THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State, Respondent,

v.

Arthur William Macon, Appellant

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities		ii
Arguments		
I.	All issues raised by the Appellant were preserved for appeal	1
II.	The testimony by Ricky Woodberry was hearsay and was not admissible	2
III.	The admission of Ricky Woodberry's testimony was prejudicial and not harmless error	6
Conclusion		12

TABLE OF AUTHORITIES

Cases

Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 764 S.E.2d 249 (S.C. App., 2014)	11
McGhee v. Wells, 57 S.C. 280, 35 S.E. 529 (S.C., 1900)	6, 9
South Carolina Dep't of Motor Vehicles v. Mccarson, 391 S.C. 136, 705 S.E.2d 425 (S.C., 2011)	4
State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (S.C., 2015)	5
State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (S.C. App., 2014)	5
State v. Humphries, 346 S.C. 435, 551 S.E.2d 286,(S.C. App., 2001) rev. on other grounds 354 S.C. 87, 579 S.E.2d 613 (S.C., 2003)	5
State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (S.C., 1985)	11
State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (S.C., 1998)	2
State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (S.C., 1994)	2
State v. Pipkin, 359 S.C. 322, 597 S.E.2d 831 (S.C. App., 2004)	11
State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010)	4
State v. Taylor, 404 S.C. 506, 745 S.E.2d 124 (S.C. App., 2013)	5
Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013)	5, 11
Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (S.C., 2010)	11

Other Authorities

Rule 17 *S.C.R.Crim.P.*	1
Rule 18 *S.C.R.Crim.P.*	1
S.C.R.E. 404 (a)(3)	5
S.C.R.E. 602	5

S.C.R.E. 801 4

S.C.R.E. 802 4

SCRE Rule 701 6

SCRE Rule 702 6

Am. Jur. 2d, Expert & Opinion Evidence §15 (2012) 6

ARGUMENTS

I. All issues raised by the Appellant were preserved for appeal.

In its brief the Respondent argues that the issues raised by the Appellant were not preserved for review by this Court. The argument, briefly stated, is that the objection made on Page 301 of the Record was insufficient to preserve any issues for trial. [R, p 128 L 15-17]. This argument is incorrect.

First, the Appellant discussed the Motion in Limine concerning Mr. Woodbery's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13 year old, but could not testify that he was easily led. The objection during the actual testimony by Appellant's attorney was to the testimony regarding the original shooting and the Court sustained the objection. That objection was to testimony which contradicted the ruling of the Court. There is nothing within this Record which indicates the issues were not preserved for this appeal.

In fact, as set forth in Rule 17 *S.C.R.Crim.P.* once evidence has been objected to, it is no longer necessary to object:

> If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

Further, pursuant to Rule 18 *S.C.R.Crim.P.*, it would have been improper for the Appellant's lawyer to continue to argue these issues as they were expressly dealt with in the Motion in Limine. This is set forth within the rule.

> (a) Argument After Ruling. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.
>
> (b) Argument on Objection. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court

Further, it is clear that once a Court's ruling is settled, the Appellant does not have to continue to object to preserve the issue. This issue was discussed at length in *State v. Humphries*, 346 S.C. 435, 551 S.E.2d 286,(S.C. App., 2001), rev. on other grounds 354 S.C. 87, 579 S.E.2d 613 (S.C., 2003), wherein the Court stated that when a trial court is clear that a ruling on a Motion in Limine is final, the opposing party need not continue to object. Once a court has made a final evidentiary ruling, there is no need to continue to object to preserve the right to appeal. *State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642 (S.C., 1998).[1] This case is one in which the Court made its ruling immediately prior to the testimony and therefore it is clear that a further objection would not only have been in violation of the Rules, but it would have been futile and no further objection was necessary. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (S.C., 1994),

II. The testimony by Ricky Woodberry was inadmissible hearsay and should not have been allowed.

Appellant finds it strange that the State argues that he is precluded from arguing that Woodberry's testimony was hearsay because "he never objected on that ground. Instead, he limited

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[1] In *Mitchell* the Court discussed this issue in footnote 3 and pointed out that a Motion in Limine is not final because the Court may change its point of view. In this instance the Court's ruling directly addressed the issues and was made immediately after the proffer and prior to the testimony. There was nothing which occurred at the trial between the ruling and the testimony which required a further objection.

