STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County
Hon John C Few, Circuit Court Judge

The State,

Respondent

v

Samuel Lamont Whitner,

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Appellant on one count of criminal sexual conduct with a minor in the first degree He proceeded to trial before the Honorable C Victor Pyle During a pretrial hearing, Appellant moved to suppress a tape recording of a conversation between himself and the minor victim Judge Pyle granted the motion to suppress on March 11, 2009

The State filed a Notice of Appeal on March 19, 2009 Subsequently, the State filed a motion to vacate the suppression ruling and require the filing of the suppression motion pursuant to section 17-30-110 of the South Carolina Code The South Carolina Court of Appeals issued an order finding the circuit court lacked jurisdiction to hear the suppression motion because jurisdiction was given to the Reviewing Authority under section 17-30-110, vacating Judge Pyle's suppression order, and directing Appellant to file a motion to suppress in the Court of Appeals pursuant to the provisions of the wiretap act The Order also set for the briefing and hearing schedule for the motion

Appellant filed a motion to suppress pursuant to the wiretap act and section 17-30-110 Upon receipt of the motion, Chief Judge the Honorable Kaye G Hearn designated the Honorable Paula H Thomas and the Honorable Aphrodite K Konduros to sit with her as the Reviewing Authority to consider the motion The Reviewing Authority held a suppression hearing on July 22, 2009 The Reviewing Authority issued a written order on July 27, 2009, denying Appellant's motion to suppress concluding the consent exception to the wiretap statute included vicarious consent by a parent

Appellant then proceeded to trial a second time before the Honorable John C Few and a jury on November 2-4, 2009 On November 4, 2009, the jury found Appellant guilty of criminal sexual conduct with a minor in the first degree and Judge Few sentenced him to thirty years in prison This appeal followed and the case was certified to the South Carolina Supreme Court on motion of Appellant

STATEMENT OF FACTS

The minor victim is Appellant's daughter (T 153, R 158) In the summer of 2007, she disclosed to her mother that Appellant had sexually abused her The minor victim indicated one time when she was at her aunt's house, Appellant sexually abused her when she was either five or six The disclosure was prompted by the minor victim reading a book her mother checked out of the library which discussed good and bad secrets (T 163-167, R 168-172)

The minor victim and her mother confronted Appellant on the phone regarding the disclosure and he denied it occurred (T 168-169, R 173-174) The minor victim's mother told her step-father about the abuse, and the two decided they would record the phone calls coming into the home (T 171, 219, R 176, 224) The minor victim's mother testified she recorded the calls because she did not know what he was saying to her and to decide whether Appellant needed to be around the minor victim (T 171, R 176) The minor victim's step-father testified the recordings were to enable them to decide the right thing to do for the minor victim (T 219-220, R 224-225) He further explained he sought to obtain as much information as possible to best help the minor victim try to go forward with counseling or whatever she needed (7/22T 29-30, R 55-56)

In one of the phone calls, the minor victim and Appellant discuss what he did to her The minor victim's step-father recorded the conversation without either party's knowledge on an extension in the bedroom After recording the conversation, they decided they needed to involve the police (T 174-176, 221-222, R 179-181, 226-227)

Detective Bradford with the Greenville Police Department met with the minor victim and her mother (T 239, R 244) He referred the minor victim for a forensic interview with the Child Advocacy Center (T 239, R 244) The child informed Detective Bradford she was abused at her aunt's house when she was between the ages of five and six (T 241, R 246) Detective Bradford received the micro-cassette tape used by the minor victim's step-father to record the conversation between Appellant and the minor victim (T 243-244, R 248-249)

Detective Bradford brought Appellant in for questioning and read him his Miranda warnings Appellant signed a waiver of his rights and agreed to talk with the detective Appellant then asked what was on the recording Detective Bradford asked Appellant what he meant regarding what he said on the recording and Appellant responded that he was not in his right mind when he did what he did Appellant then tried to explain that he was talking about something else that happened and was not talking about anything sexual (T 248-249, R 253-254)

The minor victim explained she was at her aunt's house when she was five or six (T 290-291, R 295-296) She testified she was sleeping and her father woke her up He asked her if she wanted to see his little friend She said he turned around and when he turned back to face her, his penis was exposed and he asked her to suck it She indicated she did and he asked her to do it again She did and then they laid back down (T 292, R 297)

