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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-001417

Kayla Marie Cook,

Appellant,

vs.

The State,

Respondent.

MOTION FOR APPEAL BOND

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Appellant Kayla Marie Cook, by and through the undersigned counsel, hereby moves this Court to issue an order releasing her on bond pending her appeal of her 2019 conviction and sentence. Grounds for this motion are set forth below, but include the fact that she is terminally ill with a life expectancy of less than six months.

I. PROCEDURAL HISTORY

On December 29, 2017, Ms. Cook was arrested for homicide by child abuse of a minor child under her care (the “Minor”). On January 31, 2019, she was released on a \$50,000 bond and remained on bond through trial, which was held between August 12 and 16, 2019.¹ She appeared for trial at the call of her case on August 12, 2019. At the conclusion of trial, the jury issued a verdict of guilty for the charge of homicide by child abuse and Judge McIntosh sentenced Ms. Cook to life imprisonment without the possibility of parole. On August 20, 2019, Ms. Cook filed her notice of appeal. Her appeal is currently pending before this Court.

II. LEGAL STANDARD

Although S.C. Code §18-1-90 does not allow bail for persons sentenced to life imprisonment, the Supreme Court of South Carolina has determined that, in its discretion, it may issue bail to persons sentenced to imprisonment over ten years based on the power granted to it by the Constitution to issue various writs, including the writ of habeas corpus. *State v. Whitener*, 225 S.C. 244, 248-49, 81 S.E.2d 784, 786 (1954). The Court of Appeals has the same jurisdiction to issue appeal bonds as the Supreme Court would in a similar case. S.C. Code § 14-8-200(a). In determining whether to grant bond on appeal, courts consider the following factors: “the probability of reversal, the nature of the crime, the possibility of escape, and the character and

¹ Appellant did serve a thirty-day sentence for bond revocation, but otherwise remained out on bond.

circumstances of the appellant.” *In re Michael H.*, 360 S.C. 540, 553, 602 S.E.2d 729, 736 (2004).

III. ARGUMENT

Application of the factors outlined in *In re Michael H.* weigh in favor of granting Appellant’s request for bond.

A. There is a reasonable likelihood the verdict will be reversed.

Ms. Cook has appealed her conviction on two grounds: (1) whether the trial court should have granted a mistrial when the lead detective provided hearsay testimony before the jury that Ms. Cook’s older child provided evidence that reinforced the theory that Ms. Cook caused the death of the minor child; and (2) whether the trial court should have excluded evidence of a previous injury to the minor child that was unrelated to her death.

1. The trial court’s failure to grant a mistrial due to the hearsay testimony of the lead detective was reversible error.

As noted in the Initial Brief of Appellant, a mistrial should have been granted when the lead detective provided testimony that the forensic interview with Appellant’s oldest child “reinforced the fact that [Appellant] did cause [Minor’s] death.” Brief at 12. The state and the trial court acknowledged that the detective could not testify as to what the oldest child said during the forensic interview since the oldest child would not be a witness at trial. Nevertheless, the state still elicited testimony from the detective that, while lacking specifics, violated the rule against hearsay because the testimony provided information regarding the substance of what the oldest child said during her interview. *See State v. King*, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017) (cautioning against the use and admission of investigative information to offer the substance of an out-of-court statement that would otherwise violate the rules against hearsay). Such testimony violated the hearsay rule and was extremely prejudicial to Appellant’s case, in that it suggested to the jury that Ms. Cook’s older child provided testimony against her mother that would corroborate her guilt on

the charge of homicide by child abuse. The trial court acknowledged that a curative instruction should be provided, but declined to grant a mistrial. However, no curative instruction could sufficiently erase such damaging testimony from the minds of jurors. Thus, given the gravity of the error in admitting such testimony, a mistrial was absolutely necessary in this case and the reviewing court is likely to find that the failure to grant such mistrial was an abuse of discretion requiring reversal. *See* Brief at 11-18.

2. The trial court's failure to exclude evidence of the Minor's arm injury, sustained two or four weeks before her death, was reversible error.

