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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLAYTON THOMAS JONES,

APPELLANT.

APPELLATE CASE NO. 2022-001775

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by permitting Allison Foster, the forensic interviewer who interviewed Minor, to testify via Zoom in violation of Appellant's Sixth Amendment right to confrontation and Maryland v. Craig, 497 U.S. 836 (1990) where the state failed to show any important public policy necessitating the use of two-way closed circuit testimony?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant on January 22, 2020 for third degree criminal sexual conduct with a minor. R. 276. His case was called to trial on July 11, 2022 before the Honorable Walton J. McLeod, IV, and a jury. R. 1. Assistant Solicitors Theresa Johns and Susan Chafflin represented the state. R. 1. Appellant represented himself. Tivis Sutherland was standby counsel.[1] R. 1.

On July 14, 2022, the jury found Appellant guilty as indicted. R. 274, ll. 12-17. He was sentenced to fifteen years imprisonment. R. 275, ll. 16-17.

This appeal follows.

[1] At the end of the third day of trial, after the state rested, Appellant requested standby counsel represent him for the remainder of the trial. The judge permitted Tivis Sutherland to take over representation of Appellant. R. 201, l. 9 – 204, l. 24.

STATEMENT OF FACTS

Around three o'clock on the afternoon of June 23, 2019, Erin Rish took her two daughters, Minor and Zoe, to the Congaree River to swim and play on the riverbank. Zoe was ten years old at the time and Minor was seven years old. R. 144, ll. 3-14; R. 145, l. 18 – 146, l. 10. Coming from Lexington, Erin drove over the Gervais Street Bridge, turned right onto Gist Street, and parked her car in a parking lot by the river near the Edventure Children's Museum. R. 125, l. 9 – 129, l. 10. After parking the car, Erin and her children walked down a pathway that led to the river and settled on a "beachy area" of the riverbank. The only other people Erin noticed in the vicinity were two men to the right of them swimming in the river almost directly under the Gervais Street Bridge. R. 131, l. 19 – 134, l. 16.

Erin set up her beach chair and blew up floats for the girls to play with. While Minor and Zoe were playing in the water, one of their floats "got away" and began floating down the river toward the Blossom Street Bridge. The girls were "panicking because their float was drifting away." However, Erin refused to let the girls retrieve the float because they were already "out far enough." She told them not to "worry about it" and to "just let [the float] go." R. 134, l. 17 – 138, l. 25.

Erin noticed that the two men who were swimming under the Gervais Street Bridge had been slowly drifting toward where Erin and her children were located. One of the men saw the float drifting away, swam toward Erin, and offered to get the float. Erin told him not to worry about it, but the man continued to swim toward the float. The float ended up on the bank down the river. The man retrieved the float, walked it back to Erin, and gave it to the girls. R. 139, l. 1 – 141, l. 17.

The man introduced himself as Clay and was later identified as Appellant. R. 141, l. 19. The man Appellant was with also joined the group. This man was later identified as Andy Geddings. Appellant began a conversation with Erin. He told Erin that "he did IT work and was a tutor." Appellant explained that he normally tutored adults, but he offered to tutor Erin's children if they needed any IT help. Meanwhile, Erin's daughters, Minor and Zoe, were playing a game they made up called "Mud Monsters." The game was based off of an episode of a show called Goosebumps. The children were covering themselves up with mud and then rinsing the mud off in the river. Appellant began playing this game with the girls. He likewise put mud on himself and then rinsed it off in the water. The girls went into the water at least three or four times to rinse themselves off. On a couple of occasions, Appellant got into the water with them. R. 146, l. 15 – 151, l. 24.

As Appellant was playing with the girls, he was also talking to Erin. He told Erin his old girlfriend had children about the same age as Minor and Zoe and they also liked the show Goosebumps. He discussed his upcoming birthday and trip to Disney World. R. 151, l. 1 – 152, l. 9. Andy also engaged in conversation with Erin. However, after speaking with Andy for a few minutes, Erin "got the idea that he was a little slow or . . . maybe autistic." Andy did not engage in play with the children like Appellant did. R. 153, ll. 11-17.