When they laid down, Appellant was behind her and asked her to move up and down When she did, she felt something against her bottom (T 294-295, R 299-300) She indicated he did not penetrate her When she started to fall asleep, however, Appellant woke

her up and told her she had to keep going She stated she started to fall asleep and he again woke her up This time when she asked "what was it," Appellant responded "nevermind" and then started crying (T 295-296, R 300-301) The minor victim asked him what was wrong and Appellant asked her to forgive him She said it was okay and he said "no, it's not okay " (T 296, R 301)

ARGUMENT

I The three judge panel of the Court of Appeals sitting as the Reviewing Authority correctly determined that the exception for consent by a party included vicarious consent by a parent for a child

Appellant maintains the reviewing authority erred in finding the consent exception to the wiretap act includes vicarious consent by a parent for a child The South Carolina Legislature adopted the language of the federal statute knowing the federal courts have interpreted consent to include vicarious consent Further, given the constitutional rights and privileges of a parent and guardian to act in the best interest of their children, defining consent to include vicarious consent is in keeping with the public policy of this State Finally, and as an alternative ground, the statute may be considered ambiguous, and therefore, this Court should construe consent to include vicarious consent

In 2002, the South Carolina Legislature passed the "South Carolina Homeland Security Act" with a dual purpose 1) to ensure the safety of the citizens of South Carolina, and (2) to provide law enforcement, public health officials, and other emergency workers with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties See 2002 South Carolina Laws Act 339 § 2 As part of the Act, section 17-30-20 of the South Carolina Code (2002)[1] provides

> Except as otherwise specifically provided in this chapter, a person who commits any of the following acts is guilty of a

[1]The section was amended in 2010 but the amendment does not impact the case at hand

> 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

Further, the Wiretap Act provides

> (C) It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception

S C Code Ann § 17-30-30(C) (2002)

The Reviewing Authority correctly found the tape admissible under the doctrine of vicarious consent, whereby the minor's parent or guardian may consent to the interception of a communication on behalf of the minor Appellant argues because there is no explicit statutory provision creating a vicarious consent exception the legislature intended to exclude all other exceptions However, the issue is not whether the legislature meant to adopt another exception, instead this Court is determining whether the present consent exception is satisfied when the consent of a minor party to the conversation is given by that minor's parent or guardian

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature " State v Scott, 351 S C 584, 588, 571 S E 2d 700, 702 (2002) (citing Charleston County Sch Dist v State Budget and Control Bd , 313 S C 1, 437 S E 2d 6 (1993))

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be

> reasonably discovered in the language used A statute's language must be construed in light of the intended purpose of the statute Whenever possible, legislative intent should be found in the plain language of the statute itself

State v Pittman, 373 S C 527, 561, 647 S E 2d 144, 161 (2007) (internal citations omitted)

There is no South Carolina authority considering the issue of whether the consent exception includes vicarious consent by a minor's parent As a result, the Court may look to other jurisdictions for guidance The South Carolina Wiretap Act was part of the South Carolina Homeland Security Act and is modeled nearly identically after the federal statute The federal statute 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,

18 U S C A § 2511 The federal statute, just as the South Carolina statute, provides for a one party consent exception

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State

18 U S C A § 2511 (2)(d) In drafting this consent exception, the federal courts have found "Congress intended the consent requirement to be construed broadly " Griggs-Ryan v Smith, 904 F 2d 112, 116 (1st Cir 1990), United States v Amen, 831 F 2d 373, 378 (2d Cir 1987)

In determining the application of the consent exception to a situation in which a parent intercepted the communication of a child, the federal courts determined consent included vicarious consent by the parent The first case to discuss this issue was Thompson v Dulaney, 838 F Supp 1535 (D Utah 1993) In Thompson, the court held vicarious consent was permissible under the federal statute because of the parent or guardian's duty to act in the best interest of their child

> Thus, as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children

Id at 1544

Pollock v Pollock, 154 F 3d 601 (6th Cir 1998), is the leading case regarding the vicarious-consent doctrine in the context of the federal wiretap statute In Pollock, the plaintiff was the child's stepmother and the defendant was the child's mother The stepmother appealed the trial court's determination that the mother had not violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U S C § 2511 when she recorded conversations between her daughter and the plaintiff In upholding the trial court's decision, the court of appeals looked to federal and state case law in which the vicarious-consent doctrine had been applied to both federal and state wiretap statutes Pollock, 154 F 3d at 608-610 The court adopted the rule set out in Thompson

