

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED

MAY 15 2015

S.C. Supreme Court

SAMUEL LAMONT WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001951

APPENDIX

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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JW

- Direct Examination by Mrs. Sustakovitch

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1 again. Then he said like -- I said huh? He said you
2 have to keep going. So, I did. I was going back to
3 sleep again. He woke me up again. I asked him what
4 was it. He said and then he was like nevermind. So
5 then, I was going back to sleep and then I heard him
6 crying. So --

7 Q You heard him what?

8 A Crying.

9 Q Crying. Okay.

10 A So I asked him what was wrong. He asked me
11 to forgive him. I told him I already have. No, I
12 told him it's okay. He said no, it's not okay. Then
13 I did not understand why he was crying so I just went
14 back to sleep.

15 Q When you said when he asked you to forgive
16 him, you said I already have. Was that from your
17 heart that you already had?

18 A Yes, ma'am.

19 Q At the point that this happened, did you
20 understand it was wrong for your dad to do that?

21 A No, ma'am.

22 Q When did you come to realize that that was
23 wrong?

24 A I don't remember specifically.

25 Q JW at some point -- so after this

1 happened, did your father ever do that with you again?

2 A No, ma'am.

3 Q You testified that it was some time when you
4 were five or six. This never happened with you again?

5 A Yes, ma'am. It never happened again.

6 Q Did he talk to you -- before you told what
7 had happened, did you two talk about this?

8 A No, ma'am.

9 Q JW did you end up at some point telling
10 what your dad had done?

11 A Yes, ma'am.

12 Q Why did you -- what was it that triggered you
13 tell?

14 A I read a book called Secrets.

15 Q What was the book about?

16 A It was about good secrets and bad secrets.

17 Q When you read the book, what about that book
18 made you think you needed to tell?

19 A In the book, it told you that a bad secret
20 was something that did not make you feel good. The
21 only way to feel better is to tell a parent or a
22 grown-up.

23 Q I am showing you what is marked as State's
24 Exhibit 6. Would you take a look at that and see if
25 you recognize that?

JW

- Direct Examination by Mrs. Sustakovitch

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1 A I recognize it.

2 Q Will you flip through the book and see if
3 there is any page or pages in there that stands out to
4 you that helped you decide to tell.

5 A Page 16 and 22.

6 Q What -- let me see. 16. First, can you read
7 some of what page 22 and 23 is about?

8 A "Can you think of another kind of bad secret?
9 Would you keep a secret if somebody touched you in a
10 way that made you feel uncomfortable and all yucky
11 inside? This kind of secret is a bad secret. That
12 means that you need to get help from a grown-up so you
13 can feel better."

14 Q Can you go to the other page that stood out
15 to you?

16 A "What is a bad secret? Do you know what bad
17 secrets are? Things that don't make you feel happy on
18 the inside. Bad secrets can sometimes worry you a
19 lot. The only way to make you feel better and happy
20 again is to tell a grown-up your secret."

21 Q JW when you read that -- first, with
22 that book, did your mom give it to you? How did you
23 come across this book?

24 A I came home one day and, uh, the book was
25 sitting on the table. She had got it from, my mom had

1 got it from the library.

2 Q Did your mom instruct you to read it or tell
3 you needed to?

4 A No, ma'am.

5 Q So you just pick up the book and started --

6 MR. SCALZO: Objection, Your Honor. That is
7 leading.

8 THE COURT: Sustained.

9 BY MRS. SUSTAKOVITCH:

10 Q When you saw the book on the table, what did
11 you do?

12 A I saw the book on the table and I picked it
13 up and I read it.

14 Q After reading that book, what did you think
15 now about what had happened, the secret of what had
16 happened with your father?

17 A I'm sorry. I don't understand.

18 Q After you read the book, did reading the book
19 help you decide to go and tell --

20 MR. SCALZO: Objection, Your Honor, that's
21 leading.

22 MRS. SUSTAKOVITCH: Your Honor, this just goes
23 to victim's --

24 THE COURT: Let her finish the question
25 because I'm going to have to listen to the

JW

- Direct Examination by Mrs. Sustakovitch

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1 question carefully to see whether it is a
2 permissible leading question.

3 **BY MRS. SUSTAKOVITCH:**

4 **Q** JW after you read this book, did you
5 decide to disclose the abuse of your father?

6 **A** What does disclose mean?

7 **MR. SCALZO:** Objection.

8 **MRS. SUSTAKOVITCH:** Tell.

9 **MR. SCALZO:** I think that is leading.

10 **THE COURT:** Let me see you all over here for
11 a second.

12 (WHEREUPON, a bench conference is held off the
13 record at approximately 3:57 PM.)

14 (WHEREUPON, the bench conference concludes at
15 approximately 3:58 PM.)

16 **THE COURT:** JW

17 **THE WITNESS:** Yes, sir.

18 **THE COURT:** When Mrs. Sustakovitch asks you a
19 question, there might be an objection. You've
20 heard a couple of them already.

21 **THE WITNESS:** Yes, sir.

22 **THE COURT:** If you hear Mr. Scalzo say
23 objection, if you'll just wait a minute before
24 you answer and let me decide what I need to do.
25 Then we will tell you when it is time to answer,

1 okay?

2 **THE WITNESS:** Okay.

3 **THE COURT:** If you need the question
4 repeated or something like that, we will be glad
5 to have that done. All right?

6 **THE WITNESS:** Yes, sir.

7 **THE COURT:** So that objection is overruled.
8 You can repeat the question if you would like to.

9 **MRS. SUSTAKOVITCH:** Thank you.

10 **BY MRS. SUSTAKOVITCH:**

11 **Q** JW after reading this book, did the
12 book help you to decide whether to tell what had
13 happened with your father?

14 **A** Yes, ma'am.

15 **Q** Tell me who you ended up telling about what
16 her father made you do?

17 **A** My mom.

18 **Q** Tell me about what you recall about telling
19 your mom.

20 **A** I'm sorry. Can you repeat the question?

21 **Q** Tell me about what you can recall the day
22 that you told your mom about what this Defendant had
23 done to you, your father?

24 **A** Remember that she was sleeping in her bed. I
25 went to her room and I just told her what had

1 happened.

2 Q JW after you told your mom what
3 happened, did your mom give some instructions on what
4 she wanted to have happen at that point?

5 A Not at that point, but later on. She said
6 that I had to confront him about it.

7 Q Well, did you in fact tell your father that
8 you remembered that he made you perform oral sex on
9 him when you were five or six? Did you confront him
10 about that?

11 A Yes, ma'am.

12 Q Was it in person or over the phone? How did
13 that happen?

14 A On the phone.

15 Q Was your mom present when that happened?

16 A Yes, ma'am.

17 Q What do you recall of your conversation with
18 your father?

19 A Just tell you what I remember?

20 Q Yes, ma'am.

21 A I remember he called because he wanted to
22 make sure that I wasn't mad at him or anything. I
23 told him that I had remembered and he was upset. He
24 said that he wouldn't do, he would never do that. He
25 asked me, he said that, he told me that if anybody

1 touched me in that way, then I should go and tell
2 somebody so why would he do that to me. I told him
3 that I did not know.

4 Q You did told him you did not know why he did
5 that to you?

6 A Yes, ma'am. And he was getting upset so I
7 just gave the phone back to my mom.

8 Q After that conversation, did you talk again
9 to your dad where he did admit to you --

10 A Yes, ma'am.

11 Q -- some information. What do you recall about
12 -- well, with that phone call, tell me first where
13 were you when that phone call happened?

14 A I was at home.

15 Q Where were you in the home?

16 A It's like an extra room, down by the kitchen.
17 I guess in the den.

18 Q Was anybody else in the room with you?

19 A Yes, ma'am.

20 Q Who was in the room with you?

21 A My mom.

22 Q Where was your stepdad?

23 A I guess he was in another room.

24 Q Before we go into that phone call, let me ask
25 you, how long have you known your stepdad?

JW

- Direct Examination by Mrs. Sustakovitch

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1 A Uh, --

2 Q Do you ever recall not knowing your stepdad?

3 A I don't.

4 Q Okay. So since you can remember, you have
5 known your stepdad, correct?

6 A Yes, ma'am.

7 Q What do you call your stepdad?

8 A Daddy.

9 Q What do you call this Defendant?

10 A Daddy.

11 Q Did you consider yourself to have two dads?

12 A Yes.

13 Q Going back to the phone conversation,

14 JW you may have just testified, was your
15 stepfather, Jeff, in the room with you or was he in a
16 different room?

17 A You talking about the second phone call?

18 Q Yes, ma'am.

19 A He was out the room.

20 Q JW what do you recall about --
21 actually, I'm going to show you what is marked as
22 State's Exhibit 1. Do you recognize this?

23 A Yes, ma'am.

24 Q What do you recognize this to be?

25 A My dad -- me and my dad phone call.

1 Q At the time that this call was recorded, did
2 you have any idea that it was being recorded?

3 A No, ma'am.

4 Q In preparation for court, have you since
5 listen to the phone call?

6 A Yes, ma'am.

7 Q When did you listen to the phone call? With
8 who?

9 A With you on the 20, the 26th.

10 Q Are you looking at the date on the CD?

11 A Yes, ma'am.

12 Q JW do you recognize your initials on
13 the call?

14 A Yes, ma'am.

15 Q When you listened to the phone call, is this
16 a true and accurate representation of the phone call
17 that you had with your dad?

18 A Yes, ma'am.

19 Q Before we play the phone call, what did you
20 think you were talking about when you were talking on
21 the phone call?

22 A What he did.

23 Q What he did to you?

24 A Yes, ma'am.

25 Q In your mind, were you talking about any

1 other event or thing other than what he had done to
2 you?

3 **A** No, ma'am.

4 **MRS. SUSTAKOVITCH:** I believe this is
5 admitted. Permission to publish.

6 **MR. SCALZO:** Judge, obviously I would renew my
7 objections that I had previously gone through.

8 **THE COURT:** It is admitted. You are going to
9 use the --

10 **MRS. SUSTAKOVITCH:** Yes, sir.

11 **THE COURT:** All right. Ladies and Gentlemen,
12 as you listen to this audio that has just been
13 admitted into evidence, the solicitor is going to
14 pass out for your assistance copies of a
15 transcript that has been made of the audio. The
16 evidence that is before you is the audiotape.
17 The transcript is one person or perhaps several
18 persons' interpretation of what is on the audio.
19 It is given to you simply to assist you in
20 listening to the tape but the evidence is the
21 tape.

22 So, for example, you find some, in your mind,
23 if there is some discrepancy between the audio
24 and the transcript that has been made, you
25 obviously go with what is your interpretation of

1 the audio and you would disregard the different
2 version of it than you see in the transcript. It
3 is simply for you to help you out. When we are
4 finished with the audio, we're going to take
5 those transcripts back up and we will keep them.
6 All right.

7 You can publish it.

8 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.

9 (WHEREUPON, State's Exhibit 1 is played for the
10 jury at approximately 4:06 PM.)

11 **MRS. SUSTAKOVITCH:** Can I put this on pause
12 for a second.

13 (WHEREUPON, State's Exhibit 1 is paused at
14 approximately 4:24 PM.)

15 **MRS. SUSTAKOVITCH:** Your Honor, can we have a
16 legal matter with you that defense counsel has
17 asked?

18 **THE COURT:** Sure.

19 (WHEREUPON, a bench conference is held off the
20 record at approximately 4:25 PM.)

21 (WHEREUPON, the bench conference concludes at
22 approximately 4:25 PM.)

23 **THE COURT:** Ladies and Gentlemen, we going to
24 take a short break. If you will just leave your
25 transcript folded open to the page where we are

JW

- Direct Examination by Mrs. Sustakovitch

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1 on your seat and go back into the jury room, I
2 would appreciate it. And we'll see you all in
3 just a few minutes.

4 (WHEREUPON, the jury exit at approximately
5 4:26 PM.)

6 MRS. SUSTAKOVITCH: Your Honor, should I get
7 the victim's family in here?

8 MR. SCALZO: Judge, do you want me to go
9 through the --

10 THE COURT: Let me just say this. Hold on a
11 second. During the playing of the audiotape, the
12 record will reflect what was said but there was a
13 sidebar conference in which I was told by
14 prosecutor and by Mr. Scalzo that the Defendant
15 wanted to stop the tape, stop the trial, plead
16 guilty.

17 Now, that raises a lot of concerns with me.
18 This is perhaps the most intense point most
19 certainly that we have had so far in the trial.
20 It is very emotional for everybody. I was
21 watching him -- I was watching you at the
22 beginning of this. You seemed to be emotional
23 then.

24 I started to -- we had a conversation 20
25 minutes ago. The record should reflect this in

1 which we stopped, took a break. The purpose for
2 that break was because apparently the Defendant
3 wanted to talk with his attorney about whether or
4 not to enter a plea. At the end of that
5 discussion, the decision was no plea was entered
6 so we kept going.

7 So, Mr. Scalzo, a simple question I'm going
8 to ask you, you can answer it now or you can
9 consult with your client first. Do you -- and
10 just yes or no. Do you want to have an
11 opportunity to discuss a plea?

12 **MR. SCALZO:** Yes, sir.

13 **THE COURT:** Okay. Now, you want to talk about
14 it -- you want some time to talk with him?

15 **MR. SCALZO:** Yeah. I want to make sure we're
16 on the same page.

17 **THE COURT:** We've kind of already played
18 around with this a little bit. I am willing to
19 let you have time, if that is what you want to
20 do, to talk with Mr. Scalzo and consider entering
21 a plea. But at some point, it gets to the point
22 where I have to step in and say that is enough,
23 you have had your time to make a decision and we
24 just keep going. I can't let the trial be
25 unnecessarily delayed in order for you deal with

JW

- Direct Examination by Mrs. Sustakovitch

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1 this. At this point, we are not there. You have
2 time.

3 I don't want you though -- this is my
4 concern. Your decision -- in order to accept a
5 guilty plea legally -- you know this I am sure --
6 I have to make a decision as to whether or not it
7 is being entered voluntarily. And at this
8 intense point in the trial, that is a concern of
9 mine. If you want to enter a plea, you're going
10 to have to convince me that you want to enter a
11 plea because, because that is truly what you want
12 to do rather than that you're just trying to
13 avoid some difficult moment, some difficult
14 confrontation, whatever. Okay?