his challenge at trial to asserting it was impermissible character evidence." [State's Brief at page 8] A review of the transcript shows this to be inaccurate. On the record, the Appellate's attorney expressly states that the proposed testimony is something that Woodberry does not have personal knowledge of and is hearsay. [R pp 119 L 9 - 120 L 12]. A portion of the express language from the attorney is "So, I guess to summarize, my grounds would be hearsay, improper character evidence of a witness, and relevance." [R p 120 L. 10-12]. The State also argues the issue of hearsay [R pp 120 L 15 - 121 L 4] and the Court states that "As far as hearsay, I don't think that that is hearsay, him saying what happened to his son. So, I'm going to allow that part in, the details of what happened when he was 16 years old."[2] [R pp 121 L 23 - 122 L 3]. Further, Appellant's attorney argued the exact point that the testimony by Woodberry was improper hearsay because he was not a doctor and not qualify to give the opinion. [R p 122 L 19-25]. The State admitted in its argument before the trial court that the statements were being offered to prove the truth of the matter asserted. S.C.R.E. 801. In his argument discussing Mr. Woodberry's proposed testimony, Mr. Cathcart states, "Again, Your Honor, this is not as to character, this is talking about the medical condition of his child. It is not anything to do with M. Macon, it is only as to what occurred to him [Colon] and how the frontal lobotomy he got from a bullet affects his [Woodberry] child." [R p 123 L. 14-19]. He also argues the hearsay is to prove that Colon has the brain of a 13-year-old. [R p 124 L. 9-12]. In the colloquy with the Court Mrs. Goldberg sums up exactly what evidence the Court is allowing and to which the Appellant objected, "What I wrote down was: Shot in the frontal lobe; became schizophrenic; passive; mind of a 13-year-old; easily led." [R p 125 L. 4-7].

Therefore, in light of the arguments and motion on the court record it is unreasonable for the

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[2] Woodberry's testimony was necessary as Colon was a witness and testified he had been shot.

State to argue that there was no objection on the basis of hearsay. Additionally, the remainder of the State's argument on hearsay is improper in light of the record. The State argues that the statements were not hearsay because Woodberry's testimony 'was not presented as proof Colon was schizophrenic." According to the State's argument the testimony was introduced "to explain Colon's behavior, not to diagnose him." [State's brief at 9] Woodberry's testimony was not cumulative to the testimony of Investigator Williams who testified that Colon was a little mentally challenged. That was an personal observation by the Investigator but it did not deal with the claim of a lobotomy or schizophrenia.

S.C.R.E. 801 sets forth the definition of hearsay and S.C.R.E. 802 confirms that hearsay is not admissible except as provided in the Rules of Evidence or other rules. In *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C. 2010), the Court sets forth a succinct definition of hearsay:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

See, South Carolina Dep't of Motor Vehicles v. Mccarson, 391 S.C. 136, 705 S.E.2d 425 (S.C., 2011). A cursory review of the testimony of Woodberry reveals that contrary to the assertion of the State the testimony is hearsay. None of his testimony was based upon his own observations of Colon's behavior, rather it was a recounting of events he had not seen, the shooting, and reports that doctors purportedly had given him regarding a lobotomy and mental illness. [R pp 128 L 23 - 131 L 6]. First he testifies about a shooting of which he had no notice and claimed that the shooting had the medical effect of a lobotomy. He then testifies that doctors supposedly told him that Colon was diagnosed with schizophrenia and became passive with the brain of a 13-year-old. All of this testimony regards Colon's medical condition. Woodberry had no personal knowledge or special

training to testify on these issues. Woodberry unequivocally states that the doctors told him the information regarding the mental illness of Colon. Further, his testimony is that "He was diagnosed as schizophrenia. He started talking to himself. He became passive." [R p 129 L 9-10]. There is not even any testimony connecting this mental illness with the shooting. The hearsay from Woodberry was in fact a hearsay statement made by a party not testifying before the court.

In essence this is hearsay by a lay witness pertaining to the mental condition of Colon and offered to prove that Colon was easily led by the Defendant. Woodberry did not even identify any of the purported doctors. No medical records were introduced. The instant case is much like *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), where the Court set aside a conviction because the Court improperly allowed testimony which was offered to prove the truth of the matter asserted. Not only was the testimony improper hearsay, but it was offered to bolster the testimony of Colon which is a violation of S.C.R.E. 404 (a)(3). As set forth in *State v. Taylor*, 404 S.C. 506, 745 S.E.2d 124 (S.C. App., 2013), it is improper for a witness to be allowed to give an improper opinion for the purposes of showing a witness is telling the truth or to assess the witness's credibility.

