STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL LORENZO GREEN,

APPELLANT

APPELLATE CASE NO. 2017-001240

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated that he was incapable of knowing and voluntarily waiving his rights?

STATEMENT OF THE CASE

On June 15, 2016, an Orangeburg County grand jury indicted Appellant for murder (2016-GS-38-574). R. 246-247. The state, represented by Ashley B. Cornwell, called the case for trial before the Honorable Maite Murphy and a jury on May 22-24, 2017. R. 1. Minh Lee Wyman represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 235, ll. 22-25. Judge Murphy sentenced Appellant to life imprisonment without the possibility of parole. R. 242, l. 25 – R. 243, l. 2; R. 248.

On May 25, 2017, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

Franklin Degree and Darlene Holmes were romantically involved for sixteen years. R. 85, ll. 1-6. The two were renting a room from Salley Rivers. R. 85, l. 18 – R. 86, l. 3; R. 96, ll. 12-18. Appellant was friendly with Salley and visited often in her home. R. 86, ll. 9-12; R. 97, ll. 12-24. During these visits, Appellant and Darlene developed a friendship. R. 86, ll. 9-12.

One evening, Darlene heard an argument ensuing outside the home. R. 87, ll. 1-7. As Darlene was walking to the bathroom, Franklin entered the house. R. 87, ll. 8-23. Darlene turned the corner to enter the bathroom when she heard a gunshot. R. 88, ll. 12-15. Darlene ran to Salley's bedroom, but Salley did not answer her door. R. 88, ll. 16-18; R. 89, ll. 12-18. Darlene then ran toward Franklin. She found Franklin on the floor and Appellant standing in the door with his hand outstretched. R. 88, l. 19 – R. 89, l. 1. Darlene never saw a gun. R. 89, ll. 2-11.

When Salley arrived home, she went straight to her bedroom where her boyfriend, "Priest," was waiting for her. R. 98, ll. 11-21; R. 104, ll. 16-21. Within minutes, Salley heard a gunshot. R. 99, ll. 6-11. Salley claimed she walked out of her room and saw Franklin on the floor and Appellant standing. R. 99, ll. 17-22.

Also present in the home during the shooting were a "young lady named Fifi, this young man named Greek, the other young man named New York," and an unidentified female. R. 92, ll. 8-11; R. 104, ll. 3-11. One of these young ladies may have been Patricia Wanamaker, who also rented a room from Salley. R. 104, ll. 3-11.

At Appellant's trial, the state called only Darlene and Salley as witnesses; the state did not call any of the other individuals that Darlene and Salley indicated were in the home and present during the shooting.

ARGUMENT

The trial judge erred in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated that he was incapable of knowing and voluntarily waiving his rights.

Relevant facts

On November 28, 2015, John Stokes with the Orangeburg Sheriff's Office interrogated Appellant. R. 15, ll. 2-4. Stokes advised Appellant of his rights and obtained a written waiver of those rights. R. 15, l. 5 – R. 20, l. 7; R. 245. Thereafter, Appellant admitted to shooting the deceased, but explained he acted in self-defense. R. 20, ll. 8-11; State's Exhibit #2.

Appellant injured his hand. R. 21, ll. 16-20. On November 25, 2015, Appellant went to the hospital, seeking medical care for his severe injury. R. 21, ll. 21-23; R. 25, ll. 12-19; State's Exhibit #2 (officer stating he was aware that Appellant went to the hospital). The injury developed an infection, necessitating the insertion of a drainage tube. R. 22, ll. 6-13; State's Exhibit #2 (Appellant informing the officer of his injury, his visit to the hospital, and his severe pain). Due to the severity of the infection, the attending physician prescribed Norco, a narcotic pain medication. R. 25, l. 20 – R. 26, l. 1.

On November 30, 2015, Appellant took his prescription narcotic. R. 26, ll. 2-12. The medicine put Appellant in a daze for three to four hours, including the time during which he was interrogated by law enforcement. R. 26, ll. 13-20. Additionally Appellant ingested heroin on the morning of November 30. R. 26, ll. 21-24. Due to his ingestion of heroin and a prescription narcotic, Appellant did not realize he was waiving his constitutional rights when he spoke to police. R. 27, ll. 17-18. Appellant did not even realize what he was saying. R. 27, l. 25 – R. 28,

l. 1. Appellant informed the interrogating office of his injury and his ingestion of drugs. R. 30, l. 18 – R. 31, l. 3.

