

STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

Appeal from Greenville County

The Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED
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SC Court of Appeals
Respondent

THE STATE,

v.

TIMIYA RASHAD MASSEY,

Appellant.

Appellate Case No. 2017-002348

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the court erred by refusing to allow the defense to question alleged accomplice, Nyerere Williams, if he was aware that he could receive a life sentence if he was convicted of murder in this case, since his correct potential sentencing exposure for a crime he was charged with was well settled proper cross-examination where Williams was testifying as a state's witness against appellant?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether any error by the court in not permitting appellant to cross-examine Co-Defendant, turned State's witness, about the potential sentence the he faced prejudiced the outcome of the trial?

STATEMENT OF THE CASE

Timiya Massey (“Appellant”) was indicted by the Greenville County grand jury on the charge of murder, attempted murder, burglary in the first degree, kidnapping, attempted armed robbery, and possession of a weapon during a violent crime. (R. p. 377-386). At trial, Appellant was represented by Carlyle Steele, Esq. Assistant Solicitor Doug Richardson, Esq., prosecuted the case on behalf of the Thirteenth Circuit Solicitor’s Office. (R. p. 1). Appellant was tried before the Honorable Robin B. Stilwell, November 6th, through November 8th, 2017. (R. p. 1). At the conclusion of the trial the jury found Appellant guilty as indicted. (R. p. 371, l. 7 – p. 372, l. 17). Following the conviction, Judge Stilwell sentenced Appellant to forty years imprisonment for murder, thirty years imprisonment for burglary in the first degree, thirty years imprisonment for kidnapping, thirty years imprisonment for attempted murder, twenty years imprisonment for attempted armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime. All sentences were concurrent. (R. p. 373, ll. 2-22). Appellant then filed a timely Notice of Appeal. Robert Dudek, Esq., Chief Appellant Defender with the Division of Appellate Defense, submitted Appellant’s Initial Brief on December 12, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the evening of September 30th, 2015, Appellant Timiya Massey, gathered a group of men together to go rob the apartment of brothers Anthony and Haskell Nutridge. When the group arrived at the Nutridge's apartment complex the men armed themselves with handguns and donned masks. (R. pp. 61-62; p. 119; p. 64; pp. 79-80). As they proceeded into the complex toward the brothers' apartment, they came across Kenneth Leach, who was leaving the apartments. The group took Leach hostage and forced him to knock on the door of the Nutridge apartment. Anthony Nutridge answered the door whereupon Appellant struck Anthony with a handgun and rushed into the apartment. (R. pp. 110-111). Anthony's brother, Haskell, upon hearing the commotion grabbed his .38 revolver and proceeded toward the front of the apartment to protect his brother. A gun fight then ensued between Haskell and Appellant. (R. pp. 112-113). As some point during the gun fight, Appellant turned the gun on Anthony Nutridge, shot, and killed him. Appellant was shot in the leg during the exchange. (R. pp. 36-37; pp. 116-117; pp. 146-147). Law Enforcement arrived at the apartment complex shortly thereafter and located Appellant in some bushes with a handgun, holster, and mask nearby. (R. p. 27; p. 86).

Trial

At trial, the State presented Kenneth Leach who testified that he was taken hostage by the group and forced to knock on the door of the Nutridge apartment. (R. pp. 110-111). He testified that he was then forced inside where the gunfight ensued. He said Appellant fired his gun until it ran out of bullets. (R. pp. 112-113). Leach then testified that at this point he ran at Appellant and jumped on his back. While doing this, blood from Appellant's wound transferred to Leach's clothing. (R. pp. 113-114). Leach testified that he then ran out the door in the opposite direction of Appellant who was retreating as well. (R. p. 114).

The State then presented testimony from Forensic Technician Josh Spurgeon, with the Greenville County Sheriff's Office. (R. p. 55). Spurgeon responded to the scene shortly after the murder. (R. pp. 56-57). Spurgeon testified that during his processing of the scene he located 9mm shell casings, several masks, and a handgun (R. pp. 61-71; pp. 91-92). He also testified that he was able to locate several hairs in one of the discarded masks. (R. p. 107).

