ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2016-001875

THE STATE, ...RESPONDENT,

v.

DOUGLAS KELLY PHILLIPS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The trial judge properly admitted Victim's testimony regarding Appellant's prior molestation of her as evidence of prior bad acts under Rule 404, SCRE because such evidence was clear and convincing and demonstrated a common scheme or plan. Further, any alleged error in admitting said testimony is harmless because similar evidence of Appellant's prior molestation was presented through Victim's mother.

STATEMENT OF THE CASE

On February 18, 2014, the Pickens County Grand Jury indicted Appellant for two counts of second-degree criminal sexual conduct (CSC) with a minor and one count of third-degree CSC with a minor. On July 25, 2016, Appellant proceeded to a jury trial before the Honorable Thomas A. Russo. Cheryl Aaron, Esquire, represented Appellant; assistant solicitor Christopher Jones, Esquire, represented the State. The jury convicted Appellant of all three charges. The trial judge sentenced Appellant to twenty years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Pretrial Matters

Immediately prior to trial, the State and trial counsel discussed the Lyle[1] issues surrounding Appellant's testimony. Victim, who was approximately 13 years old when she reported Appellant's abuse in 2013, eventually disclosed to law enforcement the abuse began when she was six or seven years old, around the time her mother (Mother) began dating Appellant. The abuse began as touching, progressed over time to oral sex and later several instances of vaginal intercourse in July of 2013, incidents for which Appellant was criminally charged. The State argued Victim should be permitted to testify about the entire history of abuse and compared the case to State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008), in which this Court found a trial judge properly admitted a victim's testimony of years of prior abuse as evidence of a common scheme or plan pursuant to 404(b), SCRE. The State noted this case paralleled Kirton because: (1) both cases involved abuse directed towards a single victim; (2) in both situations, the abuse occurred consistently over a six or seven year period; and (3) both Appellant and Kirton "groomed" their victims, starting with more minor offenses such as inappropriate touching but over time escalated the abuse to oral sex and eventually vaginal intercourse. (R.p.13, line 15–R.p.14, line 12; R.p.15, line 16–R.p.16, line 24; R.p.21, lines 4–9).

The State also compared its case to State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009), in which the Supreme Court of South Carolina affirmed the trial court's admission of the victim's testimony regarding prior incidents of groping although the defendant was indicted for a single incident of digital penetration. The State noted the Supreme Court referenced Kirton and adopted this Court's analysis in that opinion, finding the prior incidents of groping demonstrated an escalating pattern of abuse. (R.p.18, line 17–R.p.19, line 12).

[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Trial counsel objected to the prior abuse testimony. He alleged the State sought to admit the evidence as "back door" Lyle evidence because the State could not prove beyond a reasonable doubt those incidents occurred. He also claimed evidence of a prior bad act admitted under the common scheme or plan exception must constitute the same type of behavior as the underlying charge its admitted to prove, which in this situation would mean the prior acts must be the same type of abuse for which Appellant was charged. Trial counsel also argued there was no evidence of grooming or escalating abuse in the case because Appellant was charged with third-degree CSC with a minor, which "doesn't even involve a sexual battery,"[2] and he understood "grooming" to be the touching of a victim on the shoulder or waist, neither of which was alleged. (R.p.14, line 14–R.p.15, line 15; R.p.17, lines 2–17; R.p.19, lines 3–12; R.p.21, line 16–R.p.23, line 5).

In response, the State argued both escalation and grooming occurred during the course of Victim's abuse, and the six to seven year pattern of "continued illicit activity [was] the essence of grooming" under South Carolina law. It clarified Appellant was charged with third-degree CSC with a minor and two counts of second-degree CSC with a minor. (R.p.17, line 18–R.p.18, line 16).

The trial judge delayed ruling on the motion until hearing Victim's proffered testimony later that day. (R.p.23, line 6–R.p.25, line 5).

Prior to Victim's pretrial testimony, the trial judge held a Jackson v. Denno[3] hearing to determine the admissibility of statements made by Appellant to an investigative officer.

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[2] S.C. Code. Ann. § 16-3-651(h) defines "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

[3] Jackson v. Denno, 378 U.S. 368 (1964).