The trial court essentially allowed Woodberry to testify as an expert witness regarding both the medical condition of Colon and to bolster the testimony of Colon.[3] In the case of *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (S.C., 2015), our Supreme Court ruled both that it is improper to allow someone who is not an expert to testify on matters which require a special knowledge or skill. Further, the Court stated that even if a witness is qualified as an expert, the witness' testimony may not be used to bolster another witnesses's credibility and testimony. None of Woodberry's

[3] Woodberry's testimony also implies that only the Appellant could have planned the robbery. Therefore it was improper evidence regarding Appellant's character.

testimony was an excited utterance and failed to fall into any exception to the hearsay rule. *See, State v. Hendricks*, 408 S.C. 525, 759 S.E.2d 434 (S.C. App., 2014).

In this case, the trial court allowed Woodberry to testify about matters which were outside his personal knowledge. S.C.R.E. 602. A witness must confine his testimony to facts within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill or training. S.C.R.E. 702, *Am. Jur. 2d, Expert & Opinion Evidence* §15 (2012).[4] The State attempts to bootstrap an excuse for its argument by claiming the witness's health my be shown to explain his demeanor and cites *McGhee v. Wells*, 57 S.C. 280, 35 S.E. 529 (S.C., 1900). However, a cursory examination of this case shows it does not support the State's argument. *McGhee* is a case involving a fraudulent conveyance and the question was put directly to the party. The party who executed the deed was asked his purpose in executing the deed and was asked his physical condition at the time of trial. The finding of the court was that he could be asked if he had a fraudulent purpose in executing the deed and if he had a health problem. In this case, the testimony was not from the party in question, Colon, and did not relate to his health problems as Colon was not asked any question regarding his health on the day of trial. The case cited does not stand for the proposition that anyone may testify regarding a witness's health.

As set forth in Appellant's briefs, Woodberry's testimony was hearsay which was inadmissible for numerous reasons. Thus, the only remaining question is whether allowing the testimony was harmless error.

III. The admission of Ricky Woodberry's testimony was prejudicial and not harmless error.

The answer to the question regarding the prejudicial effect of the testimony of Woodberry

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[4] This issue is discussed in detail in the Appellant's Brief and is incorporated into this argument as well.

is contained in both the arguments made by the State and the closing statement of the State. It is clear that one of the most important prongs of their case was to prove that the Defendant had influenced Colon to do his bidding and that Colon was not fully competent. A cursory review of the State's arguments reveal this was the sole reason for proffering the testimony.

The theme that Colon was brain damaged and mentally ill was the linchpin of the State's case. During opening statement, Mr. Cathcart specifically discussed this issue:

> He walked out and went to meet up with the man who planned the whole thing, Arthur Macon, his cousin.
>
> You see, when Jason Colon was young, he suffered a traumatic brain injury and is easily manipulated. His cousin knew that. That is why his cousin drove him to the bank, gave him the gun, sent him inside, and he sat outside with a scanner set to the correct police frequency for the area.
>
> Jason Colon was nothing more than another tool that Arthur Macon used to rob that bank. And that is why we're here today, ladies and gentlemen. Arthur Macon is charged with armed robbery and kidnapping, one for each of the people who were in the bank when the armed robbery occurred. Because in the State of South Carolina, the hand of one is the hand of all, which means Arthur Macon drove Jason Colon to the bank that day, gave him a gun and sent him inside, it may as well have been Arthur Macon doing it. He was just as guilty of the crime.

[R p 11 L. 4-23].

And, at the end of his opening statement, Cathcart stated, "Ladies and gentlemen, Jason Colon [sic} may have thought he was a mastermind, but he is nothing more than a coward that used his easily-manipulated cousin to commit an armed robbery." [R p 15 L. 1-5] It is clear from the opening statement that the only way the State could have Arthur Macon convicted of armed robbery was if the jury believed that Colon was an easily manipulated tool who did Arthur Macon's bidding. It is the theme to their entire case.

