STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELVIN FOURNEY, SR.,

APPELLANT

APPELLATE CASE NO. 2018-000103

FINAL BRIEF OF APPELLANT

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2.

Did the trial judge commit reversible error by admitting a series of crime scene and autopsy photographs, which graphically depicted the decedent's body and injury, where the evidence was cumulative and unfairly prejudicial under Rule 403, SCRE, and where the only purpose was to inflame the passions of the jury?

STATEMENT OF THE CASE

A Chester County Grand Jury indicted Appellant on January 14, 2016 for murder and possession of a knife during the commission of a violent crime. R. 284-287. His case was called to trial on January 9, 2018 before the Honorable Brian M. Gibbons, and a jury. R. 1. Deputy Solicitor Candice Lively represented the state, and William Frick represented Appellant. R. 1.

On January 10, 2018, the jury found Appellant guilty of the lesser included offense of voluntary manslaughter and possession of a knife during the commission of a violent crime. R. 239, ll. 9-20. He was sentenced to ten years' imprisonment for voluntary manslaughter and five years concurrent for the weapons offense. R. 246, ll. 6-21.

This appeal follows.

STATEMENT OF THE FACTS

Appellant and the decedent, Leonard "Buster" Hayes, lived together in a small house without air conditioning in Chester. R. 98, ll. 17-21. Appellant, who was seventy years old, treated Hayes as a son. The two were very close and had lived together for years. R. 17, l. 25 – 64, l. 24; R. 23, ll. 17-18. Appellant let Hayes live with him because "he didn't have nowhere else to go." R. 46, ll. 4-8. "Every once in a while they would argue" and "fuss at each other," but most of the time Appellant and Hayes got along well. R. 43, ll. 15-23; R. 44, l. 25 – 45, l. 15.

Appellant, who had poor vision, never left the house. As his son explained, "You couldn't even get him to ride to the store with you." R. 47, ll. 18-21. Consequently, Appellant depended on Hayes and his children to buy food and other necessities for him. State's Exhibit No. 2 (Recorded Statement of Defendant).

During the late morning hours of September 1, 2015, Appellant and Hayes had a rare confrontation. Hayes, who had just prepared a meal, was sitting on the couch in the small living room with a bowl of food. A kitchen steak knife was resting next to Hayes on the couch. State's Exhibit No. 2 (Recorded Statement of Defendant). Appellant, who was standing, leaned in and asked Hayes, "What was we eating?" State's Exhibit No. 2 (Recorded Statement of Defendant). Hayes grabbed the knife, snagged Appellant's inner wrist, and exclaimed, "That's what we're eating!" State's Exhibit No. 2 (Recorded Statement of Defendant). After Hayes put the knife back on the couch, Appellant took the knife and stabbed Hayes in the chest. Appellant thought he had merely nicked Hayes on his shirt. State's Exhibit No. 2 (Recorded Statement of Defendant). He explained, "I didn't know I hit him that hard." State's Exhibit No. 2 (Recorded Statement of Defendant).

Once Appellant realized Hayes was not moving, he called his son and daughter-in-law, Tony and Teresa Fourney, and asked them to come over "right quick." R. 39, ll. 19-25; R. 96, l. 23 – 97, l. 3; State's Exhibit No. 2 (Recorded Statement of Defendant). When Tony and Teresa arrived at the house, they saw Appellant's neighbor, Edward Nelson, in the yard, who told them, "Y'all need to go in there, I think Melvin done killed Buster [Hayes]."[1] R. 41, ll. 15-19. They found Appellant sitting in a chair by the front door "shaking." R. 42, ll. 4-11. Hayes was "slumped over on the couch." R. 97, ll. 1-3. Appellant immediately asked Teresa to call 911. R. 96, l. 23 – 97, l. 3. Appellant told the 911 operator what happened. State's Exhibit No. 5 (Recorded 911 Call).

