

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Aiken County

Doyet A. Early, Circuit Court Judge  
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RECEIVED

MAR 13 2017

S.C. SUPREME COURT

WILLIAM MCCLADDIE,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001979

\_\_\_\_\_  
BRIEF OF APPELLANT  
PURSUANT TO WHITE V. STATE  
\_\_\_\_\_

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ISSUE PRESENTED

Did the trial judge err in failing to direct a verdict on the charge of burglary in the first degree based upon his finding that a structure was a dwelling house where the structure remained vacant after the owner's death?

## STATEMENT

On July 6, 2015, an Aiken County grand jury indicted Appellant for burglary in the first degree (2015-GS-02-1103), possession of implements capable of being used in a crime (2015-GS-02-1104), and possession of a stolen vehicle (2015-GS-02-1105). App. 286-287; App. 289-290; App. 292-293. On July 7-8, 2015, Appellant was tried before the Honorable Doyet A. Early, III, and a jury. App. 1. Jay Slocum and Cassie Hall represented the state. App. 1. Bradley McMillian and Wallis Alves represented Appellant. App. 1. The jury found Appellant guilty as charged. App. 254, l. 22 – App. 255, l. 7. Judge Early sentenced Appellant to fifteen years' imprisonment for burglary, ten years' imprisonment for possession of a stolen vehicle, and five years' imprisonment for the burglary tools. App. 261, ll. 16-24. He ordered the sentences to be served concurrently. App. 261, ll. 24-25; App. 288; App. 291; App. 294.

On August 6, 2015, trial counsel served his notice of intent to appeal. App. 264-265. The notice was filed at the Court of Appeals on August 11, 2015. App. 264-265. On August 19, 2015, the Court of Appeals dismissed the notice of appeal because it was not timely served as required by Rule 203(b)(2), SCACR. App. 266-267. Remittitur was issued on September 28, 2015. App. 268-269.

On October 19, 2015, Appellant filed an application for post-conviction relief. App. 270-276. Subsequently, the state filed its return. App. 277-282. By an order filed August 22, 2016, Judge Early dismissed Appellant's PCR application with prejudice. App. 283-285. Judge Early also granted Appellant a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 283-285. The order appears to have been a consent order as it was signed by Appellant, his PCR counsel, Aimee Zmorczek, and the state's attorney, Julie A. Coleman. App. 283-285.

On September 22, 2016, Appellant filed and served his notice of appeal. This petition for writ of certiorari follows. In compliance with this Court's directive in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Appellant is filing this brief addressing his direct appeal issue, and Appellant is filing a petition for writ of certiorari addressing the issue of the waiver of his direct appeal as well as an additional post-conviction relief issue simultaneously.

## ARGUMENT

The trial judge erred in failing to direct a verdict on the charge of burglary in the first degree based upon his finding that a structure was a dwelling house where the structure remained vacant after the owner's death.

### **Relevant facts**

Prior to January 11, 2014, Margaret McDaniel lived alone in a home in Jackson, South Carolina. App. 165, ll. 7-11; App. 188, ll. 7-11. On that day, she passed away. App. 165, ll. 10-13. Evelyn Clark, Margaret's sister, lived alone in her home not far from Margaret. App. 186, ll. 23-24; App. 188, ll. 7-11; App. 199, ll. 12-16. In her will, Margaret left her home to Evelyn and another sister, who had passed away almost a decade earlier. App. 189, ll. 8-13.<sup>1</sup> After Margaret's death, "there was talk of" Evelyn "moving in." App. 166, ll. 5-9. In February, Evelyn was "thinking" about moving into Margaret's home. App. 196, ll. 7-9. After Margaret's death, Evelyn stayed one night at the address. App. 166, ll. 16-24; App. 192, ll. 3-9. Evelyn stayed there because she wanted to see if she "could feel" her sister. App. 192, ll. 7-9. Electricity and water remained available. App. 165, l. 23 – App. 166, l. 1; App. 170, ll. 14-16; App. 190, l. 24 – App. 191, l. 9. A neighbor, Don Adams, maintained the lawn. App. 166, l. 2-4; App. 170, ll. 12-13; App. 191, ll. 10-15. Michael had not been into the house after Margaret's death. App. 165, ll. 14-16.

