STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

APPELLANT,

V.

JAMIE LEE SIMPSON,

RESPONDENT

APPELLATE CASE NO. 2016-002210

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

Opinion No. 5706

PETITION FOR REHEARING

On January 8, 2020, this Court reversed the trial court's decision interpreting section 24-13-1530(A) of the South Carolina Code. State v. Simpson, Op. No. 5706 (S.C. Ct. App. filed Jan. 8, 2020) (Shearouse Adv. Sh. No. 2 at 17). This Court held "the question of Simpson's own sentence [was] moot due to his completion of the determinate home detention portion of the sentence." Id. at 21. Respondent agrees with this Court's reasoning regarding the mootness of his sentence; thus, Respondent does not seek rehearing of this portion of the opinion.

Nevertheless, pursuant to Rule 221(a), SCACR, Respondent respectfully requests this Court rehear the portion of the opinion concerning the interpretation of the Home Detention Act.[1]

This Court was

> unable to reconcile that the Legislature would consider the crime of sexual exploitation of a minor in the second degree so serious as to enact a minimum sentence of not less than two years imprisonment – and require that no portion of such minimum sentence may be suspended – with the circuit court's decision to allow [Respondent] to serve the minimum two year-sentence in the same home where he participated in the file sharing of child pornography.

State v. Simpson, Op. No. 5706 (S.C. Ct. App. filed Jan. 8, 2020) (Shearouse Adv. Sh. No. 2 at 23). This Court held "the only reasonable interpretation of § 24-13-1530 [was] that the Legislature did not intend a person convicted of a "violent offense" as classified in § 16-1-60 be considered a "nonviolent offender" for purposes of substituting home detention for a mandatory minimum term of imprisonment." Id. at 24.

Respondent seeks rehearing for this Court to consider (1) the rules of statutory construction, including the requirement that courts examine the plain language of the statute, (2) the numerous statutes specifically incorporating section 16-1-60 of the South Carolina Code when referring to violent offenses juxtaposed with the conspicuous absence of any such reference in the Home Detention Act, and (3) the Legislature's specific exclusion of some offenses from the purview of the Home Detention.

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[1] This Court's opinion did not address Respondent's argument that the contention that Respondent was not a "low risk" offender was unpreserved. Rather, this Court's decision rested upon reconciling the Legislature's enactment of a minimum sentence for the offense for which Respondent admitted his guilt with the Home Detention Act. Thus, Respondent's petition for rehearing addresses those matters discussed by this Court in its opinion. However, Respondent does not waive his argument that the state's contention that he is not a "low risk" offender is unpreserved based upon the objections made during the guilty plea hearing. See R. 35, l. 25 – R. 36, l. 5; Wilder Corp. v. White, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Statutory Construction

"The cardinal rule of statutory construction is to ascertain and effectual legislative intent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. Put another way, "[i]f a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003). "When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). "[I]n construing a statute, words must be given their plain and ordinary meaning witout resort to subtle or forced construction to limit or expand the statute's operation." Id. "Finally, when a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant." Id.

First, an examination of the Home Detention Act is necessary. The primary statutory provision governing the analysis is the one permitting judges to use home detention programs as an alternative to incarceration. The statute provides:

> Notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for low risk, nonviolent adult and juvenile offenders as selected by the court if there is a home detention program available in the jurisdiction.

S.C. Code Ann. § 24-13-1530. Thus, the text permits a judge to use a home detention program as an alternative to incarceration for "low risk, nonviolent adult ... offenders." In deciding whether Respondent may be sentenced to home incarceration, the judge was required to determine if

Respondent were a non-violent offender. Based on the evidence presented, the judge exercised her discretion and determined Respondent was a non-violent offender and sentenced him to home incarceration.

Mandatory minimum sentence

Respondent admitted his guilt to the offense of second degree sexual exploitation of a minor as prohibited by section 16-15-405(A) of the South Carolina Code. The statute provides that such an offense is a felony and that upon conviction a person "must be imprisoned not less than two years nor more than ten years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence." S.C. Code Ann. 16-15-405(D). Under section 16-1-60 of the South Carolina Code, the legislature provided that the offense of exploitation of a minor in the second degree is a violent crime. S.C. Code Ann. § 16-1-60.

