STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY

Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2018-000259

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THE STATE,

Respondent,

v.

SAMUEL JOLLY,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

A Dorchester County grand jury indicted Appellant for one count of Criminal Sexual Conduct with a Minor in the First Degree (CSC) and one count of Lewd Act upon a Child (Lewd Act).[1] Although the arrest warrants were issued in 1997, Appellant evaded arrest until 2013. After being released on bond, Appellant failed to appear for court. Following his re-arrest, Appellant proceeded to jury trial before the Honorable Edgar W. Dickson on February 12, 2018. Following a three day trial, Appellant was convicted on both counts and sentenced to thirty years' incarceration for CSC and fifteen years' incarceration for Lewd Act, to be served concurrently. This appeal follows.

[1] Appellant was charged under Section 16–15–140 of the 1976 Code. This section was repealed in 2012 and replaced with the new statutory offense of Criminal Sexual Conduct with a Minor 3rd Degree, S.C. Code § 16-3-655(C). See 2012 South Carolina Laws Act 255 (H.B. 3667). For the purposes of this case, the elements of the two offenses are identical.

## STATEMENT OF FACTS

Appellant married Victim's mother in 1996. Feb 14 Tr. 68. That same year, Appellant, Victim, and Victim's mother moved together to a house in Ladson. Feb 13 Tr. 87. Victim was approximately ten years old at the time. Feb 13 Tr. 86. Appellant worked irregular hours as a musician and was often home alone with Victim while her mother was at work. Feb 13 Tr. 92.

Victim was beginning to go through puberty at the time, and one day made a comment to her mother and Appellant that her breasts had started hurting. Feb. 13 Tr. 88. Later, when they were alone, Appellant told Victim to lift her shirt and began fondling her breasts while explaining it was normal for breasts to hurt when they begin to grow during puberty. Feb 13 Tr. 88-89. This was the first of many episodes of inappropriate sexual touching Victim recalled. On another occasion, Appellant showed Victim a pornographic cartoon and rubbed her pubic area as she sat on his lap. Feb 13 Tr. 89-90. On another occasion, Appellant pulled down Victim's underwear and touched the outside of her private parts, explaining why she was growing pubic hair. Feb 13 Tr. 92. On another occasion, Appellant offered Victim money to "sit on his face," but Victim "laughed it off" and went to play with her friends instead. Feb 13 Tr. 94. On another occasion, Appellant and Victim were lying in bed together. Appellant lifted the sheet to expose himself to Victim, and requested that she rub his penis with a stuffed animal. Victim complied. Feb 13 Tr. 94-95. Victim described another incident where Appellant chased her around the house, pulled her underwear down, and fondled her buttocks. Feb 13 Tr. 96-97. Finally, on at least one occasion Appellant digitally penetrated Victim. Feb 13 Tr. 93.

Victim testified that these types of episodes occurred regularly, "at least once a month" or even "on a daily basis," but she could not precisely recall the time intervals between the incidents, or give a specific date for any one incident. Feb 13 Tr. 90; 120. Victim testified she

only remembered one incident of penetration, but Appellant pulling down her pants "and that kind of thing" happened regularly over the course of that year. Feb 13 Tr. 97; 117. Victim was thirty-one years old at the time of trial. Feb 13 Tr. 101.

Victim reported Appellant's conduct to her mother and grandmother, but "that didn't really go anywhere." Feb 13 Tr. 98. Finally, Victim reported the abuse to her gym teacher at school, and the school alerted DSS. Feb 13 Tr. 98. Victim disclosed details of the abuse in an interview with DSS caseworker on August 22, 1997, but did not recall many details of the interview at the time of trial. Feb 13 Tr. 98; 106-07; 125. Following the DSS interview, Victim went to live with her grandparents. Feb 13 Tr. 98. Victim participated in a forensic interview at the Lowcountry Children's Center on September 5, 1997. Feb 14 Tr. 47. The interview was recorded, but the recording had been lost or destroyed by the time of trial. Feb 14 Tr. 47. She also underwent a medical exam with Dr. Elizabeth Baker. Feb 14 Tr. 37. Dr. Baker discovered Victim had an interrupted hymen. Feb 14 Tr. 38-39. Dr. Baker took photographs and a video to document the exam, but they also had been destroyed by the time of trial. Feb 14 Tr. 40. At trial, Victim could not recall the medical exam and only vaguely recalled the forensic interview. Feb 13 Tr. 99-100; 103. In the years between the reported abuse and Appellant's arrest, Victim stayed in contact with law enforcement and gave another written statement in 2011. Feb 13 Tr. 104-05.

Yvonnia Brown was the DSS caseworker who interviewed Victim on August 22, 1997. Feb 13 Tr. 124. She also interviewed Appellant. Feb 13 TR. 130. Appellant admitted that he pulled down Victim's pants "to spank her," "tickled" her breasts, and exposed himself to her after a shower. Feb 13 Tr. 130; 138. When asked whether he digitally penetrated Victim, he said he did not recall. Feb 13 Tr. 130-31. He tearfully told Brown that he just wanted Victim to

trust him again, he was sorry for hurting her, and he wanted the family back together. Feb 13 Tr. 131-32. Brown told Appellant the matter would be forwarded to the Sheriff's Office. Feb 13 Tr. 133.