On February 20, 2014, Michael Clark got up from his bed because he "had this little voice in the back of [his] head telling [him] that he needed to get up and go ride down to Jackson" to check on his family. App. 160, ll. 12-23. When he arrived at the home where his deceased aunt had lived prior to her death, he saw a car in the driveway. App. 161, ll. 5-16. Unnerved by the presence of a

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<sup>1</sup> At the time of Appellant's trial in July 2015, the will was being probated with the expectation that probate would be complete by October. App. 195, l. 25 – App. 196, l. 6.

strange car, Michael drove around town until he ran into a police officer. App. 162, ll. 1-15. He asked the officer to investigate the strange car. App. 162, ll. 15-17.

Later, the officer returned and asked him to locate the keyholder, Michael's grandmother, Evelyn. App. 163, ll. 1-6. While driving to Evelyn's home, Michael called her to alert her that he was on his way to her home. App. 163, ll. 7-11; App. 187, ll. 7-11. Evelyn lived "about half a block" from her deceased sister. App. 163, ll. 19-21. Evelyn got into the car with Michael and the two went to find the police. App. 163, l. 24 – App. 164, l. 5; App. 187, ll. 11-17. By the time the pair arrived, the police had a suspect, Appellant, in custody. App. 164, ll. 11-23.

At the time of Appellant's trial in July 2015, Evelyn continued to live in her own home and had not moved into Margaret's home. App. 194, l. 25 – App. 195, l. 3; App. 196, ll. 10-12; App. 199, ll. 17-19.

Appellant moved for a directed verdict on the charge of burglary in the first degree because the undisputed evidence was that no one lived in the house on the date of the alleged burglary. App. 201, ll. 13-18. Citing State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979), defense counsel argued that in order for a structure to qualify as a "dwelling" as that term is used in the burglary statute, "there has to be an identifiable occupant and the occupant has to have some intent to return to the dwelling." App. 202, ll. 2-8. The "test" according to defense counsel was "whether not the occupant has left with the intent to return." App. 202, ll. 17-21. Defense counsel relied upon the testimony of Evelyn that she had stayed in Margaret's home only once in the six weeks' since Margaret's death, and even at the time of the trial, which was well over a year later, she had not moved in. App. 202, ll. 9-12. Evelyn maintained "an entire other residence" and never resided at Margaret's. App. 202, ll. 13-16. Defense counsel also noted that at the time of the alleged burglary, and even at the time of the trial, the structure belonged to the Estate of

Margaret McDaniel. App. 204, ll. 4-10. “[W]ithout an identifiable occupant, ..., this house is just a building and not a dwelling.” App. 204, ll. 10-12.

The state argued Evelyn was “identifiable occupant” and conceded that ownership does not equate to occupancy. App. 205, ll. 3-11. To support her argument that Evelyn was an occupant of Margaret’s home, the state pointed to her having stayed in the home one night since Margaret’s death. App. 205, ll. 12-16. The state also noted the structure had been left to Evelyn in the will and that the lights and water were left on. App. 205, ll. 22-24. The state argued this “evidence[d] an intent to return.” App. 205, ll. 23-24. To further support her position, the state pointed to the testimony that Evelyn “checked the mail every day, the lawn was kept up, the house remained fully furnished.” App. 206, ll. 3-6. The state contended there was “evidence that the owner [Evelyn] intended to occupy the dwelling.” App. 206, ll. 24-25.

The judge denied the motion for directed verdict. App. 214, ll. 1-19; App. 214, ll. 17-19. The judge explained that the evidence presented showed “the person who owned the house had died, she ha[d] left it to [Evelyn] in her will.” App. 213, ll. 1-2. According to the judge, this made Evelyn “at least the *de facto* owner of the house.” App. 213, ll. 2-4. The judge noted the “uncontradicted” testimony that Evelyn spent “at least one night in the house subsequent to her sister’s death, which occurred about six [weeks] prior to the burglary.” App. 213, ll. 4-7. The judge also noted that Evelyn had maintained the structure at her own expense following Margaret’s death, and that a neighbor had maintained the yard. App. 213, ll. 13-17.

However, the judge determined that the issue of whether the “premises located at the address in question is, in fact, a dwelling or a building” would be for the jury. App. 214, ll. 1-6. The judge found there was “evidence in the record that if they found she had an intent to return, if that’s how they construe the evidence, that it could be a dwelling.” App. 214, ll. 7-10.