As this Court pointed out, the statute provides for a mandatory minimum of two years incarceration. However, the fact that the Legislature saw fit to enact a mandatory minimum sentence for the offense does not mean the Legislature intended for the mandatory minimum to be served in a prison. To the contrary, the statutory language permits an individual convicted of sexual exploitation of a minor, or any other offense requiring service of a mandatory minimum sentence, to serve his sentence in home incarceration. The statute plainly states that it applies "[n]otwithstanding another provision of law which requires mandatory incarceration." S.C. Code Ann. § 24-13-1530(A). In Mosteller v. County of Lexington, 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999), the South Carolina Supreme Court held that by using the introductory phrase "notwithstanding any other provision of law," the legislature clearly intended that the statute be exclusive of and "trump" other provisions of law.

Recently, this Court, in Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 282-83, 781 S.E.2d 914, 917 (Ct. App. 2016), tackled the phrase "notwithstanding any other provision of law" in a statute. According to this Court, the legislature's use of the phrase "notwithstanding any other provision of law" expressed its intent to repeal a prior statute to the extent it conflicted with amended statutes. Id. See also, Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970) (holding the legislature's use of the phrase "notwithstanding any other provision of law," the legislative intent was to allow alcohol on certain premises notwithstanding the provisions of a different statute); Mead v. Beaufort County Assessor, 419 S.C. 125, 136, 796 S.E.2d 165, 171 (Ct. App. 2016) (interpreting "notwithstanding any other provision of law" to mean "despite what any other provision of law says"). Therefore, despite the statutory provision providing for the punishment of the offense to be imprisonment of not less than two years, of which no part may be suspended nor may the person be eligible for parole until having served the minimum, the Home Detention Act permits the person to be placed in home incarceration based on the plain language of the Home Detention Act.

"Nonviolent offender"

The plain language of the Home Detention Act lacks any reference to the statutory provisions classifying non-violent and violent offenses; rather, it refers to the offender as nonviolent with no reference to the criminal offense, and requires the offenders to be "selected by the court" for participation in a home detention program. Quite simply, the plea judge did not abuse her discretion by imposing a sentence of home incarceration on Respondent, whom the judge found to be a non-violent offender based upon the evidence before her.

In addition to categorizing crimes into felonies and misdemeanors, South Carolina has created a statutory scheme for defining certain offenses as violent crimes and others as non-violent

crimes. Cf. S.C. Code Ann. § 16-1-60 (defining violent crimes) and S.C. Code Ann. § 16-1-70 (defining non-violent crimes). In section 16-1-60, the legislature provided a laundry list of offenses it classified as violent. In section 16-1-70, the legislature said simply that any crime not listed in section 16-1-60 was a non-violent crime.

Had the legislature intended to link the definition of "nonviolent offender" in the Home Detention Act to the classification of violent and nonviolent offenses, it would have been a simple matter to do so. As the legislature has done in other statutes, it could have inserted after the phrase "nonviolent" a reference to the statutes classifying offenses. See S.C. Code Ann. § 24-21-480 (permitting placement in the restitution center "for a defendant convicted of a nonviolent offense, as defined in Section 16-1-70"); S.C. Code Ann. § 63-19-2050 (allowing expungement of juvenile records related to "a status offense or a nonviolent crime, as defined in Section 16-1-70").

On the other side of the coin, had the legislature intended to exclude individuals convicted of statutorily defined violent offenses, the legislature certainly knew how to do so as evidenced by its work in countless other statutory provisions. In fact, the legislature has shown this ability in almost every aspect of the law. Quite naturally, and unsurprisingly, the criminal statutes are replete with examples of the legislature's ability to make its intent to refer to the statutorily defined violent offenses. See S.C. Code Ann. § 16-1-130(A) (excluding from diversion programs persons with a current charge or prior conviction "for a violent offense as defined in Section 16-1-60" or who "is currently on parole or probation for a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 16-3-1045(A) (specifically defining an offense in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-3-1080(A) (same); S.C. Code Ann. § 16-3-1083(A)(1) (same); S.C. Code Ann. § 16-3-1085(A) (prohibiting the possession of body arm by "a person who has been convicted of a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 16-8-

