ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID SCOTT BAGWELL,

APPELLANT

APPELLATE CASE NO 2017-001844

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. The trial court erred in admitting the out-of-court interview of the minor child where it did not possess particularized guarantees of trustworthiness due to the interviewers use of leading questions and the inclusion of the interviewers own bolstering remarks.

STATEMENT OF THE CASE

On February 10, 2015 Appellant was indicted by the Pickens County Grand Jury on one count of Criminal Sexaul Conduct with a Minor First Degree. (R.p. 383 – 384). His case was called to trial August 28, 2017 before the honorable Perry H Gravely. John DeJong of the Pickens County Public Defender's office represented Appellant and Chris Jones of the 13th Circuit Solicitor's Office represented the State.

On August 30, 2017 the jury returned a guilty verdict on the indicted charge. Judge Gravely sentenced Appellant to a term of 30 years.

This appeal follows.

STATEMENT OF THE FACTS

Appellant married Toni Bagwell in 2012. Pickens County indictment 2015-GS-39-0102 alleged that between August 28, 2013 and October 30, 2013 Appellant committed sexual battery upon Toni Bagwell's daughter (the Minor Child). For about five months in 2013 the Minor Child along with her mother, brother and the Appellant lived on Cleo Chapman highway in Pickens County South Carolina. (R.p. 110, l. 24 – R.p. 111, l. 3). Minor Child alleges that while living at the house on Cleo Chapman Highway, Appellant assaulted her by touching her genital area with both his hands and mouth. (R.p. 111, l. 9 – R.p. 112, l. 21). Minor Child was eight years old at the time the alleged events occurred. (R.p. 73, l. 23). In October 2013 the family moved from Pickens County to three successive addresses in Colleton County: first on Piniel Road in Walterboro; then Victoria Lane in Ruffin and finally Beulah Road in Smoaks. (R.p. 273, l. 22- R.p. 274, l. 23). In December 2013 the Minor Child, her mother and brother then moved to Orangeburg County. (R.p. 274, l. 24 – R.p. 275, l. 1).

The investigation in this case began on May 15, 2014 when Rebecca Mosely, with the South Carolina Department of Social Services in Orangeburg County responded to a call at an address on Neeses Highway in Orangeburg. (R.p. 169, l. 24 – R.p. 170, l. 3). At this time the Minor Child along with her Mother, her grandmother, and her brother were living at the Neeses Highway address. (R.p. 170, l. 7). Appellant was not living at the Neeses Highway address at this time. (R.p. 175, l. 6-9). The purpose of the May 15th visit was to investigate allegation of physical abuse. At the time of her May 1st inspection there had been no allegations of sexual abuse. (R.p. 175, l. 24 – R.p. 176, l. 5). Minor Child first disclosed her allegations of sexual abuse in response to the model questions Agent Mosely typically asks as an investigation of physical abuse. (R.p. 178, l. 24 – R.p. 179, l. 5). Minor Child disclosed she was sexually abused while she was living in

the house on Cleo Chapman Highway. After receiving the allegations, Agent Mosely notified the Orangeburg County Sherriff's office. (R.p. 174, l. 12-19) which in turn contacted the Pickens County Sherriff's office on May 19, 2014.

The Minor Child was taken to the Edisto Children's' Clinic in Orangeburg in order to participate in a forensic interview. (R.p. 74, l. 10-18). On June 15, 2014, Pamela Darby, with CASA Family Systems in Orangeburg, conducted the forensic interview. (R.p. 163, l. 8- R.p. 164, l. 12). The forensic interview was recorded on to a DVD and over the objection of defense counsel the DVD was introduced in evidence and published to the jury as State's Exhibit 2. (R.p. 165, l. 1-21). [1]

Prejudicial Opening Remarks by the Court

On August 28, 2017 The Honorable Perry H Gavely conducted jury qualification for the Pickens Circuit Court. Immediately after qualifying the veniremen the trial Court made the following statement to the entire panel.