During the in camera argument of the Motion in Limine, this point was further driven home by Mr. Cathcart's statements and arguments. First he stated, "No, your Honor. That is all we're

proffering as to Mr. Colon's Co-Defendant's condition, his capacity, and also his relationship with the Co-Defendant." [R pp 118 L 25 - 119 L. 3]. A review of his argument to the trial court reveals the importance of this evidence:

> It is not character evidence, it is just evidence of the Defendant's condition as a medical issue.[5] It is not that he is a good person or a bad person, it is that he had a frontal lobotomy from a bullet. It is not going to the truth of what he is saying or not saying. It is just who he is. That is all the testimony is.
>
> As to the hearsay, his father is just saying how he got shot.[6] If he wants to say he was shot between – obviously there is a reason – he was shot in the head. He wasn't there. I'm assuming someone told him. I don't know, maybe that is going to be – fine. I mean, the kid just got shot in the head when he is 16 years old outside of his house. I mean, I don't see how – .

[R pp 120 L. 15- 121 L. 4] As the argument continues it is clear it is necessary for the State to place Colon's "medical issue" into evidence through Woodberry. Obviously Colon testified and could have testified about all matters relevant to the evidence, other than matters which would be inadmissible hearsay. The point was that the state wanted to use Woodberry to testify about inadmissible hearsay matters. In response to Appellant's counsel's argument, Mr. Cathcart states"

> Cathcart: His medical condition.
>
> Goldberg: He is not a doctor.
>
> Cathcart: He is a father that observed his child.
>
> Goldberg: Right, but as far as a medical condition –

[R p 122 L 18-24]. And finally from Mr. Cathcart, " Again, Your Honor, this is not as to character, this is talking about the medical condition of his child." [R 123 L14-19].

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[5] Which is an issue requiring expert testimony in this case.

[6] Woodberry's testimony was not restricted to how Colon got shot.

This argument by the State clearly shows that the intention of introducing the Woodberry testimony was to present inadmissible hearsay evidence to the jury for the purpose of bolstering any testimony of Colon and to present their theory of the case to the jury. That theory is that Colon is brain damaged and mentally ill and is incapable of planning and committing this crime and which allegedly was masterminded by the Defendant.

On page 305 of the trial transcript [R 132] the State did not even ask Colon how the gun shot affected him, mentally or otherwise. [R p 132 L 7- 10]. In fact, there was no question put to Colon with regard to his medical condition. [R p 131 L 21 - 143 L. 16]. It is the position of the Appellant that any questions regarding Colon's medical condition should have been directed to Mr. Colon, or a qualified expert, not allowed through improper inadmissable hearsay. See, *McGhee v. Wells* cited above.

The closing argument by Mr. Cathcart is instructive regarding the purpose of this testimony and why it was inadmissible hearsay which was not harmless error. In several moments of his argument he clearly shows that the theory of the case was that Colon was essentially blameless because of his condition and that Macon was the sole bad actor. Following are some excerpts of his argument"

> But for that man [Macon] there, Jason Colon would not have been there. He never would have done this. He couldn't conceive of doing it but for what he did and led him there.
>
> We are here today because on October 30, 2013, Mr. Colon followed his [Macon] instruction, took a toy gun that was provided to him, altered by him, into the bank.

[R p 166 L. 15-22] This argument makes it clear that the reason the State wanted Woodberry's testimony admitted because their argument was that Macon controlled Colon and Colon could not have planned and executed this robbery.

Further in his argument Mr. Cathcart states that Macon had planned the robbery and told Colon exactly what to do to rob the bank. He then again argues Colon's medical condition, "But it didn't work out that way. Because sometimes when you pick people to do your job for you, especially when you pick a **vulnerable adult**, he doesn't to it quite right. And, he didn't get there fast enough." [R p 168 L 3-7. Emphasis added].

After discussing the facts of the case and the nature of the charges, Mr. Cathcart returns to the theme that Colon was a vulnerable adult and therefore Macon must be guilty.

> And what makes this a unique case is that there is only one person in the bank. But there are two people who are involved in this. There is Mr. Colon, **the vulnerable adult**, and his cousin who is sitting just at the next building away waiting for him with his radio tuned in to Region 3 so he could listen to what is going on.
>
> .....
>
> Everything Jason did, he did. Everything that – God forbid, if he provided him with a rel gun and Jason and panicked and shot somebody, he would be just as guilty of shooting that person.

[R p 170 L 8-24 emphasis added. This argument confirms that the fact the importance of the State showing that Colon is an vulnerable adult and Macon is responsible for the robbery. This is the central theme to the State's case. This argument could not have been made without Woodberry's testimony. This theme continued to be played out in the remainder of the closing argument:

> Proof beyond a reasonable doubt is merely proof that leaves y'all convinced that he did these things, that he sent Jason in there, that he gave him the gun, and that he was waiting for him, listening to the radio with the truck bed down.

