STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Pickens County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2012-213548

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The State,

Respondent,

vs.

Damon T. Brown,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert witness on child abuse dynamics and delayed disclosures to testify regarding general behavioral characteristics of sex abuse victims, including multiple reasons child abuse victims delay disclosing the abuse.

## STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

## STATEMENT OF FACTS

On November 20, 2012, the Pickens County Grand Jury indicted Appellant Damon Tyler Brown on one count of first degree criminal sexual conduct with a minor, three counts of lewd act upon a child, and three counts of first degree sexual exploitation of a minor. The case was called for a jury trial on November 26, 2012, before the Honorable G. Edward Welmaker, Circuit Court Judge.

Prior to trial, Appellant moved to exclude the testimony of Shauna Galloway-Williams on the issue of delayed disclosure, contending her testimony would improperly bolster the victims' trial testimony. The State advised the court Ms. Galloway-Williams would be offered as an expert in counseling sexually abused children and their families, she did not interview the victims' in this case, and would only be testifying in general terms regarding the effects of sexual abuse on minor victims and the reasons for delayed or partial disclosures of the abuse. The court deferred ruling on the admissibility of Ms. Galloway-Williams' testimony until the State called her as a witness. (TT, pp. 14-18, Record on Appeal [R.], pp. ____).

The three minor victims were Older Brother, Younger Brother and Minor Friend.[1] During the time period the sexual abuse occurred, Appellant was involved with the sister of Older Brother and Younger Brother, and sometimes lived in their home.

Older Brother testified he was ten years old when he met Appellant, who was his sister's boyfriend. He thought Appellant was "really cool," they "played around a lot," and became "really cool friends." Their "playing around" included wrestling and the game "truth or dare," and Older Brother stated when they wrestled, Appellant would get

[1] For purposes of continuity, the State will use the same victim designations used in Appellant's brief.

"handsy," and touch him inappropriately around his "private parts." (TT., pp. 108-109; R., pp. _____).

Older Brother described the first time he and Younger Brother played "truth or dare" with Appellant. Older Brother was ten years old at the time, and Younger Brother was eight years old. Appellant told them they had to keep everything that happened in the game to themselves, or the one who told would be blamed for what happened. He then dared the brothers to compare the size of their penises. The boys removed their pants and underwear, and Appellant told them to play with their penises until they became erect. When their penises became erect, Appellant "measured" them by using his fingers. Appellant also showed the boys he had an erection too. (TT, pp. 110-117; R., pp. _____).

Older Brother described other incidents of abuse by Appellant, and testified the abuse of him and Younger Brother occurred almost daily until Older Brother was twelve. He also testified he saw Appellant abuse Minor Friend on one occasion. (TT, pp. 117-140; R., pp. ____).

Older Brother testified he did not report the abuse until he was fifteen. At that time, he told a school resource officer about the abuse, but did not provide a lot of details regarding Younger Brother and Minor Friend. He stated he did not provide those details because he thought Younger Brother, Minor Friend and "pretty much everybody" would hate him or be mad at him. (TT, pp. 141-144; R., pp. _____). On cross-examination, Appellant questioned Older Brother extensively about the delayed disclosure and lack of detail in Older Brother's first statement to police. (TT, pp. 145-177; R., pp. _____).

Younger Brother testified about Appellant's sexual abuse of him and Older Brother, as well as the incident involving Minor Friend. He said he did not disclose the abuse until after Older Brother disclosed it, and initially he did not tell law enforcement about what Appellant did to them because he was embarrassed. (TT, pp. 186-204; R., pp. _____).

Minor Friend testified about playing "truth or dare" with Appellant and the brothers when she was at the brothers' house. She saw Appellant "dare" the brothers to touch each other's penis. On one occasion, Appellant had the brothers and Minor Friend strip down to their underwear, and he made Older Brother "dry hump" Minor Friend while Appellant was fondling her, after which he made Minor Friend and Younger Brother go into the bathroom. Appellant then made Minor Friend take off her pants and instructed Younger Brother to stick his penis into her butt, which Younger Brother did after using lotion as a lubricant. (TT, pp. 225-231; R., pp. _____).

