

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

JAMES R. ROSE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002052

PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

1.

The PCR court erred by ruling defense counsel was not ineffective for failing to request a jury instruction on alibi where petitioner testified he had been at the decedent’s drug dealer’s house earlier in the evening but that he was at home with his girlfriend, Amber Wiley, at the time the murder was alleged to be committed, since this testimony that petitioner was *elsewhere* at the time the crime was committed mandated an alibi instruction if it had been requested4

Trial Facts4

Post-Conviction Relief Facts7

Discussion8

2.

The PCR court erred by finding that defense counsel did not think that Amber Wiley’s statement that she was with petitioner, at home, on the night of the murder constituted an alibi, since there was no evidence to support that finding, and where it was undisputed Wiley provided law enforcement with that alibi statement, since counsel was ineffective in not taking reasonable efforts to subpoena Wiley to ensure her presence as an alibi witness at petitioner’s trial12

Discussion14

CONCLUSION16

ISSUES PRESENTED

1.

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to request a jury instruction on alibi where petitioner testified he had been at the decedent's drug dealer's house earlier in the evening but that he was at home with his girlfriend, Amber Wiley, at the time the murder was alleged to be committed, since this testimony that petitioner was *elsewhere* at the time the crime was committed mandated an alibi instruction if it had been requested?

2.

Whether the PCR court erred by finding that defense counsel did not think that Amber Wiley's statement that she was with petitioner, at home, on the night of the murder constituted an alibi, since there was no evidence to support that finding, and where it was undisputed Wiley provided law enforcement with that alibi statement, since counsel was ineffective in not taking reasonable efforts to subpoena Wiley to ensure her presence as an alibi witness at petitioner's trial?

STATEMENT

Petitioner was indicted at the June 11, 2012 term of the Charleston County Grand Jury for the offense of murder. The indictment alleged that petitioner “did kill and murder Leland Shannon by means of shooting the victim . . .” App. 798. Petitioner’s case was called to trial on December 9, 2013, before the Honorable Stephanie McDonald, and a jury. Martha Kent Runey and Megan Ehrlich represented petitioner. Jennifer Shealy and Jessica Baldwin were the assistant solicitors. App. 1.

On December 12, 2013, the jury found petitioner guilty of murder. App. 666, ll. 19-23. Judge McDonald sentenced petitioner to life imprisonment. App. 675, ll. 14-15.

Petitioner was represented on appeal by Appellate Defender Susan Hackett. She filed a final brief of appellant in the Court of Appeals on petitioner’s behalf on December 18, 2014. App. 678 – 696. Appellate counsel raised the issue that “the trial judge erred in admitting telephone calls reportedly made by Appellant while in pre-trial incarceration because Appellant made no ‘admissions’ during the calls as required by the Rules of Evidence in order to be admissible.” App. 681.

Petitioner’s conviction was affirmed by the Court of Appeals on June 17, 2015. See State v. James R. Rose, 2015-UP-286 (June 17, 2015).

Petitioner filed an application for post-conviction relief on July 7, 2015. App. 697 – 703. Petitioner raised various allegations of ineffective assistance of counsel including ineffectiveness as to alibi. App. 699 – 700.

The state filed a return requesting an evidentiary hearing dated February 16, 2016. App. 704 – 709. An evidentiary hearing was convened on January 10, 2017, before the Honorable William Seals. James Falk represented petitioner. Alicia Olive was the assistant attorney

general. App. 712. The witnesses during the post-conviction hearing were trial counsel Martha Kent Runey, petitioner James R. Rose, and appellant counsel Susan Hackett. App. 713.

An order of dismissal was filed on September 15, 2017. This order noted that petitioner alleged: “Failure to present an alibi defense, call witnesses in support of an alibi defense, and failure to request an alibi instruction”. App. 785 – 786. The PCR court ruled inter alia, that defense counsel was not ineffective for failing to secure the presence of alibi witness Amber Wiley, who gave a statement to the police that petitioner was home during the time of the murder. App. 785 – 786. The Court also incorrectly ruled that defense counsel did not think Amber Wiley’s statement would establish an alibi, and ruled petitioner could prove ineffectiveness because Amber was not called as a witness at PCR even though it was undisputed she gave law enforcement a statement corroborating petitioner’s alibi. App. 786.

This appeal follows.

ARGUMENT

1.

The PCR court erred by ruling defense counsel was not ineffective for failing to request a jury instruction on alibi where petitioner testified he had been at the decedent's drug dealer's house earlier in the evening but that he was at home with his girlfriend, Amber Wiley, at the time the murder was alleged to be committed, since this testimony that petitioner was *elsewhere* at the time the crime was committed mandated an alibi instruction if it had been requested.