As discussed in Appellant's Initial Brief, the trial judge erred by allowing the state to introduce evidence that Minor suffered an arm injury two to four weeks before her death. Brief at 18-42. It was undisputed the arm injury was unrelated to Minor's death. It was also undisputed that any decision by Ms. Cook not to obtain medical treatment for the injury was unrelated to Minor's death. *Id.* 30-31. Finally, the state failed to show that Ms. Cook caused the arm injury or that the arm injury was not accidental. *Id.* For all these reasons, the evidence of the arm injury was irrelevant. *See id.* 27-31. Furthermore, the evidence was inadmissible under Rule 404 (6) of the South Carolina Rules of Evidence. Brief at 31-38. The evidence satisfied none of the exceptions to Rule 404 (b) and was improperly intended to show a propensity for violence. *Id. See State v. Perry*, 430 S.C. 24,32, 842 S.E. 2nd 654, 658 (2020). Finally, even if evidence of the arm injury had been relevant, the trial judge erred in refusing to exclude it. Any probative value the evidence contained was substantially outweighed by its danger of unfair prejudice, *See* Rule 403, SC RE.

B. The nature of the crime is serious, but should not weigh against Appellant's release on bond.

While the charge of homicide by child abuse is an inherently serious charge, Ms. Cook has maintained her innocence. There was no direct evidence of her involvement in causing the death

of the Minor. There was no evidence provided as to how she brought about the Minor's death, and no witness testified to ever seeing Ms. Cook strike or beat the Minor. Instead, the primary evidence of Ms. Cook's guilt was provided by the State's expert, who testified to a window of time for infliction of the fatal injury in which Ms. Cook was the only adult present with the Minor. Ms. Cook's expert, however, testified that the relevant window of time was more expansive and included a period in which the child's father had been the only adult present with the Minor. As a result, there was no overwhelming evidence of Appellant's guilt. As such, the nature of the crime should not weigh against her release on bond.

C. Appellant is unlikely to escape or forfeit bond.

Exhibits A and B to this motion are affidavits from Medical University of South Carolina oncologists, Joshua D. Hornig, M.D. and Evan M. Graboyes, M.D. Both have treated Ms. Cook since 2018. Ex. A, Hornig Aff., ¶ 3; Ex. B, Graboyes Aff., ¶ 3. Ms. Cook is diagnosed with Stage IV spindle cell sarcoma of the head and neck, an aggressive cancer with a "dismal" prognosis. Ex. B ¶ 6. Ms. Cook's cancer has recurred multiple times and has spread to other organs and tissues, including her lungs. *Id.* ¶ 5. As such, her cancer is no longer curable. *Id.* ¶ 7. Typical symptoms of the cancer at this stage include, but are not limited to: extreme fatigue, anemia, weakness, loss of appetite, shortness of breath, pain, weight loss, fever, and difficulty with normal movements. Ex. A, ¶ 5; Ex. B, ¶ 8. As of December 15, 2020, Drs. Hornig and Graboyes estimated Ms. Cook's life expectancy as less than six months. Ex. A, ¶ 6; Ex. D ¶ 9. Of course, two months have passed since the six-month estimate, meaning that today her life expectancy is less than four months.

As noted above, Ms. Cook was released pretrial on a \$50,000 bond, \$5,000 of which was posted in cash with a bail bonds company. Despite the seriousness of the charges against her and the relatively low bond, Ms. Cook appeared for trial. Today, given the debilitating effects of Ms.

Cook's cancer and her limited life expectancy, as detailed in the affidavits of Drs. Horning and Grayboyes, she certainly does not pose a flight risk. *See* Exhibits A, B.

D. Appellant's circumstances and character support granting the Motion for Appeal Bond.

The circumstances regarding Ms. Cook's health are described above. She has terminal cancer with only a few months to live. During her last months she is likely to experience pain, fatigue, and other debilitating symptoms. *See* Ex. A, ¶5; Ex. B, ¶8. Ms. Cook's parents, who live in Lancaster County, South Carolina, have adopted her children and will help support their daughter while she is out on bond. Ex. C, Matthew Cook Aff., ¶2. Her family has secured the services of attorney Stacy Thompson of Bluestein Thompson Sullivan LLC to help Ms. Cook apply for disability benefits and health insurance, although neither can be applied for until a prison release date has been determined.