Minor Friend stated Appellant's only rule in the "truth or dare" game was never to tell anyone, and said if they broke the rule, Appellant would "get really mad and something bad would happen." She stated she thought if she told anyone, they would blame her for not stopping it, and they would look at her like "this disgusting little girl." (TT, pp. 232-233; R., pp. ____).

Minor Friend did not disclose the abuse until law enforcement came to her after Older Brother disclosed it. On cross-examination, Appellant questioned Minor Friend about the delayed disclosure, and specifically about her failure to disclose it when she talked to a detective about another sexual assault a few months after the abuse by Appellant occurred. Minor Friend stated she did not tell the detective about Appellant's

abuse because the detective did not ask her about it. (TT, pp. 245-262, 323-324; R., pp. _____).

The circuit court then held an in-camera hearing regarding the admissibility of Ms. Galloway-Williams' expert testimony. After hearing the testimony, the court ruled Ms. Galloway-Williams was qualified as an expert in child abuse dynamics and disclosure, and her testimony was relevant and would assist the jury. The court noted that based on their responses during jury qualification, the seated jurors "would not have any prior knowledge from family members or otherwise as to sex abuse directly." (TT, pp. 277-311; R., p. ____).

Ms. Galloway-Williams subsequently testified before the jury that she is the Executive Director for the Julie Valentine Center, which is a child abuse and sexual assault recovery center. She is a licensed professional counselor in South Carolina, with a Bachelor's Degree in Psychology and a Master's Degree in Counseling. As of the date of trial, she had received over 140 hours of specialized training related to child abuse and sexual assault, and had worked for eleven years with children, adolescents and families impacted by child abuse and/or sexual assault. (TT, pp. 379-381; R., pp. _____).

After the court qualified her as an expert in child abuse dynamics and disclosure, Ms. Galloway-Williams testified she had never met with or interviewed the victims in this case, or reviewed any incident reports or statements associated with the case. The only knowledge she had of the case was from discussions with the Solicitor's Office. (TT, pp. 381-382; R., pp. _____).

Ms. Galloway-Williams stated research indicates between 70% and 80% of abused children delay disclosing the abuse into adulthood. She testified some of the

reasons children delay disclosing are: fear of consequences to themselves, the perpetrator or someone the child loves; the child's age; the child's relationship to the perpetrator; a lack of vocabulary to describe what happened to them; threats by the perpetrator; grooming by the perpetrator; and the perpetrator's normalization of the abusive conduct. (TT, pp. 382-385, 395-397; R., pp. _____).

She further testified most disclosures happen accidentally, and disclosure is a process that results in disclosure of more details over time. When children suffer chronic abuse, it is difficult for them to sort out individual incidents, and they may not be able to tell what days, dates and times the incidents happened, or the order in which they occurred. (TT, pp. 385-393, 397-400; R., pp. _____).

In the State's closing argument, the solicitor stressed that Ms. Galloway-Williams never met or interviewed the victims, and testified about symptoms of child abuse. The solicitor then related the symptoms, including delayed disclosure, to the individual victims in this case. (TT, pp. 433-437; R., pp. _____). In his closing argument, Appellant indicated Ms. Galloway-Williams was "just testifying as to her opinion on what she says may be science, and "some of these things may seem to apply to this case, some don't." (TT, p. 439; R., p. ____).

The jury convicted Appellant on all counts, and the circuit sentenced him to a total of 359 months incarceration. (TT, pp. 469-470, 479-480; R., pp. _____).

