STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY DALE PACE,

APPELLANT

APPELLATE CASE NO. 2014-001106

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting the videotaped forensic interview of the minor complainant under S.C. Code Ann. § 17-23-175 since the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Maryland v. Craig*, 497 U.S. 836 (1990)?

STATEMENT OF THE CASE

A Laurens County Grand Jury indicted Appellant at the August 19, 2011 term of General Sessions for five counts of lewd act upon a child. R. 229. His case was called to trial on May 13, 2014 before the Honorable Eugene C. Griffith, and a jury. R. 1. Assistant Solicitor Lance Sheek represented the state, and Chip Howe and Chelsea McNeill represented Appellant. R. 1.

On May 15, 2014, the jury acquitted Appellant of three counts of lewd act, but found him guilty of the remaining two counts. R. 209, l. 20 – 210, l. 10. Judge Griffith sentenced him to ten years imprisonment on each count to run concurrent. R. 219, ll. 21-24.

This appeal follows.

STATEMENT OF FACTS

Christina Pace and her three children, Justin, Chance, and Minor 2, along with her niece, Minor 1, moved into Appellant's mobile home in early 2008. Christina and Appellant married shortly thereafter. Appellant became the primary disciplinarian of the children while Christina worked. He was very strict and made sure the children did their homework and chores after school. When they misbehaved he would make them go to their room, write sentences, or take away privileges. R. 138, l. 2 – 139, l. 1; R. 141, l. 24 – 142, l. 4.

Minor 1, who was sixteen at the time of her testimony, testified that Appellant was always yelling at her and would make her write sentences "for ridiculous things," such as "I will not run through the house, I will not yell in the house, stuff like that." R. 60, l. 18 – 61, l. 12; R. 66, ll. 11-15. She would have to write anywhere from one hundred to three hundred sentences at a time depending on whether "he [Appellant] was really mad or not." R. 61, ll. 13-18. She admitted that she hated Appellant, did not want to live with him anymore, and was "sick and tired" of him "being mean" to her, Minor 2, and the other children. R. 71, ll. 3-16. Minor 2, who was thirteen at the time of her testimony, likewise testified that Appellant was "mean" to her and Minor 1 and that she is "happier now that he is out of [her] home." R. 108, ll. 9-18.

The allegations of sexual abuse in this case surfaced after Appellant spent the day with the children working on building an addition onto their home while Christina worked. Late in the afternoon, Minor 1 was helping Appellant use a tape measure when Minor 2

tripped over the tool and it struck her in the head.[1] Minor 2, who was upset, ran into the woods behind their home and Minor 1 followed. While they were in the woods, Minor 2 told Minor 1 that Appellant had been touching her improperly "because [she] couldn't hold it in any longer." R. 69, l. 25 – 70, l. 14; R. 89, l. 22 – 91, l. 10. When Minor 2 told Minor 1 about the alleged abuse, Minor 1 did not tell Minor 2 that it had been happening to her too. R. 70, ll. 15-17. Minor 1 did not claim Appellant had improperly touched her until Minor 2 told her mother, Christina, and Christina asked Minor 1 whether Appellant had touched her as well. R. 56, ll. 1-4.

During her testimony, Minor 1 claimed that when she was thirteen years old Appellant would make her sit on his lap while they were watching television in the living room and "would stick his hands in [her] pants and under [her] underwear and under [her] bra and touch [her] breasts and [her] private parts." R. 52, ll. 14-19; R. 55, ll. 15-16. She alleged that Appellant would "play with [her] private parts and rub" her skin under her underwear. She also claimed he would "squeeze and play with [her] nipples." R. 53, ll. 7-14. According to Minor 1, this happened "[t]wo or three" times. She was certain it happened more than once. R. 54, ll. 1-4. Each alleged encounter lasted about ten to fifteen minutes. R. 59, ll. 6-9.

On cross-examination, Minor 1 provided more detailed testimony. She explained that she was wearing blue jeans during these alleged encounters, but that Appellant never took off nor unbuttoned her pants. She claimed that she "used to be a whole lot skinnier"

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[1] Minor 1 and Minor 2 both claimed Appellant threw the tape measure at Minor 2's head because he was mad that she had stepped on it. R. 62, ll. 15-24; R. 107, l. 22 – 108, l. 4. However, Appellant testified that the tape measure struck Minor 2 in the head when it was recoiling after she stepped on it. R. 149, l. 19 – 150, l. 18.

and her pants were too big for her so Appellant was able to stick his hands down her pants while they were still buttoned. R. 58, l. 13 – 59, l. 5. She also said that Appellant only touched her during these alleged encounters and never touched himself. R. 59, ll. 10-14.

