ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V

SAMUEL L WHITNER,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted for a single count of Criminal Sexual Conduct with a Minor in the First Degree by the Greenville County grand jury on February 19, 2009 The indictment alleged appellant had sexually assaulted his daughter on a single occasion when she was five or six years old R 577

Appellant was first called to trial for this offense on March 11, 2009, before the Honorable C Victor Pyle, Jr , and a jury Assistant Public Defender Christopher Scalzo represented appellant Assistant Solicitor Christy Sustakovitch represented the state

Appellant made a pre-trial motion to suppress a tape recorded telephone conversation between himself and his daughter R 9, l 24 - 10, l 9 The recording was made by the child's stepfather at the direction of the child's mother R 10, ll 1-7 The child was thirteen-years-old at the time of trial R 291, ll 22-23

The motion to suppress was based, in part, on the fact that the recording was obtained in violation of S C Code § 17-30-30(C), of the South Carolina wiretap statute because neither party to the conversation gave prior consent to the interception under the clear meaning of the statute R 22, l 21 – 23, l 19

The state's argument for introducing the recording was that a legal doctrine, the "vicarious consent doctrine," allowed the child's mother to consent on behalf of her minor child if the mother had a good faith, objectively reasonable basis to believe that recording would be in her child's best interest or that recording was necessary to protect her child from being abused, threatened or intimidated R 11, l 10 - 14, l 4

In further support of its argument, the state represented to the court that the allegation of abuse and the tape recording of the child's conversation with appellant were both made in 2007, when the child was eleven-years-old R 18, ll 23-24 The solicitor advised the court that on the day the child first told her mother about the abuse, the mother had the child telephone appellant and confront him with the allegation R 19, ll 7-10 The child telephoned appellant, confronted him with her allegation that he had her perform oral sex years earlier, and he denied it R 19, ll 13-16 That conversation was not intercepted or recorded R 19, ll 10-11

The solicitor also offered that the "next day [after the allegation was made], or shortly thereafter," the child's stepfather was told about the allegation and the decision to record the conversations between appellant and his daughter was made R 19, ll 17-19 J W spoke with appellant a second time on the telephone about her allegations, and that conversation was intercepted and recorded by the child's stepfather, at the direction of the child's mother This was done without the prior consent or knowledge of either appellant or his daughter R 20, ll 2-5

After determining that the vicarious consent doctrine was not expressly included in S C Code § 17-30-30(C) and that the child had not given prior consent, Judge Pyle granted appellant's motion to suppress on March 11, 2009 R 11, l 9 – 15, l 20, 21, ll 4-15 The state claimed the suppression of the intercepted telephone call substantially and materially undermined its case, and informed Judge Pyle that it would appeal his ruling R 18, ll 17-19

A notice of appeal was filed on March 19, 2009 on behalf of the state Supp R * Subsequently, on March 27, 2009, Assistant Attorney General William Blitch filed a

motion to vacate Judge Pyle's suppression order and allow appellant to file a suppression motion with the Court of Appeals pursuant to S C Code § 17-30-110(A) State's Motion to Vacate Order Supp Record 2-6 Appellant opposed this motion arguing that the state should not be awarded a "second bite at the apple," nor rewarded for its sandbagging the trial judge Supp Record 7-11

The state's motion was granted by written order of the Court of Appeals dated June 11, 2009 The Court of Appeals found that the circuit court lacked subject matter jurisdiction, and that it had exclusive jurisdiction to hear a motion to suppress based on a violation of the South Carolina wiretap statute The order vacated Judge Pyle's original suppression order Appellant was directed to file a motion to suppress with the Court of Appeals, and a schedule for briefing and oral arguments was set forth R 448-449

On July 2, 2009, a motion to suppress the intercepted recorded conversation along with a memorandum of law in support of the motion was filed with the Court of Appeals by defense counsel Scalzo on behalf of appellant R 454-455 The assistant solicitor filed a reply on behalf of the state R 481-516 Defense counsel filed a response to the state's reply R 517-531

The South Carolina wiretap statute sets forth a procedure whereby any motion to suppress the contents of an intercepted wire, oral, or electronic communication must be filed with the Court of Appeals S C Code § 17-30-65(A) The motion must be heard by a panel of three judges from the Court of Appeals called the "reviewing authority" S C Code § 17-30 -15(9)

The then Chief Judge of the Court of Appeals, the Honorable Kaye G Hearn, therefore designated the reviewing authority to include herself, the Honorable Paula H Thomas, and the Honorable Aphrodite K Konduros in this case R 27

On July 22, 2009, a suppression hearing was held before the Court of Appeals R 29, ll 1-2 The state was represented by Assistant Solicitor Sustakovitch, and she called the mother and stepfather as witnesses R 27, 31, 52 Appellant was represented by defense counsel Scalzo R 27 Both parties presented oral arguments to the panel R 72

The Court of Appeals issued a written order on July 27, 2009, denying appellant's motion to suppress based on its conclusion that "the South Carolina Legislature intended to embrace the vicarious consent doctrine that federal courts interpreted was included in section 2511(2) of Title 18 of the United States Code " R 533 The Court ruled that the "vicarious consent doctrine" could be used to satisfy S C Code § 17-30-30(C)'s requirement that at least one party must give prior consent before a telephone conversation can be intercepted R 533

A trial was held in Greenville from November 2-4, 2009 before the Honorable John C Few and a jury R 95 Defense counsel Scalzo again represented appellant and Assistant Solicitor Sustakovitch again represented the state R 59

At trial, the state moved to admit the tape recording of the intercepted conversation and appellant objected and repeatedly renewed his prior objections The trial court admitted the intercepted phone call over objection R 310, l 15 – 311, l 8

On November 4, 2009, the jury found appellant guilty of Criminal Sexual Conduct with a minor in the First Degree R 423, ll 18-22 Judge Few sentenced appellant to the maximum sentence of thirty years in prison R 428, l 21

Appellant filed a motion to certify the case to this Court on June 22, 2010, since the Court of Appeals ruled, as a fact finding body, and denied the motion to suppress

That motion was granted

This appeal follows

ARGUMENT

1

Ruling that the legislature intended the vicarious consent exception to be included in the South Carolina wiretap statute was error because the Court of Appeals violated both the rules of statutory interpretation and the express requirement of S C Code § 17-30-20 that any exception to the wiretap statute's prohibitions must be specifically provided in the statute itself

Relevant Facts

As seen above, appellant is the biological father of J W On August 2, 2007, when she was eleven-years-old, she maintained to her mother, Anna Grady ("Mother"), that appellant had sexually assaulted her on one occasion when she was five or six years old R 36, l 13 – 37, l 7, 45, l 25 – 46, l 3, 50, ll 21-25 The child and her mother both acknowledged that the allegation arose from the child reading a book, Do You Have A Secret, which the mother signed out of the Greenville library which was about "good secrets and bad secrets " The topic of the book was children being touched improperly or being sexually abused R 193, l 1 – 194, l 25, 302, l 1 – 314, l 25

The mother admitted that she often asked her children -- about once a month -- if "someone had touched them " Tr 206, l 1-14 The mother had the child confront appellant on the telephone about the allegation R 38, l 24 – 39, l 8 This conversation was not recorded, and appellant denied the allegation

J W 's stepfather, Jeffrey Grady ("Stepfather"), was told about the allegation the following day on August 3, 2007 R 41, ll 15-18, 61, ll 2-4 The mother did not

immediately report the allegation to law enforcement R 45, l 25 – 46, l 3, 50, ll 10-11 There was clear tension between appellant and his child's stepfather The stepfather acknowledged that appellant liked "to be in control" as it pertained to his child, and he claimed appellant became upset when the stepfather overruled what appellant wanted in a given situation "This is just an up-and-down thing This is not like it just happened This was all the time" R 229, l 25 – 233, l 7