15 So you have got to decide do you really and
16 truly want to do this. You can't let anybody
17 pressure you. I don't want anything that I say
18 -- I'm trying to take the pressure off of you in
19 terms of a plea. I do not want to pressure you
20 into making a decision to plead guilty. Don't let
21 Mr. -- I'm sure Mr. Scalzo wouldn't do this
22 anyway but you can't let anything he says be
23 interpreted as pressure. Nobody's trying to
24 pressure you.

25 We're trying to give you -- the reason for

1 this break is to give you a chance as you
2 requested to make a decision that you think is
3 right, the right thing for you to do. You have
4 to decide that. There is no pressure on you. So
5 y'all go. You can go back in the conference room
6 back in the back. Let me know when you're ready
7 to go forward, Mr. Scalzo.

8 **MR. SCALZO:** Thank you, Your Honor.

9 **MRS. SUSTAKOVITCH:** Your Honor, can we put
10 the victim in the conference room?

11 **THE COURT:** Yeah.

12 **MRS. SUSTAKOVITCH:** Come on, JW

13 **THE COURT:** You all just -- you will be with
14 her, right? You just make sure nobody talks with
15 her about her testimony.

16 **MRS. SUSTAKOVITCH:** Okay. We will keep her
17 from her parents at this point.

18 (WHEREUPON, a recess is taken at approximately
19 4:31 PM.)

20 (WHEREUPON, the Court resumes at approximately
21 4:43 PM.)

22 **THE COURT:** Come on around.

23 All right. While she's out there -- I
24 realized Mrs. Sustakovitch is not here but there
25 are several lawyers from the Solicitor's Office.

1 Mr. Whitner, you are standing up before the Court
2 now for what reason?

3 MR. WHITNER: Well, Your Honor, uh, I going
4 to plea to this. I'm not pleading on the basis of
5 the guilt. I'm not pleading to say that I did
6 any of these things but it is clear from what's
7 going on with this case, it was not properly
8 prepared in a way. It is fixing to head into
9 something worse for me.

10 THE COURT: What do you mean it wasn't
11 properly prepared?

12 MR. WHITNER: I'm going to be honest with
13 you, Your Honor, if I got to stand here and
14 plead --

15 THE COURT: Let me ask you this one question.
16 What do you mean it was not properly prepared?

17 MR. WHITNER: As far as goes with this
18 evidence that was presented, times and everything
19 when these evidence was gathered, were gathered,
20 Your Honor. With the tape and these recordings,
21 there long period of time. I am not blaming this
22 counselor here. I'm not saying it is nobody's
23 fault. The only people I'm saying are the two
24 family members here. It is how they done things.

25 So, the bottom line is I am in a no-win

1 situation. I'm not going to admit to guilt but I
2 am pleading to this charge, you know, hopefully
3 to have some of my life or something.

4 **THE COURT:** Okay. Well, I think we'll just go
5 ahead with the trial.

6 **MR. WHITNER:** You think so?

7 **THE COURT:** Bring the jury back in.

8 **MRS. SUSTAKOVITCH:** Thank you.

9 **THE COURT:** We'll take about a two-minute
10 break.

11 (WHEREUPON, a recess is taken at approximately
12 4:45 PM.)

13 (WHEREUPON, the Court resumes at approximately
14 4:48 PM.)

15 **THE COURT:** There is one thing I'm going to
16 say just for the record. During the brief hearing
17 when Mr. Whitner stood up at the podium and he
18 said something along the lines of he was, uh,
19 somebody had not done something they were
20 supposed to do. He said I am not upset with this
21 counsel. At that point, -- now, Mr. Whitner, you
22 can clarify this if you would like. But at that
23 point, you used your arms and your hands to
24 indicate you were talking about Mrs.
25 Sustakovitch, the Solicitor, the prosecutor.

JW

- Direct Examination by Mrs. Sustakovitch

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1 **MR. WHITNER:** I'm saying -- excuse me, Your
2 Honor. I was saying that I don't blame her for
3 her job. It's not that I'm saying that she's
4 doing anything wrong.

5 **THE COURT:** Right.

6 **MR. WHITNER:** Not at all. I was just talking
7 about as this stuff was happening --

8 **THE COURT:** I don't want to put words in your
9 mouth if that's not what you meant. You were not
10 suggesting that your lawyer, Mr. Scalzo, has done
11 anything improper or failed to do something.

12 **MR. SCALZO:** No, that is not what I was
13 saying, Your Honor.

14 **THE COURT:** All right. That is what I want the
15 record to be clear on.

16 All right. Let's bring in the jury.

17 **MRS. SUSTAKOVITCH:** Do you want JW back
18 in?

19 **THE COURT:** Yeah, bring her back in. Hold
20 the jury until she has a chance to get on the
21 stand. Okay.

22 (WHEREUPON, the victim enters the courtroom at
23 approximately 4:50 PM.)

24 **THE COURT:** Okay. You can bring them in.

25 I believe the tape has been rolled back 30

1 seconds from where we stopped.

2 **MRS. SUSTAKOVITCH:** Yes, sir. You can advise
3 the jury we're going to be on page 13 of the
4 transcript, maybe like a quarter down the page.

5 **THE COURT:** All right. JW are you
6 okay?

7 **THE WITNESS:** Yes, sir.

8 **THE COURT:** You need anything? You have a cup
9 of water there?

10 **THE WITNESS:** Yes, sir.

11 **THE COURT:** And when you get a chance, can
12 you get her a cup of water?

13 **THE CLERK:** I can get it.

14 **THE COURT:** We have a juror who has some type
15 of intestinal upset and is in the restroom right
16 now. We will wait for a minute or two and see
17 how that develops.

18 (WHEREUPON, the jury enter at approximately
19 4:52 PM.)

20 **THE COURT:** Ladies and Gentlemen, we're going
21 to resume now. The tape has been rolled back a
22 little bit. And I think if you will turn to page
23 13, maybe about midway down, you will be able to
24 pick it up as we start the tape back.

25 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.

JW

- Direct Examination by Mrs. Sustakovitch

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1 (WHEREUPON, State's Exhibit 1 is played at
2 approximately 4:53 PM.)

3 (WHEREUPON, State's Exhibit 1 concludes at
4 approximately 5:01 PM.)

5 THE COURT: If y'all will pass the
6 transcripts to one end, we will have the bailiff
7 pick them up.

8 BY MRS. SUSTAKOVITCH:

9 Q JW when your dad was talking to you on
10 the phone and he told you that was not your fault, how
11 did that make you feel?

12 A Ma'am?

13 Q I'm sorry, you have to speak loud.

14 A Ma'am?

15 Q How did it make you feel when you heard your
16 dad say that he was sorry for what he did and it was
17 not your fault what happened?

18 A It made me feel good.

19 Q It made you feel good?

20 A Yes, ma'am.

21 Q And when he said that it was the drug monster
22 that made him do it, what did that make you think?

23 A You are talking about my feelings?

24 Q Yes.

25 A What did it make me think?

1 Q When your dad was saying he did not mean to
2 do it, it was the drug monster that made him do it and
3 he said he was sorry, what did that make you feel?

4 A It made me feel good that he was apologizing
5 but I was disappointed that he would do drugs.

6 Q Okay. JW did you want to have to be in
7 court today to testify?

8 A No, ma'am.

9 Q Is there any person or anything on this
10 planet that can make you come into court and say that
11 this happened if it didn't?

12 A No, ma'am.

13 Q How do you feel today about your father, do
14 you still love him?

15 A Yes, ma'am.

16 Q I have no further questions.

17 **CROSS-EXAMINATION**

18 **BY MR. SCALZO:**

19 Q JW my name is Chris. I'm your dad's
20 lawyer. I have got to ask you some questions, okay?
21 The same rules apply if you don't understand the
22 question I am asking, I will stop and try to repeat
23 it. Okay?

24 A Okay.

25 Q If you need a break, tell me you need a

1 break. Okay?

2 A Okay.

3 Q You live with your mom Anna and your stepdad
4 Jeff?

5 A Yes, sir.

6 Q Since you can remember, basically, you always
7 lived with them primarily?

8 A Yes, sir.

9 Q Was there a time when you stayed with your
10 dad?

11 A My --

12 Q Sam, I'm sorry.

13 A Yes, sir.

14 Q You know about how long you stayed with him?

15 A Not long. About a couple of weeks or so.

16 Q You remember when that was?

17 A Not last summer but the summer before that.

18 Q Would that be 2007?

19 A Yes, sir.

20 Q Would that have been in the spring when you
21 were still in school in 2007?

22 A Yes, sir.

23 Q Where did you stay? Who was at the house
24 besides you and your dad?

25 A His girlfriend and her three kids.

1 Q Okay. How long have you known those kids
2 Britney and the other two kids?

3 A For about three years now.

4 Q Okay. And you visited them before that day?

5 A I have.

6 Q And when you first went to, is it Danni's
7 house or Danni and your dad's house?

8 A Danni's house.

9 Q When you first went to Denny's house, were
10 you there to visit or to stay?

11 A When I first went, I was there to visit.

12 Q Okay. And when did it become that you were
13 staying there?

14 A Like on Monday when my mom and dad come pick
15 me, didn't come pick me up.

16 Q When you say your mom and dad, tell me their
17 names so everybody understands?

18 A Anna and Jeff.

19 Q What did you understand by they couldn't come
20 pick you up?

21 A They couldn't come pick me up. I guess at
22 first I thought they didn't want to come pick me up.

23 Q That was at the time that that happened, that
24 was when you were staying there with your dad, is that
25 what you thought?

1 A At the time, yes.

2 Q Eventually, you changed schools, right?

3 A Yes, sir.

4 Q You remember how long before you changed
5 schools?

6 A About a couple of days.

7 Q Was it the same week or the next week?

8 A I think it was the same week.

9 Q And was your dad or your dad and Danni who
10 took you to change schools?

11 A Sir?

12 Q Was it your dad or your dad and Danni that
13 took you to change schools?

14 A My dad and Danni.

15 Q Okay. Did you know why you were changing
16 schools?

17 A Because I had to be in school and my mom and
18 dad didn't come pick me up.

19 Q Okay. Uh, and then you had your appendix --
20 they say it burst. But you started to get some pain in
21 your appendix, right?

22 A Yes, sir.

23 Q And then you ended up having to go to the
24 hospital?

25 A Yes, sir.

1 Q Do you remember when that was?

2 A I think it was 2000.

3 Q It was still when you were staying with your

4 dad the time we were just talking about, right?

5 A Yes, sir.

6 Q You were going to that new school that your

7 dad had changed you to?

8 A Yes, sir.

9 Q And school wasn't over yet?

10 A It wasn't, no.

11 Q Was it almost the end?

12 A Almost the end.

13 Q Okay. And you ended up having to go into the

14 hospital, didn't you?

15 A Yes, sir.

16 Q Did you have surgery?

17 A Yes, sir.

18 Q What did they do?

19 A They took my appendix out.

20 Q How long did you stay in the hospital?

21 A I believe it was a couple of, either a week

22 or a couple of weeks.

23 Q I'm sure a lot of people came to visit you.

24 A Yes, sir.

25 Q And your dad and Danni were there?

JW

- Cross-Examination by Mr. Scalzo

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1 A Yes, sir.

2 Q Sand and Sharon come?

3 A Yes, sir.

4 Q Your mom and you stepdad also came?

5 A Yes, sir.

6 Q Other family came by?

7 A Yes, sir.

8 Q When they released you from the hospital, you
9 went back with your mom?

10 A Yes, sir.

11 Q Before you were released from the hospital,
12 do you know, did you have any conversations either
13 with your dad or mom about where you were going to
14 stay, who you were going to live with?

15 A Before I was released from the hospital?

16 Q Yes.

17 A Yes, sir.

18 Q Tell me who you had a conversation with.

19 A My mom.

20 Q What was the conversation about?

21 A She said that I was coming home with her
22 after I got from the hospital.

23 Q Did you have either any conversations with
24 your dad or did you have any idea about where he
25 wanted you to stay?

1 A It was a short conversation.

2 Q Okay. Did you know where he wanted you to
3 stay?

4 A He wanted me to stay with him.

5 Q At the time, did you know where you wanted to
6 go?

7 A I wanted to go with my mom.

8 Q All right. And when you got out, you ended
9 up having to have some homeschool, right, for a while?

10 A For a while.

11 Q Because you were healing from your surgery?

12 A Yes, sir.

13 Q When that was over, do you remember when you
14 finished that, did you actually go back to school or
15 did the year end?

16 A The year ended.

17 Q The end of school would be in June, right?

18 A Right.

19 Q Is that right?

20 A Right.

21 Q Okay. And you were talking about the book,
22 the Secrets book with the prosecutor. Do you remember
23 that?

24 A Yes, sir.

25 Q And you looked at the book. Was it in June

1 when you looked at the book or did you look at it --

2 when did you look at it? Do you remember?

3 A I don't remember exactly when. I know it was
4 in the summer.

5 Q Were you still going to school or did you
6 stop going to school?

7 A I stopped going to school.

8 Q Okay. I think you said that the book was out
9 on the table or something and you saw it?

10 A Yes, sir.

11 Q Do you remember -- I'm going to change
12 subjects, okay?

13 A All right. Do you remember growing up, your
14 mom has said that she would ask you and your brothers
15 and sisters about whether people had touched you or
16 them, do remember that?

17 A I remember.

18 Q Do you remember when she started asking you
19 those questions, about how old you were?

20 A I don't remember. I just remember that she
21 did ask us a lot.

22 Q You say it again, ask what?

23 A Ask us a lot.

24 Q Okay. What is a lot?

25 A Like when we would go somewhere and we would

1 come back home, she would ask us.

2 Q Okay. And, uh, up until when you read this
3 book, you never said anything about anybody touching
4 you?

5 A Right.

6 Q Okay. I want to talk to you about you what
7 described back when you said this happened. You were
8 younger. You say you were how old?

