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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County  
Honorable George M. McFaddin, Jr., Circuit Court Judge

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CHAD S. HAYES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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APPELLATE CASE NO. 2024-000515

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RETURN TO MOTION FOR ORDER TO REMAND FOR A HEARING TO  
ATTEMPT TO RECONSTRUCT THE RECORD OF THE POST-CONVICTION  
RELIEF HEARING IN ORDER TO ALLOW MEANINGFUL APPELLATE  
REVIEW

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The Respondent State of South Carolina hereby makes a Return to the September 19, 2024 motion by counsel for Petitioner, Chad S. Hayes, for an order to remand the case for a hearing to attempt to reconstruct the record of the post-conviction relief hearing held April 11, 2022 before the Honorable George M. McFaddin, Jr., Circuit Court Judge in Lexington County. The State agrees with the request to remand. In support of the remand Petitioner submits the following:

## I.

Respondent submits under SCACR Rule 240, it is appropriate to remand to the circuit court to attempt to reconstruct the record of the hearing held on April 11, 2022. Upon information and belief, the Applicant was present at the hearing and represented by Aimee Zmroczek. The Respondent was represented by former Assistant Attorney General Taylor Zane Smith<sup>1</sup> of the South Carolina Attorney General's Office. Also present at the hearing was former Assistant Attorney General Lilly Meadows<sup>2</sup> who made notes from the hearing. (A copy of the hearing notes are attached as Exhibit 1). Upon information and belief, testimony was received at the hearing from Chris Watkins, the Applicant Chad Hayes, trial counsel Theo Williams, and appellate counsel the late James Falk<sup>3</sup>.

## II.

Respondent's below-signed counsel has become aware of the difficulty in locating transcripts from the April 11-15, 2022 term 11<sup>th</sup> Circuit PCR term by South Carolina Court Administration. Concerning April 11, 2022, in addition to the Chad Hayes hearing transcript, the Office of the Attorney General has also learned that Court Administration has been looking for records from the Jamie Stroman PCR hearing also held on April 11, 2022 in order to prepare a transcript at the Attorney General's request. However, Court Administration was able to produce a transcript in the Ronald Michaux PCR hearing held the next day, April 12, 2022 which was produced by court reporter Krystal Smith on November 27, 2023.

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<sup>1</sup> Taylor Smith is currently employed at the in the Office of the County Attorney in Horry County as a Deputy County Attorney.

<sup>2</sup> Lilly Meadows is currently employed in Washington , D.C. by the U.S. House of Representatives, Committee on the Judiciary.

<sup>3</sup> James Falk died on May 9, 2023.

III.

Respondent concurs in the request to remand for a reconstruction hearing. Consistent with Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002), Respondent requests the Court to grant his motion and remand the case to Lexington County for a hearing before Judge McFaddin to reconstruct the PCR hearing record from April 11, 2022.

Respectfully submitted,

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By:



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October 9, 2024

## EXHIBIT ONE

Notes of Assistant Attorney General Lilly Meadows from April 11, 2022  
Hearing – Chad Hayes v. State 2017-CP-32-01247

## Chad Hayes

4/11/2022

Taylor calls case

Aimee confirms that some allegations were withdrawn

### Aimee calls Chris Watkins

- A: where are you employed?
  - o C: something computer forensics
  - o Primary focus is in digital forensic science
  - o Also licensed private investigator through SLED
- How long have you been working in the field (private investigator/digital forensic analyst)?
  - o 12 years
- Move to qualify him as an expert in digital forensic investigation

Taylor

- Formal education?
  - o Studied at Midlands Tech in 2005
  - o Earned certification through COMP(something?) general technician cortication
  - o Went back to Midlands Tech to study programming
  - o Obtained ISS(??) certification
- What sort of work do you do?
  - o Digital forensic science investigations
- What did you have to do to get certification?
  - o Went to 2-week training conference
  - o After the class, went through 4-step practical examination
  - o Then we take the final practical examination, which we have 2 weeks to complete
  - o That was done in November 2018
- Have you ever been declined as an expert?
  - o No – been qualified 24 times

Judge: qualified

Aimee direct

- What is digital forensic science?
  - o Analysis of data recovered from computers, cell phones, etc.
- Do you primary offer your services to criminal attorneys?
  - o We offer our services to all types of attorneys, to the State, and to the general public