When the allegation of the prior abuse was made, the stepfather came up with the idea of recording the telephone conversations between J W and appellant The mother agreed that they should start secretly recording their telephone calls R 41, l 21 – 42, l 13, 56, ll 11-20

The mother called appellant at his home in the first attempt to tape record appellant R 44, ll 16-21 Appellant was not home R 42, ll 17-22 The mother telephoned a second time and she spoke with appellant during that recorded conversation R 46, ll 22-25 However, the recording was not offered as evidence at trial

On August 4, 2007, J W went to visit with her maternal grandmother R 41, ll 3-14 During that time, appellant telephoned his daughter's house and asked to speak with the child R 69, ll 2-6 When he was told J W was not there, appellant asked the mother to have the child call him when she returned R 68, ll 10-22, 69, ll 2-6 The mother did not tell appellant to stop telephoning their house, or that he should not talk to J W about the allegation of abuse

On August 5, 2007, the mother and stepfather told J W that appellant had called and that he wanted her to call him back The stepfather told J W "to go ahead and call

[appellant] " R 68, ll 18-19 The mother also told the child that it was alright for her to call her father R 69, ll 7-1

The mother and stepfather knew J W would not lie to appellant so they did not tell her of their plan to record her telephone conversations with appellant The mother testified in the Court of Appeals "If he [appellant] would have asked her she would have been truthful with him and said yes, my mom is on the other line or my dad is on the other line She would have been truthful about it So we didn't let her know " R 44, ll 13-17

J W made the call from the den of her home R 44, ll 2-3 She called without knowing that her stepfather was in his bedroom eavesdropping on the conversation and tape recording it R 44, ll 3-9 Likewise, appellant also did not know that the stepfather was listening in and tape recording his private conversation with his daughter It was undisputed that the stepfather did not attempt to get prior consent from appellant or appellant's eleven-year-old daughter, and none was given The mother and stepfather also made no attempt to ascertain whether the child was afraid of appellant or intimidated by talking with him R 44, ll 13-17, 69, ll 12-14

The secretly tape recorded conversation between appellant and his daughter lasted thirty one minutes R 10, ll 13-14 It was played for the jury over appellant's repeated objections R 143, l 22 – 147, l 24, r 253, l 10 – 254, l 17, r 286, l 1 – 287, l 25, r 310, l 12- 312, l 22

The mother then took the secret tape recording to the police Detective Bobby Bradford testified that his report stated the allegation of sexual abuse was said to have taken place between July 1, 2003 and September 1, 2003 Bradford did not talk to the

child and apparently received these dates from the mother Appellant was subsequently arrested R 247, l 14 – 256, l 6

The wiretapped conversation between appellant and his daughter is on file with this Court, as is the transcript of the conversation On the tape, inter alia, appellant asked his eleven-year-old daughter to forgive him for a past wrong or wrongs, and the child responds that she has already forgiven him R 438 Appellant also speaks about being on drugs at the time and about how he cried at the time He reminds the child that she had told him everything was "O K ," but he said it was "not O K " R 431-436 The wiretapped tape is undoubtedly an extremely personal conversation between appellant and his daughter, and appellant correctly argued its exclusion did not so undermine the state's case that appeal of its suppression was necessary

Discussion

It was error for the Court of Appeals to apply the vicarious consent doctrine in this case The vicarious consent doctrine—being a judicial (not a legislative) creation—is not specifically set forth in either the federal or South Carolina wiretap statutes The Court of Appeals did not find the South Carolina wiretap statute ambiguous or unclear and, thus, it should not have looked beyond the express language of the statute to determine legislative intent R 532-534 Moreover, the South Carolina wiretap statute contains a clause that requires all exceptions to the statute's prohibition on wiretapping to be specifically set forth in the statute S C Code §17-3-20 Therefore, it was error for the Court of Appeals to incorporate the vicarious consent doctrine into the South Carolina wiretap statute

The state was the party that offered the recorded conversation into evidence at trial R 8, ll 5-6, R 310, l 15 – 311, l 8 It therefore had the burden of establishing a foundation for admissibility See State v Tyner, 273 S C 646, 656, 258 S E 2d 559, 564 (1979) The Court of Appeals, standing as it was in the shoes of the trial court, was presented with a question of whether or not the state could meet its burden Watson v Ford Motor Co , 389 S C 434, 444, 669 S E 2d 169, 175 (2010) ("As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law "), S C R E 104(a) The state failed to meet its burden both factually and legally Therefore, the Court of Appeals should have suppressed the tape

The fact that neither party to the telephone conversation gave prior consent for mother or stepfather to (1) listen in and (2) tape-record the conversation was not disputed at the suppression hearing There also was no dispute that, in fact, the private telephone conversation was intercepted by stepfather and that the intercepted recording was given to the state

There was no legal dispute over whether stepfather's interception and recording expressly violated S C Code § 17-30-20(1) or that mother's disclosure to the state expressly violated S C Code § 17-30-20(3) [1] Moreover, neither party disputed that an

[1] Section 17-30-20 states

> Except as otherwise specifically provided in this chapter, a person who commits any of the following acts is guilty of a felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter

express violation of the statute meant that "no part of the contents of the [intercepted conversation] and no evidence derived therefrom may be received in evidence at any trial" S C Code § 17-30-65(A)

The state accepted that, unless some exception or exemption could be applied, the failure of mother and stepfather to obtain prior consent from at least one of the parties expressly violated S C Code § 17-30-30(C) Consequently, the state could only offer the judicial doctrine of vicarious consent as an exception to the requirement that at least one party to a telephone conversation must give their consent before the call can be recorded R 82, ll 5-12

The Court of Appeals ruled that the legislature intended for the South Carolina wiretap statute, which is codified in S C Code § 17-30-10 *et seq* , impliedly includes the vicarious consent exception R 533 This ruling was error for two reasons

First, looking beyond the express language of a statute to determine legislative intent without first finding the statute ambiguous or unclear violates the rules of statutory interpretation See, Hardee v McDowell, 381 S C 445, 453, 673 S E 2d 813, 817 (2009) Second, incorporating an exception not explicitly defined by the terms of the South Carolina wiretap statute violates the statute's requirement that all exceptions must be specifically set forth in the statute itself S C Code §17-30-20

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(1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication,

(3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was

A

The vicarious consent exception is not specifically provided in the plain language of the federal or South Carolina wiretap statutes

When the Court of Appeals needed to define the vicarious consent exception in its written order it did not cite to S C Code § 17-30-10 *et seq* as authority for its definition It did not cite to 18 U S C A § 2510 *et seq* , either R 532-533 The Court of Appeals cited to three court cases The first case, Thompson v Dulaney, 838 F Supp 1535 (D Utah 1993), created the doctrine The other three cases -- Pollock v Pollock, 154 F 3d 601 (6th Cit 1998), Wagner v Wagner, 64 F Supp 2d 895 (D Minn 1999), and Campbell v Price, 2 F Supp 2d 1186 (E D Ark 1998) -- applied what the Thompson court had created as an exception to the federal wiretap statute's consent requirement R 532-533 The vicarious consent exception is not specifically set forth in either the federal or South Carolina wiretap statutes See 18 U S C A § 2510 *et seq* , S C Code § 17-30-10 *et seq*

The vicarious consent exception was created by a court opinion in 1993 It has since been modified by another court See Silas v Silas, 680 So 2d 368 (Ala Civ App 1996) Thus, there are two versions with slight but not insignificant differences

The Thompson version is a broadly defined exception The definition of the vicarious consent doctrine according to the Thompson court is

> [A]s long as the guardian [of a minor child] has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of [their] minor [child] to the taping of phone conversations, vicarious consent