Trial Facts

Ishmal Weston was a seventeen-year-old high school student when he testified at petitioner's trial. App. 158, l. 25 – 159, l. 9. Weston knew the decedent, Leland Shannon, Julio. App. 159, ll. 23-25. Weston said he often went over to the decedent's house to play video games. Weston knew petitioner. App. 161, ll. 23-25.

On January 23, 2012, Weston said he saw petitioner, Onyx, over at the decedent's house. App. 163, ll. 7-8. Weston said petitioner was with "some white boy." App. 163, ll. 9-15. Weston speculated that when petitioner was talking to the decedent that the decedent would not sell petitioner marijuana because he did not have enough money to buy it. App. 163, l. 21 – 165, l. 1.

Petitioner would later testify that he sold marijuana, and he acknowledged that the decedent, Leland Shannon, sold him drugs. App. 554, l. 4 – 555, l. 23. Petitioner recalled that earlier that fatal night the decedent wanted to sell him "20 grams \$120. And I told him I wasn't paying for no weed like that because the weed was brown and don't nobody like to smoke brown reefer. And Brandon [Cantrell] wanted some weed too. But he didn't have enough. So I got a little bit of weed and I was supposed to be waiting on some more, but they was talking so long

and Clarence [Hush] was rushing me because he had to get his wife back her car.” App. 561, ll. 5-22. When Petitioner left, Weston remembered petitioner was “like normal.” App. 164, ll. 2-5.

Weston testified that petitioner came back a second time with “some different people in a different car.” App. 164, ll. 9-11. Weston said on this second trip: “I guess Onyx had got what he wanted and then as soon as he went outside, and the door closed we heard Nikki scream.” App. 167, ll. 2-4.

As will be seen infra, the police thought at first that petitioner was the shooter, but the solicitor later admitted the witnesses’ statements were littered with inconsistencies. The solicitor therefore sought to prove, by the time of trial, that petitioner was guilty as somehow participating under the “hand of one is the hand of all” principle of accomplice liability.

The evidence regarding the shooting was disputed. Tawanda “Nikki” Alston, the decedent’s girlfriend, said petitioner was a friend of hers and a friend of the decedent. App. 245, l. 7 – 246, l. 15. She said petitioner returned that night, as did Antoine “Ross” Aiken, the decedent’s son. According to Aiken, petitioner came back for a third time about forty-five minutes to an hour later, and he knocked on the door. App. 193, ll. 19-24.

Aiken said petitioner was in a good mood and joking. Aiken said petitioner didn’t stay long, about five minutes, and left. The decedent walked behind petitioner and locked the door. App. 197, l. 18 – 198, l. 19. Aiken said that the decedent went into a laundry room, and “I mean that’s when we heard the first gunshot. And then as he hit the corner somebody -- he met somebody, the fellow -- the tall, slim fellow wearing all black.” App. 198, ll. 17-24. The man wearing all black also was wearing a ski mask. App. 199, l. 8 – 201, l. 14.

Aiken guessed that it was “probably about ten seconds” later, after petitioner went out the back door that all of the “activity took place in the laundry room with the tall, thin guy with the mask.” App. 201, ll. 9-14.

Aiken ran out the front door and into the woods. While in the woods, Aiken claimed he recognized petitioner’s voice yelling: “Go to the back room, everything’s in the back room.” App. 201, l. 15 – 202, l. 7.

When Aiken called 911 for the injured decedent, he gave them a false name, Ray. App. 206, ll. 3-16. During Aiken’s first interview with the police he did not claim petitioner was involved. In his second interview, after talking with others, he maintained petitioner was involved. At trial, Aiken claimed he was going to take care of petitioner personally, so that was why he did tell the police petitioner was allegedly involved. App. 210, l. 9 – 213, l. 10

As stated, petitioner testified in his own defense. Petitioner admitted visiting the decedent’s house twice on January 23, 2012 to buy marijuana. App. 558, l. 3 – 565, l. 8. Petitioner did not have transportation, and he remembered that the men, petitioner, Clarence Hull, and Brandon Camtrell stopped at a BP station on the way home, and got gas and cigars. “They dropped me off first, and then they dropped Brandon off second. And then I guess Clarence went home.” App. 560, l. 8 - 565, l. 17.

Petitioner testified that once he was dropped off that night that he stayed with his girlfriend Amber Wylie at home. Petitioner said he watched ESPN for a while, and since it was late, he did not feel like smoking so he just went to bed, and got up the next morning. App. 565, ll. 3-8.