- I've testified as an expert for the State in 2 cases but usually the State hires their own expert
- How did you become involved in this case?
  - July 2018 – hired by AZ's law firm to review evidence in this case
  - Received copy of trial transcript and asked to review that
  - Recommended that independent examination of digital evidence be done
- Did you do a report?
  - Yes
- What, if anything, did you note from your review of the trial transcript?
  - On pg. 689 – Sol Mayes asks Detective Phipps if he was able to determine the date/time of the photos in this time
    - He stated that thumbnail images do not retain info on date/time
    - Not technically true because this case involved evidence on Windows 7
    - Each thumbnail image is indexed and tracked by operating system
    - There can be additional information found in hidden files or system files
    - There was no testimony to explain whether any of that was examined
    - Also no questioning that would bring those answers to light
  - When you are hired, do you always testify?
    - No
  - What are some other things you do?
    - Often I'm asked to review the work that LE has done to verify their findings are true and correct
    - In most cases they are following proper procedure
    - Goal is to verify/authenticate information
  - How can you assist a trial attorney in determining whether LE did a thorough job?
    - By examining the work that has been done
  - Can you provide attorneys with a line of questioning that may not be within common knowledge of attorneys?
    - Yes
- In addition to not explaining the thumbnail images/how they could be tracked, were there any other questions or things you felt weren't challenged in Phipps testimony?
  - On pg. 658, they ask about FTK/forensic processing tool
    - He testified he used this to perform his examination
    - Back in 2014, FTK would not have had the ability to parse the thumbnail ID/was not equipped to handle that at that time

- However, there would have been other tools/methods available at the time to accomplish them
  - Another thing I noticed was the testimony did not include the exact location of the files
    - That is important because (something volume shadow copies)
  - Had Phipps gone that direction, he could have been able to identify valuable info pertaining to original file path of these thumbnails (dates, time, type of camera used, etc.)
    - I also noticed there were no questions along those lines
- If you had been hired in this case, would you have been able to testify about intricacies of Phipps examination?
  - Yes
  - No independent examination done
- Did you have an opportunity to forensically process and examine the evidence in this case?
  - Yes – conduct independent exam. of laptop/hard drive and a flash drive
  - The laptop became the main focus – I found the thumb drive did not contain any data relevant to the purpose of the examination
- What is a forensic image?
  - A forensically sound copy of a data that's contained on a digital storing device such as a hard drive or thumb drive
  - Preserves evidence in the way that it was found/stays that way throughout the course of the investigation
  - It was in the same state that Phipps examined it
- Did your examination have a specific focus?
  - Yes – locating more information about these thumbnail files to see if we could determine what the original file was, file path, metadata associated with it, etc.
  - Then establishing a timeline of computer use across the computer to see if we could find any pattern of use
- How did you conduct your examination of the laptop?
  - Went to the AG's office and had my own forensic work station set up
  - I was permitted to examine forensic image
  - Specifically examined these to locate all thumb cache files, search index files, and other user data on the item itself
  - Purpose of that was to establish timeline
- Why is that important?
  - Determining when the files were put on the computer is important because that will impact investigation
  - Find out how images got there – when and by whom
- Explain how thumbnail caches work/why it is important

- Dealing w/ Windows 7 – uses centralized thumbnail cache
  - A cache file is a database file/folder within a computer that is storing information that is routinely used by the application
- When someone access photos/videos on their computer, they are using file explorer
- Within that file explorer is a view option where you can change the size of icons
  - User can freely select what size icons they want to appear
- When you're browsing a folder that contains images, the system is going to automatically create a thumbnail file for each image
  - Allows the user to see what these files are without having to open them individually
  - In order for a thumbnail to be inputted into the cache, the size option has to be selected by the user to view the thumbnails
- Each image stored in cache file (cache file is stored in windows system folder – not an area a user would have normal access to)
  - If they wanted to, they could but they would need a program to open file
- Contents of that file is limited
  - It will not show metadata from thumbnail
  - It will just keep a thumbnail from that file
  - Thumbnail is given an ID number
  - Algorithm that creates ID number depends on something and file ID/extension of the file/last modified time for the file
- Why is that important?
  - Thumbnail cache is given unique ID number
  - ID is linked to windows search index database which is also located in a windows EDV
- When you were talking about algorithms, is it possible to reverse engineer it to get it to the original path?
  - No
- What we're trying to find out is who opened photo, when, etc.
  - Trying to explain how this stuff works
- Windows EDV
  - When examining windows EDV, because file by its nature is very volatile,
    - If you do improper shutdown or something, file is corrupt and you have to attempt to repair it
  - Once you get access to EDV, you can search thumbnail cache ID
  - For a file that is saved on a computer, even if it was deleted, I would expect to find an entry in that database file