> THE COURT: Ladies and gentlemen, we are able to start the trial of the State versus David Scott Bagwell.
>
> I'm going to read you just very brief facts (sic) from the indictment. I always make sure to say before I ever mention an indictment that an indictment does not mean that a person is guilty.
>
> In fact, the Defendant has pled Not Guilty in this matter. This is merely the formal paper that brings the charges before the court.
>
> **This is a matter that happened in Pickens County on August 28th, 2013 -- I'm sorry, between the dates of August 28th, 2013 and October 30th, 2013, regarding a sexual battery on a minor.**

[1] The parties agreed to redact the exhibit by muting the following sections: 1) between 22 minutes, 19 seconds and 25 minutes, 33 seconds; 2) between 33 minutes, 28 seconds to 36 minutes, 28 seconds; and, 3) 54 minutes, 20 seconds to 54 minutes, 55 seconds. (R.p. 155, l. 12-19).

So I'm going to ask you very specific questions about this -- I guess that we need to put them under oath for this particular case.

(R.p. 5, l. 21- R.p. 18, l. 16). (**emphasis added**). This was the entirety of the remarks that trial court gave to the veniremen. Immediately after these remarks the court proceeded to conduct *voir dire* and seat the final jury panel. Once the jury panel was seated the court asked the parties if there were any objections or exceptions to the selection process. The State had no objections, and defense counsel responded "nothing to the selection process" (R.p. 23, l. 10-17). The jury panel was then excused for the day. Following an in chambers meeting that was not on the record defense counsel moved for a mistrial. In support of his motion defense counsel stated:

> That Motion is based on pretty much the very opening remarks to the jury panel on this case that was made by Your Honor. I mean no disrespect. But as I recall what Your Honor said to the jury was, I would like to give you a brief statement of the facts of this case. - I take issue with the court making a statement as to facts in the case.
>
> My position is that there are no facts that have been presented in this case as of this point in time. There are certainly allegations.
>
> And, again, Your Honor, I think -- again with no disrespect intended to the Court, but for you as the judge, wearing a black robe, telling the jury that you wanted to give them a brief statement of facts as to this case is highly prejudicial to my client.
>
> I dontthink that it can be cured by a curative instruction. The bell has been rung. Now, to try to unring that bell, I would submit to the court, is an impossibility.
>
> They heard Your Honor say a 'brief of statement of facts." As I recall, you did not read the indictment after having made that statement. It was kind of a pick-and- choose, if you will, out of the indictment.
>
> I think that you gave some dates and what I'd consider allegations, but certainly were not facts of the case, Your Honor.
>
> Having said that, I think it is highly prejudicial. It was in the presence of the entire Jury panel, not just a few or not just in the presence of the jury we have just selected but in the presence of the entire venire. Based on that, Your Honor, I would respectfully move for a mistrial.

(R.p. 25, l. 16- R.p. 27, l. 7).

The trial court denied trial counsel's motion and noted that a further curative instruction could eliminate any problems. Defense counsel responded by stating: *And I'm not arguing with*

Your Honor but just so that the record is clear, certainly there is not a curative instruction that I am coming up with or one that I am agreeing to, Your Honor. (R.p. 27, l. 20-24). During his introductory remarks to the seated jury the trial court stated:

> You are the sole judge of the facts If there anything that Ive said throughout this trial, it -- the law does not allow me to have an opinion as to the facts or state any facts in the case. Anything up to this point is merely allegations. We had a reference to an indictment. An indictment has been presented to the court and the defendant has pled not guilty to those allegations and, therefore, the burden is on the State to prove each and every element of the charge beyond a reasonable doubt.
>
> If Imake any statement or make any inference that would cause you to think that Imay have an opinion on the facts, or state anything that you think I present as a fact, please disregard that. That is not -- it's your place to determine what the facts are.
>
> Anything referenced in the indictment, again those are merely allegations. An indictment is also something that youre not to consider in any way when you begin deliberations because the indictment is merely the paper that brings -- just like an arrest warrant -- the charges. An indictment merely brings a case before this court and is not to be considered evidence in any way.