Minor 1 explained that during these encounters, her cousin Chance was in his bedroom near the living room playing videogames. She claimed she never called out for help because she "didn't want him [Chance] to think that [she] was lying, that [she] was just mad at Ricky [Appellant]." She said she "knew he [Chance] wouldn't understand because his whole life is videogames and school." R. 59, ll. 20-25. Lastly, Minor 1 testified that she did not tell an adult about these allegations at first because her Aunt Christina was so happy and she "didn't want to break [her] [a]unt's heart." R. 54, l. 18 – 55, l. 3.

Minor 2 claimed that when she was ten years old Appellant touched her improperly on two separate occasions. R. 105, ll. 18-25; R. 101, ll. 7-19. She maintained that while she was watching television in the living room Appellant sat on top of her chest with his back to her and held her down by force. While Appellant was holding her down, she was kicking her legs. She could not remember how Appellant ultimately restrained her legs. R. 106, l. 24 – 107, l. 1. Minor 2 claimed that while Appellant was holding her down, he took her pants and underwear off, rubbed her vagina with his hand, and inserted a sex toy or vibrator into her vagina. R. 85, l. 1 – 87, l. 9; R. 106, ll. 6-23; R. 107, ll. 18-20. According to Minor 2, the second alleged encounter happened exactly the same as the first and each lasted about five minutes. R. 105, ll. 18-25.

Without further explanation, Minor 2 testified that she did not scream when Appellant was holding her down because her brother Chance was nearby in his bedroom. R.

107, ll. 6-17. She claimed that she did not initially tell anyone about the alleged encounters because she "didn't want to mess up [her] mama's happiness." R. 89, ll. 15-17.

During Appellant's case-in-chief, Wendy Nix, a nurse practitioner, testified that she examined Minor 2 on March 8, 2011, which was ten days after Minor 2 disclosed to her mother that Appellant had allegedly touched her improperly. R. 130, ll. 4-22. Nix's records indicate that Minor 2 told her she had been "molested" by her step-father and that "he put his fingers inside her vagina and used a vibrator on her while she was being held down." R. 132, ll. 1-4. As a result of Minor 2's allegations, Nix performed a physical examine on Minor 2. However, Nix did not find any physical signs of sexual abuse, including no bruising or tearing. She explained that Minor 2 "had a normal ten year well child check." R. 132, ll. 4-15.

Tracey Babb, Appellant's adult daughter, testified that Appellant was "very much" involved in the children's discipline and that he "was very strict." R. 137, l. 22 – 138, l. 4. She explained that "[h]omework was [the] number one priority after school every day" and that "[m]isbehavor in any type from getting in trouble at school to anything minor like blaring music too loud was unacceptable." R. 138, ll. 5-10. She also said that Appellant "expected chores to be done." R. 138, ll. 11-13. According to Tracey, Minor 1 and Minor 2 did not react well to Appellant's discipline and were not "pleased with it." R. 138, ll. 14-17.

Brian Babb, Appellant's son-in-law and Tracey's husband, also testified that Appellant was a "strict disciplinarian" and that he was tough on the children. Brian stated that the children, including Minor 1 and Minor 2, "would get mad, all of them would get mad" in reaction to Appellant's discipline and rules. R. 141, ll. 9-23.

Appellant, who testified in his own defense, explained that his wife Christina had several "sex toys," including a vibrator. He testified that the two tried to keep the sex toys hidden from the children, but that it was a small home and that it was possible the children discovered the toys and played with them without his knowledge. R. 146, ll. 4-23.

Appellant also explained that he was the primary disciplinarian of the children, but that he had Christina's approval. He said that he chose to make the children write sentences and other forms of punishment such as going to their rooms instead of spanking or other forms of corporal punishment. R. 147, ll. 4-15. However, the children did not like to be punished or disciplined and did not react well to it. R. 147, ll. 16-23.