230(4)(a) (defining pattern of criminal gang activity in reference to "a violent offense as defined in Section 16-1-60"); S.C. Code Ann. § 16-11-440(C) & (D) (describing the parameters for the Protection of Persons and Property Act in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-15-342(A) (defining a crime in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-23-490(A) (authorizing additional punishment for possession of a weapon "during the commission of a violent crime" when the person "is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 16-23-500(A) (excluding individuals "convicted of a violent crime, as defined by Section 16-1-60" from possession of a firearm); S.C. Code Ann. § 16-25-120 (A) (delineating the factors to be considered during a bond hearing for "a person ... who is charged with a violent offense, as defined in Section 16-1-60"); S.C. Code Ann. § 17-15-55(C)&(D) (explaining reconsideration of bonds for a person who committed "a violent crime, as defined in Section 16-1-60").

Also, not surprisingly, the legislature's promulgation of laws governing criminal procedures is replete with how the legislature refers to the statutory provision defining violent crimes. See S.C. Code Ann. § 17-22-50(A)(2)(e) (excluding from pre-trial intervention programs a person who is charged with "a crime of violence as defined in Section 16-1-60"); S.C. Code Ann. § 17-25-45(D) (allowing a person convicted of certain offenses to be eligible for work release as long as the crime did not involve "an additional violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 17-25-140(1) (defining a targeted offender for a community penalties program as a criminal defendant "not previously convicted of a violent crime as defined in § 16-1-60").

The statutory schemes governing corrections, including incarceration, probation, and parole contain numerous instances of the legislature showing its intent to refer to the statutorily defined violent crimes. See S.C. Code Ann. § 22-5-510 (A) (specifically stating that the term

"'violent offenses' as used in this section means the offenses contained in Section 16-1-60"); S.C. Code Ann. § 22-5-920(B)(2)(b) (excluding "an offense classified as a violent crime in Section 16-1-60" from the expungement provision for youthful offenders); S.C. Code Ann. § 24-3-20(B)(2)(b) (excluding from work release a prisoner "currently serving a sentence for a violent offense as defined in Section 16-1-60"); S.C. Code Ann. § 24-3-210(D) (excluding "a person convicted of a violent crime as defined in Section 16-1-60" from participating in furlough programs unless certain conditions are met); S.C. Code Ann. § 24-13-125(A) (providing the parameters for work release, including a reference to a "violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-230(F)(2) (not allowing the earning of educational credits "to any individual convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-650 (prohibited the release of an offender "committed to incarceration for a violent offense as defined in Section 16-1-60" under the work release program); S.C. Code Ann. § 24-13-710 (directing the implementation of supervised furlough programs with reference to individuals who "have not committed a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-1310(1)(c) (using a definitions section of the statutory scheme providing for shock incarceration programs to define an "eligible inmate" as one "who has not been convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-19-10 (d)(i)&(ii) (using a definitions of the statutory scheme for youthful offender program to define "youthful offender" as an offender of a certain age accused of committing or convicted of committing "an offense that is not a violent crime, as defined in Section 16-1-60); S.C. Code Ann. § 24-21-30 (discussing the granting of parole to "an offender who commits a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-610 (discussing parole of "a prisoner who if sentenced for a violent crime as defined in § 16-1-60"); S.C. Code Ann. § 24-21-610 (prohibiting the granting of parole "to any prisoner serving a sentence for a second or subsequent conviction,

following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-645(D) (requiring review of cases every two years for a determination of parole for "prisoners in confinement for a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-650 (providing the number of signatures required for parole "for persons convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-1300(C)(1) (excluding a person sentenced for "a violent crime, as provided for in Section 16-1-60" from participating in "day reporting centers").