- In this case, found that for the 59 images
- What were the conclusions you were able to find out?
  - 59 unique pictures that are considered to be contraband were found in all 4 of these the thumb cache (lists numbers) files
  - Also found these picture files were also present in a thumb cache file in a something shadow file in October 2011
    - Windows EDV file – searched it and did not find any recoverable info from pictures
    - Indicates pictures were present on computer and deleted before October 2011
  - Cross-referenced thumbnail cache IDs with all relevant files
    - Multiple EDV files
    - I did not identify any additional information that would indicate the file path, etc.
- Based on that examination, what observations would you find?
  - Info I just mentioned – there is no evidence existing on the machine that supports that the 59 pictures were ever actually saved/transferred to the hard drive of this computer
  - It is more likely they were accessed on computer using USB flash drive
    - Not the USB flash drive I also analyzed
  - Photos appeared to be taken on digital camera
  - Examined metadata for other pictures on the computer – there were tons of other pictures
    - Found there were only 2 digital camera models ever identified
    - Kodak Easyshare C182 and Kodak Easyshare CX240 zoom digital camera
- How do you identify when media is added to a computer?
  - USB device records – tried to find source device
  - 2 records that indicate an assigned drive letter – USB card reader and slick MP3 USB device
  - Both kodak cameras I mentioned support SD memory card
  - Required SD card reader
  - Cameras also could have been directly plugged into machine using USB cable
    - But did not see any USB records that would indicate that
  - When files are viewed on digital storage media in thumbnail mode, those entries will be added to thumbnail cache
  - There have been experiments that show when an image is moved from storage device to hard drive, there is a new thumbnail created
  - Only 2 possible scenarios that could have occurred with respect to these 59 files

- Scenario 1
    - Files were accessed on computer only on SD memory card reader
    - Don't know which camera took these photos
    - Assuming that camera contained SD card and photos were taken on SD card, scenario 1 concludes that those SD cards were viewed using USB reader
  - Scenario 2
    - Files were never viewed from the SD memory card but were directly copied from the SD card to an unknown location on the computer
    - In order for that to have occurred, the thumbnail view would have had to be turned off
    - User would have had to have opened up media in file viewer with no thumbnail view set but then later after they had been viewed, view them with thumbnail
  - Scenario 1 seems more likely
- Was there any other evidence that helped you lean more towards scenario 1?
  - One fact in support of scenario 2 being correct, the thumbnail cache records that were created by windows search index would have been deleted once that SD card was removed from that computer
    - So that could explain why records don't correspond to relevant pictures
- Did you render an expert opinion as to which scenario is most likely?
  - Scenario 1 seems more plausible just because there are more steps for scenario 2 to be correct
- Is it possible for a user to access thumbnail cache and go through them like a regular person?
  - Yes – would have to download program/thumbnail cache viewer
- Did you determine if any of these programs were on this computer?
  - I did not find any evidence of such programs
- Is there any evidence that would support that he had knowledge of these images on his computer?
  - That is the problem with evidence restricted to thumbnail cache photos
  - It could be argued that individual in control of computer would not know these photos were on there
  - You can clear thumbnail cache when you go to disk cleanup
- Computer aspect of this case was important because it was being used to corroborate other testimony...have you discovered problems with courts accepting cache information as competent evidence?
  - I am aware of at least 2 cases (not in SC) where

- Is there any indication or testimony as to how these files got on this computer?
  - o No
- If you had been hired as an expert you could have testified to that/assisted trial attorney in preparing to challenge Phipps' testimony?
  - o Yes