However, the judge allowed the jury may find she had no intent to return and construe the structure as a building. App. 214, ll. 10-12. The judge agreed to instruct the jury as to burglary first degree and burglary second degree. App. 214, ll. 13-17.

During the jury's deliberations, the jury requested the jury instructions in written form. App. 252, ll. 22-25. The judge refused to provide written instructions, but offered to "reread the charge" if the jury desired. App. 253, ll. 1-2. The jury next asked for "the definition of a dwelling versus a building in writing, two definitions." App. 253, ll. 11-12. The judge responded again that he could not provide "these definitions in written form." App. 253, ll. 12-14. After deliberating just over two hours, the jury found Appellant guilty of burglary in the first degree and the accompanying charges. App. 252, ll. 19-21; App. 254, l. 15; App. 254, l. 22 – App. 255, l. 7.

### **Discussion**

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).

Burglary in the first degree is a statutory crime, and understanding the statute requires application of the rules of statutory construction. The analysis must begin with the statute itself. The crime of burglary in the first degree requires the person (1) enter a dwelling (2) without consent (3) with the intent to commit a crime in the dwelling and (4) the existence of an enumerated

aggravating circumstance. S.C. Code Ann. § 16-11-311(A). The primary issue before this Court is what structures are deemed “dwellings” for purposes of the burglary statute. The precise issue presented in Appellant’s case – whether a structure that is unoccupied following the death of its owner remains a dwelling – is novel in South Carolina.

The South Carolina Code defines a dwelling house as “any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property.” S.C. Code Ann. § 16-11-10. Further, a dwelling “also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person.” S.C. Code Ann. § 16-11-310(2). As required by the rules of statutory construction, courts must strictly construe the criminal statutes *against* the state. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

Burglary is “a crime against possession, not against property.” State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981). “The law of burglary is primarily designed to secure the sanctity of one’s home, especially at night time when peace, solitude, and safety are most desired and expected.” Id. “Thus, at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night.” Id. at 113, 283 S.E.2d at 831. “[B]urglary is an offence against the *habitation* of some other person.” State v. Trapp, 17 S.C. 467, 471 (1882) (emphasis in original); see also State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011)(“We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership”). “[T]he core of a dwelling constituting one’s home for burglary purposes is the expectation of peace and security therein. Mere ownership does not automatically confer this status on a person. That ownership interest must

be examined in light of who possesses that expectation of sanctity in the dwelling.” Singley, 392 S.C. at 276, 709 S.E.2d at 606.

South Carolina’s first degree burglary statute serves to protect occupants inside a dwelling who could be harmed when intruders break in with intent to commit a crime inside. See Id. at 274, 709 S.E.2d at 605. Other jurisdictions have held accordingly when examining common law burglary, which is most akin to South Carolina’s first degree burglary statute. See generally, People v. Davis, 958 P.2d 1083, 1088 (Cal. 1998)(explaining “[t]he interest sought to be protected by the common law crime of burglary ... was the sanctity of a person’s home during the night hours when the resident was most vulnerable”); State v. Rooney, 862 N.W.2d 367, 373 (Iowa 2015)(explaining “the common law purpose of burglary was an offense against security of occupancy”); State v. Lozier, 375 So.2d 1333, 1337 (La. 1979)(stating that “[b]urglary laws are not designed primarily to protect the inhabitant from unlawful trespass and/or the intended crime, but to forestall the germination of a situation dangerous to the personal safety of the occupants”); State v. White, 330 P.3d 482, 485 (Nev. 2014)(describing common law burglary as “a crime against habitation and occupancy” that “clearly sought to protect the right to peacefully enjoy one’s own home free of invasion”)(internal quotation omitted); State v. Holt, 352 P.3d 702, 705 (N.M. Ct. App. 2015)(noting that the purpose of burglary statutes is to protect possessory rights); Rash v. Commonwealth, 383 S.E.2d 749, 751 (Va. Ct. App. 1989)(explaining that “[b]urglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation – the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion”).