Tom Marshall investigated the case for the Sheriff's Office. Feb 14 Tr. 42-43. He attempted to make contact with Appellant, but was unsuccessful. He left a message with Appellant's brother for Appellant to call him, but Appellant never called. Feb 14 Tr. 44. Instead, Appellant left Dorchester County and moved to Florida. Victim's mother testified Appellant was aware that law enforcement was looking for him. Feb 13 Tr. 44; 47. Investigator Marshall obtained a warrant for his arrest on October 9, 1997, but Appellant remained at large until 2013, when he was finally arrested on these charges. Feb 14 Tr. 45; 75. Appellant claimed at trial he did not know about the arrest warrants. Feb 14 Tr. 76. Appellant and the State took steps to resolve the charges in 2013, but Appellant did not show up for his court date. Feb 14 Tr. 100. Appellant claimed that he put the wrong date in his phone. Feb 14 Tr. 77. At trial, Appellant admitted to innocuous "tickling," and stated that "something may have bumped into something," but gave a blanket denial of Victim's allegations of sexual abuse, stating simply that they were "not true." Feb 14 Tr. 78; 85-88.

## ARGUMENT

### I.

### Lewd Act indictment was adequate to give Appellant notice of charged offense where Appellant received discovery and was aware of specific factual allegations.

Appellant argues the trial court should have quashed the Lewd Act indictment because "it failed to allege any specific conduct the state intended to prosecute as a lewd act," preventing Appellant from "determining what alleged conduct the state intended to prosecute and from preparing any sort of meaningful defense." Brief of Appellant, 14-15. His argument fails because the State is not required to recite each factual allegation within an indictment charging a single Lewd Act count arising from a continuing course of conduct. Appellant received discovery and was aware of each allegation. He therefore had actual notice of the charges against him and suffered no prejudice. The State was not required to plead its evidence in the indictment, and doing so would not have given Appellant any better notice, nor would it have changed his defense. The indictment, supplemented with discovery, was adequate to serve its purpose— to identify the charged offense, provide Appellant with sufficient notice to prepare his defense, and to establish the scope of prosecution to prevent double jeopardy. Accordingly, the trial court properly refused to quash the indictment.

#### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 866 (Ct. App. 2006). The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007).

## Discussion

An indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). It is "the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation." Id. (citing State v. Faile, 43 S.C. 52, 59-60, 20 S.E. 798, 801 (1895)). "Fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense." State v. Butler, 277 S.C. 452, 456, 290 S.E.2d 1, 3 (1982). Prejudice may result if a defendant is "taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). However, an indictment need not lay out the State's case in order to give adequate notice. "The State is not required to plead its evidence in the indictment." State v. Thompson, 305 S.C. 496, 500, 409 S.E.2d 420, 423 (Ct. App. 1991). An indictment serves its purpose "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution." State v. Wade, 306 S.C. 79, 82, 409 S.E.2d 780, 782 (1991); See also S.C. Code §17-19-20.[2]

The specificity required in an indictment depends on the circumstances. "[T]he sufficiency of an indictment must be judged from a practical standpoint, with all of the circumstances of the particular case in mind." State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005). "The true test of the sufficiency of an indictment is not whether it

[2] "Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20.

could have been more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972). A defendant's right to reasonable notice is not infringed "provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge." Bartell v. United States, 227 U.S. 427, 432 (1913) (in prosecution for sending obscene materials through the mail, government was not required to describe obscene content in body of indictment when it identified recipient and date and place of mailing). No better description is required than the circumstances permit. State v. Hiott, 276 S.C. 72, 81, 276 S.E.2d 163, 167 (1981).

Whether Appellant had adequate notice to meet the charge is not to be judged based on the indictment alone. Rather, this Court must look to the record to determine whether Appellant had *actual notice* of the charges. State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981) (rejecting claim of inadequate notice where "the parties evidently engaged in voluntary, mutual discovery prior to the trial. Shoemaker therefore had actual knowledge of the State's case against her."); State v. Gunn, 313 S.C. 124, 128, 437 S.E.2d 75, 77–78 (1993) (rejecting claim of inadequate notice in State Grand Jury prosecution where defendant was "permitted to review, and to reproduce, the transcript of the testimony of the witnesses who appeared before the Grand Jury"); Franklin v. White, 803 F.2d 416, 417 (8th Cir. 1986) ( "If a defendant is actually notified of the charge, due process notice requirements may be met, even if the [indictment] is deficient."); 5 Wayne R. LaFave et al, Criminal Procedure, § 19.3(c) (4th ed. 2017) ( "[T]he presence of actual notice determines the appropriate remedy for a lack of specificity, as courts here look to the level of discovery obtained (or available), and ask whether the defendant was

actually taken by surprise, and if so whether prejudice resulted."). Even prior to mandatory discovery in criminal cases, South Carolina courts focused on actual notice, allowing a "general indictment" to be supplemented by an additional "writing." See State v. Napier, 63 S.C. 60, 41 S.E. 13, 15 (1902) (sufficient notice in barratry prosecution where "conformably to the practice in relation to general indictments, the defendant was served with a notice in writing of the particular act of barratry which would be relied on in behalf of the prosecution, and to these the evidence of the trial was confined"); State v. Chitty, 17 S.C.L. 379, 380 (S.C. App. L. & Eq. 1830) (same).