While they waited for law enforcement and EMS to arrive, Appellant sat in a chair by the front door. State's Exhibit No. 2 (Recorded Statement of Defendant). Shortly after his arrest, he gave a recorded statement to law enforcement. R. 77, l. 19 – 79, l. 18; See State's Exhibit No. 1 (Recorded Statement of Defendant). Appellant gave a second recorded statement the next day, which was consistent with his first statement. R. 89, l. 24 – 91, l. 16; See State's Exhibit No. 2 (Recorded Statement of Defendant).

The trial judge charged the jury with self-defense and the lesser included offense of voluntary manslaughter. R. 229, l. 13 – 230, l. 21; R. 231, l. 5 – 232, l. 24. The jury ultimately found Appellant guilty of voluntary manslaughter. R. 239, ll. 9-20.

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1 Teresa testified Nelson said, "Y'all better go in there and check on Buster [Hayes], I think Melvin done stabbed him." R. 97, ll. 4-15.

ARGUMENT

1.

The trial judge abused his discretion and committed reversible error by refusing to instruct the jury on evidence of good reputation and character as requested when there was evidence in the record to support the charge

Relevant Facts

At the close of the state's case, Appellant requested the trial judge charge the jury on Appellant's good character and reputation. Specifically, defense counsel requested the judge charge the jury with the following language:

> The defendant has presented evidence of his good reputation and character to show that it would be inconsistent with his committing the crime. The weight you give that testimony like all other testimony in this case is for you to decide in your good judgment. You may consider the testimony of the defendant's good character along with all of the other evidence in deciding whether or not the defendant committed the alleged crime.

R. 192, l. 20 – 193, l. 2.

In support of his request, counsel asserted, "I asked every witness that was up there did they know my client, had they known him to be violent, had they known him to be mean, had they known him to cause any trouble to them or in the community." R. 192, ll. 11-14.

In response, the deputy solicitor claimed there was no evidence presented of Appellant's reputation in the community. Instead, she maintained Appellant merely presented evidence that he and the decedent had never been "violent to one another before." R. 192, ll. 5-10; R. 193, ll. 3-20. She concluded there was no evidence of Appellant's reputation in the community to warrant the charge.[2] R. 193, l. 3 – 194, l. 15.

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2 During her argument, the deputy solicitor cited to Rule 608, SCRE. Her argument concerning Rule 608 is hard to follow. Defense counsel correctly asserted that Rule 608 was not relevant as

The trial judge ultimately agreed with the solicitor and refused to give the requested instruction. He told defense counsel he could "argue it" to the jury. R. 194, ll. 16-18. Counsel, taking exception to the ruling, asserted, "I would just state for the record I believe I have elicited testimony that talks to my client's reputation. There is evidence in the record about my client's reputation for not being turbulent, not being violent, I believe that is enough evidence to - - the scintilla of evidence that is required for a charge." R. 194, ll. 19-24.

Standard of Review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

Discussion

The trial judge abused his discretion by refusing to instruct the jury on Appellant's good character and reputation in the community where there was evidence presented to support the charge.

"It is well settled that a criminal defendant may introduce evidence of his good character." State v. Lee-Grigg, 387 S.C. 310, 317, 692 S.E.2d 895, 898 (2010) (citing Rules 404(a)(1) and Rule 405, SCRE); see also State v. Lyles, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947). "Generally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself

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to whether there was evidence in the record to support the requested charge. R. 193, l. 3 – 194, l. 15.

create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant." State v. Harrison, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (Ct. App. 2000) (citing State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982)). "The good reputation of the accused, if proved, may be taken into consideration by the jury in determining whether or not he committed the crime charged." Id. (citing Lyles, 210 S.C. 87, 41 S.E.2d 625).

In State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924), our Supreme Court considered the propriety of the following jury charge:

> As to good reputation, you can consider that like any other testimony. Not that the law says a man can kill another because he has a good reputation, but the jury can take the good reputation into consideration in determining whether or not he committed a crime.

