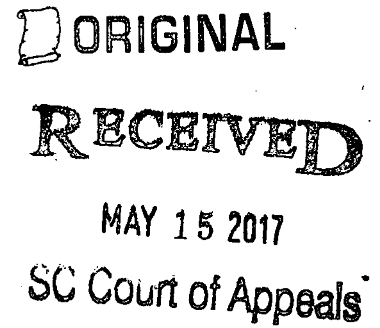
STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES ARCHIE CREWS, IV,

APPELLANT

APPELLATE CASE NO 2016-000670

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury, over objection, that the complainant's testimony need not be corroborated by other evidence in contravention of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)?

## STATEMENT OF THE CASE

On December 3, 2015, a Dorchester County grand jury indicted Appellant for criminal sexual conduct with a minor in the first degree (2013-GS-18-1838). R. 338-339. The state, represented by Sheila Mims and Phil Giese, called the case to trial on March 14, 2016, before the Honorable Diane Schafer Goodstein and a jury. R. 1. Ash Chisholm and John Loy represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 329, ll. 11-16. On March 18, 2016, Judge Goodstein sentenced Appellant to life imprisonment. R. 335, ll. 17-20; R. 340.

Trial counsel filed a notice of appeal on March 24, 2016, which was served on opposing counsel on the same day. This brief follows.

## ARGUMENT

The trial judge erred in charging the jury, over objection, that the complainant's testimony need not be corroborated by other evidence in contravention of *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).

**Relevant facts**

*State's case-in-chief*

The state's case consisted of three main witnesses: Minor 1, his mother, and the nurse who examined him.[1] The state offered no physical or forensic evidence, except to the extent the video recorded interview of Minor 1 by the forensic interviewer would be considered forensic evidence. The nurse who examined Minor 1 found no physical findings to support Minor 1's accusations. Rather, the nurse and mother were presented as witnesses to testify that Minor 1 had disclosed instances of sexual abuse to them. However, the examination of those witnesses revealed inconsistencies with the stories told by Minor 1 at trial. Further, the video recorded interview – the forensic interview – revealed additional inconsistencies in Minor 1's revelations of alleged sexual abuse.

Minor 1

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[1] The state also called Millicent Walker, a forensic interviewer at the Dorchester Children's Center, who interviewed Minor 1 on November 14, 2013. R. 238, ll. 9-20. Her testimony was limited to laying a foundation for the introduction of the video recording of the forensic interview of Minor 1. R. 239, ll. 22-24; State's Exhibit #4. The state also called Kendra Twitty, a forensic interviewer and therapist at Hope Haven, a children's advocacy center and rape crisis center. She testified as an expert in the field of child-abuse dynamics. R. 120, ll. 13-23; R. 124, ll. 3-4. Twitty's testimony consisted of explaining her experience of how children recall information. According to her experience, children who experienced trauma do not "remember things in, like, a linear fashion.... They remember, like, flashbulbs or kind of a snapshot of a memory to recall their traumatic experience." R. 124, ll. 11-20. She also explained that children who are abused do not tell right away – something called "delayed disclosure." R. 125, ll. 4-9. She provided multiple reasons for delayed disclosure. R. 125, l. 10 – R. 126, l. 1. Twitty had never met Minor 1 and offered no evidence to corroborate his testimony. R. 129, ll. 17-20.