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obtained through the interception of a wire, oral, or electronic communication in violation of this subsection,

> will be permissible in order for the guardian to fulfill [their] [state] statutory mandate to act in the best interests of the [child]

Id at 1544

In Thompson, the district court judge applied the doctrine of vicarious consent -- a doctrine the court itself created -- as a "defense" to what it determined was an intentional violation of 18 U S C A § 2511(1)(a)[2] 838 F Supp at 1542-1543 However, the vicarious consent doctrine, when applied, is more accurately an exception--not a defense As is discussed more fully below in Argument 1, B, when a concept such as vicarious consent is proposed as protection from an express violation of the federal wiretap statute, courts have treated it as an exception or exemption See e g Glazner v Glazner, 347 F 3d 1212 (5th Cir 1974) (rejecting an "exception" for inter-spousal wiretapping as not specifically provided in the federal wiretap statute), and U S v Murdock, 63 F 3d 1391 (10th Cir 1995) (rejecting an "exemption" for use of an extension line as not specifically provided in the federal wiretap statute)

Whether it is a "defense" or should more accurately be termed an exception, what is clear is that the Thompson court did not find the doctrine anywhere in the federal wiretap statute To begin with, the Thompson court did not cite to any section of 18 U S C A § 2510 *et seq* in its opinion as authority for the terms of the vicarious consent doctrine it created See Thompson, 838 F Supp at 1543-1544 The primary components

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[2] Section 2511(1)(a) states

> **(1)** Except as otherwise specifically provided in this chapter any person who—
> **(a)** intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication,

of the doctrine are based on Utah statutes concerning the rights and responsibilities of minors and their guardians Id at 1544 The words of the doctrine come from the court -- not Congress

There is a second version of the vicarious consent doctrine As mentioned above, the Thompson court defined the doctrine broadly, making it available as an exception when there is a reasonable belief that the recording was in the *best interest of the child* Thompson, 838 F Supp at 1544 In Silas v Silas, the Alabama Court of Civil Appeals made the vicarious consent doctrine slightly more restrictive than it is in Thompson

In Silas, 680 So 2d at 371-372, the court -- responding to the specific facts of the case before it -- re-defined the doctrine more restrictively as compared to the Thompson version

> [T]here may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent

Id (emphasis added) This second version of the doctrine focuses on whether the parent believes that abuse, threats, or intimidation might be taking place Id at 371-72 In contrast to the broader application of the Thompson version, which applies to any person, the Silas version restricts the doctrine as applying only when the "other" parent is the perpetrator of the abuse, threats, or intimidation Cf Thompson, 838 F Supp at 1544 and Silas, 680 So2d at 371

The fact that there are different versions is important to how and which version applies to a particular case But more important at this point in the discussion is that

having different versions further highlights that the doctrine is not part of the federal or South Carolina wiretap statutes, that it is a creation of courts, and not legislatures

The Court of Appeals decided that the Thompson version of the vicarious consent exception was the version the South Carolina legislature intended to include in § 17-30-30(C) R 533 It is unclear why the Court of Appeals chose the Thompson version over the Silas version when it chose to write into the statute an exception that does not exist

The seemingly arbitrary choice of one version over the other -- and the very fact that there are two versions -- further establishes that the exception was created by the courts and is not explicitly in 18 U S C A § 2510 *et seq* or, more importantly, in S C Code § 17-30-10 *et seq*

B

The Court of Appeals should not have looked beyond the plain language of the South Carolina wiretap statute to determine legislative intent because the statute is clear and unambiguous

The analysis of whether the vicarious consent exception can be applied is a matter of statutory interpretation The Court of Appeals, however, did not correctly follow the rules of statutory interpretation The court did not find S C Code § 17-30-30(C) unclear or ambiguous The vicarious consent exception is not part of the express language of S C Code § 17-30-10 *et seq* See Argument 1, A, supra Consequently, the Court of Appeals erred by looking to the court opinions applying the vicarious consent exception to determine the legislative intent of the South Carolina wiretap statute

The cardinal rule of statutory interpretation is ascertaining and effectuating the legislature's intent Hardee v McDowell, 381 S C 445, 453, 673 S E 2d 813, 817 (2009) The proper method for determining the legislature's intent is to apply the plain meaning rule

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute" Id "Where the statute's language is plain and unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning" Id "What a legislature says in the text of a statute is considered the best evidence of legislative intent or will" Id "Therefore, [a court is] bound to give effect to the expressed intent of the legislature" Id

The state asserted the vicarious consent doctrine as justifying an exception to stepfather's direct violation of the one-party consent exception set forth in S C Code § 17-30-30(C) The vicarious consent doctrine is not contained in the South Carolina wiretap statute See Argument 1, A, supra Therefore, the Court of Appeals should not have looked to the federal cases on vicarious consent without having first found S C Code § 17-30-30(C) ambiguous

The clarity of S C Code § 17-30-30(C) is not in question Appellant argued in his motion to suppress that this section was clear and unambiguous R 75, l 15 – 76, l 2, 88, ll 17-20 The respondent and the Court of Appeals agreed R 81, ll 7-8, 88, ll 21-22 Nowhere in the written order denying appellant's motion to suppress did the Court of Appeals determine that the statute or any of its terms was ambiguous or unclear

First, the Court of Appeals determined that the consent exception in the South Carolina wiretap statute "parallels" the federal wiretap statute R 532 Next the Court of Appeals determined that the plain meaning of the consent exception in both statutes "proscribe third parties who are not acting under the color of law from intercepting a conversation unless one of the parties to the communication has given prior consent " R 532 Both determinations were made by citing only to S C Code § 17-30-30(C) and 18 U S C A § 2511(2)(d) The order did not cite to case law or legislative history, or to any other source The statutes themselves were the only authorities cited because there is nothing unclear or ambiguous in either statute's prior consent requirement

If, in fact there was an ambiguity in S C Code § 17-30-30(C), then the place in the order to identify an ambiguity would have been where the Court of Appeals was

interpreting the consent exception, since that section of the statute is the subject of its ruling No such finding was noted

Moreover, the federal consent exception, 18 U S C A § 2511(2)(d), has been held to be clear and unambiguous See U S v King, 536 F Supp 253 (C D Cal 1982) According to the King court (and the cases cited therein), the plain meaning of 18 U S C A § 2511(2)(d) is that it "simply requires that one of the parties [to the electronic communication] agree to have the conversation recorded " Id at 268

The error made by the Court of Appeals in this case -- looking beyond the plain meaning of a clear and unambiguous statute -- is strikingly similar to the analysis of the "inter-spousal" exception in Simpson v Simpson, 490 F 2d 803 (5th Cir 1974) As is discussed more fully below, seven of the other federal circuits have rejected the analysis in Simpson as being flawed Consequently, it is instructive to look at how the federal courts have dealt with the inter-spousal exception

The inter-spousal exception is asserted where one spouse intercepts an electronic communication of the other spouse See Heggy v Heggy, 944 F 2d 1537, 1539 n 3 (10th Cir 1991) Like the vicarious consent exception, the inter-spousal exception is a court-created concept that is not expressly declared in the federal wiretap statute

The thrust of the theory behind the inter-spousal exception is that, when Congress enacted the federal wire tap statute, it did not intend to extend the statute's reach into the marital home See Simpson, 490 F 2d at 805, Anonymous v Anonymous, 558 F 2d 677, 677 (2nd Cir 1977) The argument is that Congress "intended" for there to be an inter-spousal exception because not recognizing the exception would lead to "a far reaching

result, one extending into areas normally left to states, [i e,] those of the marital home and domestic conflicts " Simpson, 490 F 2d at 805