Defense counsel argued at length at trial that the lack of specificity in the indictment made it impossible for her to defend the case. However, in doing so, counsel revealed she was intimately familiar with Victim's allegations because she went through discovery "with a fine-toothed comb." Feb 12 Tr. 31. She continued— "What is the lewd act? If you want to tell me that the lewd act is the rubbing of the teddy bear on genitalia and this and that and this, then I think we're getting somewhere. Because I don't- I can't tell from- and part of the problem is we've lost the evidence." Feb 12 Tr. 32-33. She also discussed the allegation that Appellant "put his hand down her shorts," and the accusation he "showed his privates to her by lifting the sheet while they were in bed." Feb 12 Tr. 32. She went on to detail the various inconsistencies and omissions in Victim's various statements, illustrating exactly how familiar she was with each allegation. Feb 12 Tr. 20-21. The prosecutor confirmed to the court that he disclosed all of the discovery in his file. Feb 12 Tr. 13. Appellant admitted he received discovery, but nevertheless insisted that "having just the statute listed in the indictment does not provide the defense with sufficient notice to effectively answer those charges." Feb 12 Tr. 14. Appellant's formalistic argument boiled down to the assertion that the State should have been required list each act in

the indictment, and only then would he have adequate notice to defend the charges. Feb 12 Tr. 18. Despite Appellant's protestations, the record demonstrates he was not taken by surprise. See State v. Pierce, 263 S.C. 23, 28, 207 S.E.2d 414, 417 (1974) (defense counsel's cross-examination showed defendant was not taken by surprise).

Appellant has not offered any rationale explaining how his notice would have been enhanced by the State listing each act in the body of the indictment. Nor has he explained how his preferred procedure would have changed his defense. Appellant made a blanket denial, claiming each of Victim's allegations was simply "untrue." Because Appellant had actual notice of each specific allegation, he was perfectly capable of preparing a defense.

Appellant cites State v. Tumbleston to support his argument. In that case, however, this Court approved a nearly identical indictment. That indictment alleged:

> That [appellant] did in Charleston County on or between 2001 and June 2004 willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body of one [B.J.], a child under the age of sixteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of himself or such child. This is in violation of § 16-15-140 of the South Carolina Code of Laws (1976) as amended.

State v. Tumbleston, 376 S.C. 90, 101, 654 S.E.2d 849, 855 (Ct. App. 2007). The indictment was deemed adequate because it "clearly identif[ied] the elements of each offense charged, substantially tracking the statutory language so plainly that the nature of the offense charged can be easily understood." Id. The indictment in this case is sufficient for the same reasons.

Whether Appellant had adequate notice of the charges against him is a question of fact. See State v. Baldonado, 124 N.M. 745, 747, 955 P.2d 214, 216 (1998) (remanding CSC case to trial court for hearing on whether the State could reasonably have provided greater specificity of times of alleged offenses and whether the State's failure in this regard prejudiced Defendant).

Because there is evidence in the record to support the trial court's ruling, this Court should affirm.

## II.

**CSC and Lewd Act indictments alleging acts spanning one year period were not temporally overbroad.**

Appellant asserts the trial court erred by denying his pretrial motion to quash both indictments because they alleged a one year and twenty-one day window in which the acts occurred. Appellant claims this prevented him from preparing a defense. However, South Carolina courts have consistently upheld multi-month and multi-year CSC and Lewd Act indictments because time is not an element of either offense and the circumstances typically surrounding sexual abuse against a minor justify a temporally broad allegation. The time period alleged in the indictments was reasonable under the circumstances and more precise temporal allegations would have made no difference to Appellant's defense. Accordingly, the trial court properly denied Appellant's motion to quash.

### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 866 (Ct. App. 2006). The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007).

### Discussion

Where time is not an essential element of the offense, an indictment need not allege a specific date and time the offense allegedly occurred. State v. Tumbleston, 376 S.C. 90, 101, 654 S.E.2d 849, 855 (Ct. App. 2007); State v. Peak, 134 S.C. 329, 340, 133 S.E. 31 (1926) (holding in murder prosecution "[i]t is not necessary to prove the precise day or even year laid in the indictment, except where time enters into the nature of the offense, or is made part of the

description of it"). There is no time element of CSC or Lewd Act. Tumbleston, 376 S.C. 90 at 101, 654 S.E.2d at 855. Accordingly, numerous South Carolina cases affirm that a specific date and time need not be alleged in indictments alleging sexual abuse against a minor when circumstances justify a broader range. See State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991); State v. Wingo, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991); State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005); State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007); State v. Richey, 88 S.C. 239, 70 S.E. 729, 729 (1911) (carnal knowledge with a minor). Indeed, "[t]he State is not required to denote the precise day, or even year, of the accused conduct in an indictment charging criminal sexual conduct." Tumbleston, 376 S.C. at 101, 654 S.E.2d at 855.