Not only was Appellant Minor 1's stepfather for as long as eleven-year old Minor 1 could remember, but Minor 1 claimed Appellant had been sexually assaulting him back to his earliest memories. R. 54, ll. 14-25; R. 78, ll. 10-11; R. 81, ll. 3-24. According to Minor 1, the abuse occurred continuously – "There wasn't a break." R. 92, ll. 2-7. During the trial, Minor 1 told the jurors that the last encounter was on November 11, 2013, the day before Minor 1 and his mother went to the police. R. 111, l. 25 – R. 112, l. 6. However, he told the forensic interviewer that the last encounter was on October 31, 2013, which he remembered because this was his mother's birthday. State's Exhibit #4 at 17:49. Initially, Minor 1 told the police that Appellant made him have sex with him thirty-four times, but at trial Minor 1 claimed "[i]t happened way more than that many." R. 112, ll. 15 – R. 113, l. 1. Oddly, Minor 1 told the forensic interviewer the abuse was only a couple of times. State's Exhibit #4 at 17:58. At trial, Minor 1 claimed Appellant did "the bad stuff" to him "[a] couple times a week, like three, maybe four times a week" "[w]henever [his] mom and [his] sister were gone." R. 68, ll. 2-11.

When asked to describe the alleged abuse at trial, Minor 1 claimed Appellant made him put his mouth on his penis. R. 57, ll. 11-20. He recalled the first time this happened, but could not remember how old he was at the time. R. 57, ll. 21-23; R. 58, ll. 21-22. According to Minor 1, he went into the family's living room at Appellant's request. R. 57, l. 24 – R. 58, l. 1. Appellant pulled down his pants and told him to put his mouth on his penis. R. 57, l. 25 – R. 58, l. 6. Minor 1 was on his knees and Appellant made him "do, like, a rock-back-and-forth motion with [his] head." R. 58, ll. 7-11. Appellant then instructed Minor 1 to go to his sister's room and remove his clothing, which he did. R. 59, ll. 1-3. Minor 1 claimed Appellant entered sister's room, either completely naked upon entry or removing his clothes after entry, and put his penis in Minor 1's butt. R. 59, ll. 3-4; R. 59, ll. 5-7. During this encounter, Minor 1 claimed he was

on his hands and knees as Appellant had instructed. R. 59, ll. 11-14. He further claimed that Appellant "did a rock-back-and-forth motion" while his penis was in Minor 1's butt. R. 59, l. 24 – R. 60, l. 1. "After that," according to Minor 1, Appellant "laid back on his back and some white stuff came out of his penis" and "went on his stomach." R. 60, ll. 6-15.[2] Appellant wiped it off using sister's blankets, and the two "went on with [their] day." R. 60, ll. 16-19. Finally, Minor 1 claimed Appellant told him to keep it a secret, which he did, initially. R. 60, ll. 20-23.

Minor 1 claimed another sexual encounter happened when his nephew was present. However, Minor 1's nephew did not testify at trial. According to Minor 1, Appellant threatened that if he sucked his thumb, then "the bad stuff would happen." R. 61, ll. 15-21. Despite Minor 1's best efforts, he was unable to resist the temptation and sucked on his thumb. As a result, "the bad stuff happened." R. 61, ll. 23-24. According to Minor 1, Appellant caught him sucking his thumb and instructed him to go to sister's room and take off his clothes, which he did. R. 62, ll. 19-24. Thereafter, according to Minor 1, Appellant put his penis in his butt and put his penis in Minor 1's mouth. R. 63, ll. 1-2.

Minor 1 told the jurors that the "bad stuff" usually happened in sister's room, but it also happened on the couch in the living room. R. 63, ll. 18-23. He claimed that "one time," while Appellant was in the bathtub, he made Minor one put his mouth on his penis. R. 63, l. 24 – R. 64, l. 1; R. 88, l. 19 – R. 89, l. 2. Minor 1 remained outside the bathtub, but managed to put his mouth on Appellant's penis while Appellant was lying in the bathtub and "do the rock-back-and-forth motion." R. 64, ll. 4-8; R. 89, l. 5-15. When Appellant instructed him to stop, he did, "went back out and went on with [his] day." R. 64, ll. 8-9.

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[2] During the forensic interview, Minor 1 said the stuff that came out was "black and white." State's Exhibit #4 at 18:04. Upon further leading questions from the interviewer, Minor 1 said the stuff was gray. State's Exhibit #4 at 18:04. Upon additional leading questions, Minor 1 said the stuff was clear and rescinded his earlier statement about black. State's Exhibit #4 at 18:04.