Prior to trial, defense counsel moved to exclude Appellant's statements to law enforcement. R. 33, ll. 4-22. Specifically, defense counsel argued Appellant's statement was inadmissible as a matter of law because his "intoxication was such that he did not realize what he was saying." R. 33, ll. 4-9. Defense counsel explained:

> In our case, Your Honor, based on the drugs in Mr. Green's system, he testified that he didn't know what he was saying at the time of the interview because of the drugs which were freshly in his system. He said that he was on pain medication that he took less than two hours before giving the statement. He also said he was on heroin, which he took less than three hours before giving the statement. He says that the drugs made him feel like he's in a daze.
>
> And, Your Honor, because he was so intoxicated and he did not realize what he was saying, it's our position that he did not knowingly and intelligently waive his right and, therefore, we ask that the statements be suppressed at trial.

R. 33, ll. 10-22.

Judge Murphy took the matter under advisement to permit her to watch the video of the interrogation overnight. R. 35, ll. 16-17. The following day, after jury selection, Judge Murphy ruled on the admissibility of Appellant's statements. R. 65. ll. 9-14. She found the state proved "by a preponderance of the evidence standard to establish voluntariness and in compliance with Miranda." R. 65, ll. 19-21. Judge Murphy noted it was not a lengthy interrogation. R. 65, ll. 18-19. Additionally, Judge Murphy found the police immediately advised Appellant of his rights and Appellant acknowledged those rights. R. 65, ll. 22-25. Appellant also signed a waiver of his rights. R. 66, ll. 1-2.

Concerning Appellant's argument regarding intoxication, Judge Murphy found Appellant was "appropriate in his responses" and was "able to articulate answers and full sentences where he [could] be understood." R. 66, ll. 3-6. She found Appellant did "not appear to be dazed" and

did not "slur his speech." R. 66, ll. 6-7. Additionally, Judge Murphy found Appellant's initials and signature on the advisement of rights form were "neat and legible, which would indicate that he was not grossly intoxicated." R. 66, ll. 8-11. Accordingly to the judge, she "reviewed the video and tried to look to see if there's evidence of intoxication." R. 66, ll. 20-22. She found Appellant was not "apparently outwardly intoxicated." Any intoxication was "not readily apparent on the video and it did not appear to prevent [Appellant] from having the mental capacity necessary to give the statement freely and voluntarily. R. 66, l. 22 – R. 67, l. 1. However, Judge Murphy ordered portions of the video interrogation to be redacted, finding the portions were unfairly prejudicial. R. 67, ll. 4-17. The solicitor objected to the redaction, but the judge overruled the state's objection. R. 67, ll. 23-25.

When the state sought to introduce Appellant's statement into evidence during the trial, defense counsel renewed her objection. R. 156, ll. 11-15. Nevertheless, the judge overruled the objection and permitted the jury to see and hear the interrogation. R. 156, ll. 16-17; R. 157, ll. 3-6. Despite the judge's earlier ruling to redact a portion of the video, to which the state objected, the jury saw the entirety of the video. R. 157, ll. 3-19. The judge explained she would give an instruction to the jury during the charges at the end of the trial regarding the portions of the video improperly shown to the jury. R. 157, ll. 12-19.

Discussion

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. Based on the Fifth Amendment's protection, the United States Supreme Court held that in criminal prosecutions, statements by the accused are not admissible unless the prosecution demonstrates the use of procedural safeguards. Miranda v. Arizona, 384 U.S. 426, 444 (1966). However, the required use of these safeguards is required only

when the accused is in custodial interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda, supra. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

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

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

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted); see also Withrow v. Williams, 507 U.S. 680, 693-694 (1993). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted); see also State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007).

Over four decades ago, the South Carolina Supreme Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). According to the Court, "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. Further, the Court stated that "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence." Id. Nevertheless, after making these pronouncements of the law, the Court ruled as follows:

> While there is testimony that [Saxon] had been drinking rather heavily and was not acting normally, there is other testimony from which the conclusion may be reasonably drawn that he was not drunk and fully comprehended what he was doing and saying. In fact, [Saxon] testified, and the inferences to be drawn from his own testimony amply support the conclusion that his statement was understandingly and voluntarily given. The testimony was properly admitted in evidence.