"[I]ndictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame." Tumbleston, 376 S.C. at 101–02, 654 S.E.2d at 855. South Carolina courts have recognized that the nature of sexual abuse against a minor allegations present unique circumstances. State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006), overruled on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (explaining that "the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses"). The youth of victims, "stealth and repetitive nature" of abuse, and the resulting phenomenon of delayed disclosure often make pinpoint accuracy in date and time allegations impossible, and "compels identification of the broader time period." Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855; see also Wade, 306 S.C. at 84–85, 409 S.E.2d at 783, quoting State v. Rogers, 48 Idaho 567, 570, 283 P. 44, 45 (1929) ("It would be a very weak rule of law that would permit a man to ravish a fifteen year old girl ... and then say in effect, 'you cannot

convict me of this crime, as you did not guess the right date.' "); State v. Perry, 410 S.C. 191, 213, 763 S.E.2d 603, 614 (Ct. App. 2014) ( "Where the victim is a child, such cases often involve continued offenses over an extended period of time or, as in this case, are not reported until sometime after their commission. Thus, a specificity requirement would serve to prevent many prosecutions in child sexual abuse cases.").

Appellant relies on State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), to support his claim. In Baker, the State originally indicted the defendant for four counts of lewd act and one count of CSC occurring during the summers of 2002, 2003, and 2004. Id., 411 S.C. at 586, 769 S.E.2d at 862. However, two weeks prior to trial the State amended the lewd act indictments. Id. The amended indictments alleged the acts occurred between June 1, 1998 and September 1, 2004, a six year window. Id., 411 S.C. at 587, 769 S.E.2d at 862. Baker also alleged the trial court erred by qualifying the forensic interviewer as an expert witness. The Supreme Court reversed, with two justices finding the amended indictments were insufficient to give the defendant adequate notice of the charged crimes based largely on the last-minute expansion of the time frame. Two justices dissented, with another voting to affirm in result only. Although Baker is not binding precedent because only two justices joined in the opinion's rationale, it is nevertheless instructive and clearly distinguishable from this case.

The indictments in this case covered a thirteen moth period, as opposed to the six year period in Baker. By comparison, the appellate court approved of a two year indictment in Wade and a three year indictment in Tumbleston. Perhaps more importantly, the indictments in Baker were amended two weeks before trial, requiring the defendant to defend against allegations covering a six year span instead of only three particular summers. Therefore, there was an element of surprise, the crucial ingredient in the prejudice prohibited by Wade. See Wade, 306

S.C. at 86, 409 S.E.2d at 784 (holding prejudice may result if a defendant is "taken by surprise and hence unable to combat the charges against him."). There were no last-minute expansions of the allegations in this case. Because of these distinctions, even Baker's persuasive value is not applicable to the facts of this case. Finally, despite the prejudicial element of surprise in Baker, the court still opined that had the indictment alleged only the summer months of the years 1998-2004, it would have been sufficient. Surely, having to answer allegations occurring in a continuous one-year period is no worse than having to answer allegations from six separate years totaling eighteen months. The temporal scope of the allegations in these indictments is well within what is allowable under controlling precedent and was reasonable under the circumstances.

Finally, Appellant has not shown prejudice. His defense was a complete denial. He did not claim alibi, as the defendant did in Baker. Instead, he claimed the accusations were simply "untrue" and the jury rejected his defense. See Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (no prejudice from indictment alleging three year window where appellant "proceeded with the defense of denial, and the jury simply rejected this defense"); Wade, 306 S.C. at 83, 409 S.E.2d at 783 (no prejudice from indictment alleging two year window where "defendant proceeded with a defense of denial, and presented evidence of factual impossibility. The jury simply rejected these defenses."). Not only was the time frame established as far as practicable in the circumstances, more precise temporal allegations would have made no difference in Appellant's defense. In other words, it doesn't matter when it happened, just that it happened. Therefore, Appellant suffered no prejudice. Accordingly, the trial court did not err by denying Appellant's motion to quash the indictments.

## III.

**The trial court correctly admitted evidence of Appellant's continuous pattern of abusive conduct.**

Appellant asserts the trial court erred by admitting evidence of his continuous pattern of abusive conduct against Victim, claiming the State only offered this evidence to show Appellant's propensity to sexual deviancy and alleging the State improperly used an overbroad indictment to circumvent the rule against propensity evidence. This argument fails because the acts described by Victim were part and parcel of a single course of inextricably related conduct, relevant to prove both CSC and Lewd Act. They were not introduced to show that Appellant was predisposed to pedophilia. Indeed, under the State's charging documents they were not prior bad acts at all, but rather substantive proof of the Lewd Act charge. What Appellant styles as a Lyle issue is in essence an argument that the State should not have been allowed to prosecute Appellant for all the alleged acts at one time, even though Appellant made no motion at trial to sever the proceedings. In any case, the State was not required to charge the Lewd Act as multiple counts because the decision of which charge and how many counts to bring is within the prosecutor's discretion. Finally, even if the State had charged multiple counts of Lewd Act, each act was relevant to prove both Lewd Act and CSC under the common scheme or plan exception to Rule 404(b). Accordingly, the trial court properly admitted the evidence.

### Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id.

