THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2017-001016

The State, Respondent

v.

Gabriel Betancourt, Jr., Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

Following the victim's ("Minor") disclosure of allegations of sexual abuse to a teacher, Trial Tr. p. 158-160, Mar. 20-24, 2017, Appellant Gabriel Betancourt was indicted for three counts of first degree criminal sexual conduct with a minor (CSC) (2015GS2308459; 2017GS2301209A; 2017GS2301210A), one count of third degree CSC (2015GS2308457), one count of lewd act on a child (2017GS2301207A), and one count of disseminating pornographic material to a minor (2017GS2301206A).[1] Appellant was tried by jury in March 2017 before Honorable Donald B. Hocker. Appellant testified in his own defense and denied all allegations of sexual abuse. Tr. p. 451-484. Appellant was acquitted on one count of first degree CSC and dissemination of porn to a minor. Tr. p. 675-676. The jury found Appellant guilty of the remaining charges. Tr. p. 675-676. At sentencing, the trial court found no mitigating circumstances and imposed a sentence of 45 years imprisonment for each count of first degree CSC and 15 years imprisonment for both third degree CSC and for the lewd act with a minor charge, all to run concurrently. Tr. p. 688. Following the denial of Appellant's post trial motion, Appellant timely filed a Notice of Appeal on April 21, 2017.

[1]Although the offense conduct is essentially indistinguishable, Appellant was charged with both a lewd and lascivious act on a child under the age of sixteen, S.C. Code Ann. § 16-15-140 and CSC with a minor in the third degree, § 16-3-0655(C) (2015) because Minor alleged that Appellant committed such offense multiple times on separate occasions, one prior to and following the statutory change.

STATEMENT OF FACTS

The aforementioned charges arose after ten-year-old Minor told a teacher that she had been touched inappropriately by her "'dad'" on January 14, 2015. Tr. p. 117:11. Investigator David Picone, one of the responding officers, took statements from various teachers, a school counselor, Minor, and Minor's mother ("Mother"). Tr. p. 118, 127. In her statement, Picone testified that Minor stated who abused her and disclosed only general information about the alleged incidents of sexual abuse at that point. Tr. p. 159-160. At the time of Minor's disclosure, Appellant and Mother had been dating and living together for about eight years. Tr. p. 461. Picone also testified that when Mother gave her statement at the school, she was shocked and extremely upset about the allegations and threatened to harm Appellant. Tr. p. 158-159. Picone testified that he had to instruct Mother not to illicit any details about the allegations from her daughter prior to a subsequent interview at the Judy Valentine Center ("Center"):

> And I asked her, you know, please don't discuss this with her daughter. You know, it's already traumatic enough on the children. I usually ask the parents not to ask any questions because when they - - for an interview, we want them to, you know, the information they provide to come from their mouth and not be given by the parents. Tr. p. 157: 3-14.

Minor went home from school with her mother that day. Tr. p. 160: 22. Picone and Mother did not have any contact from the date of disclosure on January 14, 2015 until January 26, 2015, when Mother contacted Picone to supplement her statement at the school with more information Tr. p. 161: 15-25. Picone testified that during that conversation, Mother was extremely angry and said she wanted to kill Appellant. Tr. 162: 6-9. Picone testified that he had to explain to Mother to "'please let me continue the investigation.'" Tr. 162: 6-9.

At trial, Mother testified that before Minor's disclosure on January 14, 2015, she had explained to Minor, although not in great detail, that she herself had been raped twice when she was nine and fourteen years old. Tr. p. 312:17-21; 313. Mother was diagnosed with schizophrenia and Bipolar Disorder at a young age, and testified that Minor may be schizophrenic or bipolar from the symptoms in Minor that she had seen. Tr. p. 313:18-25, 314-315. Additionally, prior to Minor's disclosure, Mother also explained to Minor that Minor's biological father had sexually abused Minor as an infant. *See* DVD of Forensic Interview, Julie Valentine Center, Feb. 3, 2015 ("DVD"). The trial court excluded all mention of these allegations and redacted Minor's recorded interview to remove the statements. Tr. p. 70. However, Mother testified that due to her own sexual assault experiences, she had not allowed Minor's biological father to change her diaper. Tr. p. 312: 19-25, 313:1-17. Specifically, Mother testified she told Minor that:

> I didn't want you know your [biological] father to change your diaper. I don't think its right. I don't want something to happen. You know, because always in the back of my mind every single person that walks by has the capability to do something grotesque. It's whether or not they act on it. Tr. p. 313:11-17.

Further, at trial, the teacher to whom Minor first disclosed the alleged abuse testified that Minor told her she had been touched inappropriately by her "'dad.'" Tr. p. 117:11. Minor later stated that she did not call Appellant "dad" during his relationship with her mother, and that she did not think of him as her dad. Tr. p. 224-225:8-11.

Further, after Minor's disclosure and prior to her interview at the Center on February 3, 2015, Mother discussed the allegations with other family members, as well as with Minor when Minor approached her about it. Tr. p. 317. Between Minor's disclosure and her interview at the Center, Mother testified that she "actually went into detail with

[Minor]" when explaining to Minor her own sexual assault experiences. Tr. p. 312:12-13. Mother was aware that Minor was going to be interviewed at the Center for the purposes of investigating and collecting evidence against Appellant. Tr. p. 317. During that interview, Minor stated: "my mom told me this was coming" and "my mom told me this was going to happen." DVD.