It is important to note both Thompson and Pollock[2] were decided well before the South Carolina Legislature decided to adopt almost verbatim the language used in the federal statute for section 17-30-30(C) The legislature clearly knew the interpretation of the federal statute by the courts and, as a result, made a conscious decision to adopt the language in the federal statute This is a very clear indication the legislature intended consent in the exception of section 17-30-30(C) to include vicarious consent

Further, it is well established the parent has the right and duty to act in the best interest of the child The United States Supreme Court has made it clear the importance of the parent/child relationship and the rights of the parent to control the care and upbringing of the child See Troxel v Granville, 530 U S 57, 66 (2000), (citing Stanley v Illinois, 405 U S 645, 651 (1972)) ("It is plain that the interest of a parent in the companionship, care, custody, and management of her or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'") (citation omitted), Washington v Glucksberg, 521 U S 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] to direct the education and upbringing of one's children "), Santosky v Kramer, 455 U S 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"), Parham v J R , 442 U S 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit

[2] Campbell v Price, 2 F Supp 2d 1186 (E D Ark 1998) and Wagner v Wagner, 64 F Supp 2d 895 (D Minn 1999) are two other federal cases adopting the doctrine of vicarious consent as established in Thompson and Pollack that predate the adoption of South Carolina's Wiretap Act

with broad parental authority over minor children Our cases have consistently followed that course"), Quilloin v Walcott, 434 U S 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"), Wisconsin v Yoder, 406 U S 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition") Further, parents have a duty to protect their children because children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them " Bellotti v Baird, 443 U S 622, 635 (1979)

South Carolina Courts have long held the relationship between the parent and child is to be protected and the parent is to have the right and duty to act to protect, care, and raise the child See Gary v James' Executors, 4 S C Eq 185, 195 (1811) ("The legal duties of a parent are to maintain, protect and educate the child "), Camburn v Smith, 355 S C 574, 579, 586 S E 2d 565, 567 (2003) (acknowledging parental role as defined in Troxel v Granville, 530 U S 57, 66 (2000)), Loe v Mother, Father, & Berkeley County Dept of Soc Servs , 382 S C 457, 463, 675 S E 2d 807, 811 (Ct App 2009), *cert denied* (Nov 5, 2010) (same), State v Claypoole, 371 S C 473, 639 S E 2d 466, 468 (Ct App 2006) (finding "the nature of the parent-child relationship places a legal duty upon the parent to take all reasonable steps to protect the child from harm ") (citing State v Walden, 306 N C 466, 293 S E 2d 780 (1982))

As a result, any interpretation of section 17-30-30(C) should be made in light of the long standing public policy to allow parents to direct the care and upbringing of their children and to act in their best interest for their protection Allowing the recording of a conversation, such as the one in the instant case where sexual abuse is believed to have occurred, should be allowed in order for the parent to best assist the child in recovery as well as to protect the child from the possibility of future harm

Finally, the vast majority of other jurisdictions that have examined this issue have concluded the consent exception includes vicarious consent by a parent on behalf of a child Some have done so in the context of custody disputes See Silas v Silas, 680 So 2d 368, 371(Ala Civ App 1996) (applying the vicarious consent doctrine to the state interception of communications act where one parent recorded a conversation between the minor child and the other parent), Smith v Smith, 923 So 2d 732, 740 (La Ct App 2005), (same), Cacciarelli v Boniface, 737 A 2d 1170, 1176 (N J Super 1999), (same), Kroh v Kroh, 567 S E 2d 760, 764 (N C Ct App 2002) (same) Several states have applied it in the criminal arena See State v Spencer, 737 N W 2d 124, 134 (Iowa 2007) (finding definition of consent includes vicarious consent and reversing an order suppressing tape recording of minor's phone call), Alameda v State, 235 S W 3d 218 (Crim Ct App Tx 2007), State v Diaz, 706A 2d 264, 265 (N J Super 1998)