## Discussion

The State disagrees with Appellant's characterization of the testimony detailing Appellant's pattern of abuse as prior bad act evidence. The prohibition against character evidence bars admission of uncharged conduct. The State made clear it was pursuing a general Lewd Act indictment, charging a single count supported by evidence of numerous distinct but related acts which could independently support guilt. Feb. 12 Tr. 28; Feb 14 Tr. 103. As the prosecutor argued before trial, "those aren't prior bad acts. Those are the acts that we're talking about for my lewd-act indictment." Feb 12 Tr. 29. All of the incidents described by Victim at trial clearly meet the elements of Lewd Act, with the possible exception of the incident where Appellant offered Victim money to "sit on his face," which did not result in a physical touching. Feb 13 Tr. 94. Therefore, under the State's theory of the case, the details of Appellant's lewd sexual behavior towards Victim leading up to the "ultimate act" of digital penetration constituted substantive proof of guilt for a charged offense.

When viewed this way, as it appropriately should be viewed, Appellant's argument is essentially an argument against joinder of multiple possible charges for a single trial. However, it is clear from controlling precedent that the State would have been entitled to try Appellant on each closely related accusation in a single trial. See State v. Beekman, 405 S.C. 225, 229–30, 746 S.E.2d 483, 486 (Ct. App. 2013) (allowing joinder of CSC charges against two victims because the offenses were "of the same general nature involving connected transactions closely related in kind, place and character"). The question is closely connected with Appellant's raised issue because "[p]rejudice to a defendant may occur where the defendant is jointly tried on charges resulting in the admission of prior bad act evidence that would have otherwise been inadmissible." Id. (quoting State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)).

However, because Appellant did not move to have the individual acts charged as separate crimes, and does not raise the issue of joinder in his brief, any claims along these lines are not preserved for review. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (objection must be entered on a specific ground at trial to preserve an appeal).

The trial court accepted the State's theory of the case that the acts described by Victim leading up to the digital penetration were substantive evidence of guilt under the Lewd Act indictment, not prior uncharged acts. Consistent with this theory, the court made clear that the state would be limited to proving the acts that occurred within Dorchester County in the time period alleged in the indictment. The court recognized, "when you start getting outside the realm of the indictment, outside of when it occurred, then I'm starting to deal with prior bad acts." Feb. 12 Tr. 31. The court instructed the State that Victim must not testify to allegations that occurred before August 1996 or outside of Dorchester County, even though there was evidence that Appellant's grooming of Victim started earlier.

Furthermore, the common evidentiary issues in minor sexual abuse cases, particularly the lack of specificity possible from a minor victim who suffered under a continuing pattern of abuse, present unique considerations justifying wide discretion for prosecutors deciding how to charge these acts. Generally, prosecutors have wide discretion in their charging decisions. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ( "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). As long as the defendant receives sufficient notice to prepare a defense, a prosecutor's decision which charge and how many counts to bring is a matter within his discretion. See Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937) (in conspiracy

prosecution, "blanket" indictments are allowable, "but they must not be used in such a way as to contravene constitutional guaranties"). An indictment may be limited to one specific act, justifying punishment for and barring future prosecution of that act only. Alternatively, a prosecutor may frame an indictment in more general terms, allowing him to rely on several alternative acts to support a single conviction. See State v. Solomon, 245 S.C. 550, 565, 141 S.E.2d 818, 826 (1965) (in prosecution for conducting business on a Sunday, "[t]he indictment covered, in general terms, violation of the statute on May 13, 1962, and but one conviction can be had against the defendant for the period covered by the indictment" despite the fact that the State did not specify any specific transaction and could have prosecuted Solomon for multiple transactions occurring in that time frame).

The State sacrifices procedural advantages when it pursues a general indictment. "It is allowable for the State to make general factual allegations in an indictment, and it does so at its own peril. If the defendant is acquitted under a general indictment, he may not be tried again for accusations that would have been covered in the first indictment." State v. Dewees, 76 S.C. 72, 56 S.E. 674, 675 (1907). Because double jeopardy will bar future prosecution for any acts which would support conviction under the general indictment, the State forgoes the possibility of obtaining separate convictions and sentences for multiple counts. In this way, prosecution of the acts as a single count is hugely beneficial for defendants. State v. Martinez, 250 Neb. 597, 601, 550 N.W.2d 655, 658 (1996) (charging a pattern of sexual abuse as a single count is "quid pro quo" between state and accused). Appellant seemed to suggest at trial that the State should be required to separately indict Appellant for each act. However, defense counsel stopped short of making this request, presumably to avoid exposing her client to multiple convictions and a much longer period of incarceration. Following his conviction under the Lewd Act indictment,

Appellant clearly cannot be prosecuted again for any of the allegations brought at trial, or for any other allegations which could have been brought under the indictment. See Russell v. United States, 369 U.S. 749, 764 (1962) (explaining a defendant can "rely upon other parts of the present record in the event that future proceedings should be taken against them").