After about thirty minutes, Erin became uncomfortable because "it was an odd situation" and Appellant and Andy were "lingering." It was "awkward" to Erin that Appellant "was a stranger" and "physically involved playing in the mud with [her] daughters." R. 152, l. 10 – 155, l. 3. Erin told Appellant and Andy they had to leave. They packed up their stuff and headed to the car. Appellant and Andy also decided to leave and followed behind Erin and the girls. Once they got to the parking lot, Appellant gave Erin his business card and again offered to tutor her

children. The top of the business card read "Tech Tutor Collective." It listed Appellant's name and telephone number as well as the email address and website for his business. R. 155, l. 4 – 158, l. 14.

Once at the car, Erin told Minor she had to change out of her wet bathing suit. While Erin was helping Minor change behind a towel, Minor told Erin that she was improperly touched while she was in the river. Erin then asked Zoe, who was at the front of the car deflating a float, whether she had been touched. After seeking advice from her boyfriend and father, Erin took Minor to the Columbia Police Department the next day and filed a complaint. She gave police the business card Appellant had given her the previous day. R. 160, l. 6 – 162, l. 1.

On July 30, 2019, Minor attended a forensic interview at the Metropolitan Child Advocacy Center. She was interviewed by Allison Foster. Minor told Foster that while she was playing in the river earlier that summer, a man, who she later identified as Appellant in a photographic lineup, touched her "crotch" under her bathing suit with his hand. She claimed he moved his finger around in circles on the skin of her "crotch" and asked, "You like that, right?" See State's Exhibit No. 25 (DVD of Redacted Interview).

Appellant was arrested on August 5, 2019. He waived his *Miranda* rights and spoke with Investigator Chris Odom. Appellant vehemently denied improperly touching Minor. R. 185, l. 5 – 195, l. 5.

During her testimony before the jury, Minor recalled visiting the river with her mother and sister during the summer of 2019 and meeting two men. However, she did not recall what the men looked like. She did not recall meeting with Allison Foster later that summer to talk about what happened nor did she recall being shown a photographic lineup. She did not describe any improper touching. Lastly, when asked if she saw a man in the courtroom that looked like

one of the men she met at the river that summer, Minor answered, “No.” R. 116, l. 21 – 123, l. 17.

STANDARD OF REVIEW

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision.'" State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018) (quoting State v. Bray, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000)); See State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." Id. (quoting Bray, 342 S.C. at 27, 535 S.E.2d at 639) (internal quotation marks omitted).

ARGUMENT

The trial judge abused his discretion by permitting Allison Foster, the forensic interviewer who interviewed Minor, to testify via Zoom in violation of Appellant's Sixth Amendment right to confrontation and *Maryland v. Craig*, 497 U.S. 836 (1990) since the state failed to show any important public policy necessitating the use of two-way closed circuit testimony.

Relevant Facts

The state called Alicia Benedetto, the director of the Metropolitan Children's Advocacy Center, as a witness *in camera* to attempt to lay the foundation for the admission of Minor's recorded forensic interview pursuant to S.C. Code § 17-23-275. Notably, Benedetto did not interview Minor. During her *in camera* testimony, Benedetto generally described the purpose of the Metropolitan Children's Advocacy Center, its location, its staff, and how it operates. She also discussed what a forensic interview is and where forensic interviews take place at the Metropolitan Children's Advocacy Center. Lastly, she explained Allison Foster's qualifications as a forensic interviewer and claimed Foster "followed protocol" during her interview of Minor. R. 3, l. 9 – 11, l. 17.

After Benedetto testified, the state argued the recording of Minor's forensic interview was admissible pursuant to § 17-23-275 and State v. Russell, 383 S.C. 447, 679 S.E.2d 542 (Ct. App. 2009). R. 12, l. 5 – 13, l. 11.

Appellant argued the statement did not possess particularized guarantees of trustworthiness and should be excluded. However, he further asserted he had additional questions for Benedetto concerning the admissibility of Minor's forensic interview. He believed Benedetto's initial *in camera* testimony only concerned the admissibility of Minor's

identification of Appellant in a photographic lineup during her forensic interview. The judge permitted Appellant to ask Benedetto additional questions. R. 13, l. 17 – 16, l. 11.