The interview was recorded, which was entered into evidence and played for the jury at trial. Tr. p 371-72. Minor testified that she explained "a lot more about what happened" in the interview Tr. p. 245: 19-22, such as detailing the various instances of Appellant inappropriately touching her with his fingers; striking her; raping her orally, vaginally, and anally; and forcing Minor to watch pornography as well as watch Appellant and Mother have sex. DVD. Minor also described what she wore on several of those occasions, like a purple tank top and a red dress that was part of Mother's Halloween costume in 2014. DVD. Specifically, Minor stated that Appellant made her wear the dress, without underwear, about five times total. DVD. Minor told the interviewer that on one occasion, Appellant backhanded her, knocking her tooth out, when she wore shorts underneath the dress, and that she fought back until he slapped her, knocking her out. DVD. Minor also said that while wearing the dress, Appellant made her submit to oral sex and vaginal sex, and that "a little pus came out of his penis." DVD. Minor stated that the last time she wore the red dress was just a few weeks before her disclosure on January 14, 2015. DVD. The red dress, the purple tank top, and bed sheets were seized after a search of the family home shortly after the interview. Tr. p. 160: 4-7. Each of those items tested negative for Appellant's DNA. Tr. p. 171-172, 176: 1-12, 246: 17-22.

Further, Minor then twelve years old, testified live at trial. Tr. p. 221. She identified a photograph of the red dress but first testified that she did not remember what, if anything, Appellant did to her when she was wore it. Tr. p. 234: 18-25, 235:17-25. However, Minor later testified that Appellant hit and knocked out her upper "pointy tooth", "the third tooth" while wearing it. Tr. p. 247: 3-21. Minor also testified to various incidents of sexual abuse that she had alleged against Appellant during the interview, but denied or could not recall other entire incidents or their details at trial. For example, Minor testified that Appellant had put his mouth near her "wrong spot" [genitals] starting from age five until she was ten, but also stated she could not remember what exactly happened when did that. Tr. p. 228: 2-8; *contrast with* DVD. The State then elicited testimony about Minor's previous addresses and elementary schools during that five year time period in order to pinpoint what alleged incidents occurred when and where. Tr. 223, 228-234. Minor provided each address and school, even identifying one certain address by photograph, and stated both in the interview and at trial that she remembered Appellant "touching [her] in a way [she] didn't like" at that house and testified that he had put his fingers, penis, or some other object in her bottom at that house. Tr. p. 231: 5-9. However, she also testified that she did not remember any kind of sexual abuse happening at that same house. Tr. p. 230: 7-16; *contrast with* DVD.

At trial, child abuse pediatric expert Mary Fran Croswell, M.D., testified that a physical examination of Minor showed that her genitals were normal, but also testified that a normal exam did not rule out sexual trauma. Tr. p. 338-339, 345, 347, 355. The State also called social worker Erica Von Wagner to testify, who was qualified as an expert in the "treatment of children for sexual abuse and trauma." Tr. p. 250, 254,

255:17-25-256. After extensive proffer testimony and over defense counsel's objections Tr. p. 260-269, 274-279, Wagner testified to the general symptoms of sexual trauma-induced Post-Traumatic Stress Disorder (PTSD), Minor's PTSD symptoms and "clinically significant" high PTSD diagnosis, as well as Minor's treatment in trauma focused-cognitive behavior therapy, and pace of progress. Tr. p. 256-258, 281-286.

Finally, the State called Linda Hutton, a clinical social worker, to testify as a blind expert in the field of child sex abuse treatment; specifically, the subject of delayed disclosure of sexual abuse by children. Tr. p. 429. Defense counsel objected to admitting Hutton as an expert on a myriad of grounds: the absence of reliability in her methodology; no specialized knowledge or skill was required for her testimony, which consisted of only personal observations; her testimony as an expert was not necessary or helpful to the jury in determining an issue; the bolstering or credibility vouching effect of her testimony; and the resulting unfair prejudice. Tr. p. 374: 11-22, 380-385, 404, 409-416, 425. During additional *voir dire*, Hutton testified that what constitutes delayed disclosure is "in the eyes of the beholder" Tr. p. 394: 10-14 and could not estimate as to the number of delayed disclosure cases versus immediate disclosure cases amongst her 12-15 current patients or over the span of her career. Tr. p. 396: 7-15, 397. Hutton's office kept no statistics on the subject and she was unfamiliar with any published statistics on the matter. Tr. p. 397: 13-15. Hutton did not know whether the issue is peer reviewed and in forming her opinion, she relied upon no text, article, or publication. Tr. p. 398: 3-25, 406:21-25, 407:1-2. Hutton could not testify as to what quality control methods she used and could not provide a rate of error. Tr. p. 405: 18-25, 406: 1-11. The trial court overruled all objections and found Hutton's testimony reliable. Tr. p. 417:14-

25, 418. In the presence of the jury, Hutton broadly testified to what is common in these cases, such as (1) the types of perpetrators; (2) the behavior and symptoms of child sexual abuse victims; (3) the reasons children do not initially disclose; (4) the physical manifestations of abuse children experience later on, such as nightmares; and (5) the high frequency of delayed disclosures. Tr. p. 430: 23-25, 431-436. Lastly, Hutton testified that in her 42 years of experience, she had never run across a child who had made false allegations of sexual abuse. Tr. p. 441: 9-16.

The jury began to deliberate at 4:13 p.m. on March 23, 2017. Tr. p. 665: 14. Following a jury question at 6:10 p.m. to watch the video of Minor's interview again, Judge Hocker's law clerk brought his laptop into the jury room so that they could view it without the risk that they would browse the internet or other areas of the laptop. Tr. p. 669:7, 18-25; 670:1-4. Following the jury question at 6:10 p.m. and an off-the-record discussion, the law clerk stayed in the jury room with the jury until around 7:23 p.m. when the jury was brought back into the courtroom. Tr. p. 669: 7, 12, 671: 19-25. During that time, the jury watched and discussed the interview and otherwise deliberated in the presence of the law clerk. Tr. p. 670: 4-9. Judge Hocker stated for the purpose of updating the record that he was absolutely confident that his law clerk did not participate in the deliberations but had concerns about her remaining with the jury. Tr. p. 670: 10-16. The law clerk did not speak on the record.