In support of this argument, the Simpson court looked first to the legislative history of the federal wiretap statute See id It did not make a determination that any part of 18 U S C A § 2510 *et seq* was unclear or ambiguous It simply decided, without authority, that it could look to the legislative history to determine the legislative intent of a clear and unambiguous statute Ultimately, the Simpson court concluded that it was "inconclusive" as to whether Congress intended the federal wiretap statute to "extend" to the case of one spouse recording the telephone calls of the other spouse See id at 806

A majority of the federal circuits, however, have rejected the inter-spousal exception A Third Circuit district court rejected the inter-spousal exception in 1979 See Kratz v Kratz, 477 F Supp 463, 471-472 (E D Pa 1979) [3] The Fourth Circuit rejected it in 1984 See Pritchard v Pritchard, 732 F 2d 372, 373 (4th Cir 1984) The Sixth Circuit rejected it in 1976 See U S v Jones, 542 F 2d 661, 671 (6th Cir 1976) The Seventh Circuit rejected it in 2002 See Lombardo v Lombardo, 192 F Supp 2d 885, 891 (N D Ind 2002) The Eight Circuit rejected it in 1989 See Kempf v Kempf, 868 F 2d 970, 973 (8th Cir 1989) The Ninth Circuit district courts have split on the validity of the inter-spousal exception See Perfit v Perfit, 693 F Supp 851 (C D Cal 1998) (accepting inter-spousal exception), Cf Sanai v Sanai, C02-2165Z, 2005 WL 1172437 (W D Wash 2005) (rejecting inter-spousal exception) The Tenth Circuit rejected it in

[3] The issue has not been addressed by the Court of Appeals for the Third Circuit, but it has been by the Eastern District of Pennsylvania See Kratz, supra, (E D Pa 1979)

1991 See Heggy, 944 F 2d at 1540 [4] The Eleventh Circuit rejected the inter-spousal exception in 2003 See Glazner, 347 F 3d at 1213 [5]

The analyses used by those courts that have rejected the inter-spousal exception begin with a recognition that the clarity of the federal wiretap statute makes it inappropriate to look to legislative history

In Pritchard, the Fourth Circuit held that "[i]n light of the clarity and lack of ambiguity of the statutory language [of 18 U S C A § 2511(1)], an analysis of the legislative history would not appear to be necessary " 732 F 2d at 373

In Glazner, the Fifth Circuit concluded the "language of [18 U S C A § 2510 *et seq*] is clear and unambiguous" and, thus, it did not look to legislative history 347 F 3d at 1215

In Kratz, the court found it "difficult to imagine a statutory prohibition more 'definite and specific' than that of [18 U S C A §] 2511(1)(a)" 477 F Supp 463 at 468

The Tenth Circuit found 18 U S C A § 2510 *et seq* was "clear on its face" and therefore the court did not look to legislative history Heggy, 944 F 2d at 1540

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[4] Heggy, supra, was cited in Thompson v Dulaney, 838 F Supp at 1538, and was decided by the United States District Court for the District of Utah, which is part of the Tenth Circuit

[5] The ruling in Glazner is particularly interesting In 1981 the Fifth Circuit was split to create the Eleventh Circuit One of the jurisdictions that became part of the new Eleventh Circuit was Alabama The Northern District of Alabama is the court that the Eleventh Circuit heard its appeal from in Glazner Glazner, 347 F 3d at 1212 That is the same district court that the Fifth Circuit heard its appeal from in Simpson Simpson, 490 F 2d at 803

The Eight Circuit held that the district court erred where, "[d]espite the unambiguous language of the statute," it resorted to the legislative history of the statute Kempf, 868 F 2d at 973

The Sixth Circuit also held that the district court erred in resorting to legislative history to divine congressional intent because the language of § 2511 is "unambiguous " U S v Jones, 542 F 2d at 671 The Jones court concisely summarized the proper analysis and pointed out the error in the Simpson court's analysis

> Ordinarily a court will not refer to legislative history in construing a statute which is clear on its face The language of [§ 2511(1)(a)] quite clearly expresses a blanket prohibition on all electronic surveillance except under circumstances specifically enumerated in the statute *The natural presumption when construing a statute is that Congress meant what it said* However, the Simpson Court concluded that, despite the literal language of the section, the absence of positive proof of congressional intent to include interspousal wiretaps in the Act's prohibitions indicated that Congress did not intend to reach that activity The District Court in this case adopted Simpson's analysis of the statute's legislative history and concluded that, as a matter of law, Appellee was immune from prosecution for intercepting and recording his wife's telephone conversations This conclusion is untenable because it contradicts both the explicit language of the statute and the clear intent of Congress expressed in the Act's legislative history

542 F 2d at 667 (internal citations omitted) (emphasis added)

The Kratz court found the Simpson court's resort to legislative history a "most unusual and improper method of statutory analysis " 477 F Supp at 468 The error most strongly criticized by the Kratz court was the reasoning the Simpson court gave for resorting to the legislative history in the first place As pointed out in Kratz, the Simpson court reasoned that Congress did not intend to apply the prohibitions of the federal

wiretap statute to inter-spousal wiretapping because there was an absence of a "positive expression of congressional intent (in the legislative history) to include" such cases Id Besides not being supported by case law, an argument that the absence of evidence proves the existence of evidence is illogical

The overall analysis from these courts is classic statutory interpretation a court can only look beyond the plain meaning of a statute when it determines that the statute is unclear and ambiguous

The Court of Appeals wrote in its order denying the motion to suppress

> we conclude the South Carolina Legislature intended to embrace the vicarious consent doctrine that federal courts interpreted was included in section 2511(2)(d) of [federal wiretap statute, 18 U S C A § 2510 *et seq*]

R 533 (emphasis added) Clearly the Court of Appeals was looking at federal case law and not the South Carolina wiretap statute -- or even the federal wiretap statute -- when it concluded the legislature intended to "embrace" the vicarious consent doctrine

The Court of Appeals offered no factual, statutory, or legal basis for looking beyond the plain meaning of §17-30-30(C) Once the Court of Appeals determined that the statute was clear, it should have sought to ascertain the legislature's intent solely from the plain meaning of the words in S C Code §17-30-30(C) Had it done so, it would not have adopted the judicially created doctrine of vicarious consent It is not part of the express language of either 18 U S C A § 2510 *et seq* or S C Code Ann § 17-30-10 *et seq* Hence it was error for the Court of Appeals to look at the federal case law applying the vicarious consent doctrine in order to ascertain the South Carolina legislature's intent when it enacted S C Code § 17-30-30(C)

C

The Court of Appeals erred because applying the vicarious consent exception violated the clear requirement of S C Code § 17-30-20 that an exception to the prohibitions of the South Carolina wiretap statute must be specifically provided in the statute itself

In response to the state's failure to meet the factual and legal burdens of the South Carolina wiretap statute, the state asked the Court of Appeals to recognize the vicarious consent doctrine as an exception to stepfather's clear violation of S C Code § 17-30-30(C) The Court of Appeals obliged the state's request and applied the exception Applying the vicarious consent exception, however, was error because, in doing so, the Court of Appeals violated S C Code § 17-30-20's requirement that all exceptions be specifically set forth in the statute itself

The stepfather's interception and recording of the telephone conversation between appellant and his daughter was an express violation of § 17-30-20(1) The mother's disclosure of the recording to the police clearly violated § 17-30-20(3)

Section 17-30-20, in relevant part, states

> Except as otherwise specifically provided in this chapter, a person who commits any of the following acts is guilty of a felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter
>
> (1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication,
>
> * * *
>
> (3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic

> communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection,

S C Code Ann § 17-30-20 (emphasis added) These violations are undisputed

It is obvious that S C Code § 17-30-20 was taken directly from 18 U S C A § 2511, which, in relevant part, reads

> **(1)** Except as otherwise specifically provided in this chapter any person who—
>
> **(a)** intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication,
>
> * * *
>
> **(c)** intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection,