Taylor cross

- What is the difference between a thumbnail and a photograph taken on a digital camera?
  - o Thumbnail is separate to the original picture
  - o Picture file is going to be saved with certain size, etc.
  - o Once you open picture file, thumbnail is automatically created so that average computer user browsing pictures
- Like a preview of image itself?
  - o Yes
- So if someone were on a computer viewing thumbnails and someone were to walk by and see the thumbnail, that person could say "I see that picture"
  - o Yes
- Would casual computer user be able to ID thumbnail vs picture?
  - o No – they'll just know it's a smaller version of the actual picture
- You don't dispute that someone at the very least viewed the contraband photos on the computer whether in the original file or by viewing in thumbnail mode?
  - o Correct – because there are thumbnails created, it proves that photos were accessed on computer
- You testified earlier that thumbnails were there in different sizes?
  - o Yes
- Because someone manipulated size of that thumbnail?
  - o Yes
- That's what Phipps testified to?
  - o Yes
- Did computer have SD card slot?
  - o I didn't get the actual computer itself so I don't know.
- You would assume at least that laptop had USB port?
  - o Yes, it did because there were USB devices registered
- Even if computer didn't have SD card slot, one could use an adapter?
  - o Yes
- You testified earlier about finding data on these pictures that you relate back to some cameras – but that was in reference to non-contraband photos?
  - o Correct, there were still some photos on computer that were accessible
  - o I looked in the default pictures directory to see if some of these files were still present, and they were
- Original or thumbnail files?

- Original – some I cross-referenced with Windows EDV because I was looking at multiple shadow pictures
  - There were some that appeared to be moved or deleted
  - There were 100s or possibly thousands of pictures on this computer
  - I took a sample of some pictures, cross-referenced, and saw how those lined up
- Is it true or false that you did not find data that could tell you what camera was used to take contraband photos?
  - There is not enough information for me to testify as to what camera was used to take those camera
- Could you determine date pictures were taken or accessed?
  - No
- Could you determine who took those photos?
  - That was also at issue. I did look at content of photos (reflections, etc.) and did not see anything
- You wrote in your report that the contraband picture files were present in the thumbnail cache files/shadow copy. Is that a user profile named Chad?
  - Yes
- So how would a name be associated with a user profile like that?
  - Usually computer will have various system accounts
  - There was username Chad and Administrator
  - Windows system by default has administrator account
  - There was info pertaining to last login and whether there was password change
  - Also included info about when Windows 7 was installed
- So of those 2 profiles, which one was most frequently accessed?
  - Chad – login count of 759
  - Administrator – login count of 13
- The Chad account was the one the contraband photos were associated?
  - Yes. There were no other user accounts with login information.
- Pg. 8 of report, you wrote that “these facts indicate that pictures had existed on computer and were deleted prior to October 26, 2011” and then “no evidence exists to support that 59 pictures were ever actually saved (transferred by user) to hard drive.” Can you reconcile sentence that pictures were deleted/not actually saved?
  - Indication of facts w/ respect to volume shadow copies that pictures were present and deleted prior to that time
  - That being said, there’s no evidence supporting that those files were actually saved to the computer
  - Facts indicating they somehow existed

- When a flash drive is plugged into machine, those files are being viewed on that machine (thumbnail created)
- Whether or not those files were actually moved, copied, saved, to the hard drive → there's not enough evidence to prove that
- Do you have enough evidence to disprove it?
  - There's not enough evidence to prove either way. File explorer would have been used to view thumbnails
  - Let's say thumbnails from USB are being viewed, there's going to be a thumbnail cache entry for each of these files
  - Then let's say those files are copied and then moved to hard drive, I would expect to see duplicate
  - Here, we don't have duplicate we only have one
  - Either they were only viewed from SD file or they were not viewed from SD memory card but would have been in icon or detail view where it's not showing thumbnails, copied and transferred to some location on computer, then turned on thumbnail view and then those thumbnails would appear in thumbnail cache
- \*Quotes from report\* - so you did not find any additional metadata than what Mr. Phipps testified to?
  - That's correct

Aimee re-direct

- No other users besides Chad?
  - Correct
- Does that mean that nobody else used the computer?
  - No
- So multiple people can be under one username?
  - Sure