ARGUMENT

II. THE TRIAL COURT ERRED IN FINDING THAT A TREATING EXPERT WITNESS DID NOT IMPROPERLY BOLSTER THE MINOR VICTIM'S CREDIBILITY BY TESTIFYING ABOUT THE MINOR VICTIM'S POST-TRAUMATIC STRESS DISORDER DIAGNOSIS AND SYMPTOMS.

A trial court's decision to admit or exclude expert testimony will be reversed on appeal when the decision constitutes an abuse of discretion accompanied by probable prejudice. *State v. Brown*, 411 S.C. 332, 338, 768 S.E.2d 246, 249 (Ct. App. 2015) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the circuit court's conclusions 'either lack evidentiary support or are controlled by an error of law.'" *Id.* (quoting *State v. Kromah,* 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013)). An abuse of discretion in admitting expert testimony occurs where "the ruling is manifestly arbitrary, unreasonable, or unfair," and there is "a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* at 338-339 (quoting *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003); *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Here, the trial court abused its discretion in admitting Wagner's expert testimony about PTSD in children generally, as well as her testimony about Minor's specific PTSD symptoms, her behavior, and her progress during their counseling sessions together. Tr. p. 250, 254, 255:17-25, 256, 282, 284-285. Defense counsel's objections Tr. p. 260: 15-16, 262:1-16, that Wagner's testimony improperly bolstered or vouched for Minor's credibility were overruled by the trial court, citing in its ruling: *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015) (affirmed as modified by 418 S.C. 500, 796 S.E.2d 26 (2016)); *State v. Brown*, 411

S.C. 332, 768 S.E.2d 246 (2015); and *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). Tr. p. 263-265, 266: 13-25, 267:1-4, 277:11-25, 278.

Wagner's testimony strikes at the heart of what *State v. Kromah* and its predecessors were decided to prohibit as Wagner's testimony indirectly vouched for Minor's credibility and was unduly prejudicial. In *Kromah*, the South Carolina Supreme held that an expert's testimony improperly vouched for the truth of the child victim's allegations when she testified that from interviewing the child, she made a "compelling finding" of physical abuse. 401 S.C. 340, 350-51, 359, 737 S.E.2d 490, 495-96, 500 (2013). The Supreme Court reasoned that the testimony was "the equivalent of [ ]stating the Child was telling the truth." *Id.* at 359, 737 S.E.2d at 500. The Supreme Court explained that "'[t]he assessment of witness credibility is within the exclusive province of the jury,'" and witnesses are usually prohibited from testifying whether another witness is being truthful; and when done by an expert witness, the impermissible harm is compounded. *Id.* at 358, 737 S.E.2d at 499-500 (citations omitted). The Supreme Court went on to advise what is and what is not proper testimony during a CSC trial, including in the list of improper testimony the following:

> • any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
> • any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
> • an opinion that the child's behavior indicated the child was telling the truth. *Id.* at 360.

Here, Wagner generally defined "trauma", PTSD, and the common symptoms that are seen in children that have suffered sexual abuse, such as fear; "depression, anger, irritability"; and avoidance, as in "trying not to think about, or avoiding people or places or things that reminds them of that event that happened." Tr. p. 259:16-25, 260: 2-11.

Wagner then testified that Minor specifically presented a number of the symptoms common in children that had suffered sexual abuse such as irritability, anger, a "high score for avoidance symptoms", flashbacks, nightmares, and trouble sleeping. Tr. p. 281: 5-15. Wagner testified that these symptoms were symptoms of PTSD and that she had diagnosed Minor with a "clinically significant" high score for PTSD. Tr. p. 281: 16-25, 282: 1-22. Wagner's diagnosis of Minor and testimony that Minor's symptoms were PTSD symptoms common in children that had suffered sexual abuse improperly vouched for Minor's credibility. Her PTSD diagnosis and her testimony that Minor's clinically significant PTSD score was clinically significantly for PTSD are in this way no different than testifying that there was a "compelling finding" for sexual abuse and that Wagner believed the victim. *See Kromah*, at 359, 737 S.E.2d at 500. There is no other reasonable way for the jury to interpret this testimony because if Wagner had not believed Minor's allegations of sexual abuse or had not believed Minor was telling the truth, then Wagner would not have interpreted her symptoms as those of PTSD stemming from trauma like sexual abuse and would not have diagnosed Minor with PTSD. *See State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) ("In each report, the forensic interviewer stated that during the interviews, each child had 'provide[d] a compelling disclosure of abuse by [appellant].' There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful."). *See also State v. McKerley*, 397 S.C. 461, 465-66, 725 S.E.2d 139, 142-143 (Ct. App. 2011) (holding it was reversible error to admit expert testimony regarding what forensic interviewers look for to determine if a child is telling the truth and from there finding that the interviews with the specific victims in the case were "'compelling for sexual abuse'"

because such testimony was "nothing other than her inadmissible opinion as to whether the victim was telling the truth."); *State v. Dawkins*, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (holding that it was error, but only harmless error, for a treating psychiatrist to testify that the victim's symptoms were genuine); *Smith v. State*, 386 S.C. 562, 567-69, 689 S.E.2d 629, 631-33 (2010) (holding that trial counsel was ineffective for failing to object to the expert's testimony that she found the victim's statement to be believable and that the victim had no reason to lie). From her testimony, it is not as though Wagner's PTSD diagnosis could have been based on a traumatic event in Minor's life other than the alleged sexual abuse. Wagner also phrased her findings in a way that treated the occurrence of Minor's sexual trauma as fact: "Her treatment goal was to forget about *what had happened*" Tr. p. 256: 23-24, "She progressed in treatment." Tr. p. 286:1-9. Vouching is further evident here because without a different possible traumatic event underlying Wagner's diagnosis, there is nothing else besides sexual trauma for the jury to assign to "what had happened" that Minor wanted to forget and what she was progressing from.