(R.p. 53, l. 25- R.p. 55, 1.1).

Defense counsel then renewed his motion for a mistrial and argued that these subsequent remarks by the court to the seated jury did not cure the prejudice caused by the court's earlier remarks to the venire panel. Tr. 129, l. 6 -18. The court denied defense counsel's renewed motion for mistrial by stating that: *I am sure that the subsequent instructions would have cleared any issues about that up then.* (R.p. 105, l. 1-23). After the close of the case, defense counsel again renewed his motion for mistrial. (R.p. 306, l. 2).

In Camera Hearing on Admissibility of "Forensic Interview"

Defense counsel moved *in limine* to exclude the introduction of the recording of the Minor Child's forensic interview. As grounds for excluding the video defense counsel argued that Pamela Darby, the forensic interviewer, impermissibly bolstered the Minor Child's testimony and

conducted the interview with leading questions. (R.p. 29, l. 24- R.p. 31, l. 5). Pursuant to SC CODE ANN § 17-23-175, the Court conducted a hearing to determine whether Minor Child's interview possessed particularized guarantees of trustworthiness as required by SC CODE ANN § 17-23-175 (B). The Court reviewed the video in camera and heard the proffered testimony of Pamela Darby. (R.p. 140 – R.p. 150).

A review of the interview shows that forensic interviewer did not conduct the interview using only open ended questions. The forensic interviewer asked the minor child several yes/no questions; and several questions with suggested multiple choice answers. For example the interviewer led the Minor Child's answers by asking numerous leading questions including the following: *Were your clothes on or off or something else when he touched you with his hand?; Did you have underwear on under your clothes?; Did he touch you on top of your front private part or insider your front private part or something else?; Did he touch you on top of your rear private part, inside your rear private part or something else? Were you always tied up with a rope?; Did something come out of his front private part when he wiggled it?; Did he say anything else to you when he touched your private parts?; Did he ever say it was a secret? So are you tied up laying down or sitting up? How were your arms; were they down like that* (gesturing) *or up like this* (gesturing) *or something else?* State's Exhibit 2.

Additionally the interviewer led the Minor Child through the interview by frequently repeating and restating the Minor Child's previous answers as a preface to another yes/no question. For example following a series of questions regarding what happened to the Minor Child's clothing the interviewer then asked: *Now you said that he used his hand to touch you on your lower chest and on your front private part inside and on top of it; and on top of your back private part, did he use any other part of his body to touch your private parts?* State's Exhibit 2 at 52 minutes. Later

the interviewer asked: *Now let me ask you this, I know you said he touched you with his hand on your front private part and your chest and you said he put his mouth on your front private part, did he ever put his mouth on your back private part?* State's Exhibit 2 at 58 minutes. Similarly the interviewer rephrased and repeated the Minor Child's earlier testimony with her question: *Let me ask you this, now I know you told me about what he did to you and touching you and bad things like that, and you told me about your mom and you told me that he beat you on your feet with a belt so when you were trying to close your eyes when he was touching himself, did he beat you any other time with a belt or any other place on your body*? State's Exhibit 2 at 1 hour 9 minutes. In each of these instances, the interviewer was not immediately repeating the child's answer to the last question she was asked, rather the interviewer was summarizing the Minor Child's earlier responses to other questions.

