

STATE OF SOUTH CAROLINA  
In The Supreme Court

On Writ of Certiorari to the Court of Appeals  
Appeal from Richland County  
Court of General Sessions

The Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272 (S.C. Ct. App. filed 7/5/17)  
Appellate Case No. 2017-001920

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

v.

WAYLAND PURNELL,

PETITIONER.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR RESPONDENT**

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly found the trial judge did not abuse his broad discretion in denying Petitioner's motion for a change of venue because conducting the trial in the Chesterfield County Courthouse did not deny Petitioner his right to a fair and impartial jury.

## STATEMENT OF THE CASE

### Procedural History

Petitioner was indicted at the October 2012 term of the grand jury for Richland County for two counts of criminal sexual conduct with a minor in the first degree and one count of lewd act upon a child. Petitioner proceeded to a trial by jury from July 7-10, 2014, in Columbia, South Carolina. At the conclusion of trial, he was found guilty of lewd act upon a child and one count of criminal sexual conduct with a minor. He was sentenced by the Honorable Clifton Newman to imprisonment for a term of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years' imprisonment for lewd act upon a child, with all sentences running concurrently.

On July 5, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Purnell, Op. No. 2017-UP-272 (S.C. Ct. App. filed July 5, 2017). Petitioner subsequently filed a petition for rehearing, which was denied on August 18, 2017. Petitioner subsequently submitted a Petition for Writ of Certiorari, and this Return follows.

### Factual History

During Petitioner's trial, Defense Counsel made a motion to exclude the qualification of any expert regarding child abuse accommodation syndrome. ROA. p. 189. Defense Counsel asserted the evidence was inadmissible on several grounds. Firstly, the defense argued that any testimony regarding children's behavioral characteristics is an attempt to circumvent State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). ROA. p. 189. Secondly, Defense Counsel argued the testimony violated Rule 702, SCRE, as it did not assist the trier of fact in understanding some component of the trial. ROA. p. 191. Thirdly, Defense Counsel made vague arguments

concerning the reliability of the expert testimony, asserting it was a “junk science.” ROA. pp. 245-246.

To clarify what her testimony would be, the State called its expert witness, Allison Foster, to testify in camera. ROA. p. 192. Dr. Foster is employed as the chief psychologist at the Assessment Resource Center and also maintains a private practice. ROA. p. 193. Dr. Foster completed her undergraduate studies at Emory University and received a Ph.D. in clinical psychology from the University of South Carolina. ROA. p. 195. Over 90% of her career has been devoted to children who have been abused. ROA. p. 195. Dr. Foster frequently conducts lectures and training outside of the Assessment Resource Center for organizations like the National Children’s Advocacy Center in Huntsville, Alabama, the National District Attorney’s Association, and the National Child Protection Center. ROA. p. 195. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. ROA. p. 199. Dr. Foster’s training includes the dynamics of child sexual abuse. ROA. p. 196. The study of the dynamics of child sexual abuse includes the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. ROA. p. 196.

Dr. Foster explained that the process of delayed disclosure is a professional terminology to describe the propensity of some children to not disclose instances of abuse. ROA. p. 197. There is also a phenomenon known as “piecemeal disclosure” where there are stages of disclosure that range from denial to more tentative or active stages of disclosure. ROA. pp. 197-198. Dr. Foster explained that her opinions regarding the process of disclosure are supported by research that is commonly accepted in the scientific community. ROA. p. 199. With respect to her expertise on how memories are encoded and retrieved, Dr. Foster testified there is research to

back up the information she would provide to the jury and the research was peer reviewed. ROA. p. 197. The research supporting Dr. Foster's position is commonly accepted in the psychology community. ROA. p. 198.

Dr. Foster also explained the concept of child abuse accommodation syndrome. ROA. p. 200. Child sexual abuse accommodation syndrome is a term coined by a psychiatrist by the name of Roland Summit. ROA. p. 200. Dr. Summit coined the term "child abuse accommodation syndrome" to describe the dynamics he observed in victims of interfamilial chronic child sexual abuse. ROA. p. 200. The phenomenon has five components: secrecy, helplessness, entrapment in accommodation, delayed tentative unconvincing disclosure, and recantation. ROA. p. 200. The concept of child abuse accommodation syndrome is a concept that continues to be considered clinically acute and helpful. ROA. p. 201. It is commonly taught in forensic interview academies as an aspect that investigators should understand about the dynamics of child sexual abuse. ROA. p. 201. The five characteristics discussed above are not used for diagnostic purposes. ROA. p. 201. Dr. Foster explained she would not be testifying as to whether a child had been abused if the child demonstrated any or all of the five characteristics of child abuse accommodation syndrome. ROA. p. 201.