Hill, 129 S.C. at 170, 123 S.E. at 818.

On appeal from his conviction for manslaughter, Hill argued, "The jury should not have been limited, but the good reputation should have been considered, like any other testimony, throughout the whole case, and as bearing thereupon, without any limitation whatever." Id. at 170, 123 S.E. at 818 (internal quotation marks omitted).

The Supreme Court exclaimed, "The charge by its very terms answers the appellant's criticism. Evidence of the defendant's good *reputation* for peace and good order is strongly persuasive of his good *character* in that respect, and is offered for the very purpose stated by the circuit judge, to show the improbability that the defendant would have committed or did commit the crime charged." Hill, 129 S.C. at 170, 123 S.E. at 818 (emphasis in original).

The Supreme Court revisited the issue regarding a jury charge as to good character and good reputation in State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947). In Lyles, the defendant, convicted of assault and battery of a high and aggravated nature, argued the

trial court erred "in failing to charge that the jury 'had a right to consider the defendant's good character and reputation and that it was a substantial fact in the case, if proven, and should be considered by the jury.'" Id. at 92, 41 S.E.2d at 627. The Court held:

> There can be no doubt of the right of appellant to put in evidence his good character and it was "for the jury to consider it in connection with the other evidence, and determine what force and effect it should have." State v. Barth, 25 S.C. 175, 60 Am.Rep. 496 (1886). The good reputation of the accused, if proved, may be taken into consideration by the jury in determining whether or not he committed the crime charged. State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924).

Lyles, 210 S.C. at 92, 41 S.E.2d at 627.

Although Lyles presented a witness who testified to his peaceable and law abiding reputation, he did not ask the trial judge to give a good reputation charge. Thus, the Court held the issue was not preserved for appellate review. Id.

After Lyles, the good character and reputation charge was discussed in State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982). On appeal from his conviction for armed robbery, Green argued the trial judge erred in refusing to instruct the jury, as requested, that evidence of good character alone may be sufficient to raise a reasonable doubt of the guilt of the accused. Id. at 240, 294 S.E.2d at 335. Our Supreme Court explained, "Generally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant." Id. at 240, 294 S.E.2d at 335 (citing Lyles, 210 S.C. 87, 41 S.E.2d 625).

Despite the general rule, the Court in Green held the trial judge's refusal to instruct the jury on the issue of good character was not reversible error because the defendant admitted his

presence and participation in the robbery. Id. The record conclusively established Green's guilt. Id. The Court concluded the error, if any, could not reasonably have affected the result and was harmless. Id.

"The law to be charged to the jury is determined by the evidence presented at trial." Harrison, 343 S.C. at 172, 539 S.E.2d at 74 (citing State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993)). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." Id. "A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." Id. (citing State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct.App.1996)).

Here, Appellant presented evidence through cross-examination of Appellant's good reputation and character. Specifically, the decedent's mother, Thelma Hayes, who grew up with Appellant, testified that she had never known Appellant to be violent and that she trusted Appellant with her son. R. 24, ll. 16-23. Edward Nelson, Appellant's neighbor, who knew Appellant "practically all [his] life," testified that he did not know Appellant to be a violent person, that he had never heard about Appellant being violent, and that he never heard anyone having any trouble with Appellant whatsoever. R. 34, l. 12 – 35, l. 7. Appellant's son, Tony Fourney, testified that he had never "known him [Appellant] to have any trouble with anybody" or "known him to be violent." R. 50, ll. 4-10. Lastly, Appellant's daughter-in-law, Teresa Fourney, testified that Appellant was a "good person," was not a "mean person," and that she had never "seen him get violent." R. 108, ll. 6-19.

The above testimony is ample evidence of Appellant's good character and reputation to support the requested charge. Consequently, the trial judge abused his discretion and committed reversible error by refusing to instruct the jury on Appellant's character and reputation.