Further, the trial court's improperly relied on *State v. Brown*, *State v. Weaverling*, *State v. Schumpert*, and *State v. Berry* here in finding such testimony admissible as each of these cases are significantly distinguishable from the instant case. For example, Wagner counseled Minor personally over six months, unlike in *Brown* and *Weaverling*, where the testifying experts had not personally met or treated the child. *See State v. Brown*, 411 S.C. 332, 768 S.E.2d 246, 251, 253 343, 345 (2015) (holding that the expert did not vouch for the victim's credibility in testifying generally regarding the reasons why children delay in disclosing sexual abuse, noting that the expert was sequestered

before testifying, and had not reviewed any materials specific to the victim, and neither treated or met the child); *State v. Weaverling*, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct. App. 1999). Also unlike *Brown* and *Weaverling*, the experts did not testify specifically to the victim in those cases, unlike Wagner who testified specifically about Minor's symptoms and PTSD diagnosis. *Brown,* 411 S.C. at 343-46, 768 S.E.2dat 251-53 (holding that the expert did not vouch for the victim's credibility, reasoning in part that the expert did not restate the victim's allegations or comment on her specific symptoms); *Weaverling*, 337 S.C. at 474. *Id.* at 337, 768 S.E.2d at 248-49. Moreover, *State v. Berry* is distinguishable from the instant case because although the expert in *Berry* did treat the victim in that case, the expert's testimony "regarding behaviors she witnessed in the victim was proper because it was based on her personal observations." 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015). Further, like *Berry*, *State v. Schumpert* is also distinguishable from the instant case because the expert testified to the behavior she personally witnessed the victim exhibit. 312 S.C. 502, 505-06, 435 S.E.2d 859, 861-62 (1993) (overturned on other grounds). Unlike in *Berry* and *Schumpert*, Wagner did not testify as to what behaviors or symptoms she personally saw Minor engage in, *i.e*, like she appeared nervous, anxious, etc. Without such testimony, Wagner's testimony about Minor's symptoms appears to be based solely on what Minor told Wagner she was experiencing. Wagner also went further than the experts in *Berry* and *Schumpert*, as the "clinically significant" PTSD diagnosis left the jury essentially no room to decide for themselves: whether Minor's symptoms fit Wagner's general description of such symptoms; whether Minor did indeed have PTSD; and if she did, whether that PTSD was triggered by the sexual abuse she alleged. As a result of Wagner's testimony, the only reasonable

interpretation remaining was that because Wagner diagnosed Minor with PTSD, Minor did indeed develop PTSD, which was the result of sexual abuse. From there, the sexual abuse she alleged thus must have occurred, and therefore, Minor told the truth when she made the allegations.

Further, the error in admitting these portions of Wagner's testimony was not harmless error. First, following Wagner's testimony regarding Minor's PTSD, Wagner testified that Minor had told her during the counseling sessions that she had been sexually abused and the details of it. Tr. p. 284: 21-25; 285:1-8. This thus represented as fact to the jury that as an expert, Wagner must have believed that Minor was telling the truth when she told Wagner the details of her sexual abuse because she later diagnosed Minor with PTSD. *See Kromah*, 401 S.C. 340, 357, 359, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Moreover, the error is not harmless because there was no curative instruction following such testimony. *See State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) ("[T]he trial court's curative instructions during and immediately following Elsey's testimony sufficiently cured any prejudice to Dempsey flowing from the improper vouching."). The resulting prejudice here is compounded when considering that Minor's physical examination was normal, albeit inconclusive and Appellant's DNA was not found on the clothing and bed sheets alleged to have been used during the sexual abuse. Tr. p. 338-339, 345, 347, 355, 171-172, 176: 1-12, 246: 17-22. *See also State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) ("[T]he trial court's admission of the reports did not amount to harmless

error. There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless."). Moreover, Minor's testimony at trial varied widely from the allegations she made at the Center during her interview, *see supra* p. 9-10, making her credibility all the more important to the verdict. *See Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding trial counsel's failure to object to improper bolstering met the prejudice prong under *Strickland* because the case hinged on the victim's credibility due to conflicting witness testimony and an otherwise absence of overwhelming evidence of the defendant's guilt). Indeed, Mother, who expressed her desire to harm Appellant numerous times following Minor disclosure, admitted that she had no indication to believe that Minor had ever been beaten or sexually abused prior to her disclosure. Tr. p. 311: 13-19.

Therefore, the trial court committed reversible and prejudicial error in admitting such testimony.

II. THE TRIAL COURT ERRED IN ALLOWING A CLINICAL SOCIAL WORKER TO TESTIFY AS AN EXPERT REGARDING DELAYED DISCLOSURE OF SEXUAL ABUSE BY CHILDREN. BECAUSE HER METHODOLOGY WAS NOT RELIABLE AND HER TESTIMONY WAS NOT HELPFUL TO THE JURY AND REQUIRED NO SPECIALIZED KNOWLEDGE, EXPERIENCE, OR SKILL.