## ARGUMENT

**The circuit court properly allowed the State's expert witness on child abuse dynamics and disclosures to testify regarding general behavioral characteristics of sex abuse victims, including multiple reasons child abuse victims delay disclosing the abuse.**

Appellant asserts the circuit court erred in allowing Ms. Galloway-Williams' expert testimony regarding child abuse dynamics and delayed disclosure for two reasons.[2] First, he contends the substance of Ms. Galloway-Williams' testimony was not proper for expert testimony because it was not outside the realm of ordinary knowledge, and based on the victims' testimony, the jurors could make their own determinations regarding why the victims delayed disclosing Appellant's abuse. Second, he contends the sole purpose of Ms. Galloway-Williams' testimony was to bolster the victims' testimony. As support for these assertions, Appellant relies on inapplicable case law, while ignoring case law directly on point.

### A. Standard of Review

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, which occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009).

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[2]Appellant does not challenge Ms. Galloway-Williams' qualification to testify as an expert on child abuse dynamics and disclosure. His challenges go only to whether her expert testimony was admissible.

**B. Necessity of Expert Testimony**

Expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct.App.1999). It assists the jury in understanding some of the aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. *Id. See also* State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Contrary to Appellant's assertions, the behavioral characteristics of child sex abuse victims is **not** a subject familiar to the common juror. As noted by the circuit court, based on the information provided during jury qualifications, the seated jurors "would not have any prior knowledge from family members or otherwise as to sex abuse directly." (TT, p. 310; R., p. ____).

During qualifications, the court asked if any member of the jury panel or their family members had been accused, arrested or convicted of an offense of child sex abuse, or had been the victim of such an offense. Six members of the panel indicated they had a connection with such offenses, and the court excused three panel members who stated it would affect their ability to be fair and impartial. Of the remaining three panel members, only two were called as potential jurors, and Appellant struck both of them. (TT, pp. 56-

64, 71-72; R., pp. _____). Consequently, in part due to Appellant's jury strikes, none of the seated jurors had any experience, direct or indirect, with child sex abuse.

In the absence of experience dealing with child sex abuse, it is unreasonable to think the common juror would have sufficient knowledge regarding the impact of sex abuse on children and their behavior to have even a basic understanding of how abused children may respond to the abuse and/or the perpetrator. Therefore, an expert with specialized training and experience dealing with child sex abuse victims, such as Ms. Galloway-Williams, can assist the jury in understanding victims' behavior, particularly a delay in disclosing the abuse. *See* State v. White, 361 S.C. 407, 605 S.E.2d 540, 544 (2004) (expert testimony and behavioral evidence may be more crucial when the victims are children, whose inexperience and impressionability often render them unable to effectively articulate events giving rise to criminal sexual behavior).

In addition to South Carolina, numerous jurisdictions considering this issue found behavioral traits testimony is appropriate testimony for an expert. See Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury."); State v. Tonn, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989) (expert testimony on characteristics of abused children was admissible because it could help the jury understand the delayed reporting symptom that

existed in sexually abused children); State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) ("There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS[3] identifies or describes behavioral traits commonly found in child-abuse victims."); State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994) (expert testimony on delayed disclosure was admissible in the prosecution's case-in-chief, because it explains to the jury why a minor sex abuse victim might delay reporting incidents of abuse); State v. Carpenter, 556 S.E.2d 316 (N.C. Ct. App. 2001) (the nature of child sexual abuse places lay jurors at a disadvantage, expert testimony regarding the fact that delayed and incomplete disclosure is not unusual in cases of child abuse was appropriate, and the expert witness "was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education, which included interviewing two thousand children in her career); Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. Ct. App. 2003) (expert testimony on delayed disclosure is admissible, and informs the jury that a victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused); McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006) (expert testimony about child sexual abuse syndrome, including testimony about delayed disclosure, was admissible); Kilby v. Commonwealth, 663 S.E.2d 540 (Va. Ct. App. 2008) (no error in admitting expert in "forensic interviewing, child sex abuse disclosure by children of sexual assault and recantation," to provide expert testimony on delayed disclosure); State v. Perry, 218 P.3d 95 (Or. 2009) (expert testimony on the phenomenon of delayed disclosure by victims of

[3] Child Sexual Abuse Accommodation Syndrome

child sexual abuse was admissible); State v. Friday, 73 So.3d 913, 931-32 (La. Ct. App. 2011) (expert testified very broadly about the general characteristics of sexual abuse victims, namely how such victims delay disclosure and some of the reasons why disclosure may be delayed, such as fear or shame, and she was qualified to do so based on her own practice and experience). *See also* John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." [footnotes omitted]). Thus, acceptance of such testimony is well established and wide spread.