On February 28, 2011, he and the children were working on building an addition onto their home. R. 148, ll. 7-24. Appellant explained that late in the afternoon, Minor 1 was holding one end of the tape measure and he was holding the other end to measure the distance between two walls when Minor 2 "hooked her foot on the tape measure and jerked it out of [his] hand." Minor 2 started crying and Appellant told her "she was [not] going to show out where [they were] working" so he ordered her to go sit on the trampoline right behind the back porch. Appellant explained that Minor 2 was upset, but went to the trampoline as she was told. He later noticed that both Minor 1 and Minor 2 were gone, but he did not know where they went. He later found out that they went into the woods behind their home where Appellant had set up a "tent club house" for them. R. 149, l. 19 – 151, l. 2.

While Appellant was in the shower that evening, Christina arrived home from work. Appellant explained that when he got out of the shower, Christina walked up to him and said that she had to leave him because the "girls said that [he] had been messing with them." R.

151, ll. 3-23. Appellant told Christina that Minor 1 and Minor 2 were lying, but she and the children left that night and never returned. R. 151, l. 24 – 152, l. 24. Appellant vehemently denied ever touching Minor 1 or Minor 2 improperly and testified that he did not do what they claimed he had done. R. 153, ll. 7-20.

After an hour and a half of deliberations, the jury informed the court that it was deadlocked. In response, the court gave the jury an Allen[2] charge. R. 205, l. 12 – 207, l. 24. The jury ultimately found Appellant not guilty of the three lewd act charges related to Minor 1, but found him guilty of the remaining two counts pertaining to Minor 2. R. 209, l. 20 – 210, l. 10.

[2] Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

The court erred by admitting the videotaped forensic interview of the minor complainant under S.C. Code Ann. § 17-23-175 since the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Maryland v. Craig*, 497 U.S. 836 (1990).

Relevant Facts

Appellant moved pretrial to exclude the videotape of the forensic interview of Minor 2. The state did not seek to introduce the videotape of the forensic interview of Minor 1 because she was over the age of twelve when she was interviewed and therefore the videotape of her forensic interview did not fall within the statute. R. 9, ll. 8-10.

Defense counsel told Judge Griffith that she was relying on the written motion she had submitted to the court. R. 9, ll. 16-19; See R. 220 (Motion to Exclude Forensic Video). However, she briefly outlined her argument on the record. R. 9, ll. 19-23. Counsel maintained that the videotape of the forensic interview should be excluded because S.C. Code Ann. § 17-23-175, which allows for its introduction, is unconstitutional and violates the Confrontation Clause of the Sixth Amendment as interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990). R. 9, ll. 19-23; R. 11, ll. 19-22.

Defense counsel argued that the statute violates Crawford because Crawford requires the witness be **unavailable** while S.C. Code Ann. § 17-23-175 requires the child be **available** to testify at trial. Moreover, she argued the statue violated Craig in two ways. She explained, "[F]irst, to be constitutional testimony of a child witness occurring outside the presence of the defendant must be **under oath** with an opportunity for

contemporaneous cross-examination. Second, even if constitutional, the application of S.C. Code Ann. § 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the Court makes **specific findings regarding the necessity** of admitting the evidence." R. 11, l. 18 – 12, l. 5 (emphasis added).

The trial court ultimately ruled that the videotape of the forensic interview of Minor 2 was admissible and could be played for the jury thereby finding that the statute was not unconstitutional. R. 76, l. 18 – 77, l. 6; R.18-23; R. 97, ll. 1-16. The state published the video to the jury at the end of its direct examination of Minor 2 and immediately before cross-examination. R. 97, l. 23 – 98, l. 19. Defense counsel renewed her objection when the video was played. R. 92, ll. 5-12.

Discussion

A. S.C. Code Ann. § 17-23-175 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004).

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374 (Ct. App. 2011) (citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). Confrontation has been called by the United States Supreme Court the "greatest legal engine

ever invented for the discovery of the truth." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

"Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1)(B), SCRE). However, in 2006 our legislature enacted S.C. Code Ann. § 17-23-175 which makes allowances for such hearsay statements of children under certain circumstances. Id. The statute permits the admission of out-of-court statements by a child under the age of twelve if the statements were made in response to questioning conducted during an investigative interview of the child and the child testifies at trial and is subject to cross-examination. The statute reads in relevant part:

> (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 . . . ;
>
> (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.