Ms. Cook would live at the home of her friend, Whitney Lombardo, in Mecklenburg County, North Carolina. Ex. D, Lombardo Aff., ¶¶ 2,4. Ms. Lombardo is employed as a data management specialist by a payroll company. *Id.* ¶5. She has never been charged with a crime. *Id.* ¶6. She has assisted Ms. Cook in the past with her cancer treatments and has committed to doing so in the future if this Motion is granted. *Id.* ¶7. Ms. Lombardo lives "within walking distance" of Atrium Health Pineville Hospital, but will coordinate with her family "to ensure that Kayla has transportation to go wherever needed for treatment and care." *Id.*

Ms. Cook had no prior arrests before this one. Several witnesses testified at trial that she appeared to be a caring parent, while Ms. Lombardo describes her as "a kind and loving person." *Id.* ¶3.

E. CONCLUSION

For the foregoing reasons, Appellant Kayla Marie Cook respectfully requests that the Court

order her release pending this appeal upon the posting of a reasonable bond.

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February 12, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001417

Kayla Marie Cook,

Appellant,

vs.

The State,

Appellee.

AFFIDAVIT OF JOSHUA D. HORNIG, MD, FRCS(C)

PERSONALLY APPEARED BEFORE ME, Joshua D. Hornig, M.D., FRCS(C), who, being duly sworn, deposes and states as follows:

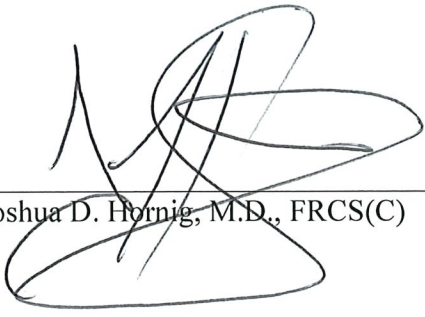
1. I am a Board-certified physician with MUSC-Health in Charleston, South Carolina, an Associate Professor with the Medical University of South Carolina, and have professional knowledge of the matters contained in this affidavit.
2. My areas of medical specialty include head and neck oncology.
3. Kayla Cook is a patient of mine and has been since 2018.
4. Ms. Cook is diagnosed with Stage IV spindle cell sarcoma of the head and neck – an aggressive cancer that has widely disseminated to other organs and tissues – including Ms. Cooks' lungs.



5. Typical symptoms of this cancer at this stage include, but are not limited to: extreme fatigue, weakness, loss of appetite, shortness of breath (when spread to the lungs), pain, weight loss, fever, difficulty with normal movement, and anemia.

6. It is my medical opinion that Ms. Cook's life expectancy is less than six months.

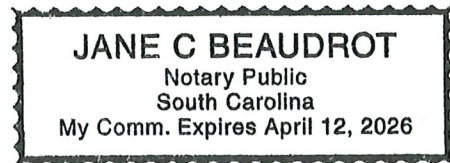
FURTHER THE AFFIANT SAYETH NOT.



Joshua D. Hornig, M.D., FRCS(C)

SWORN to and subscribed before me
this 14th day of December, 2020.

Jane C. Beaudrot
Notary Public for South Carolina
My Commission Expires: 4/12, 2026



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001417

Kayla Marie Cook,

Appellant,

vs.

The State,

Appellee.

AFFIDAVIT OF EVAN M. GRABOYES, MD, MPH, FACS

PERSONALLY APPEARED BEFORE ME, Evan M. Graboyes, M.D., MPH, FACS, who,
being duly sworn, deposes and states as follows:

1. I am a Board-certified head and neck oncologic surgeon, an assistant professor in the Department of Otolaryngology-Head & Neck Surgery at the Medical University of South Carolina, a member of the Cancer Control Program at the Hollings Cancer Center, and have professional knowledge of the matters contained in this affidavit.
2. My clinical practice focuses on the removal and reconstruction of tumors of the head and neck.
3. Kayla Cook is a patient of mine and has been since 2018.
4. Ms. Cook is diagnosed with Stage IV spindle cell sarcoma of the head and neck.