9 A Five or six.

10 Q Five or six. Can you tell us why you are not
11 sure if you were five or six?

12 A I just remember like being small.

13 Q Okay. And, uh, the place that it happened,
14 you said was Aunt Sand's?

15 A Right.

16 Q Aunt Sharon's?

17 A Right.

18 Q And some people in the trial talked about
19 Pasadena, the street that Aunt Sand had lived on at
20 some point. Do you know that street?

21 A That is the street, yes.

22 Q Is it -- are you saying it was that house?
23 Do you know if it was that house?

24 A It was that house.

25 Q Okay. The one on Pasadena?

JW

- Cross-Examination by Mr. Scalzo

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- 1 **A** Yes, sir.
- 2 **Q** Who lived at that house besides Aunt Sand?
- 3 **A** Her two kids.
- 4 **Q** What are their names and how old are they?
- 5 **A** Joshua -- you are talking about now?
- 6 **Q** Yeah, I guess now.
- 7 **A** Joshua, I believe he is 13. And she is 15.
- 8 **Q** So they are close to your age, right?
- 9 **A** Yes, sir.
- 10 **Q** I think you said this before. You stayed at
11 Aunt Sand's sometimes since you were little?
- 12 **A** Yes, sir.
- 13 **Q** You mentioned the night that you remember
14 this happening, you said something about Cricket,
15 Cricket's room?
- 16 **A** Yes, sir.
- 17 **Q** Who is Cricket?
- 18 **A** Her daughter.
- 19 **Q** You said you were in Cricket's room?
- 20 **A** Yes, sir.
- 21 **Q** If you were sleeping at Aunt Sand's house,
22 would you sleep in Cricket's room?
- 23 **A** Yes, sir.
- 24 **Q** Where was Cricket?
- 25 **A** I don't know. I think she might have been at

1 her dad's house. She might have been sleeping with her
2 mom that night.

3 Q Let's talk -- I'm going to separate it.
4 Let's talk about that night yet. We'll talk about
5 that night in a second. Okay?

6 A Okay.

7 Q Times when Cricket was at Aunt Sand's house
8 and you were at Aunt Sand's house -- okay?

9 A Uh-huh.

10 Q And you were going to sleep there, --

11 A Yes.

12 Q Where would Cricket sleep?

13 A In her bed.

14 Q Okay. And the time that we are talking about
15 when you say that this happened, --

16 A Uh-huh.

17 Q -- do you know if Cricket was there or not?

18 A I don't remember.

19 Q Okay. And then, her brother had his own room?

20 A Yes, sir.

21 Q Did you all ever sleep in his room?

22 A Not that I remember.

23 Q Was that a rule or something that Aunt Sand
24 say you are not allowed to -- girls have to sleep in
25 girl's room and boys sleep in boy's room?

JW

- Cross-Examination by Mr. Scalzo

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1 A Yes, sir.

2 Q Okay. You talked about with the prosecutor
3 that when you remember being woken up -- you remember?
4 You said that your dad asked him, asked you, sorry, to
5 suck his private, I think is the word did you used.
6 Isn't that right?

7 A Yes, sir.

8 Q When you talked to a, you talked to a lady,
9 Mrs. Carlberg. Do you remember her?

10 A Where does she work?

11 Q Okay. When you went into the -- you went
12 into a little room. They said they were going to
13 videotape you talking to the lady?

14 A I remember that.

15 Q You remember that?

16 A Yes.

17 Q You'll probably see that video later on but
18 I'll ask if you remember now. Okay?

19 A Okay.

20 Q Do you remember using the word "privacy"?

21 A Yes.

22 Q Is that the same thing, the privacy and the
23 private?

24 A Yes.

25 Q You said to Mrs. Sustakovitch when she was

1 questioning you earlier, a little while, uh, that when
2 your dad asked you to do that, what were you doing?
3 How were you positioned? Were you standing up, laying
4 down?

5 A I was standing up.

6 Q You're saying you were standing up?

7 A Yes, sir.

8 Q Is this still in Cricket's room?

9 A Yes, sir.

10 Q And you kind of described, uh, being awake
11 but also going back to sleep. Do you remember that?

12 A Yes, sir.

13 Q And explain that a little bit better for me.
14 Were you actually falling back to sleep? What were you
15 saying?

16 A I was falling back to sleep.

17 Q Okay. And, uh, sorry. I lost my train of
18 thought for a second. When this happened, do you
19 remember -- you may not remember the specific date
20 like January 1. That is not what I'm asking. What I
21 am asking you is do you remember anything about when
22 it was in the year?

23 A I don't.

24 Q Do you remember if it was warm out or cold
25 out?

JW

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1 A I don't.

2 Q Okay. Were you still in school or out of
3 school?

4 A I had just started school.

5 Q You remember you just started school?

6 A Yes, sir.

7 Q And, uh, now, when did you remember that part
8 of it that you had just started school?

9 A I was five or six. Being five or six, you
10 get enrolled in to school.

11 Q So I need to ask you a better question. The
12 better question I need to ask you is the night that
13 you saying this happened, do you remember is that when
14 you actually were in school or during the summer? Do
15 you understand what I am asking you?

16 **MRS. SUSTAKOVITCH:** Objection. She has
17 answered. She doesn't know.

18 **THE COURT:** Overruled.

19 **BY MR. SCALZO:**

20 Q You can answer if you know.

21 A Can you repeat the question?

22 Q Sure. You said to me that you remember you
23 had started school because you were five.

24 A Uh-huh.

25 Q What I am asking you is when this happened,

1 do you remember if you were actually in school during
2 that time or were you on a break from school. Do you
3 understand what I'm asking you?

4 A I don't remember actually being in school.

5 Q You just remember that because when you were
6 five, you would have been in school?

7 A Yes, sir.

8 Q Is there anything like a birthday of either
9 you or a family member that is close to the time that
10 you said this happened?

11 A I don't remember.

12 Q Okay. (Pause).

13 When you read the book, the Secrets book,
14 before that, had you remembered this?

15 A I did remember it.

16 Q You didn't?

17 A I did.

18 Q Okay. When did you remember it before you
19 read the book?

20 A Just, I would just remember it. Like, there
21 will be days when I would think about it. There will
22 be days that I wouldn't think about it. I will go
23 through the whole day without thinking about it.
24 There would be some days that I did think about it.

25 Q Okay. Now, you talked about that after you

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1 said this happened, that your dad came back to you and
2 was crying?

3 A Yes, he was crying.

4 Q This is still at Aunt Sand's house?

5 A This is still at Aunt Sand's house.

6 Q In Cricket's room?

7 A In Cricket's room.

8 Q Did he tell you not to say anything to
9 anybody?

10 A No, sir.

11 Q Did he threaten you about if you said
12 something to somebody he was going to do something to
13 you?

14 A No, sir.

15 Q Did you have any discussion with him about
16 you should not say anything about this?

17 A Not at that point, I didn't.

18 Q Okay. The, uh, telephone call that we heard,
19 we were sitting there listening to it being played
20 right there on the radio?

21 A Uh-huh.

22 Q Did you remember having that conversation?

23 A Yes, sir.

24 Q I think you said your mom was sitting -- was
25 your mom sitting next to you?

1 A Yes, sir.

2 Q You had had some conversations with your dad
3 before that, right?

4 A Yes, sir.

5 Q Do you remember how many days before that
6 when you had the first conversation about this?

7 A The first one, it was like a couple of days.

8 Q Okay. When you had this first conversation,
9 this was after you had told your mom what you said you
10 remember?

11 A Yes, sir.

12 Q She said to you that you needed to talk to
13 your dad about it?

14 A Yes, sir.

15 Q Did you remember if you called him or did he
16 call you?

17 A He called me.

18 Q When you confronted him, he said he didn't do
19 that?

20 A Yes, sir.

21 Q Eventually, did he get upset on the phone?

22 A Yes, sir.

23 Q Was he upset with you? Do you know what he
24 was upset about?

25 A I think he was upset about me remembering, I

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1 think.

2 Q That is how you took it?

3 A Yes, sir.

4 Q He eventually got on the phone or your mom
5 got on the phone with him?

6 A Yes, sir.

7 Q Could you still hear what he was saying?

8 A I could slightly, just a little bit.

9 Q He was still upset?

10 A Yes, sir.

11 Q After that phone call was over, did you have
12 any other phone calls before the one that was
13 recorded?

14 A No, sir.

15 Q Okay. When you were talking with your dad on
16 the phone call that we listened to, I think you said
17 this but you said you thought you were talking about
18 what you said happened?

19 A Sir?

20 Q You said, you, you told your mom that your
21 dad had you do this thing to him?

22 A Yes, sir.

23 Q When you talked to your dad on the phone call
24 that we didn't hear, he said he did not do that, he
25 was upset?

1 A Yes, sir.

2 Q Now we get to the phone call that was on the
3 tape that we listened to?

4 A Okay.

5 Q On the same page?

6 A Yeah.

7 Q You believed in that conversation that what
8 you basically were talking about what you had said he
9 did?

10 A Yes, sir.

11 Q All right. I didn't hear it, but you tell me
12 if you recall in the conversation. Did you ever
13 actually get back to saying, Dad, I remember -- on
14 this conversation, I remember this happening, you told
15 me to suck your private or suck your privacy?

16 A Not on that one.

17 Q Not on that call.

18 A Huh-uh.

19 Q Okay. You did -- in the tape, you said yeah a
20 lot. It sounded like your dad did more talking than
21 you did.

22 A Yes, sir.

23 Q Right. Were you scared to talk to him? What
24 was going on?

25 A Really he just did most of the talking. It

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1 was really nothing for me to say.

2 Q Okay. And, uh, did you know, did you feel
3 like you were supposed to have that conversation or
4 you just -- why were you having the conversation?

5 A I was having the conversation, I think,
6 because he wanted me to understand and talk about it
7 to him that it wasn't my fault.

8 Q Okay. That is not something you talked about
9 before you got into this conversation, right?

10 A Right.

11 Q In some of the other conversations, you had
12 talked about that?

13 A Right.

14 Q That is just what you were hearing him say to
15 you?

16 A Yes, sir.

17 Q You had not all talked about it before?

18 A Sir?

19 Q You had not all talked about having that
20 conversation about what had happened before?

21 A No, sir.

22 Q Okay. When you were, uh, I am looking down
23 here at the transcript. You were eating a granola
24 bar?

25 A Yes, sir.

1 Q Were you really eating a granola bar?

2 A Yes, sir.

3 Q Was it in the evening? When did you have the
4 conversation?

5 A In the evening.

6 Q Okay. Uh, what were you doing before the
7 phone call? He called you?

8 A Yes, sir.

9 Q What were you doing before he called?

10 A Just walking around the house.

11 Q Okay. You were not talking about this until
12 he called?

13 A Right.

14 MR. SCALZO: Judge, I think that is all I
15 have. I would ask to reserve any cross-
16 examination based on the video that might be
17 shown.

18 THE COURT: Any redirect?

19 MRS. SUSTAKOVITCH: No, sir. Nothing more
20 for this witness.

21 THE COURT: JW you can step down. You
22 can come back here and sit right behind Mrs.
23 Sustakovitch, okay?

24 THE WITNESS: Okay.

25 THE COURT: Ladies and Gentlemen, we are

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1 going to break here for the day. We'll start
2 back tomorrow morning at 9:30. Please be in the
3 jury room at that time. We will see you then.
4 Remember that you may not discuss the case
5 tonight. We will see you in the morning.

6 (WHEREUPON, the jury exit at approximately
7 5:28 PM.)

8 THE COURT: All right. I will see you all at
9 nine o'clock.

10 MRS. SUSTAKOVITCH: Your Honor, I want to let
11 you know I heard about the video that we're
12 trying to redact. They are working as hard as
13 they can on it. Lieutenant Peterson says the
14 system is taking time. The last thing I heard is
15 they are going to have it as soon in the morning
16 as possible.

17 The State at this point does not feel
18 compelled that we have to put the video in. My
19 concern is now that Lieutenant Peterson,
20 Detective Bradford has discussed the existence of
21 this. I guess what I'm saying is I don't know
22 when the video is going to be done. I know you
23 want to move on.

24 THE COURT: You are directly to the close of
25 your case. You can if you choose to do like we

1 used to do in the old days; uh, start and stop on
2 a playback device whether it be a computer or a
3 -- we will start back in the morning.

4 **MR. SCALZO:** Judge, the Defendant would like
5 me to ask you to allow him to go home and return.
6 There's never been an issue about his return out
7 on bond. He has come to court.

8 **THE COURT:** What is his bond?

9 **MR. SCALZO:** I believe it was a \$30,000 bond.
10 25, I'm sorry. \$25,000 Surety bond. I believe
11 his mother posted the bond. He asks that I
12 request that of the Court.

13 **MRS. SUSTAKOVITCH:** Your Honor?

14 **THE COURT:** Yes.

15 **MRS. SUSTAKOVITCH:** Mrs. Poaletti just let me
16 know this video is not going to be done in the
17 morning when we start.

18 **THE COURT:** Just start and stop then. That's
19 all you have to do.

20 **MRS. SUSTAKOVITCH:** My position would be, I
21 don't want defense counsel to suddenly -- we're
22 trying to honor Your Honor's ruling. We are not
23 not offering the tape because we're trying to
24 hide something. We are trying to abide by it. I
25 don't want defense counsel to be able to stand up

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1 -- Mrs. Carlberg is going to testify. If we don't
2 have the video ready at that point, I would ask
3 that defense counsel not be able to suddenly ask
4 where it is as if the State has not tried to
5 present it. We are.

6 **THE COURT:** It doesn't work that way. I
7 can't tell Mr. Scalzo what questions he can and
8 can not ask. If you have the tape, show it. If
9 you don't have it, don't show it. It is up to
10 you. It's all yours. You're in charge. Show it
11 or not.

12 **MRS. SUSTAKOVITCH:** The reason we don't have
13 it is because we're trying to --

14 **THE COURT:** It does not matter why. You
15 either do it or you don't. It seems so
16 complicated to you but it's actually just very,
17 very simple. Put the tape up or don't put it up.