Detective Jonathan Hamby questioned Appellant on July 30, 2013, the day Victim reported the abuse to her doctor. After speaking with Victim and her mother (Mother), he met with Appellant at the police station. He initially asked him whether anything ordinary had happened the Sunday night prior, to which Appellant responded nothing out of the ordinary occurred. He responded similarly when questioned about the prior Friday night. After a few more questions, Appellant volunteered that Victim "woke up" and saw him and Mother having sex while they were all in Victim's bedroom, at which point they terminated intercourse. Appellant claimed Victim caught him and Mother having sex on several occasions. When Detective Hamby asked Appellant whether he had touched Victim in a sexual manner or vice versa, he claimed no such behavior ever occurred. However, after additional questioning, Appellant admitted approximately a year before the interview Victim had lain beside him while he was sleeping and tried to touch his "private areas." He told her to stop and sent her back to bed. (R.p.27, line 1–R.p.34, line 14).

Throughout the interview with Appellant, Detective Hamby would take breaks to interview Mother and acquire additional information. Mother requested permission to see Appellant and advise him to "tell the truth" to the officers, so Detective Hamby allowed her to do so. After Mother left the room, Appellant again changed his story, claiming that on three or four occasions Victim had "come on to him" and touched him inappropriately. He stated he informed Mother of at least one of the incidents. Detective Hamby confronted Appellant with the inconsistencies in his stories, at which time Appellant became agitated and ended the interview. (R.p.34, line 15–R.p.35, line 21).

The trial judge ruled Appellant's statements to Detective Hamby admissible, finding they were freely and voluntarily given as well as reliable. (R.p.42, line 18–R.p.43, line 17).

Later, the State proffered Victim's testimony. Victim stated her birthday was April 30, 2000. She met Appellant when he and Mother started dating, when she was six or seven. Around the time Appellant and Mother started dating, the former began abusing Victim, touching her vaginal area and her breasts. Victim recalled a specific incident which occurred at a lake house in McCormick. There, Appellant forced Victim to perform oral sex on him while he touched her breasts and vagina. (R.p.90, line 20–R.p.92, line 5; R.p.96, line 11–R.p.98, line 13; R.p.99, line 9–R.p.100, line 1).

Victim also testified about the incidents of abuse for which Appellant was charged. Days before she reported her abuse to her doctor, she was watching a movie with Appellant in her room when he started touching her inappropriately. When Mother came to the door, the assault ceased. However, Appellant and Mother began having sex in front of Victim. When Victim attempted to leave, Appellant grabbed her shoulder and tried to get her to stay. Victim noted the incident was similar to an earlier occasion when Appellant and Mother had sex in front of her and her brother in a motel room. (R.p.92, line 6–R.p.95, line 22; R.p.100, lines 2–16; R.p.102, lines 6–11).

On three occasions in July 2013, prior to the movie incident, Appellant abused Victim in her home by inserting his penis into her vagina. On all three occasions, she noticed Appellant's pubic hair was shaved. (R.p.95, line 23–R.p.96, line 10; R.p.100, line 17–R.p.102, line 5).

On cross-examination, trial counsel asked Victim various questions about the abuse, including what acts she defined as "sex." He asked her when the assaults occurred, and she responded that one of the three instances of intercourse occurred in McCormick when she was nine years old, in Appellant's camper. People in the area, but not in the camper, included Mother, her brother, and Appellant's ex-wife, Denise. The other two instances of intercourse

occurred at her home and Appellant's home. She quickly recalled the incident at her home occurred in July of 2013, but did not recall when the incident at Appellant's home occurred until trial counsel asked whether it also happened in July 2013. (R.p.102, line 18–R.p.105, line 17).

Trial counsel further questioned Victim about the McCormick incident, asking Victim why she thought she was nine when it occurred, triggering the following exchange[4]:

Q: Okay. Now when you talk about McCormick, you said you thought you were nine?

A: Yes, ma'am.

Q: Why does that stick out in your mind?

A: Like why was I nine?

Q: Why do you think – why do you think that – why does that stick out in your mind that you were nine if you went there many times?

A: I mean, because we went down there a lot, but like I know I was nine.

Q. How do you know you were nine?

A: Because that's my age. I know my age.

Q: So would that have been – what month would that have been?

A: Like – it was like we went down there for the 4th of July.

Q: So this 4th – it would have been July of 2009?

A: No.

Q: When would that have been?