Another place where "the bad stuff" happened was the shed, according to Minor 1. R. 68, ll. 21-25. Minor 1 described Appellant sitting in a chair and making him put his mouth on his penis. R. 70, ll. 3-8. Upon further prodding by the solicitor, Minor 1 claimed Appellant pulled his pants down to enable the encounter. R. 71, ll. 1-4. He also claimed that Appellant made him get on his knees in order to put his mouth on his penis. R. 71, ll. 5-8. Finally, Minor 1 claimed that Appellant made him look at magazines filled with "naked pictures of people" in the shed. R. 71, ll. 11-16. The people in the magazines were "[d]oing the things that [Appellant] would make [Minor 1] do." R. 71, ll. 19-21. He even saw a picture of a girl with a penis in one of the magazines. R. 71, ll. 22-25. In complete contradiction to this testimony, during the forensic interview, Minor 1 specifically denied seeing pictures of people with no clothes in any form – photographs, cell phone, computer, movies. State's Exhibit #4 at 18:11. No magazines – and no pornography – of any sort were introduced at trial.

Minor 1 claimed Appellant would put something on his penis prior to inserting it into his anus. He was unsure what it was, but claimed it was from a tube. R. 63, ll. 3-13. However, during his forensic interview, Minor 1 stated he did not know if Appellant put anything on his penis. State's Exhibit #4 at 17:52. At trial, he also claimed that "a couple times [Appellant] wore this - - it was a cheetah-looking short dress. It was - - it was tiny. It was, like a cheetah dress, super tiny." R. 72, ll. 20-24. When the solicitor prodded for more information on this point, Minor 1 said, "It wasn't, like, a dress. It was - - no, it wasn't like a dress." R. 72, l. 25 – R. 73, l. 2. However, he said it was not for a man. R. 73, ll. 3-4.

He also described Appellant has have a "hard," "hairy," "dark brown" penis. R. 75, ll. 5-18. This too was in direct contradiction to his statements to the forensic interviewer that the top of Appellant's penis turned white. State's Exhibit #4 at 18:05. On cross-examination, Minor 1

even claimed that Appellant made Minor 1 place his penis into Appellant's butt. R. 82, ll. 14-15. In addition to the "white stuff" being wiped on sister's blanket, Minor 1 said the "white stuff" was on the couch, living room floor, and anywhere else where Appellant was during the encounters. R. 96, ll. 1-24.

Despite these numerous accusations, the state failed to produce any lubricant recovered from the home, a cheetah print dress or shirt, or any items of evidence from the home containing Appellant's DNA or even the presence of sperm and/or semen.

When Minor 1 was nine-years old, he told his mother about the alleged abuse after his mother and Appellant argued and separated. When his mother asked Minor 1 if she should give Appellant another chance, Minor 1 said, "no, no, no." R. 73, ll. 10-16. His mother questioned him on his response and he "told her a couple of lies." R. 73, ll. 16-19. When his mother did not believe the "lies," he told her "about the stuff that [Appellant] was doing." R. 73, ll. 19-20. His mother called the police. R. 73, ll. 24-25. Minor 1 saw a doctor and spoke to a woman at the Dorchester County Children's Center. R. 74, ll. 5-10.

Minor 1 admitted that his trial testimony differed from statements he had made previously. R. 102, l. 24 – R. 103, l. 1; R. 105, ll. 8-10; R. 109, ll. 3-7. He candidly admitted he had not told the police, the medical doctor, or the forensic interviewer about the sexual encounters in the shed or the one encounter in the bathtub. R. 83, l. 23 – R. 84, l. 17; R. 94, ll. 18-23. Minor 1 never told the police or the forensic interviewer regarding Appellant wearing a cheetah print shirt/dress. R. 104, ll. 5-14. He claimed he remembered the bathtub incident while "watching [his] phone." R. 94, l. 24 – R. 95, l. 2; R. 109, ll. 11-14. The incidents involving the cheetah outfit and the magazines "just came" to him. R. 109, l. 18 – R. 110, l. 7. He also reviewed a prior statement in which he claimed he was abused in the bedroom shared by his