18 **MRS. SUSTAKOVITCH:** I don't want him to argue
19 in closing that we didn't put it up and that we
20 are trying to hide something.

21 **THE COURT:** Well, then put the tape up.

22 **MRS. SUSTAKOVITCH:** I won't have it until
23 probably 11:00 or 12:00 is what I'm saying.

24 **THE COURT:** Get -- I mean, I'll do it for you
25 if you want me to. Get your pointer and stick it

1 at the little arrow on the computer that you
2 showed me and start it where you want to start it
3 and when you get to the point where you need to
4 stop it, take the cursor and move the little
5 indicator ahead to the point in the tape where
6 you want to restart it. It is very simple. You
7 can put that tape up in it's redacted form with
8 no computerized editing that they're working on
9 at all.

10 **MRS. SUSTAKOVITCH:** Well, once it comes into
11 evidence, they would have it back there to listen
12 to and they can hear the parts that you don't
13 want us to have into evidence.

14 **THE COURT:** It would not come into evidence
15 under those circumstances. It would be shown to
16 the jury.

17 **MRS. SUSTAKOVITCH:** I understand, Your Honor.
18 I'm sorry.

19 **THE COURT:** All right. I'll see you in the
20 morning at nine o'clock.

21 **MR. SCALZO:** Judge, are you denying my
22 request?

23 **THE COURT:** The, uh, -- I'm really just not
24 going to do that. If the bondsman was here, you
25 know, I might do it. I probably done it two or

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1 three times in my career. But it just -- the
2 system is set up so that at this point, there is
3 no protection. He is in custody. I'm sorry.

4 **MR. SCALZO:** Thank you, Your Honor.

5 (WHEREUPON, a recess is taken at approximately
6 5:33 PM.)

7 (WHEREUPON, the Court resumes on the 4th day of
8 November, 2009 at approximately 9:39 AM.)

9 **THE COURT:** All right. You all ready?

10 **MRS. SUSTAKOVITCH:** The State is, Your Honor.
11 I believe defense counsel has an issue he wanted
12 to take up with you.

13 **MR. SCALZO:** Good morning, Judge. Judge, it is
14 my understanding that Mrs. Sustakovitch just told
15 me that she does not intend to put in the
16 forensic interview, the video and that she has
17 one more witness who is not related to the video
18 to testify and that she would be done.

19 My understanding was that JW was
20 reserved -- my cross-examination would be
21 reserved because they were going to play the
22 video and I would need to have an opportunity to
23 examine her on the video. I did not really get
24 into the cross-examination of the video with her
25 on the stand yesterday. Mrs. Sustakovitch seem

1 to be under the impression that --

2 THE COURT: You want to cross-examine her
3 some more?

4 MR. SCALZO: I may.

5 THE COURT: What are you asking for? Y'all
6 are just -- this is a whole lot of talk. Just
7 tell me what you want.

8 MRS. SUSTAKOVITCH: Your Honor, I thought he
9 was finished.

10 THE COURT: Wait a minute. Mr. Scalzo has the
11 floor.

12 MR. SCALZO: I may not call her but I wanted
13 clarification as to whether or not I would have
14 the ability to recall her even if they don't play
15 the tape. I guess that is what I am asking,
16 Judge.

17 MRS. SUSTAKOVITCH: Just for -- the reason the
18 State has decided to do this --

19 THE COURT: I don't need to know that. Do
20 you have any opposition to Mr. Scalzo having the
21 right to additional cross-examination of JW

22 MRS. SUSTAKOVITCH: I do only because I was
23 under the impression -- I heard questions about
24 it yesterday. I thought that he had the
25 opportunity to --

1 **THE COURT:** I think that the way you -- there
2 is nothing wrong with this. There is nothing
3 wrong with this. But the way you lead everybody
4 to believe you were going to conduct your case
5 was that you were going to put the video up.

6 **MRS. SUSTAKOVITCH:** Okay.

7 **THE COURT:** I can easily see strategic
8 reasons why Mr. Scalzo might have held back on
9 cross-examination even if it doesn't relate to
10 the video knowing that he had the opportunity to
11 cross-examine her after the video. I am inclined
12 to allow it.

13 **MRS. SUSTAKOVITCH:** That would change one
14 position of the State. We would put in a portion
15 of it at this point. So I need to get -- it will
16 take me about three minutes to get this set up.
17 Sorry. Thank you, Judge.

18 **MR. SCALZO:** Judge, --

19 **THE COURT:** Make sure that you send a copy of
20 that to whoever the Solicitor is. Good to see
21 you.

22 **MR. SCALZO:** Your Honor, I needed your ruling
23 so I could advise Mr. Whitner about what his
24 options were. We've discussed it. I'm not going
25 to recall JW on cross-examination if the

1 State does not intend to put in the tape. If
2 they intend to put in the tape for their own
3 reasons, I think I will have to cross-examine.

4 THE COURT: Okay.

5 MR. SCALZO: But I don't need to do that.

6 THE COURT: Okay. Are you ready for the jury
7 then?

8 MRS. SUSTAKOVITCH: Yes, sir.

9 THE COURT: You said you have one more
10 witness?

11 MRS. SUSTAKOVITCH: Yes, sir.

12 THE COURT: Then you intend to rest?

13 MRS. SUSTAKOVITCH: Yes, sir.

14 THE COURT: All right. Bring in the jury.

15 (WHEREUPON, the jury enter at approximately
16 9:44 AM.)

17 THE COURT: Good morning.

18 Mrs. Sustakovitch.

19 MRS. SUSTAKOVITCH: Thank you. May it please
20 the Court. The State next calls Linda Hutton.

21 LINDA HUTTON,
22 is first duly sworn and then testifies as follow:

23 THE CLERK: If you would, please state
24 your name for the record.

25 THE WITNESS: My name is Linda Gray Hutton.

DIRECT EXAMINATION

BY MRS. SUSTAKOVITCH:

Q Good morning, Mrs. Hutton. Can you tell the jury where you are currently employed.

A I'm with Bay Laurel Center for Psychiatry and Psychotherapy here in Greenville.

Q What does Bay Laurel Center, what is the function of it?

A We have psychiatrists and then we have six clinicians providing psychotherapy.

Q What is your position at Bay Laurel?

A I am a clinical social worker. I work mostly with children and families.

Q Can you explain your work experience and training to the jury?

A Received a Bachelor of Arts with Honors from the University of Florida in 1974. Master Social Work from Florida State in -- '72 was University of Florida, '74 was Florida State. As a part of that training, I completed two internships in the Department of Child Psychiatry at the University of Florida Medical School. I worked 14 years with Greenville Mental Health Center which is part of the South Carolina Department of Mental Health on Child and Adolescent unit. And for the past 21 years, I

1 have been in private practice.

2 Q I believe you did mention your degrees, what
3 licenses do you have?

4 A I'm a licensed independent social worker,
5 clinical practice in South Carolina.

6 Q Are you a member of any boards past or
7 present?

8 A In the past. I been an officer on the Board
9 of South Carolina Society for Clinical Social Work and
10 on the board for a Rape Crisis Council in Greenville.

11 Q You did mention some of your training in
12 sexual assault. Could you -- specifically to that
13 area, could you go back and list some of that?

14 A It's been ongoing over the years. There was
15 a period in time when I worked with sexual abuse full-
16 time. That was way back in the 80s. Since then it
17 has been part of my practice, probably the earliest
18 training I had was in the 80s, a week-long training, a
19 national training about treatment of incest. I have
20 attended workshops, made a few presentations.

21 Q You have any presentations in the area of
22 child sexual assault?

23 A Yes, ma'am.

24 Q How many years would this span that you have
25 been working in this field?

1 **A** Uh, 35.

2 **Q** Do you read and keep current with
3 publications in your field --

4 **A** Yes, ma'am.

5 **Q** -- that are subject to peer review?

6 **A** Yes, ma'am.

7 **Q** Have you recently read some publications that
8 are subject to peer review?

9 **A** I guess --

10 **Q** -- or took any courses?

11 **A** I guess the most recent was APSAC, that is
12 American Professional Society on the Abuse of
13 Children. Earlier this year, a 10-hour course through
14 the Medical University of South Carolina on treatment
15 of childhood sexual abuse drama.

16 **Q** In your thirty-something years in the area of
17 child sexual assault, can you estimate how many
18 children you have seen?

19 **A** Okay. It's 35 years. The conservative
20 estimate of children I have seen where sexual abuse
21 has been an issue has been 8-900.

22 **Q** Have you testified in the courts of this
23 state?

24 **A** Yes, ma'am.

25 **Q** Which courts have you testified?

1 **A** Family Court, Greenville and some of the
2 surrounding counties over the years. And then in
3 General Sessions Court here and in Laurens once.

4 **Q** Can you give an estimate, rough estimate on
5 how many times you been qualified as an expert in
6 child sexual assaults?

7 **A** This would be a guess. 30 times maybe.

8 **MRS. SUSTAKOVITCH:** All right. Your Honor, at
9 this time, the State offers this witness as an
10 expert in the field of child sexual abuse and
11 assault.

12 **MR. SCALZO:** No objection, Judge.

13 **THE COURT:** All right.

14 **BY MRS. SUSTAKOVITCH:**

15 **Q** Mrs. Hutton, why were you asked to come to
16 court today?

17 **A** You contacted me asking if I would be willing
18 to come to sort of help educate the jury or help them
19 understand common features of child sexual abuse.

20 **Q** Can you educate the jury about what the term
21 "delayed reporting" means. What, in your field, does
22 that mean?

23 **A** That means that the child doesn't tell right
24 away right after the abuse happens, immediately after.

25 **Q** Is it common or uncommon for children in your

1 experience to delay reporting in cases of child sexual
2 assault?

3 A It is very common. One of the things that's
4 changed over the years is way back in the 80s, what I
5 saw most commonly would be people waiting years to
6 report, if at all. I see kids who, you know, just
7 would not report for 10 years or things like that.
8 There's been a lot of education. People talk about
9 sexual abuse more. So there is more safety things
10 out. But even with that, it's still most common in my
11 experience for kids to delay reporting but the
12 difference is they tend not to wait so long.

13 Q Right. So is there, in your experience --
14 give some reasons why children delay reporting?

15 A The most common reason I hear from children
16 -- I mean, this is in the literature too but based on
17 my experience is that they are afraid. Children tend
18 to think that if anything happens, it is their fault,
19 especially younger children. It just has to do with
20 their logic and how they think. But children are
21 afraid to get in trouble.

22 Sometimes the person who has abused them has
23 threatened them because the perpetrator would want
24 them to be silent so they may try to scare them into
25 not telling with such things as you won't be believed

1 or you will go to foster care or the family will fall
2 apart and it will be your fault, uh, or I will kill
3 you or I will kill the family. Things like that.

4 Young children may not report, real young
5 ones because they don't know what happened was
6 abusive. When kids are real small, sometimes it can
7 be framed in terms of a game. They just don't know
8 what sexual abuse is. Sometimes what I will see is
9 youngsters trying to protect their family,
10 specifically their mother. If the perpetrator was
11 someone in the family, they are afraid that the family
12 will fall apart or the mom won't be able to handle it.
13 So they won't tell.

14 Q The time frames in your experience, what are
15 some of the time frames you have seen with delayed
16 reporting? How many years would you say it goes back
17 sometimes?

18 A You mean how long before it is reported?

19 Q Right, just some examples of what you've
20 seen.

21 A I have seen 40 years before with adults.
22 With children, ranging from a few months to years.

23 Q Okay. It just depends on the case and the
24 child, correct?

25 A Yeah.

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1 Q Is it common in your experience to see a
2 familiar link in the abuser in cases of child sexual
3 assault often? By that, I mean is it usually somebody
4 that knows the child or has access to the child?

5 A Yes.

6 Q I'm sorry.

7 A Typically it is someone who the child knows
8 and who the child trusts. One of the hallmarks with
9 sexual abuse versus rape is that sexual abuse most
10 often doesn't involve full physical force. It is all
11 psychological coercion and manipulation. Whereas,
12 rape is physical force.

13 Q All right. As far as with a child's memory
14 and recollection, is it common or uncommon in your
15 experience that, say, a child discloses and tells what
16 happened, uh, are the court -- well, is it common or
17 uncommon for if the child is asked to remember and
18 tell that assault later that there would be some
19 inconsistencies between what the child can remember at
20 this point and then what they have to recall, say,
21 years later?

22 A Very common. What you look for is that the
23 core central features remain consistent. You might
24 get some variability in sort of the outward, some of
25 the details on the side. This is more pronounced,

1 even more common when the abuse happened more than one
2 time.

3 Q Okay. In your experience, is it common or
4 uncommon for the child to still even after sexual
5 assault have feelings of love or affection for a
6 person that abused them?

7 A It is very common. That is something that is
8 not often understood by folks. They expect the
9 youngster to hate the perpetrator's guts. What I see
10 is that, for the most part, the youngsters have
11 ambivalent feelings or mixed feelings toward the
12 perpetrator. They feel very badly about the abuse.
13 There is a lot of emotion tied up with that.

14 But there is also good stuff in the
15 relationship too. That has to be honored. You know,
16 things like going to the movies, getting popcorn,
17 swinging on the swings. Things that were very
18 appropriate and that the child actually misses. There
19 is positive things there but not around the abuse.

20 Q Thank you, Mrs. Hutton. Please answer any
21 questions defense counsel may have.

22 CROSS-EXAMINATION

23 BY MR. SCALZO:

24 Q Good morning, Mrs. Hutton. A couple of
25 questions. One, I think it is obvious, but I want to

1 make sure it is clear. You did not evaluate JW
2 Whitner?

3 A No, ma'am. I haven't. Uh, no, sir.

4 Q Have you ever interviewed her at all?

5 A No.

6 Q So in the testimony that you have been giving
7 today, you are not offering your opinion about her.
8 You're just talking in generalities?

9 A Talking about generalities based on my
10 knowledge and based on my experience in working with
11 children.

12 Q Okay. Your knowledge isn't to any specifics
13 that you have gotten from JW is that correct?

14 A No, sir.

15 Q You talked about delayed reporting?

16 A Yes, sir.

17 Q You said it's common but children do report?

18 A Not all children report.

19 Q It is common for them to delay the reporting.
20 But it's also, there are times when children do
21 actually report?