A: I was nine years old.

Q: Okay. But when –

[4] The State notes Appellant included a large section of the relevant testimony in his brief. However, Appellant omitted several sections of that exchange in his brief.

A: I wasn't saying 2009. I was nine years old.

Q: Okay, so what year would it have been?

A: Like – in like August.

Q: What year?

A: What year? 2013.

Q: So in 2013, you – in August of 2013 is when you're alleging this McCormick Happened?

A: Yes, ma'am.

Q: Okay. And you say that you met [Appellant] six or seven years ago?

A: Yes, ma'am.

Q: So that would have been 2010, ---

A: Yes, ma'am.

Q: --- 2009? So you're talking about six or seven years from now?

A: Yes, ma'am.

Q: The solicitor asked you before, I guess, of 2013 ---

A: Yes, ma'am.

Q: --- if [Appellant] had ever touched – well, he says touched you inappropriately. So you said breasts and vaginal area?

A: Yes, ma'am.

Q: And when did you say that that happened?

A: It was in July.

Q: In July of 2013?

A: Yes, ma'am.

Q: Okay. So you met him in 2010 and he touched your vaginal area and your breasts in 2013?

A: Yes.

Q: Okay. Anytime before then?

A: Yes.

Q: All right. When before then?

A: Like when I was young, I was like seven. Well, I was seven.

Q: How do you remember you were seven?

A: Because I remember my age.

Q: And what happened when you were seven?

A: He touched me inappropriately.

Q: And that would have been what year?

A: Like it was in 2013.

Q: It was in 2013 ---

A: Yes.

Q: --- was the first time that he touched you inappropriately?

A: Yes.

(R.p.105, line 18–R.p.108, line 9).

Following the cross-examination, the State moved to introduce the evidence of the prior sexual contact between Appellant and Victim as prior bad act evidence demonstrating a history of abuse which culminated with Appellant inserting his penis into Victim's vagina. He noted Victim was confused about some of the dates involved in the case and that she had a "low IQ,

[was] low functioning," but argued her testimony still described years of abuse which escalated into the sexual assaults for which Appellant was charged. (R.p.108, line 18–R.p.109, line 7).

Trial counsel objected, arguing Victim's testimony did not support a history of abuse because the first incident she described took place in 2013. Trial counsel contended Victim was "twisted up" when she said she was seven when the abuse began, believing Victim's testimony indicated Victim and Appellant did not meet until 2010. Finally, he noted Appellant was not indicted for any assaults from August 2013. (R.p.109, lines 9–21).

The trial judge compared the case to Kirton and found Victim's prior bad act testimony admissible. He observed the record showed the abuse began when Victim was six or seven years old, approximately the time Appellant and Mother began dating. Recognizing the confusion in Victim's testimony, he noted trial counsel could argue any credibility issues on cross-examination. (R.p.109, line 22–R.p.111, line 2).

Trial Testimony

Victim testified regarding the incidents of abuse in 2013 for which Appellant was charged. She recalled three incidents of vaginal intercourse in July of 2013, and the incident in which Appellant and Mother had sexual intercourse while Victim was in the room. (R.p.122, line 19–R.p.164, line 10; R.p.127, lines 9–24).

Victim also testified about the prior incidents of abuse, recalling it began when she was seven years old, around the time Mother started dating Appellant and was consistent until she reported it to her doctor. The abuse consisted almost entirely of inappropriate touching. Victim also stated Appellant performed oral sex on her on multiple occasions in her house and the woods. Victim recalled specific incidents of prior abuse, including one in McCormick when Appellant had Victim "suck his private area" as well as a time at a motel when Appellant and

Mother had sexual intercourse while Victim and her brother were in the room. (R.p.127, line 11–R.p.128, line 8; R.p.129, line 8–R.p.133, line 16).

After an off-the-record bench conference, trial counsel forewent his cross-examination of Victim. (R.p.133, lines 18–24).

Mother also testified at trial. She could not recall how long she and Appellant dated. After refreshing her memory with her written statement, Mother remembered telling Detective Hamby about the movie incident, explaining she went to Victim's room and found her and Appellant watching a movie in bed. She joined them, and began having sexual intercourse with Appellant in front of Victim. (R.p.134, line 15–R.p.137, line 17).