The State also presented testimony from Greenville County Sheriff's Investigator Chris Hammett. Investigator Hammett testified that he received and executed a search warrant to retrieve buccal swab from Appellant for the purpose of isolating Appellant's DNA. He further testified that Forensics retrieved several hairs from one of the masks left at the scene. (R. p. 151). The State then presented Kaitlin Appel, a DNA analyst with the Greenville County Sheriff's Office. (R. pp. 190-192). Appel testified that she received the several hairs lifted from the discarded mask and the buccal swab taken from Appellant for DNA comparison. Appel was able to match the hairs found in the discarded mask to Appellant. (R. pp. 195-196; pp. 200-202).

The State then presented testimony from James Armstrong, a forensic firearms examiner with Greenville County Division of Public Safety. Armstrong was tasked with comparing several bullets recovered from the crime scene to the handgun that was recovered near Appellant's hiding place. (R. p. 37; p. 49; pp. 63-64; pp. 91-92; pp. 223-224). In particular, he compared the gun to shell casings recovered from the Nutridge apartment and a single bullet recovered from the victim. (R. p. 217; pp. 225-226). Armstrong was able to confirm that the shell casings recovered from the scene were fired from the handgun found near Appellant. (R. p. 224). However, he was unable to conclusively confirm that the bullet recovered from the victim was fired from the same firearm. He was able to confirm that it was not fired from a revolver. (R. pp. 225-227).

The State presented the victim's brother, Haskell Nutridge. (R. p. 229). He testified that he had just laid down for bed when the intrusion occurred. (R. p. 232). He was woken by a commotion in the front of the house. (R. pp. 232-233). Haskell testified that he retrieved his .38 revolver from beside his bed and proceeded toward the front of the apartment. (R. p. 233). There he witnessed an armed masked man standing over his brother. (R. p. 234). Haskell then opened fire on the intruders. (R. p. 235). Haskell testified that the intruder who was standing over his brother returned fire, whereupon Haskell took cover in the nearby bathroom. (R. p. 236). Haskell lost track of the intruders once they had fled. (R. p. 236). He then discovered that his brother had been shot during the exchange. His brother, Anthony Nutridge, died in Haskell's arms shortly after. (R. pp. 238-239).

The State thereafter presented Terry Harris. Harris was Appellant's co-defendant, and had been charged with murder, attempted murder, kidnapping, burglary, and possession of a weapon during a violent crime, for his participation in the above crime. (R. pp. 246-247). Harris testified that he was close friends with Appellant and had known him for about ten years. (R. p. 247). He further testified that Appellant picked him and Nyerere Williams up on the day of the murder. (R. pp. 248-249). Appellant did not indicate where they were going. (R. p. 249). They proceeded to the Dolphin Apartments, where the Nutridge brothers resided. (R. p. 249). Harris testified that Appellant then gave him a gun and masks were distributed. Harris further stated that Appellant had his own gun that he kept secured in a holster on his side. (R. pp. 249-250). Shortly after arriving, they saw Kenneth Leach coming out of the apartments. Harris testified that they grabbed him, forced him back up into the apartment building, and made him knock on the victims' apartment door. (R. pp. 250-253). He stated that when the victim answered, Appellant began hitting him with his handgun and demanding to know where drugs were located. (R. pp.

253-255). Shortly thereafter, the victim's brother emerged from rear of the apartment and began shooting. (R. p. 256). Harris testified that Appellant fired his gun at the victim's brother. (R. p. 256). The witness stated that he then ran from the apartment and back to the awaiting vehicle. (R. p. 256). The group eventually fled from the scene, leaving Appellant behind. (R. pp. 257-258). Harris admitted during cross-examination that he pled guilty in federal court to a federal weapons charge and received a sentence of one hundred and twenty (120) months. He further acknowledged that he had not pled guilty to his State charges, but was hoping to receive a sentence concurrent to his federal time. (R. pp. 260-261).

Next the State called Nyerere Williams. (R. p. 269). Williams acknowledged that he too had been charged in the pending case, but that he had not received any promises from the State regarding those charges. He also acknowledged that he had a prior record for distribution of crack cocaine. (R. p. 270). Williams testified that he was picked up by Appellant on the day of the murder and was driven to the victim's apartments. (R. pp. 271-272). Upon arriving, Williams testified that they all donned masks and proceeded in the apartment after taking a lap around. (R. pp. 272-273). He described how they "grabbed" the "white" guy coming out of the apartment and took him to the victim's door. (R. p. 273). Williams indicated that Appellant and Harris were armed, but that he was not. (R. p. 274). Williams testified that Appellant and Harris rushed inside the apartment as soon as the victim answered the door. He remained outside the door. (R. p. 274). Williams stated that shooting erupted seconds later and that he immediately took off running for the car. (R. pp. 274-275). Williams indicated that everyone but Appellant made it back to the car. (R. pp. 275-276).