mother and Appellant, but claimed he was not thinking clearly when he said that because it "definitely never happened in their room." R. 94, ll. 4-11. During his forensic interview, Minor 1 told the interviewer that the last incident occurred on October 31, 2013, which was his mother's birthday. State's Exhibit #4 at 17:49. However, at trial, Minor 1 claimed nothing happened on that date, and that the last encounter was on November 11, 2013. R. 110, l. 19 – R. 111, l. 6; R. 114, ll. 10-14.

Although Minor 1 claimed his older sister witnessed multiple incidents of sexual abuse, sister did not testify at the trial. R. 98, l. 20 – R. 99, l. 22; State's Exhibit #4 at 18:06.

Tara Crews

Tara Crews, Appellant's wife and Minor 1's mother, confirmed that on November 12, 2013, Minor 1 told her Appellant was sexually abusing him. R. 141, ll. 9-12; R. 148, ll. 13-15; R. 150, l. 21. Tara claimed she and Appellant had argued because of Appellant "dressing like a woman." R. 148, ll. 20-24. When Appellant left for school, Minor 1 approached her and asked if she was going "to try to make this work" with Appellant. R. 150, ll. 7-9. Tara claimed Minor 1's face was "totally white" with "fear" and she asked him to tell her what was wrong. R. 150, ll. 9-16. According to Tara, Minor 1 said, "he rapes me." R. 150, ll. 19-20.

Tara admitted that although she was no longer living in the residence she once shared with Appellant, she still owned the home. R. 152, ll. 8-17. Between November 2013, when she and Minor 1 went to the police to report the alleged abuse and March 2016, when Appellant was tried, the police never asked to search the home. R. 158, ll. 4-8. Tara would have readily consented to a search, and permitted law enforcement to seize any items of potential evidence, including bedding, furniture coverings, and even sections of the carpet. R. 158, ll. 9-21.

Ashleigh Benda

Ashleigh Benda, a registered nurse at MUSC Children's Hospital, testified as an expert in the field of child abuse pediatrics. R. 163, ll. 20-23; R. 164, ll. 8-9; R. 166, ll. 23-25. She examined Minor 1 on November 14, 2013, two days after he reported the alleged misconduct to the police. R. 167, ll. 6-9; R. 174, ll. 14-17; R. 178, ll. 14-18. Benda found no signs of sexual abuse despite a full body examination. R. 171, ll. 12-21; R. 191, ll. 17-23. According to Benda, "all the studies and literature out there and our state protocol," provide that an examination should occur in an emergency room setting if the date of the last sexual contact was within thirty-six hours of the examination. R. 173, ll. 2-7. Benda explained the protocol would allow emergency room examination "up to 72 hours depending on the type of abuse." R. 173, ll. 7-8. However, "[a]fter 72 hours, the yield of finding evidence, finding injury, getting any kind of information or diagnostic findings is so low," the examination would be conducted in an outpatient setting. R. 173, ll. 9-13; R. 190, ll. 17-20. It was Benda's understanding based on information provided by Minor 1 that the last date of sexual contact was October 31, 2013, a date very much outside the 36-hour and 72-hour windows. R. 189, ll. 11-15; R. 193, ll. 16-20. Benda explained that one of the reasons why she may not have found any physical evidence of abuse was due to timing. R. 173, ll. 14-19. Minor 1 reported to Benda there had been "just a couple" of instances of abuse. R. 187, ll. 18-21.