If scientific, technical, or otherwise specialized knowledge will assist the jury in understanding the evidence or determining a fact in issue, a witness may be qualified as an expert to testify on a particular subject. Rule 702, SCRE. Pursuant to Rule 702, before an expert can testify on either scientific or non-scientific subjects:

> [t]he trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (citing *State v. Douglas,* 380 S.C. 499, 671 S.E.2d 606 (2009); *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997); *State v. Council,* 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)) (internal citations omitted). *See also State v. Brown,* 411 S.C. 332, 339–42, 768 S.E.2d 246, 250–51 (Ct. App. 2015) (affirming the admission of expert testimony on child sex abuse dynamics when the foundation was properly laid under *Watson*); *State v. White*, 416 S.C. 135, 138-39, 784 S.E.2d 695, 696-97 (Ct. App. 2016) (affirming the admission of expert testimony from a forensic interviewer on child sex abuse dynamics under *Watson*).

Although "there is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence", there must still be "some evidence demonstrating that the individual expert is able to draw

reliable results from the procedures of which he or she consistently applies" in order to admit expert testimony on a non-scientific subject matter. *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) (citing *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009)). *See White*, 382 S.C. at 273, 676 S.E.2d at 688 (holding that for non-scientific testimony, two threshold determinations must be made before an expert can testify: (1) there must be a determination that the expert's qualifications are sufficient; and (2) there must be a determination that the expert's testimony will be reliable).

In *State v. Chavis*, the South Carolina Supreme Court held that the trial court erred in qualifying forensic interviewer Debbie Elliot as an expert in child abuse assessment because there was insufficient evidence of reliability in her testimony to meet the second prong of *White*. 412 S.C. at 107-08, 771 S.E.2d at 339. Specifically, the Supreme Court held that because there was no evidence as to Mrs. Elliott's ability to draw reliable results from the procedures she consistently followed, and the Court held that the threshold reliability requirement of Rule 702 was not met. *Id.* at 108. In so holding, the Court looked to the absence of peer review, error rate, and quality control from her methodology:

> [A]lthough Mrs. Elliott was sufficiently trained in RATAC protocol, and that she used RATAC protocol during her interviews, there is simply no evidence that her conclusions or impressions taken from these interviews were accurate....[W]hen asked if there was any way to discern what her error rate was, she responded "no." Her only peer review involved one other interviewer reviewing her work to ensure she was using RATAC protocol. When asked what her quality control procedures were, she responded "I use R[A]TAC protocol every time in the interview room."

Id. at 108. Here, similar to *Chavis*, there is no contest to Hutton's individual qualifications under the first prong of *White*; however, the State failed to demonstrate

sufficient reliability for Hutton to be qualified as an expert to testify about children delaying the disclosure of sexual abuse.

Similar to Mrs. Elliot's conclusions, there is simply no evidence that Hutton's conclusions regarding the reasons for and frequency of delayed disclosure are accurate. During proffered testimony, Hutton testified that she uses no specific method or protocol, and testified that "I use a variation. I tend to mark things as soon as I get a file. But, you know, the most common is trauma-focused cognitive behavior therapy. I use aspects of that. I use whatever I have found that has worked." Tr. p. 402: 10-18. When asked to explain what her methods specifically involved, Hutton vaguely described it as, "[G]enerally ten to twelve sessions, and there's different topics that you work from. It's helping the youngster to master what's happened. It's a treatment, a treatment method." Tr. p. 403: 4-8. From her proffered testimony, it appears that Hutton works primarily off of hearsay, namely from her own interviews with the child and from any information she receives from the Department of Social Services or the Judy Valentine Center. Tr. p. 393: 20-25, 394: 1-5. Considering that Hutton practiced no quality control methods, she has no way to test or discern the information she relies upon in counseling children and forming her conclusions, at the very least in cases where eyewitness or physical proof of sexual abuse are absent. Tr. p. 405:18-25, 406: 1-3. Additionally, Hutton could not state what her rate of error is and has no way to discern it. Instead, she vaguely testified that, "Well, in treatment, what I try to do is try to use interventions that would mostly be successful. And so it's just looking at whether those succeed or not." Tr. p. 406:4-11. Further, all she that could say about the frequency of delayed disclosure was "I do not have specific research that I can attach that to, just clinical practice. It's common." Tr. p. 399: 9-15.

Yet, Hutton's office did not keep statistics, and she was unsure as to how many of the 12 to 15 children she was then currently counseling were immediate or delayed disclosure cases. Tr. p. 396: 22-25; 397: 1-15. Also, Hutton could not provide one study, text, or publication that she reviewed or relied upon in forming her opinions about delayed disclosure. Tr. p. 397: 16-25, 398:1-3. She was also unsure as to whether delayed disclosure in children was peer-reviewed. Tr. p. 398: 3-25.

Also during proffered testimony, Hutton failed to sufficiently delineate what delayed disclosure is. She testified that delayed disclosure could essentially be any period of time longer than 24 hours and she provided no criteria that she uses in determining whether a certain length of time is or is not delayed disclosure in any given case. Tr. p. 394:16-25, 395: 1-21. Indeed, Hutton testified that what constitutes as delayed disclosure is "in the eyes of the beholder." Tr. p. 394: 10-15.

Overall, Hutton testified that her job was all about the healing process. Tr. p. 391: 2-4. However, she never did or could explain how her work in the healing process is relevant to delayed disclosures, or that it has any connection to delayed disclosures. Significantly, Hutton failed to explain how delayed disclosure relates to her ambiguously described methodology—cognitive behavior therapy—or how any results from cognitive behavior therapy helped form her opinions about delayed disclosures. Further, even though she has no way of reliably ascertaining the accuracy of the information provided by children when forming her opinions, Hutton vaguely explained that a child's disclosure may be incomplete or inconsistent because it is common for children with a history of chronic abuse to have "more specific memories over others," and that those children can "block out some details" and "[s]ome of the peripheral stuff may not be

consistent" but "the core details remain pretty consistent." Tr. p. 435: 18-22, p. 436: 1-19. Yet, she did not explain how or even why this may be. Moreover, despite the absence of quality control methods and a rate of error, Hutton stated none of the children she had ever counseled lied about the sexual abuse they suffered. Tr. p. 406: 12-20.