The propriety of a general indictment in sex abuse cases has been persuasively approved by appellate courts in other states. See, e.g. State v. Petrich, 101 Wash.2d 566, 571, 683 P.2d 173, 178 (1984) ( "Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, including the victim's ability to testify to specific times and places."); State v. Generazio, 691 So. 2d 609, 611 (Fla. Dist. Ct. App. 1997) (noting courts have "allowed the matter of how to charge these sensitive and difficult-to-define acts of sexual abuse to rest in the discretion of prosecutors"). As explained by the court in State v. Altgilbers, 109 N.M. 453, 466, 786 P.2d 680, 693 (1989):

> The state faces a dilemma when prosecuting on evidence such as that in this case. On one hand, charging one count for each week, or even a shorter period, throughout a multi-year period can be logistically overwhelming (hundreds of counts and jury instructions), oppressive to defendant, and to no purpose. On the other hand, one count may well seem inadequate to represent a great number of serious criminal offenses[....] Recognizing this dilemma, courts have deferred to the prosecutor's charging pattern in such circumstances[....] The charging pattern that best reconciles the community's interest in proper enforcement of the laws and the interest (shared by the community and the defendant) in fairness to the defendant may well be a charging pattern fitting between the two extremes.

The prosecutor's decision to charge a single count rather than piling on as many counts as possible was a commendable act of restraint. Appellant is not entitled to have it both ways; he cannot demand the State charge him separately for each act, yet retain his limited exposure to a single conviction and sentence. And regardless of how many counts are brought, a defendant

cannot prevent the State from introducing relevant, admissible evidence of his continuous course of sexual abuse against a single victim. See infra.

The prosecutor's actions in this case compare favorably to those taken by the prosecutor in Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005). In that case, as in this one, the defendant engaged in a continuous pattern of sexual abuse over an extended time. The minor victim testified she was forced to perform fellatio on the defendant in their living room "about twenty" times, defendant digitally penetrated her "about fifteen" times, and anally penetrated her "about ten" times. She could not articulate a specific date or time for any of the acts. Rather than charge a single count, the prosecutor brought twenty identical indictments for child rape and twenty identical indictments for felonious sexual penetration. Id., 395 F.3d at 636. Valentine was sentenced to forty consecutive life sentences. The Sixth Circuit Court of Appeals admonished the prosecutor for "piling on," and held that the forty convictions would be treated as a single conviction for each offense, and that defendant could not "be subsequently charged with the same crimes against the stepdaughter during the stated period." Id.

The validity of the indictments is a distraction from the true issue; whether the State should have been limited to alleging an isolated act of sexual abuse without providing the jury with essential context. Even if the Court views the Lewd Act allegations as prior bad acts, Victim's testimony regarding Appellant's continuous pattern of conduct fits squarely within the common scheme or plan exception to prior bad act evidence. State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) (testimony regarding a pattern of sexual abuse is "quintessential common scheme or plan evidence"); State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (common scheme or plan exception is "generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the

indictment is held admissible as tending to show continued illicit intercourse between the same parties"); State v. Taylor, 399 S.C. 51, 60, 731 S.E.2d 596, 601 (Ct. App. 2012) ( "In our view, the concept of continued illicit intercourse between the same parties in sexual abuse cases is another way of stating the common scheme or plan exception to Rule 404(b)."). Indeed, our courts have gone much farther than the trial court went here by allowing prior bad act evidence to prove conduct towards a different victim. State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (in CSC prosecution where defendant engaged in similar course of conduct towards multiple child victims, court held it would be "difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence"); State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) (similar pattern of sexual abuse against multiple foster children admissible as common scheme or plan); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) (testimony from former employee detailing similar sexual abuse as victim was admissible as common scheme or plan). The State did not dig up unrelated, distant allegations of abuse in order to demonize Appellant's character or suggest guilt on an improper basis. The State's case was limited to Appellant's predatory conduct toward his stepdaughter over a specific, continuous period of time. The admission of the evidence was proper.

Finally, if this Court agrees that Victim's testimony amounted to prior bad act evidence, it should defer to the trial court's ruling that the State proved each incident by clear and convincing evidence. Because this determination was based on Victim's statements and testimony, it rests solely on her credibility. Witness credibility is the province of the trial judge, and his decision in this regard is not reviewable by an appellate court. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (appellate court does not "review a trial judge's ruling on the admissibility of

other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal"); State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) ( "[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility"). For all of these reasons, this Court should affirm the trial court's ruling.

## IV.

**Appellant's argument that the trial court erred by failing to qualify Dr. Baker as an expert is not preserved for review because he did not raise this issue at trial. Even if preserved, the record shows the trial court properly qualified Dr. Baker as an expert. Furthermore, Appellant cannot show prejudice because Dr. Baker was in fact qualified.**

Appellant argues on appeal that the trial court improperly allowed Dr. Elizabeth Baker to give opinion testimony without first qualifying her as an expert in violation of Rule 701 SCRE. This argument is not preserved for review because Appellant did not object on this basis at trial. Rather, he argued the expert should not have been allowed to testify at all because certain documentary evidence she produced following her examination had been lost. Defense counsel argued he was not able to cross-examine Dr. Baker on the "basis of her opinion," citing Rule 705 SCRE. Because defense counsel did not object to Dr. Baker's qualification as an expert at trial, Appellant's argument is not preserved for review. Even if preserved, it is without merit. The judge conducted an in camera hearing and found the witness qualified to give the proffered testimony, and the record reflects she was qualified. Appellant suffered no prejudice from the fact that the court never announced Dr. Baker as an expert in the presence of the jury, and Appellant made no such request at trial. Accordingly, the trial court did not err.