Taylor re-cross

- You can't say definitively if Chad Hayes created Chad profile, right?
  - No. Other than name being there, there is no further info

**Aimee calls Applicant**

- Did you purchase that laptop?
  - Yes
- How is it set up?
  - Me and two of the oldest girls set the computer up
- Was the computer for common use?
  - Yes
- Where was it located?
  - It was in a desk in the front room (common area)

Taylor – no questions on cross

## Aimee calls Theo

- How did you become involved?
  - o Retained
- Did he have a previous attorney?
  - o Yes
- Who was his former attorney?
  - o Richard Breibart
- Did you introduce that fact to the jury?
  - o I believe it was brought out prior to me commenting on it
- Breibart went to federal prison?
  - o Yes
- In voir dire did you question the jurors whether they had any affiliation with Breibart?
  - o I don't remember
- Would that have been something you would have asked?
  - o It could go either way. Some people loved Richard and some people hated him
- Are you familiar with State v. Daniels – case that instructs the judge (Judge Russo) not to make comments on jury's "search for the truth, fair and just verdict true facts"
  - o That is a common thing Judge Russo did
- And you would agree that the Court instructed him to stop saying that?
  - o I think our Court thought it sounded like burden shifting a little bit
- When you tried this case and Judge Russo said those things, was there a reason you did not move to strike or pre-caution him not to say those things?
  - o I didn't think it was that detrimental that I needed to stand up and object to it while he was in the middle of his statement (would draw more attention to it)
- You never filed pre-trial motions for him to not say that before he said that?
  - o No – I didn't know whether he was gonna say it
- Indictments. Have you had a chance to go back and refresh your recollection a little bit?
  - o Yes
- There were several indictments...
  - o Are you talking about being more specific? I've tried to challenge it but it doesn't seem to be very successful
- Do you have a system where you try to make yourself aware of new objectionable rulings?
  - o Yes

- When you learned of Supreme Court case (Baker) requiring timelines to be more identifiable, what did you do to ask the solicitor to narrow down that scope?
  - o There are cases that give wider scope based on the age
  - o Something referred to New Years Day, that is specific
- There was an indictment that dealt with contributing to delinquency of a minor, listed 3 minors, and 1 minor was not at trial. You argued it could be and/or/any of those minors. Do you feel like you did a good job securing those issues for appeal?
  - o Yes
- But they kept one witness who was not confronted in the indictment?
  - o I don't recall
- When you met with Mr. Hayes, did you ask him where he was on New Years, did you establish an alibi on any of these timelines?
  - o He told me the things he did with these children which in itself was a little unusual
  - o The only thing he always denied was that he was taking pictures of them in the tree (which seemed really unusual)
  - o One of the more important things was that mom lived next door, and one of the underlying themes I was trying to run through is that it was New Years and the mom should have been able to see this
- There seemed to be problems IDing who/when these pictures were taken?
  - o He essentially admitted it
- When they were using computer testimony, that was too corroborate what the girls were testifying to?
  - o The fact that there was a viewing on the computer of the photographs
  - o I don't think the computer was a big deal
  - o The fact that there were photographs that were taken that he admitted to and the fact that the children said he did those things
- Were you able to cross-examine Phipps thoroughly in your opinion?
  - o As much as needed to happen
- Are you familiar with the inter-workings of the computer?
  - o I watched the last witness testify and the only thing I could think of is lawyers, judges, etc., would asks "What is he really saying?"
  - o Would not be helpful to average jury
  - o Did not change what solicitor would have put the testimony in for
  - o I think the police officer who testified about computer was more down to earth and made it easier to understand
- Would you agree that if you had the knowledge to cross him, that would have helped?