Therefore, there is no basis to deem Hutton's methodology sufficient to draw reliable results to make her opinions reliable. Thus, the trial court erred in finding her expert testimony reliable and admissible.

Additionally, even if her testimony was reliable, Hutton's testimony should have been excluded because it required no specialized knowledge or skill and was not beyond the jury's own judgment and common knowledge. "Expert opinion testimony is generally not admissible when the matter is within the jury's common knowledge or range of experience." *McBeth v. TNS Mills, Inc.*, 318 S.C. 388, 392, 458 S.E.2d 52, 54 (Ct. App. 1995) (citations omitted). In *McBeth*, the South Carolina Court of Appeals affirmed the trial court's decision to exclude the testimony of a security expert regarding the foreseeability that a stabbing would occur in the defendant-employer's parking lot. *Id.* at 390, 458 S.E.2d 53. During his proffered testimony, the security expert opined that the employer failed to provide adequate security due to his failure to: (1) properly supervise shift changes; (2) investigate disturbances between employees; (3) formulate a security plan; and (4) know all of the previous security breaches on the premises. *Id.* 393, 458 S.E.2d at 54-55. The Court of Appeals held that the expert's opinion testimony on the issue of foreseeability was unnecessary and inadmissible because the evidence made the jury fully aware of the prior disturbances on the premises and the security measures

routinely exercised on the property, and thus, the jury could make a common sense determination on the issue of foreseeability on its own. *Id.* at 55.

Here, whether Minor delayed disclosure of the alleged abuse and why was within the province of the jury. From the evidence and testimony presented at trial, it is apparent that Minor's alleged abuse continued for five years before she first reported it to her teacher. Tr. p. 226: 12-17; DVD. Minor also testified that Appellant had hit and struck her in the past. Tr. p. 236: 10-17. Hence, the jury could make the common sense determination as to whether Minor did delay disclosure, as well as why Minor would not disclose the abuse for five years from the evidence of Minor's young age during that time and her possible fear of Appellant's violent retaliation. After all, Hutton did testify that what constitutes as delayed disclosure is "in the eyes of the beholder." Tr. p. 394: 10-15. Further, after giving contradictory and inconsistent responses on direct examination, Minor stated numerous times she was nervous, that it was hard to testify in court, and that she did not want to testify. Tr. p. 223: 1-2, 237: 1-5, 243:14-16. Thus, the jury alone could decide from commonsense whether Minor was inconsistent and even contradictory at times because the abuse did not occur, or whether it could be explained by the passing of time since the abuse, disclosure, and trial and the ordinary nervousness a child would feel on the witness stand. It is also significant to note that Hutton was unable to explain how any research or studies on delayed disclosure would be helpful for the court to know. Tr. p. 399: 1-15.

Hutton's testimony also required no specialized knowledge. *See e.g., State v. Douglas*, 380 S.C. 499, 501-02, 671 S.E.2d 606, 608 (2009) (citing Rule 701, SCRE; *State v. Williams,* 321 S.C. 455, 469 S.E.2d 49 (1996)). In *Douglas*, the Supreme

Court of South Carolina held that although it was not prejudicial error, the trial court erred in permitting a forensic interviewer to testify as an expert witness because she only testified to her personal observations and experiences. *Id.* Here, substantially similar to the witness in *Douglas*, the trial court erred in permitting Hutton to testify as an expert because she only testified to what she had personally observed in delayed disclosure cases. Tr. p. 430-437. Thus, her testimony was that of a lay witness and the trial court erred in allowing her to testify as an expert.

Hutton's testimony unduly prejudiced Appellant. First, branding her with the court's seal of "expert" gave her testimony greater weight in the eyes of the jury. *See Kromah*, 401 S.C. 340, 357, 359, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Further, her unreliable opinion, supported only by personal observation and hearsay of unidentifiable children, was prejudicial due to the lack of direct or physical evidence presented against Appellant, *supra* p. 9.

The State also relied upon Hutton's testimony to explain away Minor's inconsistencies and contradictions. *See generally Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding trial counsel's failure to object to the expert witness's improper bolstering of the victim's credibility prejudicial because the State relied heavily on the testimony to overcome inconsistencies in the victim's testimony during closing arguments). For example, the solicitor argued in closing that Minor was unable to recall what happened and where because "when there's chronic abuse, they don't know what day it is." Tr. p. 601: 11-13. Hutton was the only witness to testify that it is common for

children with a history of chronic abuse to have "more specific memories over others," and that those children can "block out some details", but "the core details remain pretty consistent...Some of the peripheral stuff may not be consistent, but the core is." Tr. p. 435: 18-22, p. 436: 1-19. The solicitor relied upon Hutton's testimony to salvage the damage to Minor's credibility:

> I will tell you, you saw expert testimony that kids mix things up. When you watch the interview [Minor], there's no doubt that some of these events are mixed up between things...because its hard to--if you have a child of chronic abuse trying to tell you in the span of an hour what happened to them over five years, it's next to impossible to get everything down. Tr. p. 617:16-25, 618:1-2.

Among the numerous other examples, Hutton's testimony that it is common for children not tell the full scope of what happened them when they first disclose, Tr. p. 435:23-25, 436:1, gave legitimacy to the extreme increase in details and number of instances of sexual abuse that Minor first provided in the interview Tr. p. 245: 19-22. It is thus significant to note that during closing, the solicitor admitted that the case turned upon Minor's credibility: "When you look at it, it all boils down to credibility of the victim and the corroborating evidence in a case. Do you believe the victim's disclosure and the corroborating evidence around it?"; "If you believe this child's testimony, you heard a horrible a crime and it's your duty to convict." Tr. p. 603: 24-25, 604: 1-3, 21-25; 619: 20-21.