### Standard of Review

The trial court's ruling on the admissibility of expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011).

## Discussion

At the start of the third day of trial, Appellant moved to exclude the testimony of Dr. Elizabeth Baker, the forensic pediatrician who performed Victim's medical exam and discovered that she had an interrupted hymen. Specifically citing Rule 705 SCRE, Appellant asked the court to exclude Baker's testimony because he was not able to examine the "information" she relied on in her examination of Victim. Feb 14 Tr. 4. Dr. Baker's in camera testimony revealed she did not rely on any outside data or information to make her findings, but rather conducted a pure visual exam and made her findings based exclusively on her own observations. The State made clear it would not elicit Dr. Baker's opinion about what caused the interruption, only the fact that Victim did in fact have an interrupted hymen.

Dr. Baker testified she received her medical degree from the USC School of Medicine and completed her pediatric residency at Richland Memorial Hospital. She practiced forensic pediatric medicine until she went back to school to earn her degree in child and adolescent psychology in 2012. Feb 14 Tr. 11. After explaining her exam procedure, she stated her finding that Victim had an interrupted hymen. The parties then made arguments regarding the admissibility of her testimony, and the court announced its ruling. Although it questioned whether Dr. Baker's testimony could accurately be called opinion testimony, the court nevertheless found her testimony did "require the expertise of a doctor to report on the physical findings that she made, and I am going to allow her to testify as she just did." Feb 14 Tr. 32. However, the court also ruled that Dr. Baker could not offer an opinion as to the cause of the interrupted hymen.

Contrary to Appellant's assertions, the above-cited testimony shows the court did qualify Dr. Baker as an expert. The court heard her qualifications, listened to her proffered testimony,

and found her testimony admissible based on her specialized knowledge and experience. The court explicitly stated: "I find that the expert has the requisite knowledge and skill to qualify on the subject she will be testifying to[.]" Feb 14 Tr. 31. The court also found her testimony reliable and that the subject matter was beyond the ordinary knowledge of a lay juror. Feb 14 Tr. 31.

Appellant never objected to Dr. Baker's qualifications or the trial court's findings. His argument was limited to the alleged prejudicial effect caused by the destruction of the photographs and videos Dr. Baker took to document her exam. Because Appellant did not object to Dr. Baker's qualifications at trial, he may not do so for the first time on appeal. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (objection must be entered on a specific ground at trial to preserve an appeal). If Appellant's argument is that the court should have declared her an expert in front of the jury, this argument is likewise not preserved because the judge was never given an opportunity to rule on that issue either. The State presumably did not tender Dr. Baker as an expert in front of the jury because the court had already found her qualified. But because Appellant did not object on that basis at trial, he may not now argue the issue on appeal. Tucker v. Doe, 413 S.C. 389, 406, 776 S.E.2d 121, 130 (Ct. App. 2015) (holding defendant must have objected to expert testimony at trial on same ground as appeal).

Regardless, Appellant cannot show prejudice from the court's ruling because the record reflects Dr. Baker was in fact qualified to give expert testimony. United States v. York, 572 F.3d 415, 422 (7th Cir. 2009) (holding any error harmless where witness "would have easily qualified as an expert had the court conducted the formal Rule 702 analysis"). To announce her as an expert in front of the jury would have served no purpose, and may actually have prejudiced Appellant. United States v. Bartley, 855 F.2d 547, 552 (8th Cir.1988) (noting that "[a]lthough it

is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court").

In short, the court properly qualified Dr. Baker as an expert and correctly allowed her testimony. Appellant did not request the court announce her as an expert in the presence of the jury, and has cited no case or offered any rationale explaining why the court should have done so. Accordingly, this Court should affirm the trial court's ruling.

## V.

**The trial court did not err by allowing expert testimony that Victim had an interrupted hymen when testimony was based on doctor's visual observations and she did not offer an opinion based on any underlying facts or data.**

Lastly, Appellant claims the trial court erred by allowing Dr. Baker to give her opinion that Victim had an interrupted hymen. Citing Rule 705 SCRE and the Confrontation Clause of the Sixth Amendment to the United States Constitution, Appellant claims her testimony should have been excluded because the pictures and video Dr. Baker took following her visual exam and a written report documenting her findings were destroyed in the twenty year period between the exam and trial. Appellant equates these documentary pictures and videos with "underlying facts, data, and evidence relied upon by the witness," and claims the absence of these items made Dr. Baker ineligible to testify. Appellant's argument is without merit because (1) Dr. Baker did not give an opinion, and (2) she did not rely on any "underlying facts, data, and evidence," but rather her own observations. Therefore, there were no underlying facts or data to disclose. Accordingly, the trial court did not err by allowing her testimony.

### Standard of Review

The trial court's ruling on the admissibility of expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011).

### Issue Preservation

Although Appellant cites the Confrontation Clause in his brief, he did not raise it as the basis for his motion at trial. Therefore, the issue is not preserved for review. State v. Sims, 348

S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("On appeal, appellant also argues the trial court's ruling violated the Sixth Amendment of the Constitution; however, this issue is not preserved for review because it was not raised at trial.").