Appellant was entitled to an instruction to the effect that evidence of his good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant.

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

2.

The trial judge committed reversible error by admitting a series of crime scene and autopsy photographs, which graphically depicted the decedent's body and injury, where the evidence was cumulative and unfairly prejudicial under Rule 403, SCRE, and where the only purpose was to inflame the passions of the jury.

Relevant Facts

The state sought to introduce a series of photographs taken of the crime scene during the testimony of Tammy Levister, who was the lead investigator and, at the time, the interim chief for the Chester Police Department. R. 52, ll. 2-7. Levister processed the scene and took photographs of the decedent's body. R. 54, ll. 7-16. Appellant objected to State's Exhibit Nos. 9-13 and State's Exhibit Nos. 27-28, which were all photographs of the decedent's body as it was found on the couch in Appellant's house. R. 57, ll. 12-19. Defense counsel argued the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Specifically, counsel asserted, "Your Honor, obviously the State has the right to introduce evidence of the injury, . . . however, there are several pictures of this injury. I also believe [these] pictures, particularly the ones that show[] a frontal view of the victim[,] [are] more prejudicial than probative and . . . should be excluded." R. 57, l. 22 – 58, l. 2.

The solicitor emphasized that the state had to prove malice aforethought. She argued the state wanted to show the "defenseless position" of the decedent seated on the couch and that the decedent's injury "wasn't just a small nick." She asserted:

> This was an intentional violent plunging of a knife into the chest of the victim. In order for me to show that I need to show that this 70 year old man, despite how he may appear to the jury at this point in time, he grabbed that steak knife and without hesitation plunged it into the chest of this victim. And the way that the size of the wound, how he was actually positioned and the fact that there was food, which is evidence that this person was - - he was sitting there eating food on

> his lap, he was not in a position where he was going to attack or harm the defendant, and in order for me to show that I need those photos to come in so the jury can see the violence of this particular incident.

R. 58, l. 4 – 59, l. 4.

As a follow up, defense counsel maintained that the photographs do not accurately reflect the position of the body because the decedent had been moved. Emergency Medical Services (EMS) personnel cut the decedent's shirt and placed probes on the body. R. 59, l. 5 – 60, l. 2.

The trial judge ultimately admitted State's Exhibit No. 10-13 and State's Exhibit No. 27-28 because they "show the angle of the body" and "the size of the wound." R. 60, ll. 3-18. However, he excluded State's Exhibit No. 9, which was a "full frontal view showing [the decedent's] entire face and all of the blood and the wound," because it "would be too prejudicial."[3] R. 60, ll. 13-18.

Subsequently, during the testimony of the pathologist who conducted the autopsy, the state sought to admit a series of close up photographs of the decedent's injury and body after it had been dissected. These photographs were marked as State's Exhibit Nos. 29-36. R. 131, ll. 10-12. Defense counsel objected arguing the photographs were cumulative and "objectionable under [Rule] 403 as being more prejudicial than probative." R. 131, ll. 13-24. He asserted:

> Obviously we have the pathological report. The doctor can - - has done an excellent job of articulating in the report and will do so on the stand of describing the injuries without having to show these rather what I would call gory photographs. I certainly understand that the State is trying to demonstrate the depth [of the wound] and their allegations of the force used but I believe they can do that without having to introduce these pictures to the jury. That's my objection basically is being cumulative and more prejudicial than probative.

R. 131, l. 22 – 132, l. 8.

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[3] Appellant did not designate State's Exhibit No. 9 because the Chester County Clerk of Court maintains it does not have a copy of this exhibit since it was only marked for identification.