*Charge Conference*

At the conclusion of the presentation of the evidence, the judge engaged the lawyers in a charge conference. The state requested the judge instruct the jury on "the 16-3-657 language regarding the child's testimony need not be corroborated." R. 256, ll. 8-11. The judge agreed to the request. R. 256, l. 12. Trial counsel immediately objected, but the judge insisted that in

order to "preserve" the objection, trial counsel would need to object "after the charge." R. 256, ll. 15-19.

*State's Closing Arguments*

The prosecutor's central theme in closing was that Minor 1's testimony "need not be corroborated" in this case. R. 262, ll. 20-23.[3] The prosecutor instructed the jury on how to determine a witness's credibility, including demeanor, consistency over time, opportunity to know the facts testified to, and bias. R. 261, l. 23 – R. 262, l. 11. She then told the jury that corroboration could be used to determine a person's credibility and that "corroboration is when one witness tells you something and another witness says something similar. Are they corroborating each other." R. 262, ll. 13-18. Immediately thereafter, the prosecutor told the jurors

> Now, this is very important when you are dealing with these cases. The testimony of the victim need not be corroborated in prosecutions under South Carolina code of law 16-3-652 through 16-3-658. And criminal sexual conduct with a minor in the first degree falls within this statute. If you believe the testimony that you heard of [Minor 1], under our law that is enough to find [Appellant] guilty of criminal sexual conduct with a minor in the first degree.

R. 262, l. 19 – R. 263, l. 3.

According to the prosecutor, "the crux of this whole case" was Minor 1's testimony that Appellant sexually abused him. R. 265, l. 21. "The rest around it is fluff. How many times and where and didn't say this before, he didn't say that after." R. 265, ll. 21-23. Conceding that her

[3] In the opening statement, the prosecutor set up this theme that Minor 1's testimony need not be corroborated and informed the jurors that the judge would instruct the jury in this regard at the close of the case. Specifically, the prosecutor wanted "to focus" the jury's "attention on one part of the law that the judge" would "instruct" "at the end of th[e] trial." R. 44, ll. 1-4. That "part of the law" was that "in South Carolina a child witness' testimony need not be corroborated." R. 44, ll. 8-9. The prosecutor explained that the jurors could "convict someone based on a child's testimony alone." R. 44, l. 10. He asked the jurors "to keep that in mind" throughout the trial as various witnesses testified. R. 44, ll. 12-15.

case depended entirely upon the jury believing Minor 1's testimony, the prosecutor said, "I want you to think about this. In this case it is black and white. You either believe [Minor 1] or you think he's lying. There's no black and white. You either believe [Minor 1] or you think he's lying and I submit to you you should believe [Minor 1]." R. 266, ll. 3-9.

Oddly, the prosecutor argued to the jurors that Minor 1's testimony was corroborated by his own testimony and by his mother's testimony.

> And you think a kid can make up the fact that he looked through magazines and that there was a picture of a man with a woman with a penis? Woman with a penis. Well, here's our corroboration. Here's another reason you should believe [Minor 1]. Because [Minor 1] said there was a man with a penis in the magazine and he says one of the times when [Appellant] did this to me he made me wear a dress. What did Tara tell you? Our marriage started falling apart in August because he wanted to dress as a woman. That's corroboration.

R. 269, ll. 2-12.

To counter the anticipated defense argument that the state lacked any physical evidence to support its case, the prosecutor "remind[ed]" the jury "about the charge you are going to hear that a child's testimony does not need to be corroborated." R. 270, ll. 15-19. In the prosecutor's opinion, the reason for such a charge was "because you rarely have that physical evidence." R. 270, ll. 19-21.

*Jury Charge*

During the charge on the law, the judge instructed the jurors how to evaluate the credibility of child witnesses.

> Now, during this trial you heard testimony from a child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding believability you may consider not only matters that I have already discussed with you, but you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability to understand and answer questions. Because young children may not fully understand what is happening here, it is up to you to decide whether the child understood the seriousness of appearing as a witness at this criminal trial, whether

> the child understood the questions, whether the child has a good memory, and whether the child understands the difference between lying and telling the truth.
>
> In addition, young children may be influenced by the way the questions are asked. It is up to you to decide whether the child understood the questions asked.