**Discussion**

Specifically citing Rule 705, Appellant moved to exclude Dr. Baker's testimony, alleging her expert opinion relied on "information that we're not able to examine or investigate." Feb 14 Tr. 4. The "information" to which Appellant referred was the pictures, video, and one of the written reports Dr. Baker produced after her exam of Victim. However, Dr. Baker testified she did not rely on the pictures, video, or report to reach her conclusion. Instead, she conducted a pure visual exam and made her diagnosis based only on her perceptions. The pictures and video were for documentary purposes only. She explained: "Whenever I would do the visualization, I wouldn't finish the exam until I had formulated my opinion. But then I would need to make sure it was documented appropriately. And so that the video— the photographs were typically used to make sure it was documented appropriately in case somebody wanted a second opinion. But I would have my own— my own opinion would have been formed before I finished the exam." Feb 14 Tr. 19. Likewise, she did not rely on any other outside information. Although she was aware of the abuse allegations, they did not factor into her diagnosis because "[t]he visual examination is pretty straightforward regardless of what the history is." Feb 14 Tr. 21-22. In other words, there was no "information" that Dr. Baker relied on to reach her conclusion. Rather, her testimony was based on her own observations.

Rule 702 provides that a qualified expert may testify regarding the area of her expertise "in the form of an opinion **or otherwise**." SCRE 702 (emphasis added). Rule 705 provides that an expert "**may** testify in terms of opinion or inference and give reasons therefor without first

testifying to the underlying facts or data, unless the court requires otherwise. The expert **may** in any event be required to disclose the underlying facts or data on cross-examination." Rule 705 SCRE (emphasis added). Thus, an expert may give opinion or non-opinion testimony, and the decision whether to require the expert to disclose the underlying "facts or data" of an opinion is within the trial court's discretion.

It is dubious to refer to Dr. Baker's testimony as opinion testimony, even though Dr. Baker herself referred to it as such. She merely stated her observation that Victim's hymen was interrupted, a perception made credible and admissible by her specialized knowledge and training as a medical doctor. The trial court recognized the flaw in Appellant's argument "that her visual inspection, what she sees, is an opinion." Feb 14 Tr. 25. The trial court astutely noted that Dr. Baker did not opine about the **cause** of the interruption. Indeed, Dr. Baker did not even entertain any hypothetical questions about what could have caused it. Defense counsel even argued in closing that Dr. Baker's **lack of an opinion** as to causation made her testimony unimportant, and accepted the testimony as truth: "Did Dr. Baker say, 'this child was sexually molested?' No. Dr. Baker told you she did an examination. There was an interruption in the hymen. An interruption caused by what? Caused by her falling off a balance beam? Caused by her falling off a bicycle or onto a bicycle?" Feb 14 Tr. 111. This is the type of inference Rule 705 contemplates as opinion testimony.

Even if the Court views Dr. Baker's diagnosis as an opinion, Rule 705 does not apply because there was no underlying data to be disclosed. Dr. Baker based her findings on her own perception. The court did not err by failing to order disclosure of something that didn't exist. Even if underlying data did exist, the decision to order disclosure is not mandatory. Rather, the rule states that the court **may** require disclosure on cross-examination. Appellant has failed to

show how Rule 705 applies to these facts, much less an abuse of discretion in the court's admission of competent testimony.

Finally, as to Appellant's Confrontation Clause argument, even if this Court finds it preserved, it is meritless. Although Appellant claims he was denied meaningful confrontation because he was not able to see the pictures and video Dr. Baker took following her visual exam, his argument lacks substance because the pictures were irrelevant to Dr. Baker's conclusion. They were merely documentation of her findings. Cf. State v. Slocumb, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999) ( holding where psychiatric expert based his opinion on defendant's DJJ incident reports, State was allowed to cross-examine him regarding those reports). Most importantly, Appellant exercised his right to confrontation when he cross-examined Dr. Baker. Notably, he made no attempt to show that her observations could have been mistaken. Rather, he just drew attention to the missing pictures and video. Feb 14 Tr. 39-41. In doing so, Appellant forfeited his opportunity to question the actual validity of Dr. Baker's testimony, the true purpose of confrontation. The prosecutor noted the hypocrisy in Appellant's argument by pointing out that the materials likely would not have been lost or destroyed if Appellant had not evaded justice for more than twenty years. Appellant should not benefit from his own wrongdoing. See, e.g. Delahouse v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) (holding that when a prisoner escapes from prison, he should not be given credit against his South Carolina sentence for time served in another jurisdiction on a subsequent crime).

Because Appellant has not shown that Dr. Baker relied on any underlying facts or data to reach her conclusion, and has not shown an abuse of discretion in the trial court's decision not to order disclosure of nonexistent evidence, this Court should affirm.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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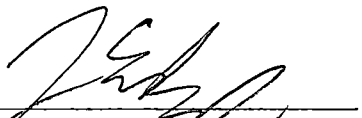
BY: 
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ATTORNEYS FOR RESPONDENT

August 20, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2018-000259

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THE STATE,



Respondent,

v.

SAMUEL JOLLY,

Appellant.

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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies addressed to Lara M. Caudy, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 20th day of August, 2018.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL



August 20, 2018

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
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Post Office Box 11589
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RE: **State v. Samuel Jolly**
Appellate Case No. **2018-000259**

Dear Ms. Caudy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

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