This statute is in direct conflict with the provisions of Crawford v. Washington, 541 U.S. 36 (2004) and therefore violates the Confrontation Clause. In Crawford, the United States Supreme Court discussed the admissibility of out-of-court hearsay statements of a

witness and concluded that the right of confrontation is violated by admission of such statements except in very limited circumstances. The limited circumstances for admission of such statements exists only when the witness is **unavailable**, the out-of-court statement is testimonial, and the defendant had a **prior** opportunity to cross-examine the witness. Id. at 68.

In contrast, S.C. Code Ann. § 17-23-175 permits the admission of out-of-court hearsay statements if the statements were made in response to questioning conducted during an investigative interview of the child (making the statements testimonial) and when the child is **available** to testify at trial and subject to cross-examination. S.C. Code Ann. § 17-23-175(A). The requirement that the child be available to testify directly contravenes the Crawford requirement that the witness be unavailable before out-of-court hearsay statements can be admitted.

The United States Supreme Court in Crawford interpreted the Confrontation Clause to be violated when out-of-court testimonial hearsay statements of an **available witness** are admitted. 541 U.S. at 68. If the child is available to testify, Crawford simply does not allow admission of her out-of-court testimonial statements made during the pretrial forensic interview. Because the statute violates the mandate of Crawford, it is unconstitutional and the forensic interview of Minor 2 should have been excluded.

B. The "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175(B) are not adequate to protect a defendant's right of confrontation under Crawford.

As noted above, one of the four requirements for the admissibility of out-of-court statements of a child pursuant to S.C. Code Ann. § 17-23-175(A) is that the court finds "that

the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness." Subsection (B) of the statute states:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;
>
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
>
> (3) whether the statement represents a detailed account of the alleged offense;
>
> (4) whether the statement has internal coherence; and
>
> (5) sworn testimony of any participant which may be determined as necessary by the court.

Prior to Crawford, the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980), conditioned the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception, or bears "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; See Crawford, 541 U.S. at 42. Under the Roberts test, the "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175 perhaps could have been held to pass constitutional muster. However, the United States Supreme Court abrogated Roberts in the Crawford decision finding that the Roberts test was too broad in that it "applies to the same mode of analysis whether or not the hearsay consists of *ex parte* testimony," yet at the same time too narrow in that it "admits statements that do consist of *ex parte* testimony upon a mere finding of reliability." Crawford, 541 U.S. at 60. The Court stated, "This malleable standard often fails to protect against paradigmatic confrontation violations." Id.

The particularized guarantees of trustworthiness that render firmly rooted hearsay exceptions reliable do not exist with regard to the videotaped forensic interview in this case. Almost all the firmly rooted hearsay exceptions recognized in our jurisprudence apply to non-testimonial statements, with the exception of certain dying declarations that might be made in a testimonial context. Id. at 56, fn. 6. The Court in Crawford stated the following about the fallacy of using the "reliability" determination when dealing with testimonial statements such as the videotaped interview at issue here:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. **Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.** To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. **It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.** The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61 (internal citations omitted) (emphasis added).

Under the reasoning of Crawford, the "particularized guarantees of trustworthiness" factors enumerated in S.C. Code Ann. § 17-23-175(B) simply cannot suffice to allow admission of the out-of-court testimonial hearsay statements contained in the videotaped forensic interview of Minor 2. Without a prior opportunity for **contemporaneous** cross-examination, admission of the videotaped interview clearly violated Appellant's right of confrontation.

C. S.C. Code Ann. § 17-23-175 violates Maryland v. Craig, 497 U.S. 836 (1990) because it does not require the child to be under oath or subject to contemporaneous cross-examination.

S.C. Code Ann. § 17-23-175 is also unconstitutional under Maryland v. Craig, 497 U.S. 836 (1990). In Craig, the United States Supreme Court, while noting that face-to-face confrontation is best, held the testimony of a child witness via closed circuit television did not violate the right of confrontation. The Court reasoned:

> Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and **must testify under oath**, the defendant retains full opportunity for ***contemporaneous* cross-examination**; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

Id. at 851 (citing Mattox v. United States, 156 U.S. 237, 242 (1895) and California v. Green, 399 U.S. 149, 179 (1970)) (emphasis added).