18 U S C A § 2511(1) (emphasis added)

The operative words in both sections are the above-emphasized clause "Except as otherwise specifically provided in this chapter" We will refer to this clause as the "specific exception" clause

U S v Giordano, 416 U S 505, 514, (1974), was the first case to apply the specific exception clause It was also the first to address the issue of whether a third-party could act vicariously on behalf of a person subject to the prohibitions of the federal wiretap statute Consequently, Giordano outlined the analysis to use when an exception not explicitly stated in the federal wiretap statute is asserted

The issue in Giordano was whether 18 U S C A § 2516(1) allowed the Executive Assistant to the Attorney General of the United States to vicariously approve an application for a wiretapping order Giordano, at 507-508 However, § 2516(1) specifically conferred power only "on the 'Attorney General, or any Assistant Attorney General specially designated by the Attorney General' to authorize an application' " Id (quoting 18 US C A § 2516(1)) The Giordano court found no ambiguities in § 2516(1), holding "[p]lainly enough, the Executive Assistant is neither the Attorney General nor a specially designated Assistant Attorney General " Id at 512-513 It thus refused to recognize an exception to the prohibitions of the statute unless, as § 2511(1) required, that exception is specifically provided for in the statute Id at 514

The law is now firmly settled that the specific exception clause in the federal wiretap statute clearly and unambiguously "prohibits, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, *except those specifically provided for in [the federal wiretap statute]* " Id (emphasis added), see also Kratz, 477 F Supp at 467 ("The clear and unambiguous meaning of §2511(1)(a) is to prohibit the interception of all wire communications by any person except as specifically provided by Congress "), Griggs-Ryan v Smith, 904 F 2d 112, 116 (1st Cir 1990) ("[18 U S C A § 2510 *et seq*] was intended to prohibit all interceptions 'except those specifically provided for in the Act'"), Heggy, 944 F 2d at 1539 (holding that an exemption for inter-spousal wiretapping is not specifically provided in the federal wiretap statute and thus could not be recognized), Pritchard, 732 F 2d 373 (4th Cir 1984) ("we find that [18 U S C A § 2510 *et seq*] prohibits all wiretapping activities unless specifically excepted"), U S v Hammond, 286 F 3d 189, 192 (4th Cir 2002) (§ 2511(1) "protects an individual from all

forms of wiretapping except when the statute specifically provides otherwise"), U S v Jones, 542 F 2d at 671 ("The explicit language of 18 U S C §2511(1)(a) is that 'any person' who violates the section is liable to punishment 'except as otherwise specifically provided ' If Congress had intended to create another exception to [the wiretap statute]'s blanket prohibition of unauthorized wiretaps they would have included a specific exception for interspousal wiretaps in the statute ")

The vicarious consent exception is not specifically stated in S C Code § 17-30-10 *et seq* The Court of Appeals, therefore, erred when it adopted and applied the vicarious consent exception because doing so violated the requirement of S C Code § 17-30-20 that an exception to the prohibitions of the South Carolina wiretap statute must be specifically provided in the statute itself

The Court of Appeals erred by ruling that the vicarious consent exception applied in this case without first finding that J W lacked the capacity to consent to having her private telephone conversation tape recorded

Relevant Facts

The Court of Appeals did not make a finding that J W lacked the capacity to give consent to having her private telephone conversations recorded See Order Denying Defendant's Motion to Suppress R 532-534 The stepfather intercepted and recorded J W 's private telephone conversation with her father on August 5, 2007 R 50, ll 2-11

J W was eleven-years-old R 50, ll 21-25 The mother did not consult with J W , and she and the stepfather did not want her or appellant to know they were being eavesdropped on or recorded R 50, ll 21-25, 41, l 21 – 16, l 13, 56, ll 11-20 They knew J W would not lie to appellant R 44, ll 13-17

Discussion

The basic legal premise of the vicarious consent doctrine is that the minor child lacks the capacity to consent Capacity to consent is at the heart of the Thompson court's analysis See 838 F Supp at 1543 Despite it being a flawed analysis to apply an exception not specifically set forth in the wiretap statute -- as is discussed above in Argument 1, B, supra -- establishing that the minor lacks the capacity to consent to having their private telephone conversation intercepted is a precondition to applying the vicarious consent exception

The Court of Appeals cited to Thompson as authority for the version of the vicarious consent exception it adopted R 533 It also cited to Pollock v Pollock,

Campbell v Price, and Wagner v Wagner, supra All three of these cases, however, cite to Thompson See Pollock, 154 F 3d at 607, Campbell, 2 F Supp 2d at 1189, and Wagner, 64 F Supp at 900 n 2 (although relying predominantly on Pollock as authority for adopting the vicarious consent exception, Thompson itself is cited) Thompson is therefore the source of the doctrine

The Thompson court premised its development of the vicarious consent exception on its determination that the children in question were "ages three and five" and "clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent since they were incapable of understanding the nature of consent and of making a truly *voluntary* decision to consent"[6] 838 F Supp at 1543 (emphasis added) The Pollock court acknowledged the Thompson court's focus on age but seems to have incorrectly decided that age was not determinative in Thompson See 838 F Supp at 1543 (citing to the lower court decision in Pollock v Pollock, 975 F Supp 974, 978 n 2 (W D Ky 1997))

However, the lack of capacity to consent was most certainly determinative in Thompson The opinion in that case very clearly states

> The children in this case were ages three and five They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either

[6] The Thompson court mistakenly cited U S v King, supra, for the proposition that, when it comes to satisfying the consent requirement in 18 U S C A § 2511(2)(d), there is a distinction between "whether a party had the legal capacity to consent and whether they actually consented" 838 F Supp at 1543 The plain meaning of the language used by the King court shows that it considered the statute to draw no distinction between legal capacity and actual consent The King court very clearly rejects the defendant's argument that the statute is concerned with legal capacity by stating "The only issue under the statute is a factual one did the individual 'voluntarily' consent?" King, 536 F Supp at 268

> express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent *Thus this case presents a unique legal question of first impression on the authority of a guardian to vicariously consent to the taping of phone conversations on behalf of minor children who are both incapable of consenting and who cannot consent in fact*

838 F Supp at 1543 (emphasis added) Moreover, note 8 of the opinion reads, in relevant part

> The court wishes to emphasize a point that should already be apparent The holding in this case is very narrow and *limited to the particular facts of this case* It is by no means intended to establish a sweeping precedent regarding vicarious consent under any and all circumstances

Id at 1544, n 8 (emphasis added)

The interception in Thompson was an express violation of 18 U S C A § 2511(1)(a) because it was an intentional interception without prior consent See 838 F Supp at 1542-43 This is the very section that would most commonly be violated in situations where a parent is intercepting their child's telephone conversation The mother's and stepfather's interception here was intentional and, if decided under the federal wiretap statute in this case, it would be in direct violation of 18 U S C A § 2511(1)(a) A so-called "defense" to this violation for a private citizen not acting under the color of law (*i e*, a parent) can only be found in the consent exception See 18 U S C A 2511(2)(C) Consequently, if we accept for purposes of argument -- as the Thompson court and all the courts that adopted the vicarious consent exception have done -- that a court can look beyond the plain meaning of the consent exception without finding the term ambiguous, then it makes logical sense that the consent exception would be the starting point of a vicarious consent analysis

Taken as a whole, the analysis in Thompson clearly requires a court to determine whether the child *lacks the capacity to consent* to their private telephone conversation being intercepted before vicarious consent can be considered as an available exception to the prior consent requirement The Court of Appeals, nevertheless, did not make a finding that J W lacked the capacity to consent under S C Code § 17-30-30(C)