Amber Wiley told law enforcement that petitioner was indeed with her the entire evening, and that he was still at home the following morning, which would have corroborated petitioner’s

alibi defense. Petitioner, consistent with his alibi defense, obviously denied being present and having shot the decedent. App. 578, l. 17 – 579, l. 3. Although Amber’s testimony would have corroborated petitioner’s alibi testimony, and would have greatly aided petitioner’s alibi defense, it was not needed to simply get an alibi instruction as shown infra.

Post-Conviction Relief Facts

At the PCR hearing, defense counsel Martha Kent Runey testified that at the preliminary hearing the police officer testified and claimed petitioner was the shooter. App. 716, ll. 11-23. Runey guessed that this officer was relying on Tawanna “Nikki” Alston, who was present at the time of the confusing shooting. App. 716, l. 24 – 717, l. 6.

Runey said that the assistant solicitor later admitted that “the stories of some of the witnesses don’t match up, particularly, Ms. Alston and a witness with the last name Aiken.” The state then changed its theory of the case to “the hand of one is the hand of all” from petitioner allegedly being the shooter. App. 719, l. 15 – 720, l. 12.

Petitioner testified at the PCR hearing that he was very shocked because all of the discovery, and the testimony at the preliminary hearing, claimed he was the shooter. App. 749, l. 4 – 750, l. 19. Petitioner said the state’s case seemed to be in such chaos that he did not think “there was going to be a trial.” App. 749, l. 23 – 750, l. 19.

Runey admitted she did not recall ever discussing “the hand of one is the hand of all” new theory with petitioner after the solicitor changed her theory because of inconsistencies in alleged “eyewitness” testimony. App. 721, ll. 7-13; App. 744, ll. 3-9.

Runey said she did not remember if a jury instruction on alibi was given during petitioner’s trial. App. 731, ll. 19-21. However, she later claimed, there was no reason to ask for an instruction on alibi because “I didn’t have contact or was able to interview the people that

could have been possible alibi witnesses.” App. 742, l. 19 – 743, l. 4. The issue of Amber Wiley being an alibi witness is discussed below. However, Counsel Runey strangely said she did not “put up any alibi witnesses,” as if petitioner’s testimony did not count to her as alibi testimony.” App. 742, l. 19 – 743, l. 4. The trial judge did not charge the jury on alibi. App. 649, l. 21 – 663, l. 17.

In the order of dismissal, the judge noted that petitioner alleged his attorney was ineffective for failing to present an alibi defense, call witnesses in support of an alibi defense, and the failure to request an alibi instruction. App. 785 – 786. The order noted that counsel Runey testified that an investigator spoke with Amber Wiley, who had previously given an alibi statement for petitioner to the police. App. 785.

Citing State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980), the judge wrote “to be successful, a defendant’s alibi must cover the entire time when his presence was required for the accomplishment of the crime . . . since an alibi derives its potency as a defense from the fact that it involves physical impossibility of the accused’s guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.” App. 785.

Discussion

In Roseboro v. State 317 S.C. 292, 454 S.E.2d 312 (1995), this Court found defense counsel was ineffective for failing to request an alibi instruction. In Roseboro, the victim testified she was walking home from a bar when she was struck from behind and lost consciousness. When she regained consciousness, a man was straddling her, and he raped her. The victim was unable to identify her assailant, who wore a dark jacket and a toboggan hat and had had hair on his face.

The circumstantial evidence against Roseboro showed he earlier approached the victim at the bar and attempted to talk to her. She rebuffed his advances. He was wearing a toboggan hat, a dark jacket, and had a light beard. Forensic testing from the rape indicated Roseboro had Type A blood. From the semen on the victim's clothing, the assailant was identified as either Type A or Type B blood type.

Roseboro denied being at the bar at any time that night. He left his mother's house at 11:45 pm and walked to the home of his friend, Ray Miller, where he watched a basketball game until 1:00 a.m. and then was driven home. Miller testified and corroborated Roseboro's testimony.

This Court, in Roseboro, noted that in Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), it had held that trial counsel's failure to request an alibi charge is deficient performance where there is evidence presented the defendant was in another place at the time the crime was committed. Moreover, counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Underwood v. State, 309 S.C. 560, 452 S.E.2d 20 (1992).

An alibi charge places no burden on the criminal defendant but emphasizes that it is the state's burden to prove the defendant was present and participated in the crime. See State v. Bealin, 201 S.C. 450, 23 S.E.2d 746 (1943).