This Court analyzed the meaning of “dwelling” in the seminal case of State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979), concluding that the statutory definition of dwelling required that the structure “have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house.” Id. at 405, 257 S.E.2d at 155. This Court explained that although “temporary absence of occupants will not prevent a residence from becoming the subject of a burglary, it is required that such occupants leave with the purpose of returning in order for breaking and entering during their absence to constitute burglary.” Id. According to this Court, “the mere fact that a building is suitable for use as a dwelling is insufficient.” Even a house furnished as a dwelling house “loses its character as such for the purpose of burglary, if the occupant leaves it without the intention to return.” Id. (internal citation omitted). This finding rested upon the centuries-old rationale that burglary is an offense against habitation, and not against property. Id. at 406, 257 S.E.2d at 155.

Ferebee was accused of burglarizing a vacant apartment. Id. at 404, 257 S.E.2d at 155. The issue before this Court was “whether the apartment was being used as a dwelling house *at the time* of the alleged offense.” Id. (emphasis added). The apartment was owned by a doctor and leased through a local real estate agency. “The building was a duplex containing two separate living units which had been utilized as rental property for the past three years.” Id. Although one unit remained occupied, the unit alleged to have been burglarized was vacant because the former tenants had moved out the prior week. Id. at 405, 257 S.E.2d at 155. The unit was partially furnished and available for rent at the time of the break-in. Id. This Court found “there was clearly no occupant or inhabitant against him the offense could have been committed” where the “former tenant had permanently abandoned the premises without the intention of returning.” Id. at 406, 257 S.E.2d at 155. Based on this reasoning, this Court

reversed Ferebee's conviction for burglary. Id. at 406, 257 S.E.2d at 156. See also State v. Scarberry, 418 S.E.2d 361, 364 (W. Va. 1992)(finding a mobile home that had been abandoned by its occupants and not yet been purchased by the prospective buyer); Wallace v. State, 492 A.2d 970, 973 (Md. Ct Spec. App. 1985)(finding a vacated apartment was not a dwelling house under its breaking and entering statute); Santistevan v. People, 494 P.2d 75, \* (Colo. 1972)(concluding the structure burglarized was not a dwelling house where previous tenants had left and the future tenants had not arrived); Marston v. State, 264 A.2d 127, 128 (Md. Ct. Spec. App. 1970)(explaining a dwelling is used regularly as a place to sleep).

Relying upon the test in Ferebee, this Court found a mobile home was a dwelling house based upon evidence showing the occupant intended to return. State v. Glenn, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988). Glenn and her husband purchased a mobile home in 1985. Id. at 30, 374 S.E.2d at 671. The following year, Glenn's husband died. Id. Shortly after the funeral, Glenn learned that she would have to surrender the mobile home or it would be repossessed. Id. Within a week of the funeral, Glenn stopped by the mobile home to retrieve a Bible. Id. at 31, 374 S.E.2d at 671. Shortly after Glenn left the mobile home, a passerby noticed it was on fire. Id. at 31, 374 S.E.2d at 671-672. The only issue before the appellate court was whether the mobile home was a dwelling house at the time of the fire. Id. at 31, 374 S.E.2d at 672. This Court found the mobile home was a dwelling house because Glenn had \$10,000 worth of personal possessions in the mobile home and had returned to the home many times after her husband's death to gather possessions, evidencing her intent to return. Id. at 32, 374 S.E.2d at 672.

In State v. Steadman, 257 S.C. 528, 541, 186 S.E.2d 712, 716, (1972), the defendant was charged with burglary in the first degree at South of the Border, a motel. The prosecuting

witness maintained an apartment on the second floor of the office building where he resided “from time to time.” Id. He used the adjacent area for business purposes. Id. At the time of the burglary, the prosecuting witness was in the business office adjoining the living area. Id. This Court found no error in a trial judge instructing the jury “that it was not necessary that the entire building be devoted to dwelling purposes, nor that the dwelling area entered be constantly inhabited every day or night of the year; and that the dwelling area might be in a building a portion of which is devoted to business purposes.” This Court noted, in approving the jury instructions, that “[i]t was made clear that the area entered must be devoted to dwelling purposes.” Id.

The Court of Appeals found a vacation home to be a dwelling in State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008). The owner of the home burglarized, Charles Shaw, testified that he had owned the home for the past ten years as a secondary residence. Id. at 424, 656 S.E.2d at 783. The home was set on heavily wooded, mountainous, and secluded terrain. Id. The family had lived in the home “off and on” for years until three years before the break-in when Shaw’s wife became ill preventing the family from spending significant amounts of time at the property. Id. Nevertheless, Shaw went to the home “once every two weeks or once a month.” In fact, he had been at the home just weeks prior to the break-in. Id. The Court found “sufficient evidence of the Shaws’ intent to return to the mountain property.” Id. at 425, 656 S.E.2d at 784.