5. Ms. Cook's cancer has recurred multiple times and has now metastasized to other organs and tissues – including her lungs.


6. Ms. Cook's cancer is an aggressive cancer of the head and neck with a dismal prognosis.

7. As such, Ms. Cook's cancer is now no longer curable.

8. Typical symptoms of this cancer at this stage include, but are not limited to: extreme fatigue, weakness, loss of appetite, shortness of breath (when spread to the lungs), pain, weight loss, fever, difficulty with normal movement, and anemia.


9. It is my medical opinion that Ms. Cook's life expectancy is less than six months.

FURTHER THE AFFIANT SAYETH NOT.

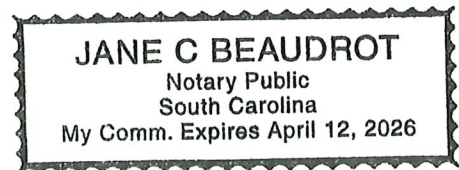


Evan M. Graboyes, M.D., MPH, FACS

SWORN to and subscribed before me
this 15 day of December, 2020.



Notary Public for South Carolina
My Commission Expires: 04/12/, 2026



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from LANCASTER County

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001417

Kayla Marie Cook,

Appellant,

vs.

The State,

Appellee.

AFFIDAVIT OF MATTHEW COOK

PERSONALLY APPEARED BEFORE ME, Matthew Cook, who, being duly sworn, deposes and states as follows:

1. I am the father of the Appellant, Kayla Cook, and have personal knowledge of the matters contained in this affidavit.
2. My wife, who is Kayla's mother, and I are residents of Lancaster County, South Carolina. We are the adoptive parents of Kayla's two minor children. We are fortunate in having a large extended family, most of whom live near Rochester, New York. They have supported Kayla and remained close to us.
3. Kayla has been diagnosed with Stage IV cancer. In March 2020, her physicians at MUSC estimated her life expectancy to be less than one year.

4. If the Court grants Kayla's pending motion for an appeal bond, we expect her to apply for disability and health insurance. We have engaged a South Carolina attorney to represent her pro bono in those matters. In addition, my wife and I, as well as our extended family, will support Kayla as best we can during the time she has left.

FURTHER THE AFFIANT SAYETH NOT.

Matthew Cook

Matthew Cook

SWORN to and subscribed before me
this 30th day of December, 2020.

Kari Calentine

Notary Public for South Carolina

My Commission Expires: August 6, 2029

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY

R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

Appellate Case No. 2019-001417

Kayla Marie Cook, Appellant,

vs.

The State, Appellee.

AFFIDAVIT OF WHITNEY LOMBARDO

PERSONALLY APPEARED BEFORE ME, Whitney Lombardo, who, being duly sworn, deposes and states as follows:

1. I am a friend of the Appellant, Kayla Cook, and have personal knowledge of the matters contained in this affidavit.
2. I am 58 years old and a resident of Mecklenburg County, North Carolina. I have known Kayla for a number of years.
3. Kayla is a kind and loving person and I believe she is innocent of the crime that she was convicted of.
4. I have offered to have Kayla live with me if the court grants her pending motion for an appeal bond and she is able to spend her final months outside of prison.
5. I currently live alone and have been employed by TriNet, a payroll company as a data management specialist for five and a half years.
6. I have never been charged with a criminal offense.
7. I have assisted with Kayla's care while she was undergoing radiation treatments in the past prior to her incarceration and am prepared to assist with her care again. I live within walking distance of Atrium Health Pineville Hospital and will coordinate with her family to ensure that Kayla has transportation to go wherever needed for treatment and care.

FURTHER THE AFFIANT SAYETH NOT.


Whitney Lombardo

SWORN to and subscribed before me

this 8 day of January, 2021.



Kerrin Cook
Notary Public for South Carolina

Kerrin Cook
Notary Public, State of South Carolina
Commission Ends April 25th, 2026

My Commission Expires: April 25, 2026

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SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Kayla Marie Cook, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by electronic mail to the following address(es):

Pleadings: **MOTION FOR APPEAL BOND**

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Shandelle Simmons
Administrative Assistant

February 12, 2021