- No. After hearing that, there's nothing the expert that just testified to would have helped this case
- Did you make any pretrial motions to limit computer stuff?
  - No because I wanted to hear what he was gonna say. Sometimes you can trip him up/sometimes he'll admit something he doesn't know
- The victim's advocate was also an investigator – was there a reason that you didn't challenge her dual role?
  - I thought I did challenge her when she testified (Sikes)

#### Taylor cross

- When were you admitted to practice law?
  - Nov. 1976
- Brief summary of legal experience
  - Did PI when first started/civil/real estate. Starting in 1996, done nothing but criminal (some appellate).
- Have you tried many cases dealing w/ CSC w/ a minor?
  - Yes
- How did you become involved in this case?
  - Chad is from Batesburg, which is where I live
  - I knew his mother, and essentially Breibart got in trouble, they had to find another lawyer, and she came to see me
- When did Judge Russo make those comments?
  - In preliminary remarks
- Do you remember whether he walked down to the jury?
  - I'm sure he did
- Indictments. What sort of issues do you look for in indictments?
  - You look for whether or not you have sufficient evidence to move to have it dismissed
  - Elements of crime, date, etc.
  - You have to look at what they're saying and then talk to client to see if some sort of alibi could be developed
- You don't think it's unusual to see wide date ranges?
  - If you look at all cases involving children, appellate courts give leniency because children don't remember things very well
  - Tend to pick certain dates that coincide with something else that happened in their lives, particularly if they've been traumatized
  - Go back to when they make disclosure, usually forensic interviewer is able to help
- Do you remember at trial whether the indictment for contributing to delinquency went back to the jury?
  - I don't think it did

- Did you have any trouble going off of what was in the indictments to understand nature of charges?
  - o No
- When you discussed allegations with Hayes, what did he say happened?
  - o His defense on all of these matters was that it was done from a medical viewpoint as a father would check a child/as a doctor would check a child
  - o He always said that there was nothing sexual with it
  - o I would ask him why he would do it as opposed to their mother, and he said she wouldn't do it right or something
- In his statement to LE, he said he would shave their public areas?
  - o Yes
- In terms of alibi, the State called a witness at trial who was from HR at Hayes' employer, testified he was not at work on NYE/New Years
  - o Yes
- Had Hayes given you any info you could have used to build an alibi defense?
  - o It wasn't a question of whether or not he was around the children
  - o The things he was accused of doing, he said he may have done those acts, but not in such a way they should be interpreted as a violation except the tree
  - o He always denied taking pictures up in the tree
- So your defense was that he did those things but it wasn't done for gratification?
  - o Yes
- Sikes – what was your understanding of her employment situation?
  - o I thought she was working for the sheriff's dept. or something
- What issue would you have taken w/ the fact that she may have at one time worked as a victim's advocate and a detective?
  - o I thought that her testimony didn't appear to be slanted in any way
- You were aware before trial that the State had done the examination of the laptop?
  - o Yes
- And you had some indication of what they had found?
  - o Yes
- What did Hayes tell you about that?
  - o He thought that possibly the children had looked at the pictures on the computer
- Did he deny that he had interest in photography?
  - o No he didn't deny it
- Do you remember questioning witnesses about allegations Hayes had hit his grandmother with a frying pan?
  - o Yes

- Why did you ask about that?
  - o Point was that children must be lying about what they're saying
  - o It's hard to imagine he would hit his poor grandmother in the head with a frying pan
  - o If he had done that, his mother would not have hired me to represent him
- Asked witnesses about stories that he had pushed his father down, etc.?
  - o Yes, all of that was for the same purpose
- What benefit did you think Hayes would get from that?
  - o If they thought stories were outlandish, they may give him a break and determine he did not do anything/may not believe children

#### Aimee redirect

- You talked about children in general not remembering. Is there a reason that you didn't have a competency hearing on any of these children?
  - o Those children knew right from wrong and they could carry on a conversation
  - o Anything that they were saying would not have been a result of their inability to remember
- One of them was in special needs class, etc.?
  - o Yes
- But you did not address that with the Court before putting them on the stand?
  - o No
- SO biggest point of contention are the tree photos and that's why computer becomes important?
  - o Computer didn't take picture of them up in the tree
  - o It was a camera
- But we don't know who took the picture with the camera right?
  - o What would be a more interesting question would be the question about where was mom when pictures were taken – mom was inside
- So computer becomes a part of it?
  - o I'm trying to figure out how a computer that was just used to view pictures that were taken, how that's gonna help anything if there are pictures of children naked up in tree
  - o If you have something that may suggest someone manipulated the photo, may be a different story, but children were able to identify pictures
- Did you do any digital testing on the photos?
  - o No – he admitted the photos of the children in the tub were the children in the tub
- In addition to school records, you received DSS records/there were indications there were problems in the family prior to his arrest?