These cases provide guidance for resolution of the precise issue in Appellant’s case, but do not resolve the issue completely. Other jurisdictions have addressed the issue more squarely and provide persuasive guidance. A Florida Court found a home, which was owned by a realtor, listed for sale, and unoccupied was not a dwelling house. Johnson v. State, 188 So.2d 61, 63

(1966). The owners recently lived in the home until the husband died and the wife had been confined in a mental hospital. *Id.* The court concluded “[t]he building was clearly not the dwelling of the real estate saleswoman, and there [was] no proof that the mentally-ill wife had an intent to return.” *Id.* Interpreting a statute regarding a “dwelling-house,” the Massachusetts Supreme Judicial Court explained that a structure “cannot be the dwelling-house of an individual before he has begun to occupy it.” Commonwealth v. Barney, 64 Mass. (10 Cush.) 478, 479 (Mass. 1852). The Court explained a “dwelling-house” “must be an occupied house; a dwelling-house in which some one lives, using the term in a liberal sense, and treating the cases of mere temporary absence as substantially a continued occupation.” *Id.* The Supreme Court of Mississippi explained that a recently erected house intended to be a dwelling house, but not yet occupied was not a dwelling house as that term was used in the burglary statutes. Woods v. State, 191 So. 283, 284 (Miss. 1939).

Confronted with a scenario remarkably similar to the instant matter, the Michigan Court of Appeals concluded a home, which was burglarized the day after its owner-occupant died, was not a dwelling. People v. Hider, 351 N.W.2d 905, 908 (Mich. Ct. App. 1984). The owner-occupant died on July 20, 1981. *Id.* at 906. Family and friends secured the house, but did not stay in it for any length of time. *Id.* The following day, a neighbor discovered the house had been burglarized. *Id.* The question before the court was “whether a house, left vacant by the death of its sole owner and occupant, may be considered an occupied dwelling house” which had been defined as a habitual place of abode. *Id.* at 907. A habitual place of abode included areas where an inhabitant had left for a temporary purpose. *Id.* The court explained the deceased’s “absence [could] hardly be considered temporary and there was no evidence that anyone had shared her home and intended to either remain in it or to return to it after a temporary absence.”

Id. at 908. See also People v. Ramos, 60 Cal. Rptr. 2d 523, 524-525 (Cal. Ct. App. 1997)(“To put it plainly, a dead body is not using a house for a ‘dwelling’ and there is no way to say that a dead man is going to return or that he has an ‘intent’ of any kind.”

The Ninth Circuit Court of Appeals held a house that had been vacant for more than a year prior to the alleged illegal entry was not a dwelling house as defined by Alaska’s burglary statute. James v. United States, 238 F.2d 681, 682-683 (9th Cir. 1956). The owner of the home lived not far from the property and had acquired it a few years before the alleged illegal entry. Id. at 682. While the owner had property in the home, he had never lived there, had never rented the home to anyone, and was not allowing anyone to live there at the time of the crime. Id.

In the instant matter, the trial judge erred in failing to direct a verdict of acquittal where the undisputed evidence showed the structure allegedly burglarized was not occupied at the time as the owner-occupant had died six weeks prior to the burglary and no one else was occupying the home. Although the home had been bequeathed to Evelyn, the will was still in probate at the time of the alleged entry. Evelyn had never lived in the home, and as a result, she could not demonstrate an “intent to return.” Evelyn maintained her own residence where she slept every night, including the night of the burglary. Although Margaret’s house was “kept up” with electricity, water, and yard maintenance, no one lived there, and unfortunately, Margaret could not return. Due to the undisputed evidence demonstrating the home was not a dwelling pursuant to the burglary statute, the trial judge erred in failing to grant a directed verdict.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal on the charge of burglary in the first degree.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County  
Doyet A. Early, Circuit Court Judge

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WILLIAM MCCLADDIE,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

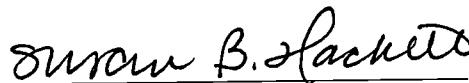
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the Brief of Appellant pursuant to White v. State, in this case has been served on Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Willaim McCladdie #364614, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of March, 2016.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day  
of March, 2016.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.