The legislature's role in licensing the workforce of this state show the legislature can and will make reference to "violent crimes as defined by Section 16-1-60" when that is the intent of the legislature. See S.C. Code Ann. § 40-22-20(18) (using a definitions section of the statutory scheme governing engineers to define a person of "good character" as "one who has not been convicted of a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 40-29-200(F) (permitting the denial of a license for manufactured home sales to an applicant who "has been convicted ... of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 40-30-230(8) (defining misconduct as including a conviction of "a violent crime as defined in Section 16-1-60" for those licensed in massage or bodywork); S.C. Code Ann. § 44-7-264(B)(1)(b) (prohibiting the issuance of a nursing home license to a person who has been convicted of "any violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 59-19-117(A) (requiring school districts to establish polices that prohibit the "hiring of individuals convicted of violent crimes as defined in Section 16-1-60"); S.C. Code Ann. § 59-25-280(A)(1) (providing for the revocation of teaching certificates when the person is convicted of "a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 59-63-370 (requiring notification to schools when a student is convicted of "a violent offense as defined in Section 16-1-60").

The Children's Code contains innumerable references to the statute defining violent crimes. See S.C. Code Ann. § 63-19-810(B)(2) (proscribing the rules for releasing a child taken into custody for "a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-820(B)(1) (providing a child is eligible for detention in a secure facility if the child "is charged with a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-1430(B) (creating a Youth Mentor Program and requiring its availability to all "juveniles who commit nonviolent offenses" and explaining that "nonviolent offenses mean all offenses not listed in Section 16-1-60"); S.C. Code Ann. § 63-19-1440(E) (requiring transfer of juveniles to the Department of Corrections on their seventeenth birthdays "following an adjudication for a violent offense contained in Section 16-1-60"); S.C. Code Ann. § 63-19-1820(A)(2) (providing for parole procedures in juvenile cases for offenders who have "not committed a violent offense, as defined by Section 16-1-60" and for offenders who committed "a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2020(E)(1)(a) (requiring notification to the school when a child is charged with "a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2030(E)(1) (requiring provision of incident reports to a school when a child is charged with " a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2040(A)(4)(a) (establishing confidentiality of juvenile offender information unless the child has been adjudicated delinquent for "a violent crime, as defined in Section 16-1-60").

In State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), the Supreme Court, relying upon a statutory provision from 1989 and case law dating back to 1996, held that a trial judge had the general power to suspend sentences and impose probation unless the legislature specifically mandated that no part of a sentence may be suspended and probation imposed. Id. at 468, 642 S.E.2d at 725. Where a statute failed specifically to prohibit suspension of a sentence,

then the court had the authority to suspend the sentence even where the statute required a minimum sentence be imposed. Id. In short, the legislature knew how to prohibit the suspension of a sentence as evidenced by its enactment of other statutes doing just that, but chose not to do so in the statute at issue; therefore, the court had the authority to suspend the sentence.

As has been made abundantly clear by examining South Carolina's Code, the Legislature knows how to refer to "violent crimes as defined by Section 16-1-60." See State v. Ramsey, 409 S.C. 206, 211, 762 S.E.2d 15, 17 (2014) (explaining the legislature's "use of the term 'freshly committed' in section 23-13-60 illustrates the legislature knows how to draft a statute extending an officer's authority to freshly committed crimes" which was not done in the statute at issue in the case). Quite simply, the legislature chose not to refer to "violent crimes as defined by Section 16-1-60" in the Home Detention Act because it was not the intent of the legislature to limit the number of individuals permitted to serve their terms of incarceration in home detention to those convicted of statutorily defined non-violent offenses. Because "[t]he legislature could have employed this phraseology when enacting" the Home Detention Act, "but it did not," the Court "must give such omission effect." See Ramsey, 409 S.C. at 211, 762 S.E.2d at 18; see also South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010) (explaining that the legislature's use of a particular phrase in one statute indicated "the legislature knew how to draft the statute to accomplish this result" had it wanted to do so in another statute). Rather, the legislature's intent was to leave the determination of whether an offender was violent or non-violent to the judge.