- o Yes

#### Taylor cross

- Did you have any concerns whether children were competent after viewing forensic interview?
  - o No – when I was crossing one of the girls, she got hostile with me
  - o It was obvious that she was just going to fight me on any question that I had
  - o She understood the questions I was asking but it had nothing to do with competence
- In terms of the person behind the camera who took the tree pictures, who did the kids say took those pictures?
  - o Hayes

#### Aimee

- Do you recall in closing statements on pg. 731, Mayes said “when he got that call he was tipped off...”
  - o Probably what she is referring to are computer that had been with Breibart (which is why I made comment about Breibart)
- Question about “I can guarantee you...” Why didn’t you object?
  - o If I objected one of the time the solicitor said “I guarantee you”
  - o The whole thing dealt with that search issue and whether the computer had been handled appropriately
  - o If I had a judge that would let me object to that, I will object to that from now on

#### Taylor

- LE officers who testified they called Hayes and set up this meeting. After they arrested him, they went to search home. When they got there, they did not find computer but found other items that would be found in conjunction with a computer. Same thing with camera. And Children testified he had multiple cameras/computers and those weren’t found?
  - o Correct
- If someone had been sexually abusing 3 minor children and gets a call from a detective saying I want to talk to you about xyz these 3 girls, that would have raised a red flag?
  - o Yes, you’d probably be trying to get rid of those things
- Is that a reasonable inference?
  - o Yes, and perhaps the computers should never have been taken to Breibart’s office, then it may not have looked as bad

#### Aimee calls Jim Falk

- How did you get involved?
  - o Volunteered for appellate defense project

- So you wrote the brief?
  - o Yes
- How did you determine which issues to raise?
  - o Reviewed transcript, got copy of forensic interview, watched FI, looked to see what I thought was possibly going to see any issues that COA would be interested in
- What issues did you raise?
  - o Forensic interviewer/this case was right after Kromah
- There were certain Kromah issues involved in this case?
  - o Yes
- Other than those, did you see other issues?
  - o Maybe potential search issue on computer but it seemed to me to be voluntarily turned over so I didn't think I was gonna get anywhere
- Have you run across solicitors making improper statements during closings?
  - o Yes but that didn't seem to be preserved
- Had it been preserved, would you have raised it?
  - o I would have spent more time on it but not sure
- For example, in these cases where you've got credibility of the children vs. defendant is the question for the jury, do you look for things that would be improperly bolstering?
  - o Yes – also look to whether they crossed the line in closing arguments
- As far as computer stuff, your main issue was search rather than content?
  - o The last 10 seconds of the forensic interviewer, when witness turned to the camera and said whatever she said, it seemed very calculated. It concerned me that there wasn't more going on there. That is why I was focusing there and wanted COA to see that
- You were aware family had problems with DSS?
  - o Yes
- Did you petition to the Sup. Ct.?
  - o No
- Why not?
  - o The decision came back that the issues I argued weren't preserved either, so I just didn't think it would make sense

#### Taylor cross

- When were you admitted to practice law?
  - o 2010
- Brief summary of legal experience
  - o Practiced in Kentucky until 2008 when I moved to Charleston
  - o Took SC bar in 2010
- What portion of your legal work has been criminal?
  - o Probably from 1990-2007 I was doing criminal cases in KY

- Involvement in PCR?
  - o I do a lot of PCRs
- What was your process for deciding which issues to raise?
  - o Look for defense objections that were overruled, and that's where you start
  - o I didn't really see anything I thought would be fruitful
  - o Watched forensic interview
- Did you consider raising some issue about Judge Russo's preliminary remarks?
  - o I don't think it was preserved
- Did you see any issue you could raise regarding indictments?
  - o There could be something there with overbroad, but not sure they were preserved

Aimee re-direct

- You felt there was issue with FI?
  - o I thought there could be something there especially in light of Kromah
- COA disagreed with you because it wasn't preserved?
  - o Right, they found both issues not preserved

Taylor re-cross

- Concern with FI was that child looked at camera – was that your biggest concern?
  - o No, that part concerned me. I think her candor and whether she was calculated during interview
  - o I had issues with some of her testimony

State rests

Judge: submit bullet points