Given that J W was eleven-years-old at the time of the recording it seems very likely she was capable of giving consent An eleven-year-old child has the capacity to understand Miranda warnings given by the police as well as the capacity to subsequently voluntarily waive their Fifth Amendment right to remain silent and submit to interrogation See In re Christopher W , 285 S C 329, 329-31, 329 S E 2d 769, 769-79 (Ct App 1985) (applying a totality of the circumstances test) Similarly, a court, using a totality of the circumstances test, can find a minor has the capacity to understand Faretta warnings[7] and waive the Sixth Amendment right to counsel In re Christopher H , 359 S C 161, 166-70, 596 S E 2d 500, 503-05 (Ct App 2004) The Fifth and Sixth Amendment rights are much more complex rights than is the right to have a private telephone conversation

The mother and stepfather knew the child in this case would not lie to her father about whether their conversation was being monitored or recorded This provides strong evidence that she understood the concept of consent, and that she had the capacity to consent if she desired The Court of Appeals erred by failing to make a finding that J W

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[7] See Faretta v California, 422 U S 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975)

lacked the capacity to consent before applying the judicially created vicarious consent exception in this case

The Court of Appeals erred when it ruled that the state met its burden of establishing that mother had an objectively reasonable basis for believing that, in order to protect J W 's best interests, it was necessary for mother to consent on J W 's behalf to stepfather's listening in and tape recording J W 's telephone conversation with appellant

Relevant Facts

As seen, the mother and stepfather did not tell J W they were taping because they feared she would tell appellant the truth if he asked R 44, ll 13-17 During the private telephone conversation between appellant and his daughter on August 5, 2007, they discussed a past transgression, and appellant blamed it on drugs He repeatedly told the eleven-year-old child that he loved her R 437

Appellant explained to his daughter that his own experience had been very painful He said to her "I was letting it drive me crazy" R 432 He told her that the pain "drove [him] to the point where [he] was on drugs" He described how he was "high and out of my mind" at the time of the assault He cautioned her about not making the same mistake with abusing drugs that he had R 435 As seen above, J W said she forgave her father for what he had done during the intercepted telephone call

The following day -- August 6, 2007 -- the mother reported the allegations and gave the tape to the Greenville City Police Department R 45, ll 8-18 Three days had passed since J W told her mother that appellant had abused her when she was five or six years old Appellant was arrested on September 19, 2007

Discussion

The state failed to meet the evidentiary requirements of the vicarious consent exception As seen above there was much tension between the stepfather and appellant, and the stepfather claimed appellant became angry when he overruled appellant's wishes in any given situation At one point, the stepfather went so far as to say "he [appellant] probably wouldn't even be here," had the stepfather's parents apparently not talked him out of a violent confrontation with appellant over the intercepted telephone call with his stepdaughter and appellant R 226, ll 2-15

The stepfather and mother did not act in good faith, nor was there an objectively reasonable basis to believe intercepting the private telephone conversation between appellant and J W was necessary to protect the best interests of J W as argued below

A

The mother did not have a good faith basis for intercepting the telephone conversation between appellant and J W because Mother's purpose in directing J W to call appellant was not to protect her child from any harm during the conversation but to obtain evidence against appellant

The mother did not act in good faith when she consented on her daughter's behalf to Stepfather listening to and recording J W 's private telephone conversation with her father Mother's intent was not to protect J W from some danger on the telephone or some immediate danger she couldn't otherwise protect her daughter from The mother and stepfather wanted to obtain evidence they could use against appellant To accomplish their goal, the mother and stepfather decided to use their daughter to get appellant to make an incriminating statement That is not the kind of good faith basis that

courts have allowed to support the vicarious consent exception on *a five or six year-old allegation* of abuse There is simply no evidence the child was *presently in any danger* of being intimidated or abused

The cases that apply the vicarious consent exception focus on what is taking place on the telephone and whether what is happening is either harmful to (1) the minor child or (2) the relationship of the parent intercepting the call and their child

For example, in Thompson, the wife believed that, when her estranged husband spoke with their three and five-year-old children on the telephone, he was using the conversation to undermine and interfere with the relationship between the wife and her children 838 F Supp at 1542, 1544 Likewise, in Pollock, the mother suspected the father and stepmother were using the telephone to pressure the daughter to try to convince the mother to allow custody to be changed to the father 154 F 3d at 604

In Silas, the father believed the mother was saying something on the telephone to cause their daughter to become upset, but the father did not know what exactly the mother was saying 680 So 2d at 370 The father presented evidence that he had observed the child being upset after speaking with the mother on the telephone Id Similarly, in Campbell v Price, the father observed that his daughter would "cry and become upset after talking with her mother on the telephone " 2 F Supp 2d at 1187

In all of these cases, the *immediate harm* that the children needed protection from was the telephone conversation The parent asserting the vicarious consent exception presented evidence that (1) the child experienced some kind of negative emotional reaction during or right after the telephone conversation with the other parent and (2) the

parent intercepting the phone calls either could not prevent them or did not know for sure what was causing the child to become upset

Neither of those are the circumstances of this case The mother's focus was not on protecting J W from some harm that was transpiring (or might transpire) on the telephone Her focus was on getting appellant on tape saying something incriminating that she could take to the police

The mother's actions when she first heard the allegation belie a good faith intent to protect J W from being harmed during the telephone conversation with appellant Instead, her actions show a willingness to use J W to obtain evidence against appellant by placing J W in situations that risked exposing J W to emotional harm

When J W first made her allegation to the mother, on August 2, 2007, the mother did not immediately report the allegation to law enforcement Instead, the stepfather and mother hatched a plan to obtain incriminating evidence from the child's conversations with appellant that she believed could be used to prosecute appellant

Instead of acting to protect J W from a potential harm on the telephone, the goal was to further an investigation taken on not by law enforcement but solely by mother and stepfather R 63, ll 8-21 Under these circumstances, the stepfather and mother were not acting in good faith to protect J W from a danger she might potentially be exposed to during the conversation By having an eleven-year-old girl confront the person she alleged just two days earlier to have sexually abused her when she was a young child, they placed J W in a position that exposed her to potential significant emotional harm

Using the child that the parent is trying to protect as a lure is not the kind of good faith found in the cases discussed above In those cases, the parents either had made

efforts to prevent the calls but were unsuccessful or, because they lacked proof of actual harm, could not stop the calls In either situation, the harm was clearly coming from the telephone conversation and the parents could not make an effort to prevent the harm without recording The mother faced neither of those situations in this case

Several of the cases discussed above were divorce cases where any potential action on the part of one parent could easily mean going back to court and a potential change in custody The mother was not faced with that kind of dilemma in this case because there was no real risk that, if she cut off contact between J W and appellant, a court was going to remove J W and give the child to the father she was now alleging had sexually assaulted her

Most importantly, though, is the lack of any real effort by the mother and stepfather to shield J W from whatever harm they thought could potentially befall her during the conversation If the mother believed there was a danger to J W in speaking with appellant on the telephone, then she should not have permitted the call to be placed Consequently, the mother cannot in good faith claim there was a potential danger to J W when the mother was the one who placed her child in the very situation she claimed J W needed protection from

It is obvious from the stepfather's own testimony that removing appellant from their lives would be a positive development for him This case did not involve any immediate harm to the eleven-year-old and it was simply the stepfather's and mother's attempt to act as law enforcement in prosecuting a five or six year-old allegation of prior sexual abuse That is not what the judicially created doctrine of vicarious consent was meant to cover

B

The mother did not have an objectively reasonable basis for believing it was necessary to intercept the telephone conversation in order to act in the best interest of J W because there was no evidence that J W was going to be harmed by the conversation and Mother was in a position to protect J W from any potential harm by preventing J W from calling appellant