Periodically throughout the interview, Pamela Darby would provide declarative summaries of Minor Child's prior testimony that were neither premises for another question nor an immediate clarification of what the Minor Child had just said. For example about 1 hour into the interview the Pamela Darby provided the following summary of the Minor Child's prior testimony: *Now you said this happened more than one time; that he'd tie you up with a rope and touch you on your private body parts, Ok, Ok, And you know his mouth touched your front private part on top of it, and his hands you on your private parts OK, OK, And he touched himself in front of you. OK, OK.* During Pamela Darby's proffered testimony, defense counsel asked whether she was trained to repeat everything the child says. In response the forensic interviewer stated: *[p]art of the process is that you do repeat if you, uh, to make sure that you heard the child correctly as to what they stated. Or you do that to give the child an opportunity to self-correct.* (R.p. 144, l. 23- R.p. 145, l. 5). Darby went on to state: *[a]s part of the interview guidelines, if a child says something you*

repeat information; or if you need clarification of what they said or information that they shared as this opportunity to disclose, then yes, you review what they said. (R.p. 145, l. 15-20).

Following Pamela Darby's in camera testimony and review of the video, trial counsel objected to the admission of the video as it did not comply with the standards set forth in SC CODE ANN. 17-23-175. Specifically he argued that Pamela Darby's technique of repeatedly paraphrasing the Minor Child's testimony as a preface to another question amounted to leading the Minor Child's testimony. (R.p. 152, l. 23- R.p. 153, l. 11). Additionally trial counsel argued that by repeating the prior testimony Pamela Darby's conveyed the message that she believed the Minor Child's testimony thus bolstering that testimony. (R.p. 152, l. 23- R.p. 153, l. 24). The trial court allowed the admission of the video. The trial court acknowledged that some of the questions may have been leading, but that the video was trustworthy and met the elements of SC CODE ANN. 17-23-175. (R.p. 154, l. 7-16).

ARGUMENT

I. The trial court erred in denying defense counsel's motion for mistrial after the trial court made prejudicial comments to the jury regarding the facts of the case.

At the beginning of the jury qualification process for this trial Judge Gravely's uttered the following statement to the veniremen: *This is a matter that happened in Pickens County on August 28th, 2013 -- I'm sorry, between the dates of August 28th, 2013 and October 30th, 2013, regarding a sexual battery on a minor.* This statement related to three elements of the offense the state would have to prove beyond a reasonable doubt namely: 1) that a sexual battery upon a child occurred; 2) that the battery occurred between specific dates in 2013; and, 3) that the battery occurred in Pickens County. It is not clear from the trial court's previous remarks that when the judge uttered the statement he was referring to allegations in the indictment. Instead the remarks left the jury with the impression that it was not contested whether a sexual battery occurred and that perhaps the only issue was the identity of the person committing the battery.

Article 5, Section 26, of the Constitution of the State of South Carolina, 1895, provides: *Judges shall not charge juries in respect to matters of fact, but shall declare the law.* This section is founded upon the concept of our system of justice that every person charged with a crime has the right to a fair and impartial trial and that such a trial may only be achieved with the neutrality of the trial judge. State v Campbell, 297 S.C. 24, 26, 374 S.E.2d 668 (1988). *It is elementary that in the course of the trial of a criminal case, the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of evidence, the credibility of witnesses, the guilt of the accused, as to the controverted facts.* State v Kennedy, 272 S.C. 231, 233 250 S.E.2d 338, 339 (1978). The only evidence that the sexual battery occurred came from the Minor Child's forensic interview and her in-court testimony. Therefore the trial Court's statement that

"this matter happened", must been seen as the trial judge's own opinion of the veracity of the Minor Child's testimony. Trial court judges must refrain from any comment from which the jury could infer the judge's opinion regarding the veracity of a witness. See Id., 271 S.C.at 233 (reversing defendant's conviction because when defendant was on the stand and defense counsel asked three witnesses be excused from the courtroom, trial court responded by saying *I think they ought to stay in here. I want them to hear this fellow's lies I mean I want them to hear this fellow testify*); Campbell Id., at 297 S.C. at 25 (reversing conviction for distribution of cocaine where the Court's remarks were viewed as commentary on the relative moral character of the undercover agent and the confidential informant). .