22 A You mean immediately?

23 Q Yeah. Relatively close in time.

24 A Yeah. My experience has been more commonly
25 there is a delay.

1 Q Okay. And the delay that you are talking
2 about can range from what to what?

3 A It can range from three days to decades.

4 Q And tell me if I am wrong, but I don't think
5 that what you are saying is delayed reporting is
6 somehow an indication that sexual abuse took place?

7 A No. I am not saying that.

8 Q What hear you saying is sometimes if sexual
9 abuse has happened, delayed reporting may be something
10 that goes along with that?

11 A It is very common to go along with that. It
12 is not, a delayed report does not mean that something
13 did not happen.

14 Q Right. But it also does not mean that you, if
15 you were evaluating somebody, a child or even an adult
16 that was talking about something that happened when
17 they were a child, the mere fact of delayed reporting
18 wouldn't be something you could say, well, I'll rely
19 on the fact that it was a delayed report to say that
20 happen?

21 A Correct. I have been training for that many
22 years but also there is a period of time where I did
23 the forensic exams and would make, give professional
24 opinions about the occurrence of abuse. Even when I
25 was doing that, that is not a factor that you'd look

1 at in making a determination.

2 Q Okay. You talked about some of the reasons
3 for delayed reporting?

4 A Yes, sir.

5 Q You didn't use the term but it sound like you
6 were saying fear is usually the number one reason.

7 A Being afraid.

8 Q Being afraid?

9 A That's been in my experience in working with
10 kids.

11 Q And threats, whether they are subtle or
12 verbal come along with that?

13 A They can come along with that. The
14 fearfulness, being afraid, can occur even in the
15 absence of threats.

16 Q Okay because the child anticipates some kind
17 of repercussion. Is that what you're saying?

18 A Exactly. Children use their own logic. It's
19 real weird. It's not like ours. And part of it is
20 they assume that things are their fault. This is not
21 just with sexual abuse. It is with anything. You talk
22 with kids whose parents are getting divorced. I
23 always ask them if they think it is their fault
24 because very often, little kids will say yes.

25 Q Okay. And children can internalize a lot of

1 things going on around them that sounds like that
2 description of what you just said.

3 A Well, uh, I guess that is one way. I look
4 upon it as a reflection of how kids think at different
5 ages. You know, just cognitive development.

6 Q Okay.

7 A Also, there can be reactions -- uh,
8 environment can influence or even kids react to
9 environmental stressors. There is a whole cluster of
10 things.

11 Q You talked about core features?

12 A Yes, sir.

13 Q When you say core features, is that a set or
14 a list that you have or is that, you're working from
15 what the child is telling or the person is telling
16 you?

17 A It would be the main features. If, for
18 example, if what was described is oral sex, you would
19 expect that to be consistent across interviews. If
20 there is a lot of time, if it was way back, you might
21 get some. Or if there is a lot of occurrences of the
22 abuse, you may have some variation and maybe things like
23 what time of day or things like that, but not in the
24 core about what happened.

25 Q Okay. When you have multiple instances of

1 abuse --

2 **A** Yes, sir.

3 **Q** -- would that increase or decrease the
4 ability of the person or the child, let's talk about
5 the child in this case, to be able -- do you recall
6 specifics like when it was or where they were or
7 things like that?

8 **A** It could. One of the things that happens
9 that used to confuse investigators, interviewers, the
10 thing is you can ask a youngster about abuse. If
11 there has been multiple occurrences, you know, and you
12 are asking them across or different people are, you
13 make the assumption that they are talking about this
14 one time out of 10 times. But they might be getting
15 the first time and the third time mixed up or things
16 like that. So when you get the inconsistency around
17 peripherals, that is not an indicator or red flag that
18 nothing happened.

19 **Q** If you are talking about multiple instances
20 or incidents, the child may be remembering different
21 events but essentially the conduct, you're saying the
22 core may be the same?

23 **A** If the core was the same, if it was, say,
24 oral sex, it was oral sex every single time.

25 **Q** Right, but peripheral things that -- use your

1 term --

2 A Yeah. Because they may be talking about
3 number one or number three but the interviewer does
4 not know that. The interviewer is like, whoa, the
5 peripheral stuff is not particularly consistent.

6 Q When you don't have multiple incidents, you
7 are talking about one incident, the potential, the
8 problem that you just described when you have multiple
9 incidents of confusing some of the peripherals that
10 what kind of running together, you would think that
11 you would have less concern over that kind of
12 confusion when you have one incident?

13 A Right. Well, you would. You would have
14 reports from different incidents running together.
15 Then you've got another set of factors playing in.
16 Depending on how long it has been. How the youngster
17 has been dealing with it. There is a lot of defense
18 mechanisms like dissociation or just denial or just
19 repression. Things like that that can alter too.

20 Q And in order to figure out the defense
21 mechanism that you are talking about, you would in
22 fact have to talk to the child and evaluate the child
23 to figure that out. It would not be something you can
24 simply say this applies to all children, right?

25 A Right.

1 Q Okay. You talked about you had done forensic
2 interviews before?

3 A A long time ago. Several years ago.

4 Q I am assuming you have training in it?

5 A I do.

6 Q So that the jury understands, a forensic
7 interview, the purpose of it is for the interviewer to
8 try to obtain information from the child?

9 A It is an investigative interview. I got
10 training in that when it first started being done by
11 clinicians. I was asked to do it. I was asked to take
12 the training in doing it. It is an information
13 gathering sort of interview. You ask clean questions.
14 You are very careful about not contaminating
15 information, not leading and all of that. At the time
16 that I was doing it, you would make a, uh, give a
17 professional opinion. Since -- when I stopped doing
18 them, I didn't keep up on it. The protocols and all
19 that have been refined since.

20 Q The protocols were initially developed, even
21 when you started doing this, were to help make sure
22 that the interviewer could get the information without
23 sort of suggesting or giving information to the child.
24 Is that kind of the goal?

25 A Right, keeping it clean.

1 Q That's what you meant by clean?

2 A Yes, so that whatever information, if
3 something happened or didn't, that could be clean.

4 Q That comes out of the fact that there are
5 psychiatrists and psychologists and therapists and
6 clinical social workers have built a body of
7 experience to tell them, research to tell them that
8 children have high susceptibility. They could be
9 suggested to. You have to be careful about how you
10 ask questions or how you speak with them. Isn't that
11 right?

12 A Exactly. I can't remember the name of the
13 fellow. C.C. A fellow by the name of C.C. did a whole
14 lot of research about that. I remember once it was on
15 2020 back in the 90's or something on the TV show.

16 Q And it's not necessarily that the person, the
17 questioner or the other person talking to the child
18 wants to suggest something to them. It may happen
19 based on how the questions or how the conversation
20 takes place?

21 A Right. It would be the interviewers leading
22 this. There have been highly publicized cases, 25/30
23 years ago in California where that was an issue.

24 Q You are talking about the daycare cases?

25 A Yes. That was back sort of in the beginning

1 when research was coming in but it is nowhere near as
2 refined as now.

3 Q Was the daycare cases where the children had
4 claimed abuse and studies ended up showing that it was
5 the way the questions were going and there was a lot
6 of suggestiveness that took place in the questioning?

7 A As I recall, it was in a daycare case in
8 California. The questioning was flawed.

9 Q That led to kind of refining, as you use the
10 word, how you ask these questions?

11 A That itself didn't lead to the refining. It
12 was an ongoing process.

13 Q Research was done based on that?

14 A Research was being done. That was like a
15 side thing. It was not like that this was a wake-up
16 call to anybody. People were very aware. The reason
17 that I stopped doing forensics was just because it was
18 too time-consuming. It's just -- the way I was doing
19 it, it was really important. In my mind, there was
20 obviously no room for even a little bit of error.

21 Q Okay.

22 A The stakes were too high for everybody.

23 Q Okay. My last point is you obviously have
24 been well educated in doing this kind of work for a
25 long period of time, right?

1 A I am old.

2 Q I did not mean to say you were old.

3 A I am fine with that. Wisdom comes with that.

4 Q The mistakes of a young man. My point is
5 that your experience as an expert and as a clinician
6 requires you to apply all of your knowledge and
7 experience in information you would get in a
8 particular case with a patient, right?

9 A Correct.

10 Q It is not the situation where you would be
11 able -- you're going to meet with a child or a person,
12 find out the things that you believe you need to find
13 out to formulate opinions consistent with your
14 training before you would render an opinion. Isn't
15 that right?

16 A Correct.

17 Q Like most experts or doctors are not going to
18 just say I know what this piece of information, not
19 have gotten a history, not have spoken to the person
20 or other people and then say I can make a conclusion
21 based on this piece of information?

22 A Correct. Again, I am not offering an opinion
23 about the occurrence of abuse or not here.

24 Q I understand that.

25 A I am just giving educational material.

1 Q Obviously, the big elephant in the room would
2 be you give educational material. You, yourself,
3 wouldn't take information that you have given so far
4 and apply it alone, the limited information you have
5 given today, and use only that to make a diagnosis or
6 a determination about what has happened. You would
7 find out more information, wouldn't you?

8 A You would find information specific to the
9 case. I do think what I'm sharing today is very
10 helpful.

11 Q Sure.

12 A The things I am sharing, the general public
13 don't know. They shouldn't know. There is no reason
14 for them to know it. The professionals would know it.
15 If I were sitting on a jury, and say delayed
16 reporting, and I did not understand that this was
17 common, I might think, whoa, is this youngster lying.
18 I think offering the jury information that helps them
19 render a decision that they think is right.

20 Q My question is you are offering information
21 about topics that they might not know about. That's
22 what you just described.

23 A Yes, sir.

24 Q What I am saying is even though you know that
25 information, you could not simply take that piece of

1 information and look at a case and say based on that
2 information, I can make my decision. You need more
3 information than what you described.

4 **A** Yes, sir.

5 **Q** Okay.

6 **A** Although the information I am giving is very
7 important.

8 **Q** Sure. I am not trying to undermine the
9 information being important. But it's the complete
10 picture I guess is what I'm getting at.

11 **A** You want to know the specifics about a
12 specific case.

13 **Q** Right. You need to -- for a person with your
14 skill, you need to apply all the knowledge that you
15 have that you have not imparted to the jury today. You
16 have much more knowledge than what you've imparted,
17 correct?

18 **A** Yes, sir.

19 **Q** You need all of that to be able to evaluate
20 all the information that you might eventually take on?

21 **A** I would take all the information that I could
22 get.

23 **MR. SCALZO:** Thank you.

24 **MRS. SUSTAKOVITCH:** Your Honor, may we
25 briefly approach? And the State is through with

1 this witness.

2 **THE COURT:** All right, ma'am, you may step
3 down.

4 **THE WITNESS:** Thank you.

5 (WHEREUPON, a bench conference is held off the
6 record at approximately 10:10 AM.)

7 (WHEREUPON, the bench conference concludes at
8 approximately 10:11 AM.)

9 **THE COURT:** Ladies and Gentlemen, we're going
10 to take a short break. We'll have a little more
11 evidence for you in just a few minutes. You all
12 can step back into the jury room.

13 (WHEREUPON, the jury exit at approximately
14 10:11 AM.)

15 **THE COURT:** Okay.

16 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.
17 Judge, the State has, just for the record, we're
18 going to stop it at 20:19. I don't know if
19 defense counsel reviewed it. I believe that's
20 what it goes beyond Your Honor ruling.

21 **MR. SCALZO:** I think that is the right area,
22 Judge.

23 **THE COURT:** Okay.

24 (WHEREUPON, there is a short recess at
25 approximately 10:12 AM.)

1 (WHEREUPON, the Court resumes at approximately
2 10:25 AM.)

3 **THE COURT:** Bring the jury in.

4 (WHEREUPON, the jury enters at approximately
5 10:25 AM.)

6 **MRS. SUSTAKOVITCH:** Thank you, Your Honor. The
7 State calls Christine Carlberg.

8 **CHRISTINE CARLBERG,**
9 is first duly sworn and then testifies as follow:

10 **THE CLERK:** Would you please state your
11 name?

12 **THE WITNESS:** Christine Carlberg.

13 **THE CLERK:** Thank you.

14 **DIRECT EXAMINATION**

15 **BY MRS. SUSTAKOVITCH:**

16 **Q** Where are you currently employed?

17 **A** I am employed with the Greenville Department
18 of Mental Health.

19 **Q** And what is your position with the Department
20 of Mental Health?

21 **A** I am a forensic interviewer.

22 **Q** Describe for the jury what is a forensic
23 interviewer. What does that mean?

24 **A** A forensic interview is a non-leading
25 developmentally appropriate method of gathering

1 information from a child. It usually takes place in a
2 child friendly setting. It is just a way for a child
3 to tell what happened to them.

4 Q Can you explain to the jury your work
5 experience and training that allows you to be a
6 forensic interviewer? Or you can start with just your
7 general work experience and training. We'll go into
8 forensic interviewing.

9 A I have been conducting forensic interviews
10 since May 2000 and have been doing them since -- I
11 have done over 1300 interviews. My, uh, training has
12 been -- I been to nationally recognized training
13 facilities for forensic interviewing. One called
14 Corner House which is in Minneapolis. I've been
15 through another one called Finding Words in
16 Mississippi. I've also been through Finding Words
17 here in South Carolina.

18 Q And in those training courses, what are you
19 learning in those courses?

20 A We learn about child development, how to ask
21 questions, uh, information a child of a certain age
22 should be able to share with us. We also learn about
23 the protocol that we use called RATAC.

24 Q All right. We're going to go into that in a
25 moment. But first, have you had occasion to consult

1 with other professionals in your field related to
2 forensic interviewing?

3 A Yes, ma'am.

4 Q And going to RATAC, can you explain what is
5 RATAC?

6 A RATAC is a semi-structural protocol that we
7 use consisting of 5 steps. Rapport, uh, -- it's
8 rapport, anatomy identification, touch inquiry, abuse
9 scenario and closure.