In April or May of 2013, Mother had a conversation with Appellant about "being truthful." During that conversation, Appellant told mother that on July 4, 2012, he was with Victim in McCormick and let Victim "play with his dick," followed by both of them performing oral sex on each other. After Mother's arrest, she spoke with her nephew and "Denise" and told them about both the McCormick and movie incidents. (R.p.137, line 18–R.p.140, line 10; R.p.144, line 16–R.p.146, line 19).

Detective Hamby's testimony mirrored his pretrial testimony with the exception that he noted the three assaults against Victim for which Appellant was charged occurred July 26, 28, and sometime approximately a week before those incidents. (R.p.147, line 10–R.p.164, line 23).

ARGUMENT

The trial judge properly admitted Victim's testimony regarding Appellant's prior molestation of her as evidence of prior bad acts under Rule 404, SCRE because such evidence was clear and convincing and demonstrated a common scheme or plan. Further, any alleged error in admitting said testimony is harmless because similar evidence of Appellant's prior molestation was presented through Victim's mother.

Appellant argues the trial judge erred in admitting Victim's testimony regarding her prior abuse, claiming: (1) the State failed to prove the existence of said abuse through clear and convincing evidence; and (2) the testimony was inadmissible propensity evidence. The State disagrees with these allegations of error. Victim's testimony established clear and convincing evidence of consistent abuse which was further supported by the testimonies of other witnesses both prior to and during trial. Further, the challenged testimony was not inadmissible propensity evidence, but rather evidence of a common scheme or plan of abuse, well-established under South Carolina law. Regardless, any alleged error in admitting the prior bad act testimony is harmless because other evidence of Appellant's prior abuse was admitted through other witnesses at trial, including Mother's and Detective Hamby's testimonies.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). A trial judge's ruling on the admissibility of evidence of a defendant's prior bad act is not an abuse of discretion if there is any evidence to support the admission of the evidence; in such situations the trial judge's ruling will not be disturbed on appeal." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Credibility findings are treated as factual findings; accordingly, an appellate inquiry into such findings is limited to reviewing whether a trial court's factual findings are supported by any evidence in the record. State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015). "The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." Id. at 467–68, 776 S.E.2d at 371–72 (citing State v. Cutro, 332 S.C. 100, 117, 504 S.E2.d 324, 333 (1998) (Toal, J., dissenting)).

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). However, prior bad acts may be admissible when they establish: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 32–33, 446 S.E.2d 438, 439 (Ct. App. 1994).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Further, A prior bad act, which is not the subject of conviction, must be established by clear and convincing evidence. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) (citing State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 683 (2000)). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d. 480, 483 (2008). The clear and convincing standard is more than a preponderance of evidence, but less than the standard of beyond a reasonable doubt. Id. However, clear and convincing "does not

mean clear and unequivocal." Id. "When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous." Tutton, 354 S.C. at 325, 580 S.E.2d at 189 (citing State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)).

Clear and Convincing Evidence

Appellant asseverates the Victim failed to provide "a consistent, chronologically possible timeline for the alleged prior bad acts of **sexual touching**" and thus Victim's testimony was not "clear and convincing" evidence of the assaults. (Br. of Appellant, p.13) (emphasis added). The State disagrees.

In Clasby, the defendant argued the victim was not "definitive in her testimony regarding the time and place" of the four incidents of prior abuse which occurred approximately five years prior to the trial. Clasby, 385 S.C. at 157, 682 S.E.2d at 896–97. However, the Supreme Court found the Victim's credibility regarding these prior incidents was best evaluated by the trial judge. Id.

Similarly, the trial judge was in the best position to evaluate the credibility of Victim's testimony regarding the prior incidents of abuse. The trial judge noted Victim testified the inappropriate touching began when Mother and Appellant began dating and continued throughout their relationship. The State concedes Victim did confuse some of the details of the abuse during her cross-examination, but as noted by the trial judge Victim testified the inappropriate touching began when Mother and Appellant began dating and continued throughout their relationship and was generally consistent in this regard. The trial judge was in the best position to evaluate Victim's testimony, and found her testimony credible; accordingly,

because this finding is supported by the record, the Court should defer to the trial judge's ruling. See Johnson, 413 S.C. at 467–68, 776 S.E.2d at 371–72.