In an effort to discredit the testimony of Dr. Foster, the defense called Dr. Julie Buck of San Diego, California, to testify in camera. Dr. Buck traveled from San Diego, California to testify in this case. ROA. p. 222. Dr. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in psychology from Florida State University. ROA. p. 222. Dr. Buck currently works full time as a consultant in eyewitness memory cases. ROA. p. 222. Dr. Buck agreed with Dr. Foster's testimony that most children don't disclose during childhood, agreeing that around 60% of children wait until after childhood

to disclose. ROA. p. 226. When a child is interviewed in a high-quality interview setting around 85% of children will disclose the abuse to their interviewer. ROA. p. 226. Dr. Buck opined that she believed the 1983 article written by Dr. Roland Summit on child abuse accommodation syndrome was not supported by research. ROA. pp. 225-226. Dr. Buck further explained that the scientific community is not likely to support the theory of child abuse accommodation syndrome because the research is not there.

After hearing the in camera testimony of Dr. Foster and Dr. Buck, the trial judge ruled:

I find that the testimony is admissible as far as this witness is allowed to testify as an expert witness in this case. I'm not prepared to go so far as to say that South Carolina should adopt this child abuse accommodation syndrome, I don't think that's particularly relevant to the issues in this case or the issues upon which the expert is likely to offer testimony. She is imminent qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children. She had the necessary expertise, training, experience and skills that involves the subject matter based on the testimony of both experts here today that clearly involved matters that would be helpful to the jury in understanding issues in this case, it's involving matters in which the trier of fact may be assisted by a person with specialized knowledge and training. Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function. There has been an adequate amount of scientific research and skills employed to assess the nature of the problems with child sexual abuse victims, this witness can testify generally to those issues involved without seeking to usurp the decision making function of the jury.

ROA. p. 254.

At trial, Dr. Foster was qualified as an expert in the area of the dynamics of child abuse.

ROA. p. 260. Following her qualification as an expert, the trial judge provided the jury a limiting instruction, stating:

The testimony of this witness, Dr. Foster, is being offered to you and may be considered by you only for the purpose of understanding the behavior or the

dynamics of the child sexual abuse victims in general and not as proof that molestation occurred as to any or more of the victims in this case.

ROA. p. 260. Dr. Foster's testimony before the jury mirrored her in camera testimony. Dr. Foster did not testify concerning specific details of Victim 1 and Victim 2's case. Dr. Foster did not review the interviews with Victim 1 or Victim 2. ROA. pp. 271-272. Dr. Foster also did not speak with Ray Olszewski or Alicia Benedetto, the forensic interviewers who interviewed Victim 1 and Victim 2, regarding the facts of the case nor did she discuss the facts of the case with the State or hear testimony from any of the fact witnesses in the case. ROA. p. 272.

## ARGUMENT

**The Court of Appeals properly affirmed the trial judge's qualification of Dr. Allison Foster as an expert in child sex abuse dynamics, and findings that the subject matter of her testimony was sufficiently reliable and outside the realm of a lay juror, and was not offered to bolster the victims' credibility. (Petitioner's Issues I and II).**

Petitioner contends the trial judge erred in qualifying Dr. Foster as an expert in the dynamics of child sexual abuse because there was insufficient evidence of reliability, the subject matter of her testimony was within the realm of lay knowledge and would not assist the trier of fact, and it improperly bolstered the victims' credibility. These arguments lack merit and were conclusively resolved in recent cases.

### **A. Expert Qualification (Petitioner's Issue I)**

Relying almost exclusively on this Court's recent decision in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), Petitioner asserts the trial judge erred in admitting Foster's testimony because "she failed to cite to any specific studies or explain the methods of peer review that were used," and "the subject matter of her testimony, particularly her testimony related to the child sexual abuse accommodation syndrome, is not supported by the research community," and thus the State failed to establish her testimony was reliable.<sup>1</sup>

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the

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<sup>1</sup> Petitioner makes no contention that Foster's qualifications, as reflected by her vast knowledge, experience and training, were insufficient.

technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) (“The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id. In State v. Chavis, this court concluded the testimony of child abuse assessment experts is nonscientific. 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

In Chavis, the trial court qualified two witnesses (Elliott and Griggs) as experts in child abuse assessment. Elliott, who had significant training and experience with the RATAC protocol for forensic interviews, and conducted a forensic interview of the victim, testified it was her expert opinion the victim’s disclosures reflected in a report issued by another forensic interviewer, who was unavailable to testify at trial, constituted disclosures of sexual abuse. 771 S.E.2d at 338-339.