Appellant relies on Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), as support for his contention Ms. Galloway-Williams' testimony was unnecessary, and improper bolstered the victims' testimony. Those cases involved forensic interviewers who had interviewed the victims, and their testimony in some way indicated they believed the victims' allegations of sex abuse. Therefore, those cases are factually and legally inapplicable to the instant case.

Similarly, Appellant's reliance on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), and State v. Dempsey,

340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), is misplaced. In Jennings, the South Carolina Supreme Court held the report prepared by a forensic interviewer (Ms. Galloway-Williams) regarding her interviews of the victims was inadmissible hearsay, and impermissibly vouched for the victims' credibility by concluding the victims "provided a 'compelling disclosure of abuse.'" 716 S.E.2d at 94. Both Dawkins and Dempsey involved testimony from therapists who were actually treating the victims, and their testimony clearly indicated they believed the victims were telling the truth. Dawkins, 377 S.E.2d at 302 (therapist testified his impression was that victim's symptoms were genuine); Dempsey, 532 S.E.2d at 308-310 (therapist testified children alleging sexual abuse were truthful 95% to 99% of the time, and he concluded victim was reliable).

In this case, Ms. Galloway-Williams was not testifying as a forensic interviewer, she never interviewed the victims, did not prepare a report, and did not express any opinion or belief regarding the credibility of victims' allegations in general, or these victims in particular.[4] Therefore, the analysis and holdings in Jennings, Dawkins and Dempsey do not apply to this case.

While citing and relying on the cases discussed above, however, Appellant inexplicably makes absolutely **no** reference to several cases directly on point with the issue in this case: State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 863 (1993) ("both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its

[4]Her testimony regarding the percentage of sex abuse victims who delay disclosing the abuse merely referenced the results of various studies, and she did not express any opinion regarding application of those percentages to this case. (TT, pp. 382-383, 395-397; R., pp. _____).

prejudicial effect"); Weaverling, 523 S.E.2d at 794 (*citing* Schumpert) (same); White, 605 S.E.2d at 544 (same). The failure to even mention Weaverling is particularly interesting because the circuit court specifically relied on Weaverling in ruling Ms. Galloway-Williams' testimony was admissible.

Indeed, Weaverling is both factually and legally on point with the instant case. At issue in Weaverling was the admissibility of testimony from an expert in the field of sexual abuse victims. The defendant contended the testimony was irrelevant, and the prejudicial effect outweighed the probative value. 523 S.E.2d at 794.

As in this case, the expert in Weaverling did not meet or interview the victim, and her knowledge of the case was limited to discussions with the solicitor. Further, again as in this case, the expert did not testify specifically regarding the victim or the facts of the case. *Id.*

In holding the expert testimony was properly admitted, the South Carolina Court of Appeals found the testimony simply explained the effect of molestation on a person's subsequent conduct. The Court further found such testimony is relevant, it helps the jury understand some aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. *Id.*

The South Carolina Supreme Court subsequently re-affirmed the admissibility of expert testimony and behavioral evidence in White. The victim in White was an adult, and the Court held behavioral evidence is relevant regardless of the victim's age. The Court then noted expert testimony "may be more crucial" when children are victims, because their inexperience and impressionability often render them unable to effectively relay incidents of criminal sexual behavior. 605 S.E.2d at 544.