When questioned by Appellant, Benedetto explained that Minor's forensic interview took place over a month after the case was referred to the Metropolitan Children's Advocacy Center. When asked whether she was able to control outside influences on Minor from family or other individuals during that month long period, Benedetto prefaced her response with "I didn't conduct the interview." She then admitted she had no way of controlling outside influences nor would anyone else employed at the MET CAC. When Appellant asked Benedetto whether she noticed "any contradictions" within Minor's interview, Benedetto said she could not answer the question as she did not conduct the interview. Benedetto admitted she did not review the recording of Minor's forensic interview and that she "was not here for that purpose." Consequently, Appellant concluded his examination of Benedetto stating, "Well, since you did . . . not review [Minor's interview] and, and we don't have Allison Foster here today, no further questions, Your Honor." R. 16, l. 19 – 18, l. 9.

After taking a break, the judge expressed concern with "whether or not the interviewer who conducted the interview was required to be here." R. 19, l. 21 – 20, l. 2. The assistant solicitor explained to the judge that Allison Foster, who conducted Minor's forensic interview, was in Washington state under a federal subpoena, and was therefore unavailable to testify in Appellant's case. She explained that during a hearing on June 23, 2022, Judge Newman ordered Appellant's case be tried the week of July 11, 2022 as a result of Appellant's motion for a speedy trial. The state wanted to try Appellant the week of July 4, 2022, but there was "a 10 day issue with subpoenas." R. 27, l. 6 – 29, l. 7. When the state's investigator served Allison Foster with a subpoena for the week of July 11, 2022, Foster notified the solicitor's office that she was already

under a federal subpoena for that week and would be in Washington. R. 35, ll. 11-18. The assistant solicitor told the judge that she incorrectly believed the state could present Alicia Benedetto, the director of the MET CAC, to lay the foundation for the admission of Minor's forensic interview. R. 27, l. 21 – 28, l. 3.

Appellant argued Foster's testimony was necessary in order to determine whether Minor's recorded interview was admissible pursuant to § 17-23-275. He asked the judge to exclude Minor's interview given that Foster was not available to testify. He further objected to granting the state a continuance arguing he had already been incarcerated for three years pending trial. R. 21, l. 3 – 22, l. 1.

Citing to State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), the judge found the forensic interviewer must testify *in camera* before a child's out of court statement could be admitted pursuant to § 17-23-275. The judge emphasized that there were factors listed in § 17-23-275 that address whether a statement possesses particular guarantees of trustworthiness that Appellant could cross-examine Allison Foster about if he so chose. The judge concluded that to allow Alicia Benedetto to lay the foundation for the admission of Minor's forensic interview would "run contrary to the clear language" of Anderson. R. 23, l. 22 – 25, l. 11.

The assistant solicitor contacted Allison Foster, who suggested she could testify through Zoom. The solicitor informed the judge that the state had the technology to allow Foster to testify virtually. R. 30, ll. 1-25. Appellant objected to Foster testifying virtually. He said it made him "uncomfortable" and expressed concern regarding how the jury would respond to virtual testimony and how Foster herself would respond to being questioned virtually as opposed to a "more formal setting" in the courtroom within the presence of the judge and "the authority of the Court." R. 31, ll. 3-9.

The judge asked the parties to review State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018), which "makes reference to exceptional circumstances for video testimony." Despite this language from Johnson, the judge indicated he was inclined to allow Foster to testify via Zoom because she was "an administrative witness who's not here due to involvement in another court" rather than "an accuser" or "an eyewitness to an event." R. 31, l. 15 – 32, l. 3.

Appellant objected to Foster testifying virtually pursuant to Johnson. He argued the analysis set forth in Maryland v. Craig, 497 U.S. 836 (1990) applies. Reading from Johnson, Appellant argued Craig "plainly requires [a] public interest more substantial than convicting someone of a criminal offense" before the right to face to face confrontation may be modified. He emphasized that Johnson "indicated that a generalized conviction of criminal offenses is not sufficient to dispense with the defendant's right to in court confrontation." While Appellant recognized that there "are exceptions" to face to face confrontation in cases of "exceptional circumstances," he argued "exceptional circumstances are not present here . . . because due diligence would [have] allowed the prosecution to know that the statute requires the interviewer [testify] and they were aware of the interviewer's indisposition prior to the docketing of the case." R. 34, l. 14 – 35, l. 9.