The Supreme Court affirmed, with two justices finding Elliott was sufficiently trained in RATAC protocol, which she used during her forensic interviews, but there was no evidence her conclusions or impressions from those interviews were accurate, and therefore, the trial court erred in qualifying her as an expert. As to Griggs, who also conducted a forensic interview of the victim, the two justices assumed there was sufficient evidence of reliability as to her expert

qualification, but held her testimony about recommending the victim not be around the defendant for any reason improperly bolstered the victim's credibility. *Id.* at 339-340. Ultimately, however, the two justices concluded both errors were harmless beyond a reasonable doubt. *Id.* at 340-341.<sup>2</sup>

Unlike the expert testimony at issue in Chavis, Dr. Foster never interviewed the victims, Mother or law enforcement, and did not render any opinions or recommendations that could even remotely be regarded as specific to the victims, Mother, or the allegations against Petitioner in this case. In fact, she never expressed any conclusions specific to the case at all. Therefore, the discussion of individual reliability referenced in Chavis simply does not apply to this case. See *State v. Jones*, 417 S.C. 319, 332, 790 S.E.2d 17, 24 (Ct. App. 2017) (“Jones primarily relies upon Chavis to support his argument that Galloway–Williams' testimony was unreliable. We find Chavis distinguishable, however, because the expert found to be unreliable in that case was qualified as a forensic interviewer and testified regarding the conclusions she reached after using the RATAC method to interview the victims. In contrast, Galloway–Williams testified in general terms as to child sex abuse dynamics, focusing on delayed disclosures and the responses of nonoffending caregivers.”).

Dr. Foster had specialized knowledge regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse based on her education, knowledge, training, and experience. Dr. Foster is the chief psychologist at the Assessment Resource Center at the Children's Advocacy Center in Columbia. She has a Ph.D. in clinical psychology from the University of South Carolina and was the program director at the Assessment Resource Center

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<sup>2</sup>Two justices concurred in the result, but disagreed with the conclusions of error as to both Elliott and Griggs. *Id.* at 342-43 (Toal, CJ, concurring in part and dissenting in part). The fifth justice dissented, finding the errors were not harmless and the conviction should be reversed. *Id.* at 343-45 (Hearn, AJ, dissenting).

from 1995 to 2012. She conducted forensic interviews, therapy with child victims of sexual abuse, and training on things like child development, language, memory, dynamics of child sexual abuse, and the process of disclosure. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. In addition to testifying in South Carolina, she has testified in Utah, District Courts in Chicago, Colorado, Iowa, Georgia, and proceedings in the U.S. court martial system. ROA. pp. 259-260. Dr. Foster testified there was research to back up the information she would provide to the jury and that research was peer reviewed. ROA. p. 197. Dr. Foster specifically testified her position is commonly accepted in the psychology community. ROA. p. 198,

The primary focus of Petitioner's argument regarding reliability is Foster's alleged inability to recall from memory the citations to specific studies and articles supporting her position, aside from a 1983 article by Roland Summit. This argument ignores her superb qualifications and significant field experience working with children and examining their behavioral characteristics, as well as her assurances that the research supporting her testimony was in fact commonly accepted in the psychology community and the studies were subject to peer review. Petitioner also fails to acknowledge the lack of any studies indicating all the studies supporting her testimony were unreliable, and the so-called expert produced by the defense to rebut Dr. Foster's claim was an expert in eyewitness memory flown in from San Diego, California. Considering her testimony in its entirety, it is clear Dr. Foster's expert testimony was based on accepted principles in the field of child sex abuse assessment and treatment, and inherently reliable.<sup>3</sup> This Court should deny certiorari.

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<sup>3</sup>This type of expert testimony is recognized and admissible in numerous jurisdictions, and discussed in legal publications. See 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) ("[F]rom a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such

## B. Necessity of Expert Testimony and Improper Bolstering (Petitioner's Issue II)

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. Anderson, 413 S.C. 212, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise [child abuse assessment]: this is the type of expert who can, for example testify to the behavioral characteristics of sex abuse victims.") (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 [1993]; Weaverling, and State v. White, 361 S.E. 407, 605 S.E.2d 540 [2004])<sup>4</sup>; State v. Smith, 411 S.C. 161, 767 S.E.2d 212, 217-18 (Ct. App. 2015) (cert. denied June 17, 2015) ("When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim's feelings of shame over what happened and the victim's fear of or intimidation by the perpetrator. We find this was an appropriately general explanation [by an expert witness] of the medical or scientific reasons a child might not immediately disclose sexual trauma.")