Ms. Galloway-Williams' testimony in this case is the type of expert testimony approved in Schumpert, Weaverling and White. Her testimony was relevant, and assisted the jury in understanding the evidence and determining a fact in issue. *See* Rule 702, SCRE (expert with specialized knowledge may testify if it will assist the trier of fact to understand the evidence or determine a fact in issue). Therefore, the circuit court properly exercised its discretion in allowing her testimony.

**C. Bolstering**

Appellant's contention Ms. Galloway-Williams' testimony was the State's attempt to circumvent case law by using her to indirectly comment on the victims' credibility is patently meritless. As discussed in depth above, Ms. Galloway-Williams' testimony was exactly the type of expert testimony contemplated and approved in Schumpert, Weaverling and White. Thus, the State complied with prevailing law rather than attempting to circumvent it.

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct.App. 2013) (*quoting* State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 [Ct.App.2006], *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 [2009]). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. *Id.*

Appellant contends the jury "very likely interpreted" Ms. Galloway-Williams' testimony as expressing her belief the jury should believe the victims. This contention is

nothing more than rank speculation, with no support in the record. At no point did Ms. Galloway-Williams relate her testimony to the victims' allegations. Rather, she testified in very general terms regarding various reasons sex abuse victims delay disclosing the abuse, and how the disclosure process generally progresses.

Further, Appellant's claims that Ms. Galloway-Williams' testimony was "cumulative," and "used solely to bolster [the victims'] credibility," are specious. The testimony at issue involved general behavioral characteristics of sex abuse victims, and Ms. Galloway-Williams never related any of the characteristics to the victims in this case, or their testimony. It is undisputed Ms. Galloway-Williams did not talk to the victims at any time, and there is no evidence she even knew the substance of the victims' trial testimony. Thus, her testimony could not be "cumulative" to the victims' testimony.

The mere fact Ms. Galloway-Williams' testimony may have provided insight and context for the jury regarding the behavior of sex abuse victims and delayed disclosure in general, does not make it improper bolstering, even if some of her testimony ultimately corroborated parts of the victims' testimony. In fact, in his closing argument, Appellant's counsel told the jury some parts of Ms. Galloway-Williams' testimony "may seem to apply to this case, **some don't**." (TT, p. 439; R., p. ____) (emphasis added).

Such is the nature of all expert testimony - parts of it tend to corroborate evidence submitted by the party offering the expert, including the party's own testimony, and in that regard, it could always be considered cumulative and bolstering to a certain extent. If corroboration becomes the equivalent of improper bolstering, however, expert testimony will virtually never be admissible in any case.

Ms. Galloway-Williams's testimony was not cumulative, and she did not, and could not, bolster the substance of the victims' testimony. The circuit court properly allowed her expert testimony regarding general behavioral characteristics of sex abuse victims and delayed disclosure, and its ruling should be affirmed.

## CONCLUSION

Based on the foregoing reasons, Respondent respectfully submits Appellant's convictions should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 20, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Pickens County
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The State,

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**DESIGNATION OF MATTER**
**TO BE INCLUDED IN THE RECORD ON APPEAL**

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Respondent proposes the following to be included in the Record on Appeal:

1. Indictments

2. Trial Transcript, pp. 1-6, 10-18, 56-65, 68-73, 104-267, 277-311, 323-325, 351-409, 418-454, 469-470, 479-480

To facilitate preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 20, 2013

STATE OF SOUTH CAROLINA

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**PROOF OF SERVICE**

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I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Lara M. Caudy
Assistant Appellate Defender
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I further certify that all parties required by Rule to be served have been served.

This 20th day of December, 2013.

Sally B. Ellison

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ALAN WILSON
ATTORNEY GENERAL

December 20, 2013

Lara M. Caudy
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RE: State v. Damon T. Brown
Appellate Case No. 2012-213548

Dear Ms. Caudy:

Enclosed are two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case, with proof of service.

Please contact me if you have any questions are concerns regarding this case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

DRJS/sbe
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services