The assistant solicitor argued Appellant's right to "confrontation of Doctor Foster is limited in scope because Doctor Foster is not a factual witness in regards to a confession or a factual witness in regards to fact. She is an administrative witness that is used by law enforcement as a tool to ensure that the interview of a child sexual assault victim is done properly and is done so that the Court can determine the reliability of that statement." R. 35, l. 19 – 36, l. 2.

The trial judge stated, "I think, in light of the circumstances, that it's appropriate to move forward." He ruled, "In addition to the witness not being available as a result of being compelled to appear in another court, I think the prior proceedings in this case, particularly the motion on the speedy trial, is of great importance . . . in this instance with this witness who I, in my opinion, doesn't address the merits of the case as much as just the administrative process of how this interview was conducted. I think it's appropriate to use Zoom and that's what we will attempt to do here." R. 36, ll. 8-20.

Allison Foster then testified *in camera* via Zoom for purposes of determining whether the recording of Minor's forensic interview was admissible pursuant to § 17-23-275. R. 81, l. 12 – 99, l. 17. After the judge ruled Minor's forensic interview was admissible, Allison Foster testified before the jury via Zoom concerning Minor's interview. R. 105, l. 4 – 111, l. 17. The judge admitted Minor's forensic interview, which was marked as State's Exhibit No. 25, during Foster's testimony and the state published it to the jury. R. 110, l. 7 – 111, l. 9.

Discussion

The trial judge abused his discretion by permitting Allison Foster, the forensic interviewer who interviewed Minor, to testify via Zoom in violation of Appellant's Sixth Amendment right to Confrontation and Maryland v. Craig, 497 U.S. 836 (1990) since the state failed to show any important public policy necessitating the use of two-way closed circuit testimony.

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, establishes that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The South Carolina Constitution similarly provides that "any person charged with an offense shall

enjoy the right... to be confronted with the witnesses against him...." S.C. Const. art. I, § 14. The Confrontation Clause:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970) (footnote omitted). Together, these "elements of confrontation" serve to safeguard "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing." Maryland v. Craig, 497 U.S. 836, 846 (1990) (internal citations omitted). To this end, United States Supreme Court precedent establishes that the Confrontation Clause reflects a preference for physical face-to-face confrontation. Id. at 849; See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"). "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." Id. at 850.

The Supreme Court's decision in Maryland v. Craig is the seminal case on the use of a video medium in lieu of physical confrontation. In Craig, the Court addressed the constitutionality of Maryland's statutory procedure that allowed a child victim to testify without seeing the defendant via a one-way closed circuit television. Id. at 841. After reviewing the history and purpose of the Confrontation Clause, the Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.*" Id. at 850 (internal

citations omitted) (emphasis added). In applying this two pronged standard, the trial court is required to make a fact specific finding of necessity in order to allow substitution of video for live testimony. Id. at 855-56.

The majority of courts that have addressed two-way closed circuit testimony have adopted the same test set forth in Craig, which only addressed the use of one-way video testimony in the context of a child sexual assault case. State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018). "In Craig, the United States Supreme Court recognized the right to face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified 'where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.'" Id. (quoting Craig, 497 U.S. at 850).

The Fourth Circuit has "acknowledged the Craig test is the measure for considering whether two-way closed circuit testimony is permissible under the Confrontation Clause." Id. at 451, 812 S.E.2d at 745 (citing United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008)). "In Abu Ali, the court affirmed the admission of testimony of Saudi Arabian officials beyond the reach of American courts in prosecution of a terrorism suspect." Id. (citing Abu Ali, 528 F.3d at 240-41). The Fourth Circuit "found the interest of national security and protecting Americans from unprovoked terrorist attacks satisfied the first prong of Craig." Id. (citing Abu Ali, 528 F.3d at 240-41). "However, the court clarified: 'This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of Craig. Craig plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is, however, just the kind of important public interest contemplated by the Craig decision.'" Id. (quoting Abu

Ali, 528 F.3d at 241). "The court further determined the trial court had taken steps necessary to ensure the reliability of the testimony so that no Sixth Amendment violation occurred." Id. (citing Abu Ali, 528 F.3d at 241-42).