Contrary to Petitioner's assertions, as expressly recognized by the Supreme Court in Anderson, the behavioral characteristics of child sex abuse victims is **not** a subject familiar to the

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testimony is not worrisome." [footnotes omitted]); see also Elizabeth Trainor, Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case, 85 A.L.R. 5th 595 §3 (Originally published in 2001) (discussion of testimony regarding general behavioral characteristics of sex abuse victims and list of cases addressing the issue).

<sup>4</sup>Petitioner continues the defense bar's attempts to relegate Weaverling and Schumpert to "outdated" status after State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). This completely ignores this Court's affirmation of those cases in Anderson.

common juror. In the absence of experience dealing with child sex abuse, it is unreasonable to think a lay person has sufficient knowledge regarding the impact of sex abuse on children and their behavior for even a basic understanding of how abused children may respond to the abuse and/or the perpetrator. It is equally unreasonable to think a lay person has sufficient knowledge of non-offender caregiver behavior to understand how they may respond in such situations. Indeed, much of victims' and caregivers' actions seem counter-intuitive to people who have never experienced the horror of sexual abuse. Therefore, an expert with specialized training and experience dealing with child sex abuse victims and non-offending caregivers, such as Dr. Foster, can assist the jury in understanding their behavior. See White, 605 S.E.2d at 544 (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); State v. Brown, 411 S.C. 332, 342 768 S.E.2d 246, 251 (Ct. App. 2015) ( cert. denied August 6, 2015) (“We believe the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse. The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.”)

Dr. Foster's testimony in this was is the type of expert general behavioral testimony recently affirmed in Anderson, Jones, and Brown, and previously approved in Schumpert and Weaverling. Despite Petitioner's continued insistence the substance of Dr. Foster's testimony was not outside the realm of ordinary lay jurors, a contention already soundly rejected by South Carolina courts, 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).

Petitioner's contention that the only purpose of Dr. Foster's testimony was to improperly bolster Victim 1 and Victim 2's testimony is also rebutted by recent cases. See Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 252-53 (distinguishing improper bolstering when the expert conducted the forensic interview compared to independent mental health experts who address general behavioral characteristics."); Jones, 417 S.C. 319, 335, 790 S.E.2d 17, 226 ("Because Galloway-Williams never commented on the credibility of Mother or the Victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims and nonoffending caregivers, we find her testimony did not improperly bolster their testimonies. The fact that her testimony corroborated some of the Victims' reasons for delaying disclosure of the abuse, or Mother's failure to act when she became aware of it, does not mean Galloway-Williams' testimony improperly bolstered their accounts."). Brown and Jones support the position that Petitioner'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), State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), and State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) is misplaced. In Jennings, this Court held the report prepared by a forensic interviewer 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.'" 394 S.C. 480, 716 S.E.2d at 94. See also McKerley, 397 S.C. at 467, 725 S.E.2d 139 ("In this particular case, none of this testimony has any relevance except insofar as it informs the jury Smith believes the story told by the victim. As Justice Pleicones explained in Jennings "[t]here is no other way to interpret the language used in [Smith's testimony] other than

to mean [she] believed the [victim was] being truthful.”) (Citing Jennings, 394 S.C. at 480, 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, 297 S.C. 386 at 393, 377 S.E.2d at 302 (therapist testified his impression was that victim’s symptoms were genuine); Dempsey, 340 S.C. 656 at 57-72, 532 S.E.2d at 308-10 (therapist testified children alleging sexual abuse were truthful 95% to 99% of the time, and he concluded victim was reliable). In this case, Dr. Foster 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. Therefore, the analysis and holdings in Jennings, Dawkins, Dempsey, and McKerley do not apply to this case.

Dr. Foster’s testimony about general behavioral characteristics did not rise to the level of improper bolstering. “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)). Dr. Foster gave general testimony on the dynamics of child sexual abuse, specifically testifying about the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. Dr. Foster offered no testimony where she offered any opinion on whether the victims were telling the truth. In fact, she specifically testified she had not reviewed the forensic interviews, spoken with the forensic interviewers about the facts of the case, or heard any testimony from the fact witnesses in the

case. This establishes that Dr. Foster was testifying generally and was disengaged from the facts in this particular case. The fact that Dr. Foster's testimony provided insight into the behavioral characteristics of abused children does not equate improper bolstering. This Court should deny certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 18, 2017

STATE OF SOUTH CAROLINA  
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**PROOF OF SERVICE**

I, Destiny Blue, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Lara M. Caudy, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 18<sup>th</sup> day of October, 2017.

  
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