Here, appellant testified in his own defense that he was dropped off by his friends after an uneventful night that did involve visiting the decedent's house, and attempting to buy drugs. Petitioner spent the night with his girlfriend, Amber, he watched ESPN for a while, and went to bed. The next morning, petitioner and Amber had a court hearing in summary court that they attended together. App. 564, l. 25- 565, l. 11.

In Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992), this Court similarly found defense counsel ineffective for failing to request an alibi instruction. Riddle was tried for first degree burglary and ABHAN where the victim, who was his neighbor testified she awoke in the early morning hours when she felt someone fondling her. She saw her neighbor, Riddle, at the foot of her bed. Riddle left, but only after the victim promised not to tell his Riddle's wife, the landlord, or the police, about the encounter. Riddle testified that he was at home asleep with his wife the entire night, and his wife corroborated that testimony. In Riddle, defense counsel told the trial judge she did not think an alibi instruction was necessary. At PCR, however, counsel testified that alibi was their trial defense. Counsel was held ineffective.

The failure to give an alibi charge, where the defendant claims to be at another place, is a reversible error. See State v. Robbins, 275 S.C. 73, 271 S.E.2d 319 (1980) cited by the PCR court here.

In State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980), Robbins was indicted for robbing a store. Robbins testified he had been at the store that night, but his further testimony was to the effect that he had been to the store prior to taking his wife to work at 10:00. It was also Robbins' testimony that after taking his wife to work, he went straight home and accordingly he was not at the store when the robbery is alleged to have occurred at about 10:45 pm. This Court noted that alibi means *elsewhere*, and while a general denial of committing the crime does not require an alibi instruction, that Robbins was entitled to such an alibi instruction because *his sworn testimony* was that he was elsewhere at the time of the crime.

Here, much as in Robbins, as seen above, petitioner testified he was dropped off by friends at the home he shared with Amber Wiley. Petitioner provided testimony that he was elsewhere, at home, and with Amber at the time the state submitted the crime was committed.

The *elsewhere* provided by petitioner's testimony was that he was with friends that night, nothing eventful happened, and he was dropped off where he spent the remainder of the night at home with his girlfriend Amber Wiley.

If Runey had requested an alibi instruction, the trial judge would have had to give it. This alibi instruction would have been important because otherwise the jury here had no guidance on to process conflicting testimony trying to convict petitioner under the complex "hand of one is the hand of all" legal theory against his own alibi testimony that he was at home with Amber that night, and that they went to summary court when they both awoke the next morning.

The jury needed clear instructions that alibi had been raised, that it was not petitioner's burden to prove his alibi, and that the state had to prove petitioner's presence at the scene of the crime. See State v. McGhee, 137 S.C. 256, 135 S.E. 59 (1926). At that point the jury could begin to process the complicated accomplice liability instruction as it pertained to the state's new theory of the case – if it thought it necessary at that point.

Defense counsel in this case was ineffective for failing to request an alibi instruction. Counsel's performance was deficient, and petitioner was prejudiced. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner should be granted a new trial.

The PCR court erred by finding that defense counsel did not think that Amber Wiley's statement that she was with petitioner, at home, on the night of the murder constituted an alibi, since there was no evidence to support that finding, and where it was undisputed Wiley provided law enforcement with that alibi statement, since counsel was ineffective in not taking reasonable efforts to subpoena Wiley to ensure her presence as an alibi witness at petitioner's trial.

Here, the PCR court incorrectly found that Amber Wiley's testimony would not establish an alibi and for that reason, and because she was uncooperative, defense counsel "elected not to call her as a witness." App. 786. That was an incorrect finding, as there is no support in the record for the conclusion that Runey did not think Amber Wiley's testimony would establish an alibi. Counsel Runey, was respectfully wrong in many respects as it pertained to alibi, but she did know that Amber's testimony would have been alibi testimony the same as Amber's statement to law enforcement was an alibi statement.

Runey admitted there was exculpatory alibi evidence in this case that was not heard by the jury: "Sophie Wiley lived with James Rose and his girlfriend Amber Wiley and her husband Matt Wiley. What her statement does say is she was home with Matt Wiley and she was getting ready to go out of town. So they were in the room watching TV the night of the incident." Amber Wiley also gave a statement indicating she was home with petitioner on the night of the incident. "She took a shower and took Tylenol PM and went to bed. And then when she woke up the next morning, James was there." App. 723, ll. 6-24.