Id. at 529-530, 201 S.E.2d at 117. Thus, the Court analyzed the evidence to determine whether there was evidence that Saxon was "not drunk and fully comprehended what he was doing and saying." This holding contradicted the legal principles previously enunciated, which suggested that unless an individual were intoxicated to the point unconsciousness, then any statements made by the individual were not *per se* inadmissible. The Court's holding in the case rested upon its view that evidence existed in the record that Saxon "was not drunk and fully comprehended what he was doing and saying."

Three years after Saxon, the South Carolina Supreme Court had the opportunity to examine another case in which a statement was allegedly made while the defendant was intoxicated. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Collins and a co-defendant were charged with armed robbery of a local store. Id. at 568, 225 S.E.2d at 190-191. There was no dispute that on the day of the robbery, the men "had been drinking heavily." Id. at 568, 225 S.E.2d at 191. Collins was arrested on the day of the robbery for public drunkenness. Id. at 569, 225 S.E.2d at 191. A detective questioned Collins concerning the robbery about an hour after his arrest. Id. According to the detective, he "determined, by means of a field sobriety test, that [Collins] was capable of and did understand his rights before questions were asked." Id. To the contrary, the officer who arrested Collins "stated that in his opinion, [Collins] was still intoxicated" after being questioned. Id. at 569-570, 225 S.E.2d at 191.

In deciding whether the trial judge abused his discretion in determining the statement by Collins was voluntarily and knowingly given, the South Carolina Supreme Court cited Saxon,

supra, for the proposition that "[p]roof of accused's intoxication, short of rendering him unconscious of what he is saying, does not require in every case, that statements he made while in that condition be excluded from evidence." Id. at 572-573, 225 S.E.2d at 193. However, the Court based its ruling on the fact that "[t]he evidence, including the condition of the defendant presented a factual situation which the judge determined unfavorably to the defendant." Id. at 573, 225 S.E.2d at 193. See also, Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968)(ordering the state court to conduct a hearing on the voluntariness of Unsworth's statements where the undisputed evidence showed he was "in a state of gross intoxication" at the time of the making of the statements); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964)(holding a defendant's confessions "should not be permitted to stand as evidence against" the defendant where the "totality of all the circumstances, such as the man's physical condition, in combination with the impact of narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements" meant the confessions "were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination"); State v. Young, 875 P.2d 1119, 1123 (N.M. Ct. App. 1994)(remanding where the trial court erroneously determined the defendant's intoxication was irrelevant to the issue of waiver because "voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent"); State v. Bramlett, 609 P.2d 345, 350 (N.M. Ct. App. 1980) *overruled on other grounds by* Armijo v. State Through Transp. Dep't, 737 P.2d 552 (N.M. Ct. App. 1987)(holding the contradictory testimony from the officers that the defendant was too intoxicated to be released and was detained for his own protection, but was not so intoxicated that he could not provide a knowing waiver of his constitutional rights "offends the standards of fundamental fairness under the due process clause" "and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver").

To the extent, this Court determines that Saxon stands for the proposition that intoxication short of unconsciousness may *never* render a statement involuntarily made, Appellant argues against precedent. Appellant urges this Court to review the entire Saxon opinion, which demonstrates the South Carolina Supreme Court determined the trial judge did not abuse his discretion in finding Saxon's statement was voluntary because there was evidence in the record that Saxon was not intoxicated and fully understood what he was doing and saying. Additionally, Appellant points to evidence in the record that his intoxication rendered him unable to understand the import of his constitutional rights and the waiver of those rights. Specifically, Appellant testified that he had taken a prescription narcotic pain killer shortly before the interrogation and that the narcotic would put him into a daze for hours thereafter. Appellant also testified that he took heroin within hours of the interrogation, which also put him into a daze. Finally, the video of the interrogation supported that Appellant was intoxicated. He told the police that he had been in the hospital, and the officer admitted that he knew Appellant had been in the hospital. State's Exhibit #2. Appellant's speech was slurred, and his answers to questions were incoherent at times. State's Exhibit's #2. At the beginning of the interrogation, Appellant made clear that he thought the interrogating officer was someone that he knew, and the officer had a difficult time persuading him otherwise. State's Exhibit #2. Overall, the evidence presented supported Appellant's argument that his intoxication rendered him unable to understand his rights and the impact of the waiver of those rights.

During closing argument, the solicitor relied heavily upon Appellant's statement to law enforcement to shore up its weak case. Additionally, the solicitor vouched for its main witnesses, Darlene and Salley. R. 189, ll. 2-16. The solicitor stated, "I would submit to you that neither Darlene Holmes nor Salley Rivers had any reason to be untruthful on the stand." R. 189, ll. 8-10.