Lastly, the State presented pathologist Dr. Michael Ward. Dr. Ward testified that he conducted the autopsy on Anthony Nutridge. (R. pp. 295-297). From this, Dr. Ward was able to

determine that the victim was killed as a result of two gunshot wounds. It was determined that the first projectile entered the victim's right upper abdomen and was recovered from his upper back. (R. pp. 299-300). The second projectile entered the victim's inner thigh and transected the femoral artery. (R. pp. 299-300). Dr. Ward also discovered the victim had a broken nose with an accompanying laceration and a grazing gunshot wound to his right wrist. (R. pp. 301-302). It was Dr. Ward's medical opinion that the victim died from blood loss resulting from the combination of the gunshot wounds to his abdomen and thigh. (R. p. 303).

SUMMARY OF THE ARGUMENT

Any error in not permitting Appellant to impeach co-defendant, Nyerere Williams, with the maximum potential sentence he faced on his pending charges was harmless. Absent the improper limitation, the trial court permitted the Defense meaningful cross-examination of the co-defendant. Additionally, the testimony offered by the witness was merely cumulative to other evidence submitted during the State's case. The Prosecution presented testimony from an additional co-defendant whose testimony was similar to that offered by Williams, and which further implicated Appellant in the kidnapping, robbery, and resulting murder.

ARGUMENT

- I. Harmless Error—Any Error By The Trial Court In Not Permitting Appellant To Cross-Examine His Co-Defendant Regarding The Potential Sentence He Faced Did Not Prejudice The Outcome Of The Case Because The Defense Was Permitted Meaningful Cross-Examination Of The Witness And The Testimony Offered Was Merely Cumulative To Other Evidence Presented.**

How the Issue Arose at Trial

During cross-examination, Defense Counsel, Carlyle Steele, questioned Nyerere Williams about his pending charges. During his extensive cross on the topic, Defense Counsel asked *and the witness answered* questions regarding the fact that he faced the same charges as Appellant, his expectations from the State in exchange to his testimony, whether his testimony would contribute to a shorter sentence, and whether he was aware of the maximum sentence he was facing. (R. pp. 287-290). This line of questioning culminated in the following exchange between the witness and Defense Counsel:

Q Tell me what - - do you know - - have you been told or do you know about what you [sic] maximum sentence is on this thing, what you possible maximum sentence is on this thing?

A No, sir.

Q Well, you're aware you're charged with murder, aren't you?

A Yes, sir.

Q Are you aware you could get a life sentence?

MR. RICHARDSON: Objection, Your Honor.

THE COURT: I sustain.

MR. STEELE: All right.

(R. p. 290).

After the objection was sustained, Defense Counsel moved on to another line of questioning. (R. p. 290). At the conclusion of Defense Counsel's cross-examination, the trial

court gave the following explanation to the jury regarding his sustaining of the objection:

All right, ladies and gentlemen, during that last testimony, you heard an objection stated by the State over the Defense's characterization of a certain penalty for a certain criminal offense. And I sustained that objection. That's not because I have any secrets that I want to keep from. It's because a potential sentence is not relevant to your decision. Your decision in this case is to determine whether the State has met its burden of proof of proving each and every element of the offense beyond a reasonable doubt.

It's entirely the authority and the responsibility of the Court, that is me, to determine sentencing. So, you don't have to determine that. You don't have any stake in that. That is the business of the Court. That's why that was that - - that's why that objection was sustained. Just wanted to let you know.

(R. p. 294).