10 Q And RATAC is acronym that forensic -- when
11 you are trained in forensic interviewing, it is kind
12 of what you follow when you go through the interview,
13 is that correct?

14 A Yes, ma'am.

15 Q Is RATAC the method generally accepted in
16 your field of expertise?

17 A It is generally used in most of the children
18 advocacy centers around the nation. I would say half
19 of more of the children advocacy centers in the United
20 States use the RATAC method.

21 Q Have you read articles on RATAC that are
22 subject to peer review?

23 A Yes, ma'am.

24 Q I believe you did state that when you have
25 gone to the trainings at Corner House and then Finding

1 Words in Mississippi and in South Carolina, have you
2 received training on the RATAC method at those
3 training sessions?

4 A Yes, ma'am.

5 Q Have you -- how many forensics have you done
6 in your --

7 A Over 1300.

8 Q Have you ever testified in the courts of this
9 state?

10 A Yes, ma'am.

11 Q How many times have you testified?

12 A About 10 times.

13 Q Have you been qualified as an expert in the
14 field of forensic interviewing?

15 A Yes, ma'am.

16 MRS. SUSTAKOVITCH: At this time, the State
17 moves to admit this witness as an expert in
18 forensic interviewing.

19 MR. SCALZO: No objection, Judge.

20 THE COURT: All right.

21 BY MRS. SUSTAKOVITCH:

22 Q Did you have occasion to do a forensic
23 interview on the victim in this case, JW

24 A Yes, ma'am.

25 Q What date did you do that?

1 A I interviewed her on August 23rd, 2007.

2 Q How did JW come to you? How was she
3 referred to you?

4 A She was referring to us by Detective Bobby
5 Bradford with the Greenville Police Department.

6 Q In doing a forensic interview, is it fair to
7 say it's a tool, it's a step in the process, correct?

8 A Yes, ma'am.

9 Q Where did this interview take place?

10 A It took place at the Rape, Greenville Rape
11 Crisis and Child Abuse Center on White Horse Road.

12 Q How old was JW at the time that you did
13 this interview?

14 A She was 11.

15 Q This would have been two years and a couple
16 of months ago?

17 A Yes, ma'am.

18 Q Did you make an audio recording of the
19 interview?

20 A An audio and video recording.

21 Q I am showing you what is marked as State's
22 Exhibit 11. This is the cover of the video that has
23 been placed into the computer. You recognize this
24 cover?

25 A Yes, ma'am.

1 **Q** What is that cover?

2 **A** This is the cover that we store our CDs in.
3 This is the cover for JW DVD.

4 **Q** Have you viewed and watched this DVD prior to
5 court?

6 **A** Yes, ma'am.

7 **A** Yes.

8 **Q** Is this DVD a fair and accurate
9 representation of the video, the interview you had
10 with JW in August of 2007?

11 **A** Yes, ma'am.

12 **Q** Does there appear to be any alterations or
13 deletions in the video?

14 **A** No, ma'am.

15 **MRS. SUSTAKOVITCH:** At this time, the State
16 moves to admit this video and publish to the
17 jury.

18 **MR. SCALZO:** Subject to my prior objections,
19 Judge.

20 **THE COURT:** And subject to my prior rulings.

21 (WHEREUPON, State's Exhibit 11 is played for the
22 jury at approximately 10:31 AM.)

23 (WHEREUPON, State's Exhibit 11 concludes at
24 approximately 10:51 AM.)

25 **BY MRS. SUSTAKOVITCH:**

1 **Q** Mrs. Carlberg, just to clarify for the jury.
2 When JW was stating that there was up and down,
3 were you able to determine what she was meaning? I
4 believe she stated that she was on her side, he was
5 behind her. How did you interpret what she was trying
6 to talk about?

7 **MR. SCALZO:** Objection.

8 **THE COURT:** Sustained.

9 **MRS. SUSTAKOVITCH:** Okay. I am sorry.

10 **BY MRS. SUSTAKOVITCH:**

11 **Q** Was the victim's disclosure in your opinion
12 coherent and consistent as a forensic interviewer?

13 **MR. SCALZO:** Objection.

14 **THE COURT:** Sustained.

15 **BY MRS. SUSTAKOVITCH:**

16 **Q** Mrs. Carlberg, after you've completed this
17 forensic interview, it was turned over to Bobby
18 Bradford?

19 **A** Yes, ma'am.

20 **Q** All right. Please answer any questions
21 defense counsel has.

22 **CROSS-EXAMINATION**

23 **BY MR. SCALZO:**

24 **Q** Mrs. Carlberg, you described the RATA
25 method, the acronym?

1 A Yes, sir.

2 Q But you say the Corner Stone and Finding
3 Words, that's your training to actually do the RATAC
4 method, correct?

5 A Yes, sir.

6 Q The RATAC method, the word "protocol" has
7 been used in this trial as well. Is it a protocol as
8 to how you are supposed to conduct these kinds of
9 interviews?

10 A Yes, sir.

11 Q The purpose of the protocol is -- were you in
12 here when Mrs. Hutton testified?

13 A Yes, sir.

14 Q She mentioned, she used the word "clean", uh,
15 interview?

16 A Yes, sir.

17 Q Is that indeed the purpose of your training
18 is to make sure that you can get the information from
19 the child without actually giving information to the
20 child?

21 A Yes, sir.

22 Q The rapport, anatomy, all the words that go
23 along with that acronym all are working together to do
24 that. Not you give information but you get
25 information?

1 A Yes, sir.

2 Q Now, have you been trained or learned about
3 why that is, why it is necessary for you to follow the
4 protocol as opposed to using some other method?

5 A Yes, sir.

6 Q Is that because if you give information,
7 particularly with children, it is easily suggestible?
8 They are easily suggestible.

9 A Children suggestible as are some adults. But
10 yeah, you don't want to provide information that they
11 haven't.

12 Q Okay. And, uh, your interview of her was, I
13 think you said, in August of 2007, right?

14 A Yes, sir.

15 Q The 23rd?

16 A Yes, sir.

17 Q That was the only interview of her by you?

18 A Yes, sir.

19 Q Did you speak with her family members before
20 you interviewed her or after your interviewed her?

21 A I gathered background information from her
22 mother before I interviewed her.

23 Q Before you interviewed her. Without going
24 into what she specifically said to you but the subject
25 matter, are you trying to find out the basic

1 allegation at that point?

2 **A** I get just basic background information plus
3 the allegations that the caregiver knows about.

4 **Q** Did you find out how many times they might
5 have talked about it or who else she talked to about
6 the allegation?

7 **MRS. SUSTAKOVITCH:** Your Honor, objection.
8 Hearsay. He is going into the background
9 testimony Anna Grady gave, not what JW told
10 this witness.

11 **MR. SCALZO:** I did not ask her what it was, I
12 asked if she found out.

13 **THE COURT:** Ask the question again please.

14 **MR. SCALZO:** Did you find out in talking with
15 the family whether or not or how many times they
16 had discussions about this topic. That is a
17 better question.

18 **THE COURT:** Okay.

19 **THE WITNESS:** Uh, she --

20 **BY MR. SCALZO:**

21 **Q** At this point, maybe yes or no. Did you find
22 out how many times they might have talked about it?

23 **A** About the specific allegations?

24 **Q** Yes.

25 **A** Uh, I don't think so.

1 **Q** Okay.

2 **MR. SCALZO:** That is all I have, judge.

3 **MRS. SUSTAKOVITCH:** Nothing further from this
4 witness.

5 **THE COURT:** You can step down, ma'am.

6 **MRS. SUSTAKOVITCH:** Your Honor, at this time,
7 the State would rest.

8 **THE COURT:** Ladies and Gentlemen, I would ask
9 you to step back into the jury room for just a
10 few minutes. We will have you back out here
11 shortly.

12 (WHEREUPON, the jury exit at approximately
13 10:57 AM.)

14 **THE COURT:** All right, Mr. Scalzo.

15 **MR. SCALZO:** Your Honor, before I get into my
16 motions, I just want to clarify, State's Exhibit
17 11 which is the video we were watching has been
18 moved into evidence but my understanding of your
19 rulings have been it should be redacted. It
20 stopped at an appropriate time, I think,
21 consistent with your ruling. My concern is is
22 that that going to go back with the jury if it
23 has not been redacted.

24 **THE COURT:** Nope.

25 **MR. SCALZO:** Thank you. I just wanted to

1 make sure my issue is preserved. Judge, at this
2 time it's obviously an appropriate time for
3 motions. I renew my prior motions and I would
4 ask for a directed verdict.

5 **THE COURT:** I deny the motions.

6 **MR. SCALZO:** Your Honor, obviously, this is a
7 point in time where it would be convenient to
8 discuss Mr. Whitner testifying. I would ask Your
9 Honor to make a ruling on what might be
10 admissible as far as his prior record and then
11 allow me to speak with him to make sure he
12 understands what he will have to do as far as
13 answering your questions in regard to testifying.

14 **THE COURT:** Okay.

15 **MRS. SUSTAKOVITCH:** Your Honor, the State
16 finds Possession with Intent to Distribute
17 Cocaine that would be admissible. That is the
18 only prior conviction that we find. That, I
19 believe, is December 1999. It is just barely in
20 the ten-year limit.

21 **THE COURT:** That is the date of the
22 conviction?

23 **MRS. SUSTAKOVITCH:** Yes, sir.

24 **THE COURT:** When was his sentence?

25 **MRS. SUSTAKOVITCH:** I'm sorry. He got five

1 years probation I believe.

2 **THE COURT:** Possession with intent to
3 distribute what?

4 **MRS. SUSTAKOVITCH:** Cocaine.

5 **THE COURT:** Okay. Was his probation ever
6 revoked.

7 **MRS. SUSTAKOVITCH:** I believe it was, yes,
8 sir. It was. It was revoked actually in 2000.

9 **MR. SCALZO:** Your Honor, 10 suspended to one,
10 balance with five years probation. He had
11 probation.

12 **THE COURT:** It is well within the 10 years.
13 All right.

14 **MR. SCALZO:** If I could have a minute to make
15 sure he is prepared to answer your questions,
16 Judge. I think that would be the only issue.

17 **THE COURT:** Okay. Before you begin that
18 discussion, let me ask you a question or two.

19 **MR. SCALZO:** Sure.

20 **THE COURT:** You have talked to him before
21 today about his right to remain silent and also
22 his right to testify?

23 **MR. SCALZO:** Yes, sir.

24 **THE COURT:** When you had those discussions
25 with him in the past, were you satisfied that he

1 understood what you were telling him?

2 **MR. SCALZO:** Yes, sir.

3 **THE COURT:** Take your time now. If you need
4 to go back into the conference room to have this
5 discussion, you certainly can. If you want to
6 just do it there, it's up to you.

7 **MR. SCALZO:** I think I should be able to do
8 it here. Thank you, Judge. (Pause).

9 **MRS. SUSTAKOVITCH:** Your Honor, may I step
10 outside the door for just one second.

11 **THE COURT:** You may.

12 (WHEREUPON, there is a short recess at
13 approximately 10:56 PM.)

14 (WHEREUPON, the Court resumes at approximately
15 11:09 AM.)

16 **THE COURT:** Now that all the evidence has
17 been all been entered or the State has completed
18 all its evidence, have you now had a chance to
19 discuss with your client his right to remain
20 silent and also his right to testify in light of
21 the way the case has progressed so far?

22 **MR. SCALZO:** Yes, sir.

23 **THE COURT:** Do you feel that he understands
24 both of those rights?

25 **MR. SCALZO:** I do.

1 **THE COURT:** Do you need any more time to talk
2 to him about that now?

3 **MR. SCALZO:** Not about that.

4 **THE COURT:** Mr. Whitner, please stand. Raise
5 your right hand.

6 (WHEREUPON, Mr. Whitner is first duly sworn.)

7 **THE COURT:** You can put your hand down. You
8 have heard me talking with Mr. Scalzo about his
9 discussions with you about your right to testify
10 and also about your right to remain silent,
11 correct?

12 **MR. WHITNER:** Yes, sir.

13 **THE COURT:** You have those discussions with
14 him as he described them?

15 **MR. WHITNER:** Yes, sir.

16 **THE COURT:** And did you understand what he was
17 explaining to you about those two rights?

18 **MR. WHITNER:** Yes, sir.

19 **THE COURT:** I'm going to go over it with you
20 myself for just a minute. I want to make sure
21 for myself that you understand. You have the
22 right to remain silent. That means that no one
23 can make you or no one can compel you to testify
24 in the trial of this case.

25 If you choose to remain silent, in other

1 words, if you choose not to testify, then I will
2 explain to the jury in very clear terms that this
3 is a constitutional right that you have and that
4 the exercise of that right can not be used
5 against you. I will not even allow the jury to
6 discuss in the jury room the fact that you did
7 not testify.

8 On the other hand, if you choose to testify,
9 you have the right to do so. You would take the
10 stand. You will be cross-examined just as you
11 have seen these other witnesses cross-examine.
12 We already had a discussion about the possibility
13 that the conviction that you have for Possession
14 with Intent to Distribute Cocaine could be used
15 during your cross-examination to impeach you or
16 to attack your credibility as a witness. Do you
17 understand everything that I have just explained
18 to you about those two rights?

19 **MR. WHITNER:** Yes, sir.

20 **THE COURT:** You should listen carefully to
21 the advice that Mr. Scalzo has given you or might
22 give you now about whether or not to testify.
23 But ultimately, it is your decision as to whether
24 or not you should testify or whether or not you
25 will testify. Do you understand that?

1 **MR. WHITNER:** Yes, sir.

2 **THE COURT:** Have you had all the time you need
3 to make up your mind about whether or not you
4 wish to testify?

5 **MR. WHITNER:** Yes, sir.

6 **THE COURT:** Then tell me what is your
7 decision?

8 **MR. WHITNER:** I choose not to.

9 **THE COURT:** You choose not to testify?

10 **MR. WHITNER:** Yes.

11 **THE COURT:** All right. You can be seated.

12 Mr. Scalzo, do you have any other evidence
13 that you would like to put up?

14 **MR. SCALZO:** Yes, there is an issue about the
15 incarceration. We talked about this earlier in
16 the trial. That would be the only additional
17 evidence. My understanding from Mrs.