After telling the jury, she did not "believe anything that [Appellant] ha[d] said," the solicitor said, "I do think that what Salley Rivers told you is true and what Darlene Holmes told you is true." R. 199, ll. 7-9. Quite simply, the solicitor vouched for her only witnesses.[1]

Finally, the solicitor propped up her weak case by telling the jurors what missing witnesses would have told them had the state called the witnesses to testify.[2]

> Could I have brought more evidence, more testimony, more witnesses? Sure. I definitely could have, but was it worth it to waste your time, to keep you here all week, to do what I would consider beating a dead horse to give you the same information over and over and over again? Yeah. I could have brought Sgt. Smith in. I could have brought Cpl. McDuffie in, Investigator Sheppard.
>
> I could have brought all of them in and had each one of them get on the stand and tell you the same thing. They were dispatched out there for a shooting. They spoke to witnesses. *They indicated that Michael Green was guilty.* They saw the victim on the floor. I could have brought all of those people in.
>
> I could have brought in a ballistics expert to tell you exactly what type of gun had to have been used for that bullet. Michael Green told you what gun he used, and the evidence corroborated it.
>
> I could have brought in Fifi and Greek and New York and all of these other people that were allegedly at the house when this incident occurred. You heard the defendant. He said nobody was in the house when he shot the victim. You heard Darlene and Salley say they didn't see it. Nobody else saw the shooting as it actually happened.

R. 203, l. 13 – R. 204, l. 10 (emphasis added). The solicitor explained she "could've easily subpoenaed all of them and brought them in and put them on the stand, but what good would that have done? Would that have proven anymore what happened to hear them say, yeah, I was at the

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[1] Defense counsel failed to object to the solicitor's improper vouching. See Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016)(addressing a solicitor's repeated assertion that the state's witnesses all believed the complaining witness's version of events); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002); Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002).

[2] Defense counsel failed to object to the solicitor telling the jury what missing witnesses would have told them had the state called the witnesses to testify. See Vaughn v. State, 362 S.C. 163, 167, 607 S.E.2d 72, 75 (2004).

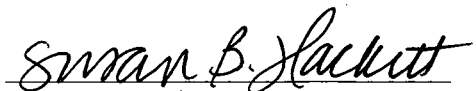
house, but I didn't see it? There was no need to bring all of those people and there was no need to waste your time with all of those -- that testimony and to drag this case out any longer than it has to be." R. 204, ll. 13-20.

The solicitor used Appellant's explanation on the interrogation video that he had to get his head right before speaking to police against Appellant. See State's Exhibit #2. The solicitor told the jury this meant Appellant "had to get his story straight." R. 194, ll. 3-6. According to the solicitor, "[h]e had to figure out what story he could tell law enforcement to try to get away with the murder of Franklin Degree." R. 194, ll. 7-9. The solicitor claimed that Appellant's explanation of prior difficulties between Appellant and the deceased was part of Appellant "getting his head right, when he was getting his story straight, he thought, well, if we've got problems, then I can give this self-defense argument. I can give this self-defense story." R. 195, ll. 1-4.

The trial judge erred in admitting Appellant's statement to law enforcement because Appellant's intoxication rendered him unable to voluntarily waive his constitutional rights and unable to know what he was saying when he spoke to police. Within mere hours of the interrogation, Appellant used a prescription narcotic to treat the pain he suffered due to an infection and heroin. Appellant's inability to understand his constitutional rights and what he was saying to police rendered his statement involuntary.

CONCLUSION

Appellant respectfully requests this Court grant him a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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MAR 27 2018
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THE STATE,

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MICHAEL LORENZO GREEN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Lorenzo Green states:

1. She is an 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 Maite Murphy, which was held on May 22-24, 2017, 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 Michael Lorenzo Green.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 27th day of March, 2018.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript;
(2) State's Exhibit #1 (Advisement of Rights & Waiver);
(3) State's Exhibit #2 (DVD);
(4) True-billed indictment; and
(5) Sentence sheet

I certify that this designation contains no matter which is irrelevant to this appeal.

March 27, 2018

Susan B. Hackett
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ATTORNEY FOR APPELLANT

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."

March 27, 2018.

Susan B. Hackett

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Michael Lorenzo Green, 200769, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of March, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.