Standard of Review

"The trial court has broad discretion in determining the general range and extent of cross-examination." *State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812, 814-15 (Ct. App. 1996) (citations omitted). "[T]rial judges may impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant. *Jenkins*, 322 S.C. at 474 S.E.2d at 814-15 (citation omitted). "[T]he exercise of such discretion will not be disturbed except in cases of manifest abuse or injustice." *State v. Miller*, 258 S.C. 573, 577, 190 S.E.2d 23, 25 (1972); *see also State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000) ("Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion."). "An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012) (citing to *State v. Morris*, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008)). Moreover, "the court's decision will not be reversed on appeal absent a showing of prejudice." *Colf*, 337 S.C. at

625, 525 S.E.2d at 247–48. “Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Williams*, 380 S.C. 336, 343–44, 669 S.E.2d 640, 644 (Ct. App. 2008) (citing *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). “In determining whether error is harmless, the circumstances of each individual case are to be considered.” *Id.*

Analysis

Under *State v. Gracely*, the trial court erred in denying Appellant the opportunity to cross-examine his codefendant. *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (“The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias.”) (citing *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994)). However, the Supreme Court of South Carolina has held that “[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis.” *Gracely*, 399 S.C. at 375, 731 S.E.2d at 886 (citing *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002); see also *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (finding no prejudice in the trial court’s refusal to allow further inquiry into coconspirator’s potential sentences where the defendant “amply demonstrated any bias on the part of [the two conspirators]”). In *Gracely* the South Carolina applied the five factors set forth in the U.S. Supreme Court case of *Delaware v. Van Arsdall* to determine whether a violation of the Confrontation Clause constitutes harmless error. See *Gracely*, 399 S.C. at 375, 731 S.E.2d at 886 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). In *Van Arsdall* the U.S. Supreme Court set forth:

Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include [1] the importance of the witness's testimony in

the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.

Gracely, 399 S.C. at 375, 731 S.E.2d at 886 (quoting *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1431); *see also State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (“The list of factors as set out in *Van Arsdall* is not exhaustive.”).

Analysis of the *Van Arsdall* factors support that the trial court’s error in limiting Appellant’s cross-examination of Neyerere Williams was harmless. First, the importance Nyerere Williams’s testimony was greatly negated by the fact that co-defendant, Terry Harris, testified for the State immediately prior. (R. pp. 246-259). Therefore Williams was not the only witness to link Appellant to the murder as he was one of two witnesses presented by the State that positively identified Appellant. Moreover, Appellant’s DNA was linked to one of the discarded masks located at the scene. (R. p. 107; pp. 195-196; pp. 200-202). Furthermore, Appellant was located by Law Enforcement at the scene with a gunshot wound to his leg. (R. p. 27; p. 86).

Second, Williams’ testimony was cumulative to Harris’s prior testimony. *See State v. Taylor*, 255 S.C. 147, 149-150, 177 S.E.2d 550, 551 (1970) (“The weight to be given the testimony of an accomplice is for the fact finding body and if his uncorroborated evidence satisfies the jury of the defendant's guilt beyond a reasonable doubt, a conviction is warranted.”) (quoting *State v. Rutledge*, 232 S.C. 223, 226, 101 S.E.2d 289, 290 (1957)). Despite being sequestered at trial, both gave almost similar descriptions of what occurred. (R. p. 11). Both Williams and Harris testified that Appellant picked them up, took them to the apartments, and proceeded into the victim’s apartment masked and armed. (R. pp. 246-259; pp. 270-277).

Third, not only did Harris's testimony corroborate everything that Williams testified to, but the testimony from the kidnapping victim, Kenneth Leach, and the victim's brother, Haskell Nutridge, further corroborates Williams' testimony in regards to events that occurred upon the group's arrival at the apartment. While neither Leach nor Nutridge could identify Appellant as the shooter in the group, the State proceeded on a "hand of one, hand of all theory" which imposed liability on Appellant for the murder based on his participation in the burglary.¹ (R. p. 311). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Barber v. State*, 393 S.C. 232, 236–37, 712 S.E.2d 436, 439 (2011) (citing *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). Therefore, it is unnecessary to prove that Appellant was the shooter in order to hold him liable for the consequences of the burglary.