The constitutional proscription against judges commenting upon facts in a case applies to cases where the judge's comments were not intended as a commentary on any particular fact(s). Olin Mathieson Chemical Corp. v. Planters Corp. 236 S.C. 318, 328, 114 S.E.2d 321, 330 (1960) (emphasis added). See also Peay v Durham Life Ins. Co., 185 SC 78, 193 S.E. 199, 202 (1937) (finding a jury charge was prejudicial in a case concerning whether an insured had canceled an insurance policy. The court's charge included language from a prior court's decision which contained references to "attempted cancelation" and "arising out of the cancelation"); In State v Thorne, 237 S.C. 248, 116 S.E.2d 854, (1960) defendant was on trial for rape. The court's charge included the following language: *I will tell you frankly that every woman has the right to walk upon the highways and our streets without the fear of being robbed of something which God alone gives her and when that is stolen from her she is very poor indeed. Such an act is not looked upon by the law with any degree of lightness. The facts are for you.* Id., 237 S.C. at 250. In reversing the defendant's conviction the court in Thorne stated: *The Judge must be careful to avoid expressing,*

or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Id., 237 S.C. at 251.

In Appellant's case the trial court's curative instruction that the jurors were to be the sole judges of the facts did not cure the prejudice caused by the trial court's initial remarks. In China v City of Sumter, 51 S.C. 453, 29 S.E. 206 (1898) the Court stated that the object of the Constitutional provision barring Judges from commenting on the facts:

> *was to leave all questions to the jury, to be decided according to their own judgment, unbiased by any expression, or even intimations, of opinion from the judge, it is manifest that such object would be defeated if a circuit judge should be allowed to express his own opinion upon any material question of fact, and then undertake to wipe out the impression made upon the minds of the jury by telling them that all questions of fact were for them. The impression having been once made, it would be very difficult, if not impossible, thus to obliterate it, and the result would be that the jury would be more or less influenced by an opinion coming from so high a source as an intelligent judge, whose mind had been trained to weigh testimony, and determine its force and effect, and thus the very object of the constitutional provision-to preserve the minds of the jury from being in any way influenced by the opinion of the judge as to a question of fact-would be defeated.*

Id at 29 S.E.2d at 209.

In State v Smith the Court recognized that in evaluating the propriety of a trial court's charge it must consider the charge as a whole. 227 S.C. 400, 88 S.E.2d 345 (1955). However, the Court held that an erroneous jury charge was not cured by subsequent language that all questions of fact are exclusively for the jury. Id., 227 S.C at 409. The Smith Court stated: *the real objective of the constitutional provision against charging on the facts is to leave all questions of fact to the jury to be decided according to their own judgment, unbiased by an expression or even intimation of any opinion from the judge.* Id. Similarly in Appellant's case, the trial court's subsequent instructions to the jury found at page 77 of the trial record did not cure the prejudice left after the court's initial statement

that this *matter happened.* At no point in this curative instruction did the trial judge make clear that he was reading allegations from the indictment when he told the veniremen that a sexually happened in Pickens County in 2013.

The State's case against Appellant rested primarily upon the Minor Child's in-court testimony and her forensic interview. The State introduced no medical or forensic testimony that corroborated the Minor Child's testimony. In his closing argument defense counsel argued that the sexual assault never happened, that the minor child's story was not credible and that the minor child had a bias against Appellant. (R.p. 321, l. 17- R.p. 322, l. 14; R.p. 334, l. 4-16). Therefor the court's introductory remarks that *this is a matter that happened in Pickens County... regarding a sexual battery on a minor* was highly prejudicial because the jury could have inferred that the court believed that the child was sexually assaulted.

II. The trial court erred in admitting the out-of-court interview of the minor child where it did not possess particularized guarantees of trustworthiness due to the interviewers use of leading questions and the inclusion of the interviewers own bolstering remarks.

"Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." State v. Russell, 383 S.C. 447, 450, 679 S.E.2d 542, 543-44 (Ct. App. 2009). "In CSC cases, such hearsay statements are admissible, but only to the extent they are limited to the time and place of the assault." Id. at 450-51, 679 S.E.2d at 544. S.C. CODE ANN. § 17-23-175 provides a further exception for the admission of an out-of-court statement for a child under twelve, provided the following:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child; (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F); (3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and (4) **the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.**

S.C. CODE ANN. § 17-23-175(A) (**emphasis added**). In determining "whether a statement possesses particularized guarantees of trustworthiness," the court considers:

> (1) whether the statement was elicited by **leading questions**; (2) whether the interviewer has been trained in conducting investigative interviews of children; (3) whether the statement represents a detailed account of the alleged offense; (4) whether the statement has internal coherence; and (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. CODE ANN. § 17-23-175(B) (**emphasis added**).

Here defense counsel challenged the trustworthiness of the Minor Child's out-of-court statements based upon the interviewer's use of leading questions and the interviewer's bolstering of the Minor Child's testimony. Although the interviewer did pose some open ended questions to the minor child many of her questions were intended to elicit a yes or no answer. Additionally with many of the questions the interviewer lead the Minor Child's response by suggesting that the right answer was one of a few suggested answers.

A leading question is one which suggests to the witness the desired answer. State v Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). When asking the Minor Child to describe how she allegedly was tied to the Appellant's bed, the interviewer did not wait for the Minor Child to answer before posing the following questions which suggested possible answers. The interviewer asked: *So are you tied up laying down or sitting up? How were your arms, were they down like that* (gesturing) *or up like this* (gesturing) *or something else?* The Minor Child's eventual description of how she was tied was similar to the manner suggested by the interviewer. Similarly the interviewer led the Minor Child's description of the manner in which Appellant allegedly touched her. Instead of posing opened questions she asked her: *Did he touch you on top of your front private part or insider your front private part or something else?; Did he touch you on top of your rear private part, inside your rear private part or something else?* Again the manner in which the interviewer posed the question suggested to the Minor Child the possible correct answers.

In addition to being untrustworthy because of the extensive use of leading questions, the Minor Child's statement should have been excluded because it contained the interviewer's bolstering statements. The interviewer bolstered the Minor Child's responses by interjecting her own summaries of the Minor Child's prior testimony. The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766

(1977). It is impermissible for one witness to bolster the testimony of another witnesses. State v McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). See also State v Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989); (finding a therapist's testimony indicating he believed victim's allegations were genuine was improper). Comments by a forensic interviewer that serve to bolster the testimony of the child accuser are improper. See State v Jennings, 394 S.C. 473,480, 716 S.E.2d 91, 94 (2011) (finding that the introduction of forensic interviewer's report stating that the child provided "a compelling disclosure of abuse" was improper); State v Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013); (ruling that forensic interviewer's direct testimony as to "a compelling finding of child abuse" was improper).

In Jennings, the State introduced no physical evidence to corroborate the testimony of the accusers. Id. Jennings, 401 S.C. at 479. The Jennings Court found therefore found that the accusers' credibility was the "most critical determination" of the case. Id. at 480. As did the court in Jennings, this Court should find that the admission of testimony that bolstered the credibility of Minor Child was not harmless. Id.

The forensic interviewer's extensive use of leading questions diminished the trustworthiness of the Minor Child's forensic interview. Lacking the required particularized guarantees of trustworthiness, the trial court erred in admitting Exhibit 2 into evidence. In addition to lacking the requirement's for admission set forth S.C. CODE ANN. § 17-23-175, the inclusion of the interviewer's bolstering commentary during the interview provides a separate ground for excluding the Minor Child's forensic interview.

CONCLUSION

The State's case against Appellant hinged upon the credibility of the Minor Child. The effect of both the trial court's errors was to enhance the credibility of the Minor Child's testimony. Therefore based upon the foregoing, Appellant David Bagwell respectfully requests that this Court reverse his conviction and remand his case for a new trial.

By: _____

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This December 18, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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DAVID SCOTT BAGWELL,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief 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"

By: JKF

James K Falk
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ATTORNEYS FOR APPELLANT

December 18, 2018