Prior advisement insufficient*

In 1979, the South Carolina Supreme Court interpreted Miranda to mean that “once a voluntary waiver of the Miranda rights is effected, the waiver continues in effect until the individual being questioned indicates that he wishes to revoke the waiver and remain silent; or circumstances exist which establish that his will was overborne and his capacity for self-determination critically impaired.” State v. Moultrie, 273 S.C. 60, 61-62, 254 S.E.2d 294, 294-295 (1979). Using this interpretation, the Court determined Moultrie’s statement to police was admissible because he did not indicate a wish to revoke his waiver “and the mere lapse of one and one-half hours [was] insufficient to establish that [Moultrie]’s will was overborne or his capacity for self-determination critically impaired.” Id. at 62, 254 S.E.2d at 295. Thus, it is clear from the Court’s opinion that communication of a desire to revoke a waiver is sufficient to require re-advisement of the rights. Further, it is clear that a lapse of time between the advisement and the interrogation may operate to require re-advisement of the rights. See United States v. Hopkins, 433 F.2d 1041, 1045 (5<sup>th</sup> Cir. 1970)(“The Miranda warnings, once given, are not to be accorded unlimited efficacy or perpetuity.”).<sup>2</sup>

The South Carolina Supreme Court stated that “the question of whether Miranda warnings, having been once given, should be repeated at later stages of the interrogation must be determined upon the basis of the facts and circumstances surrounding each case.” State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 871 (1972). Likewise, in analyzing this issue, some courts have established a “totality of the circumstances” test to determine whether Miranda warnings became so stale as to dilute their effectiveness due to a

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<sup>2</sup> Of course, “the better practice is for an interrogating officer to advise an accused of his rights before each interrogation.” People v. Chase, 719 P.2d 718, 721 (Colo. 1986); see also Biddy v. Diamond, 516 F.2d 118, 122 (5<sup>th</sup> Cir. 1975).

significant lapse in the process of interrogation. Those factors include: (1) the length of time between the giving of the first warnings and subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different actors; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect. See State v. DeWeese, 582 S.E.2d 786, 798 (W. Va. 2003); People v. Delgado, 832 P.2d 971, 973 (Colo. Ct. App. 1991); DeJesus v. State, 655 A.2d 1180, 1195 (Del. 1995); State v. Lester, 126, 709 N.E.2d 853, 856 (Ohio 1998); State v. Birmingham, 527 A.2d 759, 761-762 (Me. 1987); Commonwealth v. Hughes, 555 A.2d 1264, 1276 (Pa. 1989). In considering the factors, “the most relevant factor ... is the amount of time elapsed between the first reading and the subsequent interview.” Koger v. State, 17 P.3d 428, 431 (Nev. 2001).

The Massachusetts Appeals Court excluded a statement given by a defendant where the warnings were provided on a Friday evening and the interrogation occurred on a Monday morning. Commonwealth v. Doe, 636 N.E.2d 308, 311 (Mass. App. Ct. 1994). The Court held the warnings “should have been repeated before [the defendant] was questioned further by the police.” Id. In DeWeese, the West Virginia Supreme Court of Appeals held the police were required to re-advise a suspect of his rights when “roughly seven days had lapsed” since the last time the rights were given to the suspect. DeWeese, 582 S.E.2d at 799. According to the court, this factor was dispositive without consideration of any other factors “[a]s a matter of public policy.” Id. The District Court for the Eastern District of Michigan concluded that a defendant’s statement must be suppressed where the initial warnings occurred more than eighteen hours before the second interrogation, the

interrogators changed, and there was a change in location of the interrogation. United States v. Jones, 147 F.Supp.2d 752, 761-762 (E.D. Mich. 2001). Likewise, the Maryland Court of Special Appeals concluded that a statement provided by a defendant on September 6 where the advisement of rights occurred on September 4 “fell short of compliance with the dictates of the Miranda decision.” Franklin v. State, 252 A.2d 487, 491 (Md. Ct. Spec. App. 1969); see also State v. Walker, 729 S.W. 272, 274 (Tenn. Crim. App. 1986)(finding a statement given five months after the administration of the warnings was in violation of the Fifth Amendment because of the lapse of time); Commonwealth v. Wideman, 334 A.2d 594, 598-599 (Penn. 1975)(finding a delay of twelve hours, a change in location, a change in officers, and a material difference in the statements given required re-administration); State v. DuPont, 659 So.2d 405, 407-408 (Fla. Dist. Ct. App. 1995)(requiring re-advisement after a lapse of twelve hours); Ex parte J.D.H., 797 So.2d 1130, 1132 (Ala. 2001)(finding a lapse of sixteen days between advisement of rights and defendant’s custodial statement rendered the statement inadmissible).

As an initial matter, Appellant respectfully requests this Court to follow the lead of the West Virginia Court and declare that as a matter of public policy, the passage of five days between the advisement of rights and interrogation requires re-advisement of rights, and if the police fail to advise a suspect of his rights, then the statement must be suppressed. However, if this Court were to require satisfaction of a totality of the circumstances test, then Appellant respectfully requests this Court hold the circumstances surrounding his statement to police required suppression. The most relevant factor for consideration, the length of time between the advisement and interrogation, weighs heavily in Appellant’s favor because the police interrogated Appellant five days after the initial advisement. The

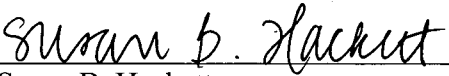
limited record available demonstrates the advisement and the second interrogation occurred at different locations. The advisement of rights occurred during a traffic stop on the side of the street. The interrogation occurred in the detention center after Appellant had been held in jail for five days. While one officer – Pressley – was present for the advisement and for the delayed interrogation, Pressley had a second officer accompany her for the delayed interrogation. Thus, the subsequent interrogation involved at least one different actor. Also, Appellant’s second statement differed in material ways from his initial statement. He initially told police that he did not touch Graham. However, when the police approached him five days later, he told the police that Graham straddled him while he was lying on the floor. This statement indicated he had touched Graham and the type of touching appeared to be of a sexual nature. While the record provides little in terms of Appellant’s intellectual state, it takes very little inferring to determine that Appellant’s emotional state would have been one of a wrecked and defeated man. He had been in jail for five days. He had been accused of sexually assaulting a woman whom he considered a friend and with whose family he was very close. There is no doubt Appellant felt scared, overwhelmed, and stigmatized.

For these reasons, Appellant respectfully requests this Court hold the rights administered five days prior to Appellant’s statement to police were stale and lacked efficacy. Thus, the police were required to re-administer the rights. In light of law enforcement’s failure to do so, the statement should have been suppressed.

**CONCLUSION**

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2016.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Williamsburg County  
Clifton Newman, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JIM EDWARD FEAGIN,

APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

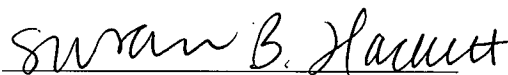
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Counsel for Jim Edward Feagin states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of Appellant's trial before Judge Clifton Newman, which was held October 20-24, 2014, and the transcript of the motions hearing held on April 2, 2015 before Judge Clifton Newman, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jim Edward Feagin.

Respectfully submitted,



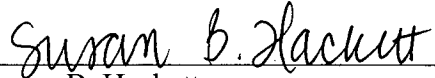
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 14th day of January, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

January 14, 2016



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