Fourth, the extent of cross-examination allowed at trial, also does not support a finding of prejudice. See *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (finding accused suffered no prejudice from limitation on cross-examination of one co-defendant where other evidence, including the testimony of co-defendants, established his commission of the crime). While the trial court did not permit impeachment pertaining to Williams' potential maximum sentences, it did permit Defense Counsel meaningful cross-examination of Williams. During the Defense's cross-examination, Williams testified that he was charged exactly the same as Appellant. (R. p. 287). He further testified that he had yet to plead guilty. (R. p. 287). When asked by Defense Counsel what he was hoping to get out of testify, Williams replied, "I don't know, just doing the right thing." (R. p. 288). When questioned on whether he expected a shorter

¹ Reference *Barber v. State*, 393 S.C. 232, 236–37, 712 S.E.2d 436, 439 (2011) (citing *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)).

sentence, Williams repeatedly replied “I don’t know.” (R. p. 289). Williams also conceded during cross that he had originally lied to law enforcement regarding the events at the Dolphin Apartments. (R. pp. 277-278). The Record clearly support, that the trial court allowed a meaningful cross-examination of Williams with adequate opportunity for impeachment. Accordingly, the jury had sufficient evidence before it to judge William’s credibility.

Lastly, the case presented by the State against Applicant was strong. Absent Williams’s testimony, the State presented independent testimony to support its “hand of one, hand of all theory, i.e. that Appellant actively participated in the kidnapping Kenneth Leach and the burglary of the Nutridge apartment, which resulted in the shooting death of Anthony Nutridge. *See State v. Washington*, 424 S.C. 374, 417, 818 S.E.2d 459, 482 (Ct. App. 2018) (“In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties.”). In addition to Williams’ and Harris’ testimony, the state presented the following in support its case:

- 1) Victim Kenneth Leach testified that he was kidnapped at gunpoint by three masked individuals, who forced him to knock on the victim’s apartment. Furthermore, that a gunfight ensued shortly thereafter between an apartment resident and one of the masked individuals which resulted in the masked individual getting shot. (R. pp. 111-114).
- 2) Victim Haskell Nutridge testified that shortly after laying down to rest he heard a commotion in the front of his apartment. He armed himself with a .38 revolver and travelled towards the commotion, at which point he discovered his brother, Anthony Nutridge, being accosted at gunpoint by a masked individual in the apartment. Haskell fired at the masked individual and a gunfight ensued. Haskell further testified that the masked individual fled the apartment shortly after, whereupon,

Haskell discovered that his brother had been mortally wounded. Anthony Nutridge died shortly after. (R. p. 232-238).

- 3) Appellant was found by Law Enforcement hiding behind bushes near the murder scene, with a gunshot wound to his leg. (R. p. 27; p. 86).
- 4) A 9mm pistol, holster, and masks were discovered near where Appellant was located. (R. pp. 61-71).
- 5) Law Enforcement were able to make a DNA match between Appellant and hairs harvested from a mask left at the scene. (R. pp. 200-202).
- 6) Law Enforcement were able to link shell casing found at the murder scene to the gun found near Appellant. (R. p. 224).

Based on the above, sufficient evidence was presented by the State to support a finding of harmless error.

As to Appellant's argument that Williams admitted he did not see the shooting, and was operating under Harris' orders, this further diverts from the fact that Appellant was prosecuted under "hand of one, hand of all." The circumstantial evidence, and the testimony offered by both Terry Harris and Nyerere Williams confirmed that Appellant and his two co-defendants participated in the armed burglary of the victim's apartment. (R. pp. 248-250; p. 251; p. 271). Regardless of who shot the victim, Appellant is criminally liable for everything done by his co-defendants incidental to the robbery. *Mattison*, 388 S.C. at 479, 697 S.E.2d at 584. Additionally, Harris *did* testify that he witnessed Appellant firing his weapon inside the victim's apartment. (R. p. 256). Of note, Williams' testified during cross-examination that he did not realize a robbery was going to occur. (R. p. 283). Nevertheless, while he may have initially been unaware a home invasion was going to occur when getting into the car with Appellant and Harris, it would be unreasonable to believe that he remained ignorant to this fact once masks were donned and guns presented. Therefore, any suggestion by Appellant that he was also unaware of the impending burglary is outlandish.

Lastly, in regards Appellant's tenuous inference to the impeachment of Crime Scene Processor Spurgeon through disciplinary records (R. pp. 98-108), "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Furthermore, the Record reflects that the court carefully instructed the jury as to this point during its charge to the jury at the conclusion of Appellant's trial. (R. p. 340). Also, nothing in the Record would support that any mistakes were made in the collection of evidence during Appellant's case.

CONCLUSION

When the circumstances of the trial are taken as a whole it is clear that any error in permitting only limited impeachment was harmless and did not prejudice the outcome of the trial. For this reason, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 18th day of April, 2019.



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