The plain and unambiguous language of the statute shows the legislature left it up to the sentencing judge to determine who is a "nonviolent" offender, placing the court's focus on the individual, not necessarily the crime for which he was convicted. See S.C. Code Ann. § 24-13-

1530. The Home Detention Act authorizes home incarceration for "nonviolent adult ... offenders as selected by the court." S.C. Code Ann. § 24-13-1530(A). The statute uses "nonviolent" to describe the offender, not the offense. S.C. Code Ann. § 24-13-1530(A). The legislature specifically chose this language, which differs from the language chosen by the legislature when referring to violent offenses as defined in Section 16-1-60 or nonviolent offenses as defined in Section 16-1-70, to evidence its intent to permit the presiding judge to determine whether an individual should serve his sentence in a home incarceration program.

Not expressly excluded

Finally, the legislature specifically excluded certain individuals from the Home Detention Act. S.C. Code Ann. § 24-13-1590(1). The legislature made clear the Home Detention Act did not apply "to a person, regardless of age, who violates, or is awaiting trial on charges of violating, the illicit narcotic drugs and controlled substances laws of this state which are classified as Class A, B, or C felonies or which are classified as an exempt offense by Section 16-1-10(D) and provide for a maximum term of imprisonment of twenty years or more." S.C. Code Ann. § 24-13-1590(1). "The canon of construction '*expressio unius est exclusion alterius*' or '*inclusio unius est exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative." Hodges, 341 S.C. at 86, 533 S.E.2d at 582. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Id. at 87, 533 S.E.2d at 582 (internal quotation omitted). When the legislature chose to specifically exempt individuals charged with and convicted of certain crimes, the legislature evidenced its intent that the provision include all others not specifically enumerated in its exclusion. Therefore, Respondent, who was not charged with or

convicted of an offense specifically enumerated in Section 24-13-1590(1), could be sentenced to serve his term of incarceration on home detention.

The plea judge correctly determined the Home Detention Act applied to Respondent as he was a low risk, nonviolent offender. At the guilty plea hearing, no one disputed that he was a low risk offender and the undisputed evidence from Dr. Martin was that he was at a very low risk of re-offending. When examining whether Respondent was a "nonviolent offender," Judge Lee considered the uncontroverted evidence of Respondent's upbringing, his distinguished military career, his pursuit of higher education, and his mental health. After the judge learned that Respondent suffered a gunshot wound and a traumatic brain injury during his military service in Iraq, Respondent's psychologist, Dr. Martin, informed the judge of Respondent's mental illnesses – PTSD and depression – resulting from his combat-related experiences and injuries.

Judge Lee also learned of Respondent's stable marriage, his efforts to support his family financially, and his clean criminal record, including his time while out on bond. Judge Lee considered Respondent's acceptance of responsibility, which occurred immediately, and his initiative to seek help. The undisputed evidence showed Respondent was motivated in his therapy and was progressing. Dr. Martin assured the court that Respondent was not a pedophile, psychopath, or a sexual predator. In fact, he showed no evidence of paraphilia at all.

Judge Lee considered the nature of the offense and expressed her desire for Respondent to continue to receive treatment, which he could only due if he were not incarcerated. In conjunction, Judge Lee considered whether a sentence of home detention would serve the penological goals of the criminal justice system and society, including punishment, retribution, and deterrence. Judge Lee exercised her discretion to sentence Respondent to a just and proper sentence – home incarceration. This Court may not interfere with the trial judge's discretionary

sentence. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (explaining that an appellate court "has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression, or corrupt motive."); State v. Warren, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011) (noting that "[t]he authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge.").

For these reasons, Respondent respectfully seeks rehearing pursuant to Rule 221(a), SCACR, of this Court's opinion in State v. Simpson, Op. No. 5706 (S.C. Ct. App. filed Jan. 8, 2020) (Shearouse Adv. Sh. No. 2 at 17).

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 23rd day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

THE STATE,

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JAMIE LEE SIMPSON,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jamie Lee Simpson, at 448 Fountain Lake, Columbia, SC 29209, this 23rd day of January, 2020.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of January, 2020.

Lindsay M. Matthews (L.S)
Notary Public for South Carolina
My Commission Expires: 10/22/2024