R. 315, l. 11 – R. 316, l. 6. This instruction was not given during the general charge on how to evaluate the credibility of witnesses. Instead, this section appeared after the instruction to the jury not to consider the fact that Appellant did not testify and consideration of expert witnesses. Cf. R. 311, l. 22 – R. 313, l. 18 with R. 312, l. 19 – R. 315, l. 10.

Immediately after the instruction regarding children as witnesses, the judge instructed the jury concerning the "no corroboration" rule. Specifically, the judge instructed:

> Now, ladies and gentleman, I further charge you that the testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 and I further charge you that this offense is alleged to be a violation of Section 16-3-655.

R. 316, ll. 7-12.

Following this instruction, the judge read the indictment to the jurors yet again. R. 316, l. 13 – R. 317, l. 1. Thereafter, the judge instructed the jury on the elements of criminal sexual conduct with a minor in the first degree. R. 317, ll. 2-25. The final instruction to the jury concerned completion of the verdict form and unanimity. R. 318, l. 1 – R. 322, l. 18.

*Objection*

In keeping with the judge's instruction that he must object to the charge after it was given, trial counsel re-iterated his earlier objection to the judge instructing the jury that the testimony of Minor "need not be corroborated in the prosecution of this type." R. 323, ll. 7-10. Trial counsel noted the charge would confuse the jury because the jurors could interpret the language to mean they could disregard the lack of corroborating evidence. R. 323, ll. 10-18. Thereafter, trial counsel cited the dissent in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244

(2006), explaining that the charge biased the jury against the defendant by singling out the alleged victim's testimony as not requiring corroboration and appearing to express an opinion about the alleged victim's credibility. R. 323, l. 19 – R. 324, l. 5.

In response, Judge Goodstein noted the dissent in Rayfield, supra, was written by then-Associate Justice Pleicones, now Chief Justice Pleicones, and that a change in the law may occur. R. 324, ll. 6-9. "It may cease to be a minority opinion and become in fact the law." R. 324, ll. 9-10. Despite acknowledging the well-reasoned dissent in Rayfield, supra, Judge Goodstein overruled trial counsel's objection to the charge. R. 324, ll. 10-12.

**Discussion**

On May 4, 2016, less than two months after Appellant's trial, the South Carolina Supreme Court decided State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Overruling Rayfield, supra, the Supreme Court held charging a jury pursuant to section 16-3-657 of the South Carolina Code was "confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Stukes, 416 S.C. at 499, 787 S.E.2d at 483. The South Carolina Constitution forbids judges from charging juries "in respect to matters of fact," and limits judges to "declar[ing] the law." S.C. Const. art. V, § 21. Thus, "it is not within the province of the court to express an opinion to the jury on its view of the facts." Stukes, 416 S.C. at 499, 787 S.E.2d at 483. "By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Id.

The Supreme Court found the state had not satisfied its burden of showing the error was harmless beyond a reasonable doubt because the "case hinged on credibility." Id. at 500, 787

S.E.2d at 483. The Court was not dissuaded that the error was harmless even where two witnesses testified to seeing the alleged victim shortly after the sexual encounter and claimed to see "a handprint" on her face or neck "matching" her version of events and witnesses describing the alleged victim's demeanor as "afraid," "withdrawn," "nervous and tearful," and "visibly upset and crying." Id. at 501, 787 S.E.2d at 484. The case against Stukes included a DNA match and his inconsistent statements to authorities – at first, denying he knew the alleged victim and then claiming consensual sex. Id. Nevertheless, the Court held the error was not harmless in light of the confusing nature of the charge and the entire case boiling down to credibility. Id. at 483, 787 S.E.2d at 500.