Citing to State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), the solicitor argued the photographs were admissible given the state's burden of proof. Anticipating a jury instruction on the lesser included offense of voluntary manslaughter, the solicitor maintained the photographs were necessary to show "the level of violence and intent by the defendant." She said out of twenty-seven photographs taken during the autopsy, she only sought to admit nine "that are specific to what I believe the State has to prove in order to show murder." Moreover, the solicitor claimed the photographs were necessary "in order for the State to be able to show those jurors how vicious of a stab wound that this was to the victim, not only the depth but also how the knife would have went in and then with a jagged serrated edge came back out and actually tore, that's the reason why there's that unusual wound to the victim." Lastly, referring to State's Exhibit No. 35, the solicitor said she "changed" the photograph to a "more muted color so that the blood wouldn't be so obvious to show where the rib was actually separated from the sternum whenever the knife went into the victim." She concluded the photographs were not "intended at all to be unfair or unduly prejudicial." R. 132, l. 10 – 133, l. 23.

After proffering a portion of the pathologist's testimony, the trial judge excluded State's Exhibit Nos. 29-30, but ruled State's Exhibit Nos. 31-36 were admissible "after properly balancing the prejudicial versus probative value."[4] R. 140, l. 18 – 141, l. 4.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Collins, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)) (internal quotation marks omitted). "This Court is bound by the trial

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4 Appellant did not designate State's Exhibit Nos. 29-30 because the Chester County Clerk of Court maintains it does not have a copy of these exhibits since they were only marked for identification.

court's factual findings unless they are clearly erroneous." Id. at 530, 763 S.E.2d at 25 (quoting Baccus, 367 S.C. at 48, 625 S.E.2d at 220) (internal quotation marks omitted). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." Id. (quoting State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Wise, 359 S.C. at 21, 596 S.E.2d at 478) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by admitting State's Exhibit Nos. 27-28, which are crime scene photographs of the decedent's injury, and State's Exhibit No. 31 and State's Exhibit Nos. 34-36, which are photographs from autopsy, since the evidence was cumulative and unfairly prejudicial under Rule 403, SCRE.[5] The only purpose of these graphic photographs, most of which show the decedent's body after it was dissected during autopsy, was to inflame the passions of the jury.

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Rule 403, SCRE.

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[5] Appellant does not challenge the admission of State's Exhibit Nos. 10-13 or State's Exhibit Nos. 32-33 on appeal.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)) (internal quotation marks omitted). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Collins, 409 S.C. at 534, 763 S.E.2d at 27 (quoting Nance, 320 S.C. at 508, 466 S.E.2d at 353) (internal quotation marks omitted).

"When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Id. at 534, 763 S.E.2d at 27-28 (quoting State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). "To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Torres, 390 S.C. at 623, 703 S.E.2d at 228-229 (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In State v. Torres, 390 S.C. at 624, 703 S.E.2d at 229, our Supreme Court expressed to the bench and bar its concern over the admission of gruesome photographs, like the photographs admitted in this case. See Collins, 409 S.C. at 540, 763 S.E.2d at 30-31 (Pleicones, J., dissenting). The Court stated:

> Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an

> autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

Torres, 390 S.C. at 624, 703 S.E.2d at 229.

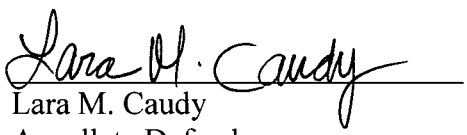
Here, the detailed and graphic testimony of the pathologist was sufficient to enable the state to establish the elements of the offense. Dr. Thomas explained how he measured the depth of the wound and the actual depth compared to the length of the knife. He also graphically described how the knife severed the attachment of the fourth rib to the sternum. R. 143, l. 17 – 148, l. 12. Therefore, the probative value of these photographs was greatly outweighed by the danger of unfair prejudice to Appellant. See Rule 403, SCRE. The photographs were also cumulative to other photographs admitted that are not challenged on appeal and to the pathologist's testimony. Consequently, the trial judge abused his discretion by admitting these gruesome photographs in violation of Rule 403.

Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court to reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

December 14, 2018

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