18 Sustakovitch is that she's not going to require a
19 custodian of records from either jail here in
20 Greenville or the Department of Corrections. I
21 have two documents, one from each department.

22 I also did a timeline that I have given to
23 Mrs. Sustakovitch. I think it is easier for the
24 jury to understand from compared to the actual
25 documents. The documents don't say anything

1 about what he was in for. It just gives the time
2 in and the time out. If there is no objection, I
3 would rather have that timeline put in as opposed
4 to a more complicated document.

5 **THE COURT:** Do you have any objection to the
6 timeline?

7 **MR. SUSTAKOVITCH:** Your Honor, I haven't --

8 **MR. SCALZO:** Your Honor, I could give you a
9 copy if you want to see it.

10 **THE COURT:** I don't need to see it unless
11 there is an objection to it.

12 **MRS. SUSTAKOVITCH:** I don't have an objection
13 to this.

14 **THE COURT:** You can mark it as an exhibit and
15 introduce it. That is all you are going to do.

16 **MR. SCALZO:** That is all I needed to do,
17 Judge. I have one that we can give as the actual
18 piece of evidence. I did have copies. I don't
19 know how the State or the Court feel, like, they
20 only want one copy in and or multiple copies in
21 just for ease of discussion.

22 **MRS. SUSTAKOVITCH:** I did want to state one
23 thing for the record. Mr. Scalzo and I talked at
24 length about this. He is not trying to claim an
25 alibi is my understanding. He's not trying to say

1 that was never a time that he was, it was
2 impossible for him to have committed this crime.
3 I have not checked all the dates that he is
4 trying to do on this. I'm trusting as an Officer
5 of the Court that he's got it right. I have no
6 reason to not believe they are.

7 I'm just saying he has asserted to me there
8 is no alibi defense that he is trying to put in
9 here. He is trying to say some of the days he
10 was in jail. His time for possibly doing this
11 was cut down out of a three-year period. If that
12 is the purpose that that timeline is being put
13 in, I don't have an objection.

14 **MR. SCALZO:** That relates to the pretrial
15 motions I had about asking that the State be more
16 specific about the time that we -- if there, in
17 fact, was an alibi, it was something we could
18 deal with. But the State -- you've already ruled
19 on it. But that's kind of where it is coming
20 from.

21 **THE COURT:** Okay. That was a very
22 interesting discussion. I don't think that there
23 is anything in it for me to rule on. I am ready
24 to proceed. We will probably than just bring the
25 jury out, you can introduce that exhibit and

1 publish it as you desire and then we will go
2 right into closing arguments.

3 MR. SCALZO: I put on here, Judge, just so
4 that I make sure I don't say something I'm not
5 supposed to be saying. On this form, it says
6 GCDC and SCDC. Can I simply say this is
7 Defendant's Exhibit 1 and say SCDC stands for the
8 South Carolina Department of Corrections or do
9 you want to do it from the --

10 THE COURT: Do you mind if he gives that
11 explanation from the jury as to what the --

12 MRS. SUSTAKOVITCH: No.

13 THE COURT: All right. You can --

14 MR. SCALZO: Those are the only two things I
15 would say.

16 THE COURT: You could take a moment to explain
17 the form and what it shows.

18 MR. SCALZO: Thank you, Judge.

19 THE COURT: Basically that is a stipulation.

20 MR. SCALZO: Essentially, yes.

21 THE COURT: That he is -- it is a stipulation
22 that the information shown in that exhibit is
23 true.

24 MRS. SUSTAKOVITCH: As to that charge, yes.

25 THE COURT: I will include in the charge then

1 something about the stipulation. You can call it
2 a stipulation.

3 **MR. SCALZO:** Okay.

4 **MRS. SUSTAKOVITCH:** Your Honor, my only last
5 question is have you decided on those charges?
6 My biggest concern is the charge as it relates to
7 that time is not an element of CSC. It looks
8 like they are very focused on it. I think it is
9 critical for the jury to understand that is not
10 the issue. We do not have to prove --

11 **THE COURT:** You can explain that to them. I
12 am not going to charge the jury a concept of law
13 that relates to sufficiency of the indictment.
14 That is not a matter for the jury to be charged
15 on. So, no, I am not going to charge that. I am
16 not going to charge voluntary intoxication.
17 Unless I am mistaken, there is no evidence in the
18 record that there was any intoxication.

19 **MRS. SUSTAKOVITCH:** My position would be it
20 definitely is in the record. This tape, his
21 reason for doing is he was out of his mind on
22 four different drugs.

23 **THE COURT:** He said that on the tape?

24 **MRS. SUSTAKOVITCH:** Yes, sir. It is replete
25 with the drug monster did this, I was on four

1 drugs, that wasn't your daddy.

2 **THE COURT:** All right. What can you say
3 about that?

4 **MR. SCALZO:** I can tell the Court I don't
5 intend to argue that he is putting up a defense
6 that it happened --

7 **THE COURT:** All right. If it is in that tape,
8 I will charge voluntary intoxication.

9 **MR. SCALZO:** I would object. My ground would
10 simply be that it is not off -- the defense is
11 not offering the defense of voluntary
12 intoxication. It simply is going to have to be a
13 defense of it happened or it didn't happened, not
14 that it happened and I have a justification. That
15 would be my grounds for the objection.

16 **THE COURT:** I understand. All right. I am
17 not charging that the testimony of the victim
18 need not be corroborated. I am not going to
19 charge, as I already said, the time.

20 **MRS. SUSTAKOVITCH:** Last question, does Your
21 Honor charge both hesitate and reasonable doubt?

22 **THE COURT:** Usually. As long as you don't
23 quote it during your argument. I will change it
24 if you do that.

25 **MRS. SUSTAKOVITCH:** Do you say something kind

1 of close?

2 THE COURT: You will be fine.

3 MRS. SUSTAKOVITCH: Thank you, Judge. Okay,
4 are you ready? So Solicitor has first argument.
5 Mr. Scalzo then makes his argument and the
6 solicitor can reply.

7 MRS. SUSTAKOVITCH: I'm going to waive
8 opening on the law so you know. I just want the
9 final argument.

10 THE COURT: Waive opening on the law? What
11 does that mean?

12 MRS. SUSTAKOVITCH: My understanding is --
13 I'm not going to take a first argument. I'm just
14 going to --

15 THE COURT: Oh, you're not going to take first
16 argument. I just always wondered what that
17 phrase "waive opening on the law" meant.
18 Everybody who has used in front of me for all
19 these years, I have asked and nobody knows what
20 it means.

21 MRS. SUSTAKOVITCH: I just want him to go
22 first and me finish.

23 THE COURT: You want to go last is what you
24 would like to do. You have any objection to
25 that?

1 **MR. SCALZO:** Well, I have a general
2 objection. I think that is not fair and I think
3 it is a violation of due process and his ability
4 to rebut because the State gets to go last and
5 they are the ones bringing the case. I understand
6 the case law but I just think that is an
7 incorrect rule. The State brought the case.

8 **THE COURT:** Let's just change it then.

9 **MR. SCALZO:** That's what I am asking Your
10 Honor to do.

11 **MRS. SUSTAKOVITCH:** You don't need to hear
12 from me, right?

13 **MR. SCALZO:** Particularly in a case where all
14 you have is one piece of evidence.

15 **THE COURT:** She has -- that is why -- you are
16 giving up final argument for a -- I don't know
17 that it is all that big of a deal. Lawyers seem
18 to think that it is. You are making a choice.
19 It is your choice. If you put in that evidence,
20 she gets the right to, at a minimum, reply to
21 your argument.

22 **MR. SCALZO:** Sure. I understand that. It
23 certainly can be done. I think it is more
24 consistent with due process to be done the way
25 federal court does it. The State goes first,

1 defense goes last and then there is rebuttal.
2 That handles the concern that if they don't have
3 the opportunity to rebut something that has been
4 brought out as far as evidence goes. I think
5 that's more consistent with due process.

6 THE COURT: I agree with Mr. Scalzo.

7 MRS. SUSTAKOVITCH: Your Honor, the State's
8 position would be if he puts in evidence in his
9 case, he loses final argument.

10 THE COURT: I agree with you on that. He
11 loses final argument. But the question though
12 that the defense bar just can't get ahold of as
13 an important question has never been really
14 resolved. Does that mean that the State does not
15 have to make its opening argument in full? It
16 does not. Nobody has ever said that.

17 MRS. SUSTAKOVITCH: Okay.

18 MR. SCALZO: I guess I didn't understand what
19 Your Honor was asking earlier on about opening.
20 You are talking about opening on the law when
21 she --

22 THE COURT: There's no such thing as opening
23 on the law. That is a phrase that some judge
24 wrote 100 years ago and lawyers have been
25 repeating it with no idea what it means for all

1 these years. It means nothing. It means
2 absolutely nothing. The question is does the
3 State have to make an opening argument on the
4 facts.

5 **MR. SCALZO:** I guess I am asserting that the
6 State does unless we were talking about opening
7 on the law versus opening on the facts. I think
8 the State should open in full first. Was I not
9 clear about that, Judge?

10 **THE COURT:** No, I thought you were.

11 **MR. SCALZO:** Okay.

12 **MRS. SUSTAKOVITCH:** Your Honor, do you need to
13 hear from me? I would just say that the State
14 would like to, since the defense counsel is
15 putting in this incarceration evidence, we would
16 like to have last argument.

17 **THE COURT:** You get a reply argument.

18 **MRS. SUSTAKOVITCH:** Our reply argument will be
19 our only argument.

20 **THE COURT:** Okay.

21 **MRS. SUSTAKOVITCH:** Can we get JW Your
22 Honor, before we bring the jury in?

23 **THE COURT:** Since I'm the one that raised
24 this ruckus, I'm going to let you do your
25 argument last. You didn't really --

1 **MR. SCALZO:** You talking to me, Judge, or
2 Mrs. Sustakovitch?

3 **THE COURT:** Mrs. Sustakovitch. You can argue
4 first. But one of these days, though somebody --
5 I hint at this in every trial. One of these
6 days, somebody's going to make a motion to
7 require the State to open fully on the facts
8 despite --

9 **MR. SCALZO:** Didn't I just do that, Judge?

10 **THE COURT:** No, you just halfway responded to
11 what I said.

12 **MR. SCALZO:** Okay. I thought that was what I
13 was doing.

14 (WHEREUPON, there is a pause.)

15 **MRS. SUSTAKOVITCH:** Your Honor, she'd rather
16 be outside so we're going to keep her outside.

17 **THE COURT:** Okay. So I am going to allow the
18 State to refrain from making its initial factual
19 closing argument, allow the defense to proceed
20 with its closing argument first and then the
21 State argument can be made last. Okay. In
22 accordance with the tradition in this State that
23 nobody understands where it came from or why we
24 keep it. But nevertheless, I'm just going to do
25 it because somebody else did it. That's the only

1 time I will allow it.

2 Bring the jury in please.

3 MR. SCALZO: Judge, I think it goes back to an
4 1800 case. I have it in my office.

5 THE COURT: What does?

6 MR. SCALZO: That tradition.

7 THE COURT: The, uh, tradition is, uh, -- Oh,
8 okay.

9 MR. SCALZO: It recognizes the tradition.
10 That is kind of where it starts.

11 (WHEREUPON, the jury enter at approximately
12 11:28 AM.)

13 THE COURT: Mr. Scalzo.

14 MR. SCALZO: Thank you, Your Honor.

15 Ladies and Gentlemen of the Jury, I'm going
16 to introduce to you Defense Exhibit Number 1.
17 It's something that you will be able to have. I
18 want to explain two things about it. It is a
19 chart of a timeline which it says at the top.
20 There is the acronym SCDC. That stands for South
21 Carolina Department of Corrections. There is the
22 acronym GCDC which stands for Greenville County
23 Detention Center, the jail. The rest of the
24 exhibit is self-explanatory. It is something you
25 will have.

1 I will offer that into evidence, Judge.

2 **THE COURT:** Let me take a look at it.

3 **MR. SCALZO:** Sure.

4 **THE COURT:** Okay. So, Ladies and Gentlemen,
5 the exhibit that Mr. Scalzo just referred to
6 reflects a stipulation by the State and the
7 defense that the facts shown in that exhibit are
8 true. When two parties reach a stipulation as to
9 the truth of certain facts, those facts become
10 binding on you. You must accept them as true for
11 purposes of your deliberations in the case.

12 That is going to be all of the evidence that
13 you will hear in the case. We are now ready to
14 begin with closing arguments.

15 Mr. Scalzo.

16 **MR. SCALZO:** Thank you, Your Honor.

17 I can still say good morning. Obviously,
18 this is the time in the case where we can sum up,
19 make our arguments about how you should put this
20 all together. That is kind of really what we are
21 down to. What I said earlier still stands. It
22 is a difficult case. It is probably got more
23 difficult when you actually got into it. That
24 doesn't change.

25 None of us are, but you more importantly, are

1 not machines. You are human beings. We can't
2 discount that aspect of it. You are going to get
3 a charge from the judge probably more in debt
4 than you got earlier in the case. Essentially,
5 it is the same process that you are required,
6 your duty, your oath is to evaluate the evidence
7 and to determine whether or not the case, the
8 allegation that has been brought by the State has
9 been proven beyond a reasonable doubt.

10 It sounds very clean and almost easy but it
11 isn't. Evaluating evidence, particularly in a
12 case like this, is not easy to do. What I am
13 going to try to do in this argument, this
14 discussion with you, is to go through some of the
15 evidence and talk about what we learned or what
16 questions might have been raised, to kind of talk
17 a little bit.

18 So, a couple of things. I think what I was
19 trying to accomplish in my questioning was to
20 figure some things out and try to assist you, try
21 to get some information that might not have been
22 presented if the State just gave its own
23 presentation, its own version. I think that
24 maybe even starting from the end of the trial and
25 working backwards to the videotape that you saw

1 of the forensic interview is a good place to
2 start with what I am talking about.