Very few states have found the consent exception does not allow a parent to consent on behalf of a minor child The cases, however, are readily distinguishable from the case at hand In both State v Christensen, 102 P 3d 789, 796 (Wash 2004) and Williams v Williams, 603 N W 2d 114, 116 (Mich App 1999), the court declined to find vicarious

consent was sufficient The statutes of both states, however, require more than a single party's consent in order to record the telephone call and are, therefore, readily distinguishable from South Carolina's one-party consent statute Additionally, in W Va Dep't of Health & Human Res ex rel Wright v David L , 453 S E 2d 646, 648 (W Va 1994), the Court found a father did not have the authority to consent on behalf of his children to the interception of conversations between his children and their mother The case easily distinguishable from the facts of the current case because the father made the recording in the mother's home where the children resided and not in the father's own residence

As a result, the great weight of authority, especially the federal authority which all was decided prior to the South Carolina Legislature's adoption of the federal statute, lies in favor of this Court finding consent as used in section 17-30-30 includes vicarious consent by a parent The Reviewing Authority correctly determined the standards as expressed in the federal cases, such as Pollack, should be controlling as those are the standards in place when the legislature adopted South Carolina's statute

As an alternative sustaining ground, this Court may determine the word consent is ambiguous as it is not defined and nothing in the statute indicates the age or ability of a minor to consent If the Court determines the definition is ambiguous, the State submits it should look to the federal definition and those states that have construed the definition of consent and find vicarious consent was intended by the legislature

II The Reviewing Authority correctly applied the doctrine of vicarious consent in the instant case (Appellant's Issues 2 and 3)

Appellant contends the Reviewing Authority erred in finding the victim's mom and step dad could vicariously consent on her behalf in this case He maintains there was no finding the minor victim lacked the capacity to consent or that the parents met their burden to vicariously consent on behalf of the minor The State presented ample evidence the parents operated in the best interest of the child and possessed a good faith basis that was objectively reasonable for believing it was necessary to consent on behalf of the minor child to the taping of the phone conversations

I Capacity to Consent

Appellant maintains the Reviewing Authority failed to make a finding the minor victim lacked the capacity to consent prior to applying the doctrine of vicarious consent to allow a parent to consent on her behalf There is no requirement under any of the case law relied on by the Review Authority, nor should there be any requirement, of a specific finding the minor victim lacked capacity to consent The issue is whether the parent has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, and not whether the child has the capacity to consent

Several courts have discussed the age of the child The courts have held that the ability of the child to consent is not mutually exclusive of the parent's ability to vicariously consent for the child See Pollack, 154 F 3d at 610 (finding the doctrine may apply to a fourteen year old minor stating "It would be problematic, however, for the Court to attempt

to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so "), Alameda v State, 235 S W 3d at 223 (finding the doctrine may apply to a twelve year old minor stating "A minor's actual ability to consent does not preclude her mother's ability to vicariously consent on her behalf "), see also, Spencer, 737 N W 2d at 134 (finding a parent may vicariously consent to recording a thirteen year old minor), Campbell, 2 F Supp 2d 1186 (finding vicarious consent on behalf of a twelve year old minor is appropriate)

Nothing in the Pollack or Thompson standard requires a specific finding the child lacked the capacity to consent, but clearly the age of the child could be a factor in determining whether the parent has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on the child's behalf The analysis of whether the actions of the minor victim's mother and step-father met this requirement are addressed in the next section

In this case, however, even if the lack of capacity is a required finding, the evidence clearly would support based on a totality of the circumstances that the child lacked capacity The child was merely eleven years old and was confronting abuse by her father He was involved in a phone conversation explaining his actions and seeking to keep her from going any farther with the allegations (Tape Recording Transcript pages 1-19, R 429-447) As a result, even if capacity to consent should be considered this Court should find the minor victim's capacity to consent was limited given the circumstances she faced

II Pollack Standard

Appellant asserts the Reviewing Authority erred when it ruled the State met its burden of establishing the minor victim's mother had a good faith, objectively reasonable basis for believing that it was necessary and in the best interest of the child to consent on behalf of her minor child to the taping of telephone conversations The State, however, presented ample evidence demonstrating the recording met the standard articulated by Pollack and the other cases, and the Reviewing Authority correctly found the minor victim's mother and step-father could vicariously consent on her behalf for the recording of the telephone conversation

As stated above, the State must demonstrate the parent has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations The State presented the testimony of the minor victim's mother and step-father to demonstrate the good faith reason why they recorded the phone call and why it was in the minor victim's best interest