[R p 172 L 4-9]. And in his summation, he brings home the point that the jury needs to believe that the Appellant controlled Colon to bring back a verdict against Macon.

I just want to point out, this is a fairly unique kind of case, because Jason Colon was 16 years old and got shot in the head and it changed his life forever. They brought him down here to South Carolina to be amongst family and be safe. Not to be taken advantage of.

[R p 181 L 6-11]. This review of the arguments advanced by the State make it clear that they could not have presented this case against the Appellant had it not been for the trial court allowing the hearsay evidence from Woodberry. And, the testimony regarded medical terms, illnesses and a state of mind to which Woodberry was not qualified to testify.

While most of the issues regarding the expert testimony, hearsay and inadmissibility of Woodberry's testimony are set forth above, the Appellant does want to address some additional considerations and case law. The admission of opinion evidence testimony by a non-expert is grounds for a case to be reversed. *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (S.C. App., 2014). This case relied upon *State v. Kelly*, 285 S.C. 373, 329 S.E.2d 442 (S.C., 1985) wherein the Supreme Court stated that someone who is not qualified as an expert witness may not give an expert opinion. See also, *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (S.C., 2010), where the Supreme Court addresses the necessary that an expert witness be qualified.

All three of those cases are similar to this case. A lay person who was unqualified was allowed to give expert testimony regarding the mental illness and condition of the brain of Colon. Woodberry was not qualified to provide this testimony. As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. In *State v. Pipkin*, 359 S.C. 322, 597 S.E.2d 831 (S.C. App., 2004), this Court ruled that evidence which is merely cumulative is harmless error. However, as set forth above, not only was the error harmless but it was not cumulative as Woodberry was the only witness who testified regarding Colon's mental and medical condition. The police officer did offer his personal observation that Colon was "slow" but clearly was not qualified to discuss the mental and medical condition of Colon. Thus, it is clear that not only was

the evidence improperly admitted, it substantially prejudiced the Appellant. Further, as shown herein, the improper hearsay evidence was the major factor which tied the case against the Appellant together. Without that evidence, the State would not have been able to argue the case or present the case the way it did at trial.

CONCLUSION

A review of the record shows that the Appellant did in fact properly object to the hearsay testimony of Woodberry and that it should have been excluded. It was hearsay and was offered to prove the truth of the matter asserted. Woodberry was not an expert witness and was not qualified to testify whether Colon had suffered a lobotomy or was schizophrenic. He was not a qualified expert witness. In light of the fact that the entire case of the State was tied to the admission of this testimony showing that Colon was incompetent, it is clear that the admission of the evidence was highly prejudicial and that the case should be reversed and remanded to the lower court.

Respectfully submitted, this the 11th day of August, 2016, at Orangeburg, South Carolina.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCAR.

August 11th, 2016

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August 12, 2016

The Hon. Jenny Abbott Kitchings
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Re: The State v Arthur William Macon, Appellate Case No. 2014-2126

Dear Ms Kitchings:

Enclosed you will please find the Appellant's Final Brief, Final Reply Brief, Attorney's Certification together with the Certificate of Service. We also include 15 copies of the final briefs, one of which is unbound. We request that you stamp the copy with the date and time of filing and return it to us in the stamped envelope provided for your convenience. Please call me at 803-413-5676 with any questions. By copy of this letter, we are serving a copy on Counsel for the State of South Carolina.

With kind regards, I am

Yours very truly,

R. Bentz Kirby

cc: Ranee Saunders

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CERTIFICATE OF SERVICE

On the 12th day of August, 2016, the undersigned served a copy of the Final Brief, Reply Brief and Certificate of Counsel on counsel for the Respondent by placing a copy in the United States Mail, postage fully paid, to the following address:

Ranee Saunders
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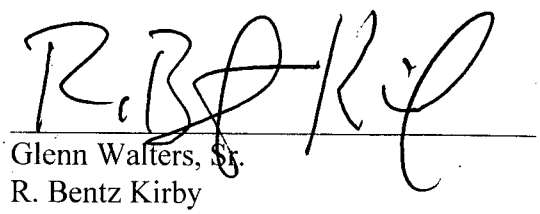

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