The mother did not have an objectively reasonable basis to believe intercepting the telephone conversation between J W and appellant was necessary to protect J W 's best interest The mother did not contend prior conversations produced any immediate harm that required interception The mother made no effort to prevent the call between J W and appellant—she in fact encouraged it, and the mother was not in a situation where she could not prevent the conversation from taking place

In the cases where the vicarious consent exception was held to have been established, the parent vicariously-consenting for their child had observed the child to be crying, upset, or appearing to be psychologically hurt by the telephone conversations For example, in Silas, the basis for the interception was that father had observed "several instances when the minor child became extremely upset and began to cry during the telephone conversations, [and so] he decided to find out what was happening during the telephone conversations " 680 So 2d at 370 In Pollock, the mother observed "emotional and psychological pressure" on her child 154 F 3d at 604 In Campbell v Price, the father had observed daughter crying and becoming upset after talking with the mother 2 F Supp 2d at 1187

In these cases the parents were also not able to prevent the telephone conversations from taking place A prime example is State of Iowa v Spencer, where the father's suspicions that his minor daughter was having an inappropriate relationship with her teacher were confirmed by, among other things, the daughter's friends 737 N W 2d 124, 126 (2007) It was necessary to intercept the phone calls precisely because of the inability to stop the conversations from taking place that provided an objectively reasonable basis to act in the child's best interest and intercept the conversation Id

Additionally, the children in the cases discussed above either defied their parents or did not tell the parents what was transpiring on the phone J W was forthcoming with the mother and there is no evidence she was contacting appellant without the mother's knowledge No necessity existed for the mother to intercept the telephone conversation because she was present and able to prevent the call

The Court of Appeals erred by not suppressing the intercepted telephone call between appellant and his daughter because the call was taped without appellant's knowledge or consent and, thus, it violated appellant's right to privacy under Article I, §10 of the South Carolina Constitution

Relevant facts

As seen, after Judge Pyle suppressed the intercepted telephone call between appellant and his daughter the state immediately informed the court it would appeal The solicitor argued "that suppressing that tape will significantly impair the ability of the State to prosecute the case " R 14-15, r 24

The state then took the position that the Court of Appeals had exclusive jurisdiction to hear the suppression motion under the wiretap statute, and that the suppression hearing before Judge Pyle was a nullity Supp Record 4 Appellant argued the state should not be rewarded for sandbagging the trial judge, and that Judge Pyle's ruling suppressing the intercepted telephone call without the consent of appellant and his daughter should stand Supp R 4

In his subsequent motion to suppress the wiretap, after the Court of Appeals granted the state's motion to vacate Judge Pyle's order, appellant argued the Court of Appeals should suppress the intercepted phone call because, inter alia, it violated appellant's "right to privacy under Article I, §10 of the South Carolina Constitution for the reasons stated in the memorandum of law " R 455 In appellant's Memorandum of Law he argued that Article I, §10 of the South Carolina Constitution provided "an

additional and explicit right to privacy' guaranteeing citizens of this state privacy rights beyond the federal Constitution and those of other states " R 474-475

The Court of Appeals issued an order denying the motion to suppress dated July 27, 2009 R 532-534 When the audio tape of the intercepted call was played for the jury during appellant's November 2-4, 2009 trial, appellant again renewed his previous objections, R 311,1 4 – 312,1 7 as seen above

Discussion

Article I, §10 of the South Carolina Constitution provides "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated " The vicarious consent exception runs counter to this explicit right of privacy granted by our state constitution

Our state Constitution provides a right to privacy both within and outside the search and seizure context State v Forrester, 343 S C 637, 644-645, 541 S E 2d 837, 841 (2001) For example, in State v Singleton, 313 S C 75, 437 S E 2d 53 (1993), this Court found the state constitutional right to privacy prevented the forced medication of a death row inmate to restore his competence for execution

In State v Forrester, 343 S C 637, 541 S E 2d 837 (2001), this Court held that the search of a citizen beyond the level of consent violated the state constitutional right to privacy See, also, State v Church, 538 So2d 993 (La 1989) (disallowing a police roadblock as a violation of the state's right to privacy even though it did not violate the Fourth Amendment)

In State v Weaver, 374 S C 313, 649 S E 2d 479 (2007), this Court also noted that the South Carolina Constitution favors an interpretation offering a higher level of protection than the Fourth Amendment

In short, as argued above, the plain meaning of "consent" does not authorize the expanded exception urged by the state The vicarious consent exception runs counter to the S C Wiretap Statute's objective of protecting the privacy rights of private telephone conversations, and it also runs afoul of the grant by our state constitution of an explicit right of privacy for each of our citizens This Court should respectfully order a new trial because the intercepted telephone call was the centerpiece of the solicitor's argument that appellant was guilty and its prejudicial effect is therefore obvious R 408, l 15 – 411, l 2

5

The trial court erred by ruling that the videotaped forensic interview was admissible even if it was bolstering, on the grounds that the statute providing for the videotape in a child sex case took precedence over the Rules of Evidence, since the forensic interview impermissibly bolstered the child's testimony and it should have been excluded on that basis

Relevant facts

Prior to trial the forensic interview was discussed R 128, l 4 – 133, l 18 Defense counsel argued that the forensic interview itself constituted impermissible bolstering of the child who was going to testify during the trial R 133, l 22 – 134, l 4 The judge overruled the bolstering objection R 134, l 5 When defense counsel began making his constitutional argument about the statute not allowing for confrontation, the judge responded that bolstering objection was a proper objection under the rules of evidence The judge ruled "[T]he statute would clearly override the rules of evidence When the legislature decided to pass this statute, to the extent that they thought it might corroborate or help the jury or fact finder to believe what the victim testified to on the stand, *they clearly see* [*saw*] *that it would have the effect of bolstering* I overrule that objection"[8] R 134, ll 6-13

The solicitor argued that the Court of Appeals had addressed the improper bolstering of the forensic interviews and found the interviews were permissible R 135, ll 15-17 As will be seen infra, if the solicitor meant the Court of Appeals and later this

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[8] Appellant made this same bolstering objection before Judge Pyle at the suppression hearing R 4, l 1 – 6, l 8

Court in State v Douglas, 380 S C 499, 671 S E 2d 606 (2009), approved of bolstering in these cases she was clearly wrong The judge then observed that some statements during the forensic interview were leading questions but he ruled the videotaped forensic interview was admissible R 135, l 18- 139, l 22

Appellant's daughter testified that she was thirteen-years-old at the time of trial R 291, l 22- 292, l 4 The child testified that "before anything happened" she had a good relationship with appellant and his family, particularly her aunt Sand R 295, ll 5-23

The child said the incident that resulted in this trial happened "at my aunt Sand's house " R 296, ll 19-21 The following colloquy occurred on direct examination of the child

> Q Jasmine, why don't we start with were you awaked? Were you asleep? Where were you when this happened?
>
> A I was sleeping
>
> Q Do you recall where you were sleeping?
>
> A I think it was Cricket's room
>
> Q You think it was You are not certain? Yes or no?
>
> A I'm not sure
>
> Q All right So you were sleeping Was it daytime or nighttime?
>
> A Night
>
> Q Tell me what you recall you dad doing
>
> A I was sleeping and he [appellant] woke me up He asked me did I want to meet his little friend I was like yeah So he turned around Then he turned back to where I

> could see him He had his private part out He asked me to suck it, so I did He asked me to do it again So I did Then we laid back down

R 296, l 24- 297, l 17

The child said appellant told her that the oral sex "felt good " R 299, ll 5-9 The child also said she then "recalled feeling something warm on my bottom " R 300, ll 13-14

The child testified that appellant began crying after the incident and "he asked me to forgive him I told him I already had " R 301, ll 1-14