Runey admitted that Amber Wiley gave the police a statement that petitioner was with her on the night of the fatal incident. Runey claimed "we tried to" serve Amber Wiley with a subpoena. Runey also acknowledged that if Amber testified differently during trial -- than she

did in her alibi statement -- that Runey could have impeached Amber with her statement to the police that provided petitioner with an alibi. The following occurred on direct examination of Runey at the PCR hearing:

Q. So she would have been exposed to a criminal sanction, supposedly, if she had given a false statement to the police?

A. She could.

Q. And that was a witness then that the State could have called to testify as an alibi witness?

A. The defense, could be.

Q. Excuse me. The defense could have called her as an alibi witness; is that correct?

A. Yes.

Q. And was it a trial strategy reason for not calling her?

A. I couldn't get her to respond to me. So I couldn't even talk to her to see what she would say if she did get on the stand. I'm not going to call somebody until I talk to them.

Q. Did your investigator talk with her?

A. She wouldn't cooperate. It looks like he talked to her about serving the subpoena on her, but he couldn't track her down.

App. 726, ll. 1-20.

Runey said Amber Wiley would have provided a good alibi for petitioner, and she admitted "it looks like there was some interaction with her and my investigator over the phone." Runey said they had an address for Amber Wiley but for whatever reason, they were unable to subpoena her. App. 737, l. 19 – 739, l. 25.

Petitioner testified that Runey told him, "She talked to Amber and she will be available. We were supposed to have a trial on the second of December but we didn't go on the second of

December. Prior to that, she told me she talked to Amber and she would be ready.” App. 751, ll. 8-12.

The order of dismissal acknowledged that defense counsel had a reasonable duty to investigate alibi witnesses identified by the defendant, and it would be unreasonable to fail to make some effort to contact them to see if their testimony would aid the defense. App. 785 – 786.

The PCR judge concluded, “In the present case, counsel investigated the purported alibi witness identified by Applicant, and after obtaining a second statement from her and determining she was uncooperative and did not establish an alibi, elected not to call her as a witness. Counsel performed effectively regarding Applicant’s claims of an alibi.” The PCR court also faulted petitioner for failing to present Amber Wiley as an alibi witness at the PCR hearing, even though Amber Wiley had given a statement to law enforcement already establishing an alibi for petitioner. App. 786.

Discussion

Defense counsel was ineffective for failing to procure the testimony of Amber Wiley. Counsel’s conclusion that Amber was not being cooperative respectfully should not be accepted as a sufficient reason to follow through, and ensure that the subpoena was served on Amber, and that she was present at the time of trial. If Amber was not cooperative at the time of trial defense counsel could have moved for a continuance to ensure Amber was present. The trial judge, as they often do in difficult cases, could have asked law enforcement to assist in ensuring Amber’s presence to testify if defense counsel had made all diligent efforts to secure her presence, and to subpoena her.

The PCR judge correctly noted that pursuant to Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014), that counsel has a reasonable duty to investigate alibi witnesses, and to make a reasonable effort to contact them and ascertain whether their testimony would be beneficial. Here, there can be no doubt that if Amber Wiley's alibi statement for petitioner given to law enforcement was heard by the jury as testimony it would have aided petitioner's alibi defense. It respectfully may have aided counsel to understand she had an alibi case, and that this was important corroborating alibi testimony.

The PCR court erred by ruling petitioner could not raise this ineffectiveness issue because Amber Wiley did not testify at the evidentiary hearing. It cited Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) in support of that ruling. App. 786.

However, in the present case, Amber Wiley had already given a statement in support of petitioner's alibi as explained by PCR counsel. App. 756, l. 2 – 757, l. 19. Wiley would have been impeached and could have been charged with giving a false statement to the police if she attempted to disregard that statement at trial. See Argument on this issue -- App. 757, ll. 1-17.

The PCR court here incorrectly found that defense counsel did not think Amber Wiley's statement and consistent testimony constituted alibi evidence, and based on that error of law, the PCR court should be reversed. Moreover, given the highly unusual facts of this case it respectfully should not be found that Amber Wiley's testimony was mandatory to preserve the the Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) ineffectiveness alibi witness issue. Finally, defense counsel's handling of the alibi issue, and her efforts to ensure Amber Wiley appeared as an alibi witness do not inspire confidence in the result. Defense counsel was deficient regarding her handling of Amber Wiley, and petitioner was prejudiced. Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'R M D', is written above a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of May, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

JAMES R. ROSE,

PETITIONER

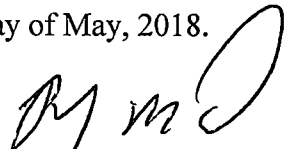
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

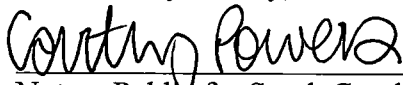
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James R. Rose, #293938, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of May, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of May, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.