The minor victim and her mother called Appellant and confronted him with the allegations (T 169, R 174) The minor victim's mother testified Appellant talked to the minor victim and she told him she remembered what he did The minor victim's mother indicated the victim was "crying real bad" when the conversation ended (T 170, R 175) The minor victim's mother testified the child was crying a lot and they talked about getting her help and getting her counseling (T 173, R 178)

The minor victim's mother testified she recorded the calls because she did not know what Appellant was saying to her She was worried about whether to continue allowing Appellant to be around the minor victim (T 171, R 176) The minor victim's step-father testified the recordings were to enable them to decide the right thing to do for the minor victim (T 219-220, R 224-225) He further explained he sought to obtain as much information as possible to best help the minor victim try to go forward with counseling or whatever she needed (7/22T 29-30, R 55-56) The minor victim was crying and her mother and step-father were concerned She alleged her father sexually abused her and they needed to know what was happening now if anything to determine whether to allow her around him

As the mother explained, she did not know what was being said on the phone call As it turned out, Appellant was explaining the excuses for why he committed the sexual assault against the minor victim, but was also telling the minor victim "You don't discuss this with nobody else, you hear me?" He continued "This is you daddy talking to you and then you know um, you know you just don't have to talk about it no more, you hear me?" (Tape Recording Transcript p 5, R 433) He continued to talk to the minor victim about hoping to be able to see her again and hoping that her mom will let her come around He tells her they don't need any one else to become involved (Tape Recording Transcript p 16, R 444) Appellant then tells the minor victim again "Okay, remember we don't have to discuss nothing with nobody else about anything You hear me? Just gonna move past it " (Tape Recording Transcript p 16-17, R 444-445) So the mother's concern that she did not know what Appellant was telling the minor victim was well founded as he attempted to

make excuses for his behavior and get his daughter to allow the incident to be put in the past without involving anyone else

Appellant had illicit sexual relations with a minor and cannot reasonably expect that the minor victim's mother will not try to obtain information concerning her welfare by recording potentially revealing telephone conversations The mother and step-father clearly acted out of concern for the minor victim's well-being and in hopes of finding out the full story to allow them to best help her moving forward

The State presented ample evidence the mother and step-father acted with a good faith, objectively reasonable basis for believing that it was necessary and in the best interest of the child to consent on the child's behalf to the recording of the conversation with Appellant Their motives were clearly not as Appellant has attempted to portray, but were in keeping with their duty to protect their daughter from harm and to care and raise her in the best manner possible See, Bellotti, 443 U S at 635, Gary, 4 S C Eq at 195, Camburn, 355 S C at 579, 586 S E 2d at 567 Accordingly, the Reviewing Authority correctly determined "Mother and step-father's motive for recording the conversation was to assist them in counseling daughter and to protect daughter from harm " (Order of Court of Appeals Denying Motion to Suppress, R 532) The Reviewing Authority's decision denying the motion to suppress because the mother and step-father properly vicariously consented to the recording of the conversation should be affirmed

III The Reviewing Authority did not violate Appellant's right to privacy by defining consent to include vicarious consent and allowing the recording of Appellant's conversation with the minor victim

Appellant contends the recording of the conversation between himself and his daughter violated his right to privacy under Article I, Section 10 of the South Carolina Constitution South Carolina has provided for one-party consent to recording of conversations, as a result, when one party consents either expressly or vicariously, the rights of the other party are not violated Accordingly, the admission of the recording does not violate Appellant's right to privacy

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, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained

S C Const art I, § 10 This Court has held "by articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence" State v Forrester, 343 S C 637, 644, 541 S E 2d 837, 841 (2001)

South Carolina, however, has never been willing to extend this right to privacy to information voluntarily disclosed by a party to a conversation In State v Andrews, 324 S C 516, 479 S E 2d 808 (Ct App 1996), the Court of Appeals found a party to a telephone

conversation may record the conversation and turn the tape over to police The Court ruled the tape may be admitted into evidence because the recording did not violate the recorded party's right to privacy