Less than one month later, this Court rendered its opinion in State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (Ct. App. 2016).[4] The trial judge presiding over McBride's trial also charged the jury pursuant to section 16-3-657 of the South Carolina Code that a victim's testimony need not be corroborated in a sexual assault case. Id. This Court held the charge was erroneous. Id. However, this Court found the state satisfied its burden of showing the error was harmless beyond a reasonable doubt. Id. This Court distinguished the evidence presented at McBride's trial from that presented at Stukes' trial. Id. According to this Court, "there was corroborating evidence" presented against McBride. Id. "The victim's mother testified she smelled men's cologne and saw the stain on the victim's shirt. The mother's sister testified she confronted McBride and he said he did not mean to do it, and 'tr[ied] to compromise with [her].' The sister described it as McBride's confession." Id. (alterations in original).

[4] Proceeding *pro se*, Mr. McBride filed a petition for writ of certiorari seeking review in the South Carolina Supreme Court on August 22, 2016. The state filed its return on October 11, 2016. The case is ready for consideration.

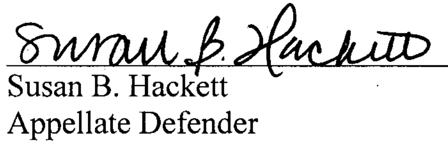
Without question, the trial judge erred in charging the jury that Minor 1's testimony need not be corroborated in light of the Supreme Court's decision in Stukes, supra. The only question that remains is whether the state can satisfy its burden that the error was not harmless beyond a reasonable doubt. The state simply cannot do so in this case. The entirety of the state's case depended upon the credibility of Minor 1. There was no corroborating evidence presented. Although Minor 1's testimony indicated that at least some corroborating evidence could have been found – the pornographic magazines, sperm/semen on items where it should not have been – the state presented none. Minor 1 even indicated that his sister witnessed the incidents of sexual assault, but the state did not call sister to testify despite the fact that she was Minor 1's older sister, and presumably competent to testify. The state presented the jurors with contradictory evidence from Minor 1 and asked the jury to trust them through the use of the "no corroboration" charge. Minor 1's testimony before the jury differed significantly from his prior statement in a prior hearing and from his statements during his forensic interview. He even claimed the date of the last sexual encounter was different. He changed the type of abuse occurring and the locations for the abuse. Without question, the state's case against Appellant depended solely upon Minor 1's credibility, which was called into question by his forensic interview and the cross-examination revealing his inconsistent statements. It was only the judge's instruction to the jury – a victim's testimony regarding criminal sexual conduct need not be corroborated – that could have saved the state's case.

The state's argument regarding the statute was peculiar as well. The state told the jury that the statute concerned the testimony of child witnesses who allege criminal sexual conduct. According to the state, when a child claimed to be the victim of criminal sexual conduct, the child's testimony need not be corroborated by other evidence. While the statute provides that the

testimony of an alleged victim of criminal sexual conduct need not be corroborated, the statute does not carve out any special treatment for children and does not apply only to children. This aspect of the state's argument is particularly important when analyzed in conjunction with the judge's instructions to the jury. The judge charged the jury with instructions specific to testimony from children. In fact, the charge instructed the jury to evaluate the credibility of children using a different standard than the one applied to all other witnesses. This specific charge was followed immediately by the "no corroboration" instruction. Coupling the placement of the charge to the jury as following the child-specific (and different) instruction on credibility with the solicitor's argument that the General Assembly has promulgated legislation to permit jurors to consider testimony from child witnesses who allege sexual abuse without corroboration demonstrates the additional prejudice Appellant suffered due to this erroneous charge. One of the last things the jury heard before the administrative matters of the verdict form were that credibility of child witnesses is determined under a different standard, testimony of victims alleging sexual abuse need not be corroborated, and then the reading of the indictment, which alleged that Appellant had committed sexual battery. Despite the inconsistencies and the dearth of evidence, the jury was left with but one option – to convict – based upon the judge's instructions.

## CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 15, 2017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