In light of the normal yet inconclusive exam of Minor's genitals and the absence of Appellant's DNA on the clothing Minor alleged she was sexually abused in, admitting Hutton's testimony, which explained away all of Minor's contradictions and inconsistencies, was reversible error.

III. THE TRIAL COURT ERRED IN EXCLUDING PRIOR STATEMENTS BY THE MINOR VICTIM THAT ALLEGED SEXUAL ABUSE AGAINST AN INDIVIDUAL OTHER THAN APPELLANT.

In criminal cases, the appellate court generally reviews errors of law and will reverse the lower court's decisions if the appellant's rights were clearly abused or prejudiced. *State v. Nance,* 393 SC 289, 712 S.E.2d 446 (2011). In the instant case, the trial court committed a prejudicial error of law by excluding crucial prior statements by Minor during her videotaped interview regarding her biological father's sexual abuse when she was an infant. Tr. p. 70:9-21. Partly relying on *State v. Boiter*, 302 S.C. 381, 396 S.E.2d 364 (1990), the trial court excluded mention of the allegations against Minor's biological father from testimony and ordered that the video of Minor's interview be redacted to remove these statements. Tr. p. 70:9-21.

In the interview, Minor stated she remembers the abuse herself as well as her mother telling her that her biological father abused her. DVD; Tr. p. 64:16-23, 65:1-3. However, when describing the abuse, Minor described as a memory: "I can remember looking down and seeing his hand go into my diaper. And he was giving me a bath." DVD. These statements are admissible and *Boiter* is inapplicable. *Boiter* holds that:

> [I]n deciding admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy.

302 S.C. at 383-84, 396 S.E.2d at 365. Here, because it did not actually matter whether Minor's allegations against false for defense counsel's purposes, *Boiter* does not apply. See *State v. Sprouse*, 325 S.C. 275, 279, 478 S.E.2d 871, 874 (Ct. App. 1996) (explaining that the rule set forth in *Boiter* is designed to allow a

defendant to challenge the victim's credibility based on the victim's prior false allegations). Instead, the defense's intentions for this evidence were to: (1) show how Mother played a role; (2) serve as an alternate source of Minor's knowledge of sexual acts and the sensory details of those acts; and (3) demonstrate that Minor may have confused or conflated her memories or what she was always told about the abuse committed by her biological father with the abuse she alleged against Appellant. But even if *Boiter* did apply, the trial court erred in gauging the remoteness of her prior allegation by equating when the incident underlying the allegation occurred and when the allegation *itself* was made. In making his ruling, the trial judge stated, "I think remoteness--I think you have to look at when the activity allegedly occurred as opposed to when it was recorded." Tr. p. 70:11-15. Indeed, in *Boiter*, the Supreme Court evaluated the remoteness prong from when the allegation itself was made: *Id.* at 384 (italics added).

Further, the trial court erred in excluding the Minor's allegations against her father because this evidence does not trigger the prohibitions in the Rape Shield law and its underlying policies as the State argued during the motion in limine. The Rape Shield law provides that: "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible." S.C. Code Ann § 16-3-659.1 (1). In *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (1989), the Supreme Court held that the Rape Shield Statute did not bar evidence of a victim's sexual conduct if the evidence was offered for a purpose other than to attack the victim's morality. *State v. Lang*, 304 S.C. 300, 301, 403 S.E.2d 677, 678 (Ct. App. 1991). In *Lang*, the defendant "proposed to offer evidence concerning the

victim's sexuality simply for the purpose of impeaching the victim's credibility; thus, the Rape Shield Statute had no application." *Id.* Indeed, the Rape Shield Statute addresses evidence of a "general reputation for unchastity," and does not prohibit evidence of a prior sexual assault suffered by a victim when it was offered, in part, to impeach her credibility. *Id. (quoting State v. Johnson,* 66 N.C.App. 444, 446, 311 S.E.2d 50, 52 (1984), *review denied,* 310 N.C. 747, 315 S.E.2d 707 (1984)). Here, the trial court erred in excluding Minor's allegations against her father because the evidence was not intended to attack her morality, as she was merely an infant at the time of the incident and ten years old at the time of disclosure.

The exclusion of these allegations was prejudicial, reversible error. Because Minor disclosed the alleged abuse by Appellant and her father at the same time at her school, the evidence of abuse by Minor's father would have shown the jury that Minor may have confused or conflated Appellant with her biological father. Tr. p. 67:12-13, 69:14-20. The resulting prejudice from excluding Minor's biological father as an alternate or third party perpetrator of abuse is further evident in Minor's first disclosure to her teacher: "She told me she had been inappropriately touched by her "'dad.'" Tr. p. 117:11. Additionally, during her interview, Minor stated that she was there to discuss "what my father did to me," noting "her father" to be Appellant. DVD. It is significant to note that Minor testified that she did not call Appellant "dad" during his and her mother's nine-year relationship, and she did not think of Appellant as her dad. Tr. p. 224-225:8-11. The evidence also aligns with Mother's testimony regarding why she would not let Minor's father change her diapers. (Tr. p. 288-289, 313). Further, because the evidence establishes that Mother may have told her about this incident, the jury could find that no

infant could have such detailed memory, which supports the inference that Mother played a heavier hand in what the Minor stated during her interview.