As seen above, the child related that she later read a book her mother got from the library "about good secrets and bad secrets " The child's mother admitted that the book was about children being sexually abused R 302, l 12- 304, l 1 The child then said she told her mom about this incident after reading the book and her mother told her she would have to confront appellant about it R 306, l 11- 307, l 20

The child said when she told appellant she remembered the incident he became upset and said he would never do that The child said because appellant was getting upset she "just gave the phone back to my mom " R 307, l 21 – 308, l 7

The child testified that the telephone call that was played for the jury was an accurate representation of the phone call between herself and appellant R 310, ll 15-18 As seen, defense counsel renewed his objections to the intercepted telephone call being played for the jury R 311, ll 4-9 The tape was then played for the jury R 312, l 9-316, l 4

The child said after listening to the tape "it made me feel good that he was apologizing but I was disappointed that he would do drugs" R 319, l 1-5 On cross-examination the child admitted she spent some time with appellant because her mother and step-dad did not come to pick her up She acknowledged that appellant put her in another school to finish the year R 322, l 15- 323, l 21

The child also admitted appellant visited with her in the hospital when she had her appendix removed and that her mother "said that I was coming home with her after I got out of the hospital" R 324, ll 11-22 The child also stated on cross-examination that to her appellant's "private" and "privacy" were the same thing R 330, ll 22-24

After the child's testimony the solicitor informed the judge the state was working to redact the forensic interview Tr 338, l 8- 339, l 14 The solicitor said they were having trouble redacting the interview and the judge suggested the solicitor "just start and stop it then" in the presence of the jury R 340, l 15 – 347, l 13

As will be seen infra the child's forensic interview statements, as the solicitor would argue in her closing, were consistent with her trial testimony R 411, ll 3-9 However, such prior consistent hearsay statements are the evil of impermissible bolstering

Christine Carlberg was the forensic interviewer Defense counsel did not object to her being recognized as an expert in forensic interviewing R 372, ll 16-19 However, defense counsel did renew his prior objections to the forensic interview being published to the jury The judge again stated the forensic interview was admissible subject to his prior ruling R 374, ll 15-20 The twenty minute forensic interview was then played for the jury R 374, ll 21-24

In the forensic interview on file with this Court, state's exhibit 11, Carlberg told the child she would not get in any trouble for anything she told her Carlberg used a flow chart to write as the child gave her details of her life The forensic interview also involved the child using male and female dolls to explain what happened to her

On the videotape before this Court, the child described how the incident allegedly happened at her Aunt Sand's house She said she was sleeping when appellant woke her up and asked her if she wanted to "meet my buddy " The child then related how she had oral sex with appellant She said appellant told her the oral sex "felt good" the child said she felt something warm on her bottom

The forensic interviewer asked her if she saw anything "come out of appellant's privacy," and the child said she did not

The child also related to Carlberg how she was told to confront appellant about the incident and she said appellant admitted to her that he did it and that he was on drugs at the time The child also said appellant told her his father had sexually abused him also The child stated that she read the book on good secrets and bad secrets and that is what led her to tell her mother about the alleged incident The child also talked about her being in the hospital for having her appendix removed The child said she felt if she was touched by anyone again she could tell her mother [9]

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[9] As seen above, the state informed the trial judge that it was having trouble redacting the videotape The entire videotape apparently was not played for the jury after the judge suggested the state simply "start and stop it" before the jury R 374, 15-24 The entire videotape is before this Court Undersigned appellate counsel has been an advocate and has done everything within his power to attempt to have court reporters transcribe such tapes when they are played in Court Court Administration has steadfastly refused to have such tapes transcribed To the extent that the entire videotape may not have been played for the jury a reconstruction hearing may be necessary involving the court

In short the child's out-of-court hearsay statements in the forensic interview were consistent with her trial testimony and they constituted very prejudicial bolstering

Discussion

In State v Douglas, 380 S C 499, 671 S E 2d 606 (2009), this Court held that trial court should not have qualified the forensic interviewer as an expert, but found, based on the facts of that case, that the Court of Appeals erred in finding "the only reasonable inference the jury could have drawn from Herod's [the forensic interviewer's] testimony is she believed the victim told the truth about being sexually assaulted " State v Douglas 380 S C at 504 671 S E 2d at 609 In dissent, Justice Pleicones stated that the forensic interviewer's testimony went to the ultimate issue to be decided by the jury and that "juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony " See, State v Douglas 380, S C at 504 671 S E 2d at 505-506

The evil of improper bolstering and hearsay testimony is that both impermissibly give the jury the false impression that by repeating the same story it has been corroborated, and is true Hearsay is "a statement, other than one made by a declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted " Rule 801(c), SCRE Player v Thompson, 259 S C 600, 193 S E 2d 531 (1972) The child's statements during the forensic interview were not permissible under any hearsay exception, and the trial judge stated his reason for admitting it was that the legislature knew it was allowing for hearsay bolstering during a child sex case by passing

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reporter's back-up tapes, the trial judge, defense counsel, the solicitor, appellant, and the witness, Ms Carlberg

the law However, there is not anything in a child sex case that allows for the admission of hearsay testimony that impermissibly bolsters the child's trial testimony

As stated, the solicitor argued to the jury that the child's out of court statements during the forensic interview were consistent with her trial testimony thus confirming the trial judge's observation that the child's statements during the forensic interview, which went far beyond time and place, constituted impermissible bolstering While in Douglas and Smith v State, 386 S C 562, 689 S E 2d 629 (2010), the bolstering centered on the forensic interviewer herself, here the child's in court testimony was improperly bolstered by her out of court forensic interview

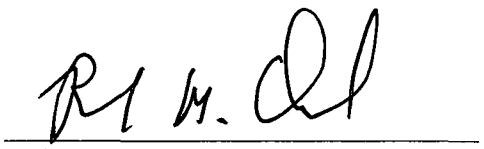
As seen, during the trial and during the forensic interview, the child went far beyond the prior consistent statement of a sexual assault victim that was limited was to time and place See State v Jeffcoat, 350 S C 392, 565 S E 2d 321 (Ct App 2002), State v Whisonant, 335 S C 148, 515 S E 2d 768 (Ct App 1999)

The forensic interview in this case graphically bolstered the child's trial court testimony As seen above, the child said many of the same things in the out-of-court forensic interview that she repeated in her trial testimony The videotaped forensic interview presented the jury with a sympathetic forensic interviewer eliciting the same story the child told at trial The evil, again, of improper bolstering is that the jury will impermissibly think that because it hears the same testimony or story more than once that it more than likely is true That is a bogus reason for judging credibility The child's out of court statements during the forensic interview were highly prejudicial, and the solicitor argued the consistency of her statements out of court and in court to the jury Appellant should be granted a new trial

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial

Respectfully submitted,



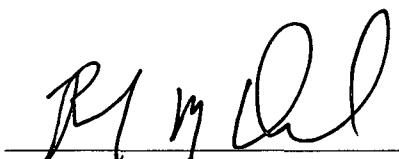
Robert M Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of June, 2011

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

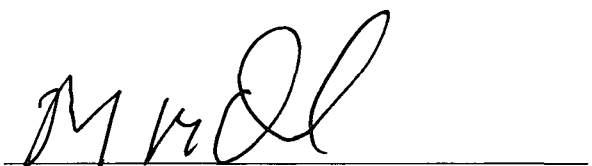
V

SAMUEL L WHITNER,

APPELLANT

CERTIFICATE OF SERVICE

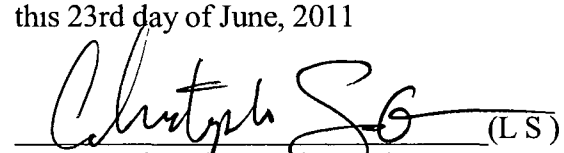
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M Blitch, Jr , Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 23rd day of June, 2011



Robert M Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of June, 2011



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