The Andrews Court relied in part on this Court's decision in Mays v Mays, 267 S C 490, 229 S E 2d 725 (1976), in which this Court held 18 U S C A § 2511(2)(d) "makes it clear that one party to a telephone conversation may lawfully tape the conversation without the other's knowledge or permission and subsequently disclose it" The analysis used by this Court in Mays to find the recording admissible would also apply to any alleged violation of the South Carolina Statute given its similarity to the federal statute Additional support can be found in Southern Bell Tel and Tel Co v Hamm, 306 S C 70, 409 S E 2d 775 (1991), in which this Court concluded information voluntarily turned over to another party may be disclosed by that party without violating the right to privacy

Accordingly, the Reviewing Authority properly admitted the telephone recording Once it was admitted under section 17-30-30 and the doctrine of vicarious consent, the recording by the victim's mom and step-father did not violate Appellant's right to privacy

IV The videotape of the forensic interview was properly admitted and did not impermissibly bolster the minor victim's testimony

Appellant contends the trial court erred in admitting the forensic interview of the child victim pursuant to section 17-23-175 of the South Carolina Code The statute assumes a level of bolstering will occur by requiring the child to testify in addition to the admission of the videotape of the forensic interview The trial court properly admitted the videotape in this case as there has been no challenge to whether the State met the requirements for admission, and its admission did not constitute impermissible bolstering

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion State v Saltz, 346 S C 114, 551 S E 2d 240 (2001) An abuse of discretion occurs when the trial court's ruling is based on an error of law State v McDonald, 343 S C 319, 540 S E 2d 464 (2000)

In general, the admission of a prior consistent statement has been held to be hearsay and, when the statement has been admitted for the sole purpose of bolstering the credibility of a crucial witness, the error in admission is not harmless See e g , State v Foster, 354 S C 614, 582 S E 2d 426 (2003) (holding the admission of a witness's prior consistent statement, which clearly bolstered her crucial trial testimony, could not be considered harmless error), Jolly v State, 314 S C 17, 443 S E 2d 566 (1994)

Section 17-23-175, however, provides for the admission of the videotape of a child victim of a sex crime when certain criteria are met Specifically, the statute reads

> A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if

> (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 (Supp 2007) (emphasis added) Additionally, the South Carolina Rules of Evidence specifically state that they can be preempted by statute or other rule See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101 ")

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature " State v Scott, 351 S C 584, 588, 571 S E 2d 700, 702 (2002)

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used A statute's language must be construed in light of the intended purpose of the statute Whenever possible, legislative intent should be found in the plain language of the statute itself

State v Pittman, 373 S C 527, 561, 647 S E 2d 144, 161 (2007) (internal citations omitted)

The hearsay rules or any other rules of evidence are superseded by the statute in determining the admissibility of the videotape It is clear the legislature intended to allow

the videotape into evidence even though it will likely constitute hearsay under Rule 801, SCRE, and may run afoul of other rules of evidence The legislative enactment requires the child to testify in addition to admitting the videotape, which demonstrates the Legislature presupposed some bolstering will naturally occur and the bolstering was deemed acceptable

Additionally, the statute shows the Legislature of our State has made a public policy decision that admitting evidence of the child's prior statement will be beneficial to finding the truth in sexual crimes where there is a child victim As a result, the court need not partake of the same analysis required of other evidence, and the videotape should not be excluded on the basis that it bolstered the minor victim's testimony See State v Russell, 383 S C 447, 451, 679 S E 2d 542, 544 (Ct App 2009) The videotape was properly admitted because it clearly met the requirements of section 17-23-175 [3] The statute provides the sole means for admitting the videotape, and does not prohibit admission when the tape bolsters the credibility of a witness or the victim

[3] The State notes that there has not been a challenge on appeal to whether the videotape met the criteria of section 17-23-175 and this unappealed finding is the law of the case See State v Sampson, 317 S C 423, 427, 454 S E 2d 721, 723 (Ct App 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case)

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 29, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County
Hon John C Few, Circuit Court Judge

The State,

Respondent,

v

Samuel Lamont Whitner,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to

Chief Appellate Defender Robert M Dudek
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served This 29th day of June, 2011

Ellen DuBois

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June 29 2011

Chief Appellate Defender Robert M Dudek
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Re State v Samuel Lamont Whitner

Dear Mr Dudek

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case

Sincerely,

William M Blitch, Jr
Assistant Attorney General

WMB erd
Enclosures
cc Honorable Tanya A Gee (original and nine enclosed)
Victim Services (enclosure)