The allegations against Minor's biological father could have also been used to show that Minor's knowledge of sexual acts came from the abuse by her biological father rather than Appellant if she did indeed remember it or if Mother planted the idea in her head years earlier. *See State v. Grovenstein,* 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000). ("[I]n light of the *Finley* and *Lang* decisions, we hold that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct."). The prejudicial effect in excluding these allegations is further evident in the State's reliance on the sensory descriptions Minor gave to corroborate her allegations:

> [Minor] knew sensory things that no ten-year-old should know. There's no scenario in this world where a ten-year-old should ever know what physical pain from a penis in your butt feels like....And then she talked about the taste of semen. Quote, "it tasted really nasty." What ten-year-old knows what that tastes like? She described the look of semen. She saw pus come out. And then she talked about how semen feels....These sensory descriptions are beyond the capacity of a ten-year-old child's mind.

Tr. p. 611: 11-24, 612: 3-16.

The resulting prejudice from excluding these statements is exacerbated in light of the lack of physical and direct evidence against Appellant, *supra* p. 9 which made his and Minor's credibility pivotal to the verdict. *See Grovenstein,* at 221, 530 S.E.2d at 412 ("Because the jury's determination of Grovenstein's guilt depended on whether it believed Grovenstein's testimony or the victims' testimony, we cannot say the exclusion of evidence that was critical to Grovenstein's credibility was harmless beyond a reasonable doubt.")

IV. THE TRIAL COURT ERRED IN ALLOWING A LAW CLERK TO STAY WITH THE JURY IN THE JURY ROOM DURING DELIBERATIONS FOR APPROXIMATELY NINETY (90) MINUTES[2].

It appears that the issue of a third party's presence in the jury room at the request of the trial judge has rarely presented itself to South Carolina courts. However, ample precedent exists on the exclusivity of the jury room and its isolation from outside influence to prevent any uncertainty in the integrity of the jury's verdict. *See e.g., State v. Carrigan,* 284 S.C. 610, 613-14, 328 S.E.2d 119, 121 (Ct. App. 1985) ("As to courtroom conduct, our courts have held that a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence.")

By raising this issue, Appellant does not doubt that Judge Hocker had only sincere intentions in having his law clerk enter and remain in the jury room. Appellant also does not question the forthrightness of Judge Hocker's subsequent assurances that his law clerk did not participate in deliberations. However, the law clerk did not speak on the record, and it cannot be readily ascertained whether the law clerk even inadvertently or implicitly influenced the jury in reaching its verdict in some manner. There was no determination on the record as to whether the jury was influenced by her presence. *See e.g., State v. Grovenstein,* 335 S.C. 347, 351, 517 S.E.2d 216, 218 at fn.2 (1999) (holding that if some extraneous influence is brought to the trial court's attention during trial, then

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[2] Although the discussion to initially send the law clerk into the jury room was off the record while the court was at ease Tr. p. 669: 12, there is no indication that an objection was made at that time. However, the error in the law clerk's hour-long presence in the jury is clear from the context. Judge Hocker also expressed his concerns about his law clerk staying with the jury for the remainder of deliberations on the record. Tr. p. 670. Moreover, the language and policy of the contemporaneous objection requirement anticipates evidentiary issues rather than courtroom practice or the actions taken here. *See* Rule 103, SCRE.

it is necessary to attempt to determine whether such influence was prejudicial to the verdict); *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (1982). *See also State v. Paige*, 375 S.C. 643, 648-649, 654 S.E.2d 300, 303-304 (Ct. App. 2007) (recognizing that inherent prejudice from extraneous influence upon the jury, such as unauthorized third party presence, can be sufficient to vacate the jury's verdict when the outside influence is state-sponsored) (citing *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998), *cert. denied*, 525 U.S. 1043, 119 S.Ct. 597, 142 L.Ed.2d 539 (1998); *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) ("Inherent prejudice occurs when an unacceptable risk is presented of impermissible factors coming into play.")). Further, apart from stating the purpose in removing the law clerk for the remainder of deliberations, there was no instruction to the jury about any resulting improper influence or inference from the law clerk's presence in the jury room. *See Blake v. Spartanburg General Hosp.*, 307 S.C. 14, 413 S.E.2d. 816 (1992).

CONCLUSION

For the foregoing reasons, this Honorable Court should vacate Appellant's conviction and sentence and grant Appellant a new trial.

Respectfully submitted,

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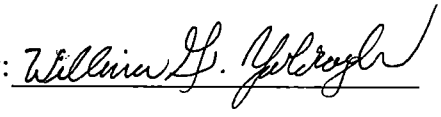
By: 

ATTORNEY FOR APPELLANT

October 17, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2017-001016

The State, Respondent

v.

Gabriel Betancourt, Jr., Appellant.

AFFIDAVIT OF SERVICE

I, Lauren Hobbis, certify that on this date, October 17, 2017, I served Appellant's Initial Brief and the Designation of Matter upon: (1) Jennie Abbott Kitchings, Clerk of Court, Court of Appeals of South Carolina; (2) J. Benjamin Aplin at the S.C. Attorney General's Office; and (3) Christy Sustakovitch, Assistant Solicitor at the Thirteenth Solicitor's Office, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

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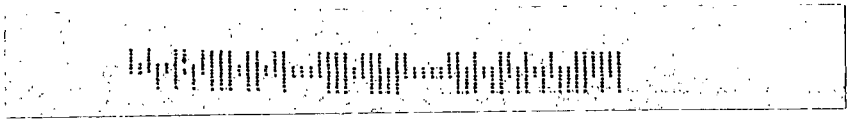
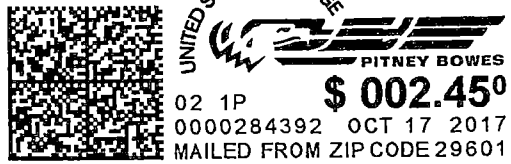
Sworn to before me this 17th
day of October, 2017

Notary Public for South Carolina

My commission expires: 06-08-2022

RACHAEL L. ALEJANDRO NOTARY PUBLIC MY COMMISSION EXPIRES 6/8/2022 SOUTH CAROLINA





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