Moreover, Victim's testimony of the prior abuse was corroborated by other pretrial evidence. Detective Hamby testified Appellant admitted to several incidents of inappropriate touching involving Victim and other occasions when she witnessed he and Mother have sexual intercourse. Appellant's statements supported Victim's allegations of prior abuse along with the "movie incident" which formed the basis of Appellant's charge for third-degree CSC with a minor.

Accordingly, the trial judge's credibility finding is supported by the record and he did not err in finding Victim's testimony was clear and convincing evidence of the prior abuse. See Johnson, 413 S.C. at 467, 776 S.E.2d at 371.

Common Scheme or Plan

Appellate also argues the prior bad act evidence "constituted inadmissible propensity." (Br. of Appellant, p.16). However, the challenged testimony was admissible evidence of a common scheme or plan under Rule 404(b), SCRE.

Appellant contends his case in similar to State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (Ct. App. 2011), in which this Court found a trial court reversibly erred in admitting evidence of an alleged, uncharged prior bad act of sexual misconduct. In Fonseca, however, the prior bad act was a single incident, remote in time and with no similarities to the charged crime. In State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App 2013), the Court further clarified its ruling in Fonseca, noting the prior bad act evidence in that case was inadmissible because: (1) it occurred years before the charged crime; (2) little similarity existed between the bad act and the charged offense; and (3) there was no "continuous, illicit conduct" between Fonseca and the victim.

However, as noted by both the State and the trial judge, the instant case is "on all fours" with Kirton. In Kirton, this Court found the victim's testimony about six to seven years of prior abuse admissible as evidence of a common scheme or plan. The Court noted Kirton's behavior, which began with inappropriate touching of the minor victim's breasts progressed to having her touch his penis, him touching her vagina, and eventually the sexual intercourse for which he was charged and convicted. Although the prior abuse was of a different type for which Kirton was charged, it demonstrated a "clear pattern of escalating sexual abuse" which was the "essence of grooming and continuous illicit activity." Thus, the prior abuse was evidence that Kirton's abuse of his victim was "part of an overall plan or scheme devised by him" to perpetuate abuse against his victim. Accordingly, the probative value of the evidence was so great "it substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Here, identical to the victim in Kirton, Victim testified to a six or seven year period of consistent abuse which began with inappropriate touching and ultimately escalated to sexual intercourse. Appellant's behavior was demonstrative of grooming and included not only the direct abuse of Victim but repeated intercourse with Mother in front of Victim, but also repeated instances of intercourse in front of Victim to normalize sexual behavior.

Moreover, the prior bad act evidence in the instant case is even more relevant than that introduced in Kirton because it not only demonstrated a pattern of escalating abuse, but also involved the same type of behavior as that for which Appellant was charged: in addition to the two charges for second-degree CSC with a minor pertaining to the instances of sexual intercourse in July 2013, Appellant was charged with third-degree CSC with a minor for the inappropriate touching which occurred immediately prior to Mother and Appellant have sexual intercourse in front of Victim.

Accordingly, the trial judge did not err in finding the prior bad act testimony was admissible as evidence as a common scheme or plan pursuant to Kirton.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). If improperly admitted evidence was merely cumulative to other, un-objected to evidence, the improper admission is ultimately harmless. See e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

In the instant case, evidence of Appellant's prior abuse was not limited to Victim's testimony: Mother also testified at trial, revealing Appellant had admitted to her his prior abuse of Victim. In fact, Appellant specifically informed mother of the abuse which occurred in McCormick and corroborated Victim's testimony that said abuse included oral sex. Further, Detective Hamby testified Appellant admitted to sexual contact with Victim on multiple occasions. Accordingly, any alleged error in admitting Victim's testimony regarding Appellant's prior abuse is harmless given it was largely cumulative to the other prior bad act evidence introduced at trial. See id.; Kirton, 381 S.C. at 44, 671 S.E.2d at 126 (finding improper testimony which corroborated the victim was harmless where it was cumulative to other un-objected-to testimony in the record).

CONCLUSION

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

Respectfully submitted,

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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."

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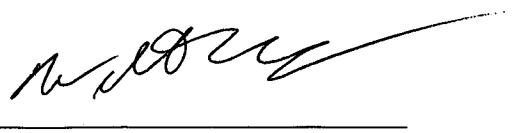
BY: 

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