The Court in Craig noted that the majority of states had adopted procedures for child witnesses to testify via closed circuit television or videotaped testimony. The Court concluded, "[T]he Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 857. The Court held that **without an oath** and ***contemporaneous* cross-examination**, there cannot be effective confrontation. Id.

The videotaped forensic interview in this case is not similar to videotaped testimony that occurs outside the presence of the defendant (which was found constitutional in Craig) because during the forensic interview the child is **not under oath** and there is no opportunity for ***contemporaneous*** **cross-examination**. Because S.C. Code Ann. § 17-23-175 allows for the admission of a child's hearsay statements without an oath and without contemporaneous cross-examination, it is unconstitutional.

D. Even if constitutional, the application of S.C. Code Ann. § 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence.

Even if this Court determines that S.C. Code Ann. § 17-23-175 does not violate the Confrontation Clause, it should require all trial judges to consider the necessity of admitting videotaped forensic interviews in addition to the criteria enumerated in the statute, as is required when a court determines whether to allow testimony of children via closed circuit television. In Craig, the United States Supreme Court held that the Confrontation Clause does not prohibit a child witness from testifying by closed circuit television, but that a case specific finding of necessity for the use of the procedure was required. Id. at 855-856.

If a finding of necessity is required in the circumstances where a child is actually testifying **under oath** during a trial **and** is subject to **contemporaneous cross-examination**, surely the same finding should be made for the admission of an out-of-court testimonial statement in which the child witness was not subject to contemporaneous cross-examination. As noted in Craig, the denial of a physical, face-to-face confrontation at trial is permitted "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.

In Craig, the United States Supreme Court noted that the public policy of protecting child witnesses from the trauma of giving testimony in child abuse cases could be sufficiently important in some cases to outweigh the defendant's right of confrontation. Id. at 853. However, the Court also held that the importance of protecting child witnesses outweighs the defendant's right of confrontation only "if the State makes an adequate showing of necessity." Id. at 855.

To make a showing of necessity: (1) the state must present case specific evidence from which the trial court can determine whether admission of videotaped evidence is necessary to protect the welfare of the particular child witness; (2) the trial court must find that the child witness would be traumatized by the presence of the defendant; and (3) the trial court must find that the trauma suffered by the child witness in the presence of the defendant is more than "mere nervousness or excitement or some reluctance to testify." Id. at 856.

South Carolina courts agree that a particularized showing of necessity is needed before videotaped or closed circuit testimony can be used to avoid face-to-face confrontation with a defendant. Although S.C. Code Ann. § 16-3-1550(E) does not preclude the use of videotaped testimony for certain witnesses, the judge must make proper findings before such procedures can be used.[3] In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), our Supreme Court affirmed the trial court's order allowing videotaped testimony of a child witness where the judge heard expert testimony that the child would be significantly harmed

[3] S.C. Code Ann. § 16-3-1550(E) reads: "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."

by an in-court confrontation. In that case, the child witness was placed in a courtroom setting and the defendant was in an adjacent room viewing the child on video. The defendant's attorney was present in the courtroom for direct and cross-examination and the attorney's law partner was in the room with the defendant with three way communication available at all times between the attorneys and the defendant. Id. at 71, 393 S.E.2d at 920-921.

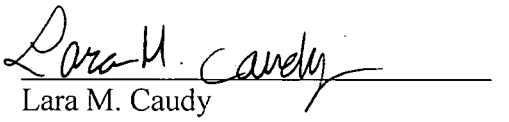
In State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000), our Supreme Court determined that although the record contained sufficient evidence to support a finding that testimony of a child witness should be given by closed circuit television, reversal was mandated because the trial court failed to make specific findings for its ruling allowing testimony outside the presence of the defendant, specifically failing to cite to testimony that the child would be traumatized if required to testify in the presence of the defendant. Id. at 31-32, 535 S.E.2d at 641.

These requirements for case specific findings of necessity for admission of videotaped or closed circuit television testimony should limit S.C. Code Ann. § 17-23-175 in a similar manner. Because S.C. Code Ann. § 17-23-175 does not require a finding of necessity for admission of videotaped forensic interviews, it contravenes the provisions of Craig and its progeny and therefore violates Appellant's constitutional right of confrontation. Because the statute is unconstitutional, the trial court should have excluded the videotaped forensic interview of Minor 2.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

February 1, 2016

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of February, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.