In Johnson, this Court noted South Carolina had not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. However, it emphasized that our state has adopted the Craig test in cases of one-way closed-circuit testimony and the testimony of children in sexual assault cases. 422 S.C. at 452, 812 S.E.2d at 746 (citing State v. Lewis, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996)). This Court further explained, "While our courts have generally noted the protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. This approach underscores the reluctance of the court to use methods other than live testimony except under extreme circumstances." Id. at 452-53, 812 S.E.2d at 746 (internal citations omitted).

After examining state and federal jurisprudence, this Court held the trial judge in Johnson erred by permitting the state to present Investigator Mason Moore's testimony via Skype. Id. at 453, 812 S.E.2d at 746. Moore, who had moved to Montana, interrogated Johnson after his arrest. Moore first testified via Skype during an *in camera* Jackson v. Denno hearing to determine the voluntariness of Johnson's statement and then later before the jury. Johnson objected to Moore testifying via Skype before the jury. He argued the Skype testimony violated the Confrontation Clause. The trial judge ruled Moore could testify via Skype because "the witness was 2,500 miles away, was an ancillary witness, everything that was going on with him

is available on videotape, and another officer was in the room for the majority of the interrogation." Id. at 446-47, 812 S.E.2d at 743 (internal quotation marks omitted).

In holding the trial judge erred by allowing Moore to testify via Skype, this Court concluded, "In the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate." Id. at 453, 812 S.E.2d at 746. The Court subsequently noted in a footnote that it declined to adopt a specific test for the admission of two-way closed circuit testimony in Johnson, "as convenience and expediency alone do not rise to the level of exceptional circumstances . . . or implicate an important public policy consideration as required by Craig."

The trial judge here abused his discretion by permitting Allison Foster to testify via Zoom because it was not necessary to further an important public policy as required by Craig. Notably, the judge never found permitting Foster to testify via Zoom furthered an important public policy. Rather, his ruling was based on convenience and his opinion that Foster was merely an "administrative" witness. As this Court emphasized in Johnson, "convenience and expediency alone" do not implicate an important public policy consideration.

If this Court were to hold two-way closed circuit testimony is also admissible in exceptional circumstances, a less stringent standard than that required by Craig, exceptional circumstances did not exist in this case. See United States v. Gigante, 166 F.2d 75 (2nd Cir. 1999). As Appellant asserted at trial, the state should have known § 17-23-275 requires the interviewer testify during an *in camera* hearing before a child's recorded forensic interview may be admitted pursuant to State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and "due

diligence" would have put the state on notice that Foster would be out of state prior to trial. See R. 34, l. 14 – 35, l. 9.

Respectfully, this Court should hold the trial judge abused his discretion by permitting Foster to testify via Zoom, reverse Appellant's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2024.

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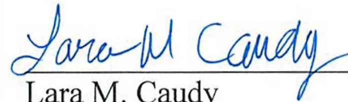
CERTIFICATE OF COUNSEL

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

August 21, 2024.



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THE STATE,

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V.

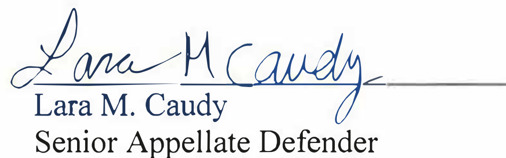
CLAYTON THOMAS JONES,

APPELLANT

APPELLATE CASE NO. 2022-001775

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon Joshua A. Edwards, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 21st day of August, 2024.



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

From:	Mcinnis, Sara
To:	Josh Edwards
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Subject:	2022-001775 The State v. Clayton T. Jones Final Brief of Appellant
Date:	Wednesday, August 21, 2024 2:50:00 PM
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Good Afternoon Mr. Edwards,

Please find attached for service in the above-referenced case the final brief of appellant, which will be filed with the Court of Appeals today, August 21, 2024, via email filing.

Thank you!

Sara McInnis
Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
(803) 734-1330