3 As I watched the forensic interview, the
4 first thing I can tell you that jumped out is it
5 gave you the opportunity to assess JW in two
6 different settings. There was the videotape,
7 August 23, 2007, two years ago and then there was
8 her yesterday. What you all have to do is
9 obviously evaluate her in both settings. It is
10 not simply that she testified today. It is not
11 simply that she gave that forensic interview. It
12 is the combination of those two things. You have
13 to evaluate what was said, demeanor, and all of
14 that in both settings. They are both evidence.

15 Some of the things I will point out about
16 that interview that was in contrast to the
17 testimony was Mrs. Carlberg was sitting there
18 when they first started interviewing, building a
19 little rapport and asked her who she lived with
20 and things like that. Then she got to a point
21 when she said do you know why you are here.

22 JW said because of my dad.

23 Then, Mrs. Carlberg asked a little more, tell
24 me more about that. If you will notice, the way
25 that JW -- she started, went on, told the

1 whole thing and then stopped. Which was a little
2 bit different in the way she did -- in other
3 words, Mrs. Sustakovitch didn't ask her tell us
4 about it. She started, went all the way through
5 and stopped. It kind of had to flow from
6 multiple questions.

7 The other thing was there was a difference in
8 emotion in terms of how JW expressed her
9 emotion on the stand versus in the video that you
10 will have to assess. One of the difficulties, I
11 think it was kind of explained by a question from
12 Mrs. Sustakovitch is JW was emotional. She
13 was scared from what I think Mrs. Sustakovitch
14 asked her about, being scared to testify. One of
15 the things you have to sort through is how much
16 of her emotion was actually from sitting there in
17 front of you, in front of all of these people and
18 how much of that had to do with what the emotion
19 that came from the incident that she alleges. You
20 have the benefit of having a video from two years
21 ago when you can look at the two. I would
22 encourage you to do that.

23 Another issue that I think the video helps to
24 bring about is -- let me find it in my notes. To
25 me, the biggest difference in what was testified

1 to yesterday and what was said in the video was
2 the standing, sitting, kneeling. Talking about
3 this oral sex allegation. They are very distinct
4 positions. They almost can be easily overlooked.

5 Remember that she is alleging that she is
6 five or six years old. That is her allegation.
7 The oddest allegation is that he is an adult. He
8 is not much different than he is now in terms of
9 his size. She obviously would have been much
10 different in height between five and six years
11 old and the 11, 12, 13-year-old that you saw. I
12 think that is significant. You do have to
13 evaluate, as the State said, what are the core
14 details.

15 Part of what they are trying to present to
16 you is that there are this core set of things
17 that you're supposed to rely upon. That is why
18 it is a reliable statement. That is what they
19 were trying to bring to you. And is that really
20 a peripheral thing? It is really just kind of
21 core more than it is peripheral. It is not her
22 describing the bed sheets were black or white.
23 That is pretty irrelevant in terms of whether or
24 not she has a memory of that. Kneeling, sitting,
25 standing, I think, is a little bit more core.

1 I will point you to the point in the trial
2 where you have to evaluate. The point in the
3 trial where she said standing was yesterday. She
4 was being asked by the prosecutor about the
5 event. She said she was standing up when he did
6 it. I think that was the word that she used.
7 Today, when you watched the video, what you saw
8 was at, I wrote down nine minutes, 37 seconds,
9 that she was talking about Mrs. Carlberg's
10 question, answer her question. I was on my knees.
11 Had to bend down. What she described in the
12 video was that, she was saying that in order to
13 be in the position to do what he was supposedly
14 asking her to do that she had to change the
15 possession of her body.

16 That would make more sense now because of her
17 height. It made little sense as a five or six-
18 year-old. The kneeling versus the standing makes
19 less sense. A kneeling five-year-old is not
20 going to be able to reach the midsection of a
21 grown man. Again, that, you have to take that
22 evaluation and you have the advantage of having
23 what was said years ago basically at the initial
24 allegation and then what was said yesterday.

25 The falling asleep, I thought -- and she did

1 say falling asleep in both the video as well as
2 on the stand. You have to evaluate that as well.
3 It is a little bit strange because what the State
4 is saying is that these core facts, core
5 indicators or whatever the term is that they
6 used, all they are saying, the argument to you is
7 believe this.

8 She is saying she is falling asleep, waking
9 up, falling asleep, waking up. We all know that
10 it is certainly possible that at that time, we
11 may not be fully aware of what is going on, that
12 is really what is happening. Is that in and of
13 itself proof that she has an actual memory? Is
14 it not an actual memory? Where does that come
15 from? I don't know. It really wasn't something
16 she was able to explain or may not even
17 understand.

18 It is something that you have to evaluate
19 because like the kneeling, standing, sitting, it
20 is something more objective than this is what I
21 say my memory is or what I believe my memory is.
22 It does deal with the heights. There is not a
23 memory about the height. That is a little more
24 tangible. That is important as well.

25 One of the things that came out of this

1 trial, some of the testimony was -- again, maybe
2 working backwards. We talked about
3 suggestibility. I talked with a forensic
4 interviewer, Mrs. Hutton, about that. There
5 clearly is, through training and experience in
6 this area, a great effort placed on the people
7 who do this to be concerned about that, to be
8 concerned about the memory of the child, the fact
9 that they can be susceptible to suggestion.

10 As I asked Mrs. Hutton, it is not even that
11 it has to be purposeful. It is not that someone
12 has to set them down and say I am purposely
13 telling you you have to have this memory even
14 though I know is false. It can be developed is
15 essentially what she was describing. It is sort
16 of a risk that you take if you do not view it in
17 the correct way.

18 I think that was important because when you
19 compare and, I guess, contrast how JW was
20 handled by some professionals, primarily Mrs.
21 Carlberg, and how we could have expected her to
22 be handled by family or nonprofessionals. One of
23 the things that stood out in the trial from the
24 fact is that her mother asked her and the other
25 children since she was three years old if anybody

1 had touched her. This was -- whether it was
2 monthly or whether it was, uh, it happened often
3 enough that it might be characterized as monthly.
4 JW even confirmed that it did happen quite a
5 bit.

6 You have to take that piece of evidence and
7 figure out what does that mean in the broader
8 spectrum of what is going on. I am not saying
9 that it means that Anna Grady was saying JW
10 here is what the story should be and really
11 purposely are sling it out. But what we don't
12 know is how that memory was really is formed.
13 That really wasn't described.

14 Mrs. Hutton didn't evaluate her. The
15 testimony of Mrs. Hutton gives you these
16 indicators that she was talking about, delayed
17 reporting and things of that nature. She was
18 trying to educate you on some of the sort of
19 topics of child sexual abuse in the interviewing.
20 As she admitted that is not something -- you are
21 not now experts in evaluating children for child
22 sexual abuse in the way that she is. That is not
23 the education that she was bringing to you.

24 So how that memory came to be developed from
25 a clinical standpoint is not something that they

1 brought out. Certainly they are saying JW
2 testified that this is what her memory is, but it
3 hasn't been evaluated from a clinical standpoint.
4 Now you have the factual evaluation that you are
5 now going to do. You have to look at what are
6 the facts that are surrounding it.

7 Again, we could go back to the internal
8 coherence that was talked about. What does
9 internal coherence mean? Well, you would think
10 that it would go back to the standing, kneeling,
11 sitting on the bed or on the floor. That is
12 certainly a pretty important piece of evidence
13 that is surrounding in terms of coherence. The
14 way that, the color of the sheets may not factor
15 in.

16 Another area is related to the timeline.
17 That was put in evidence. You will be able to
18 better see it when you go in to deliberate. But
19 what you will see is there are periods of time
20 where Samuel Whitner is incarcerated, whether it
21 is in the jail or whether it's in the Department
22 of Corrections. The range go from December 10,
23 1999 on this timeline to December 1, 2003. The
24 allegation, what you have in the indictment is
25 December 28, 2000 to December 28, 2002. That the

1 fifth birthday through sixth birthday for
2 JW

3 What you will notice when you look at this is
4 there are periods of time, long periods of time
5 in some instances where he simply was
6 incarcerated. There is a total at the bottom, it
7 says the total time period between those days is
8 1453 days. He was incarcerated 946 of those
9 days. There are 507 days that are free. He was
10 free. It can be further narrowed because there
11 was testimony about Aunt Sharon, Aunt Sand's
12 house. That was testimony about her living there
13 in 2001. The Pasadena house, I guess, is how it
14 had been described. JW I believe,
15 yesterday said it was Pasadena house.

16 Now, we have narrowed it from 2001 and kind
17 of going forward even though the allegation goes
18 to 2002. Why? She said five or six. So the
19 State put in there five. Which gets us back to
20 another issue about memory of one incident. I
21 think that was very important as well that there
22 was one incident alleged as opposed to multiple
23 incidents.

24 The experts said, hey, what I've found is
25 when there are these multiple incidents, that it

1 is not uncommon for parts of them, the
2 peripheral, the outer edges to be kind of
3 forgotten or mixed up and the person can't
4 remember it was May of 2000 versus September of
5 2000 because it happened so often that they all
6 work together.

7 You don't have that in this case. You have
8 one allegation on one day, one night which again
9 raises the issue of the inability to remember
10 beyond five or six years old as the timeframe.
11 Was it wintertime? Was it summertime? Was it
12 cold? Was it not cold? Was it near somebody's
13 birthday? Was it near Christmas? It does not have
14 to be and we are not arguing that any child, let
15 alone JW should be held to be able to say
16 on December the 5th. It's not literal. That
17 would be an unfair thing to require of an adult
18 rather than a child.

19 However, it's not only JW There is an
20 investigation. There are groups of adults
21 involved in this who could provide assistance in
22 trying to narrow down this timeframe into a more
23 specific time than a year. We might be talking
24 differently if we were talking about multiple
25 alleged incidents of abuse. We are talking about

1 one. If essentially what the State is going to
2 argue to you is that she is believable because of
3 the core facts that she is telling you, the sort
4 of consistency of it, I guess, is what they might
5 argue, I don't know how you could ignore the
6 inability to remember some connection in time.

7 It does not have to be, like I said, a
8 specific date but some connection in time that
9 gives you a season, that gives you close to a
10 holiday, close to an event in life that even an
11 11-year-old or 12-year-old can formulate. Again,
12 your job is to evaluate credibility. Those are
13 some of the facts or assertions that have been
14 made. That works into this whole thing.

15 Because, and perhaps the State may argue -- I
16 don't know. They go after I do. I don't think it
17 is a fair argument. I don't think that you
18 should let them get away with the idea that
19 simply because you are shown that he was
20 incarcerated on these days therefore, she must be
21 talking about another date when he wasn't
22 incarcerated. That is kind of circular. That is
23 not proof. That is your guess that it must have
24 been on that date.

25 What we are saying is remember the State has

1 bought the case. The reason the State brings the
2 case is because the government doesn't -- the
3 Constitution, I should say -- recognizes that it
4 is not fair to say you prove the negative. We
5 say you did something, now you prove that you did
6 not do it. No, it is the reverse.

7 We say you did something. Part of saying you
8 did something involves these allegations. Part
9 of the responsibility is you need to be clear
10 about when you are saying this happened. When
11 you hear the elements of the crime as the judge
12 describes it, it may not have time involved in
13 it. It is going to talk about what is called a
14 sexual battery. The age of the child is probably
15 the closest thing to time that was discussed.
16 That is an element of the crime. The State has
17 to prove beyond a reasonable doubt that the child
18 was below a certain age.

19 Just like motive is not a specific element in
20 a murder case, it is relevant from a factual
21 standpoint, from a believability standpoint about
22 what is going on, the time, I think, in this case
23 is pretty relevant about what had happened in
24 light of the fact that you have evidence of, in
25 essence, the possibility of him having done it

1 during 946 days out of 1400.

2 You can narrow that even more. If it
3 happened at Pasadena as JW said, you are
4 talking about 2001. So you have lost a year in
5 the allegation. Now, you are down to 356 days of
6 the year 2001 to 2002 that is alleged where he in
7 fact was incarcerated. I'm not saying -- you
8 will see with the timeline, it does not say that
9 he was incarcerated the entire time of that year.

10 But again, I don't think with the burden of
11 proof and the way that it is required that that
12 means that the proof that she said it somehow
13 means that must have happened on a day when he
14 was not incarcerated. The State needs to prove
15 when it happened as part of the believability of
16 the case. I think that needs, that is why this
17 piece of evidence that we introduced is important
18 in evaluating what has been described to you.

19 Clearly, in, uh, -- bear with me one moment.
20 I want to write something down. I don't want to
21 forget it. Clearly, it's something we don't
22 know, it may not be something we can know because
23 of the time that has passed but it sounds, from
24 the testimony of JW as well as Anna and the
25 other evidence, that this may have been a

1 difficult time period for JW separate from
2 the allegation of abuse.

3 The mom and dad don't live together. There
4 is shuffling back and forth. She does stay with
5 her aunt. Clearly, her dad had problems at the
6 time. What is going on for her during that period
7 of time emotionally has not been evaluated and
8 presented. I don't know what it means. There is
9 not evidence of it here. But because it has not
10 been presented does not automatically mean that
11 it is not potentially an explanation. Again,
12 that goes to what the State has to prove. They
13 have to prove that there aren't any other
14 explanations. That is part of the process is
15 about. Again, you don't have to prove the
16 negative.

17 I believe the judge is going to talk to you
18 about, as judges of the facts, it is in your
19 purview, your control to believe all of what one
20 witness says, all of what another witness says,
21 none of what one witness says, part. In other
22 words, you are not bound to say if I believe
23 JW I have to believe everything JW
24 says, take it or leave it, or Mrs. Carlberg,
25 everything she said, taking it or leave it. That

1 is not how it works. You can say I believe this
2 part, I don't believe that part or I believe all
3 of it or I believe none of it. That is where
4 your realm is as far as what you are in control
5 of.

6 For instance, you may believe oral sex did
7 happen. You may believe oral sex did not happen.
8 You may believe a rubbing took place. You may
9 believe it didn't take place. You may believe
10 none of it ever took place. You can break it up.

11 One of the concepts that the judge is going
12 to explain to you is sexual battery. Sexual
13 battery requires penetration. Part of what is
14 necessary for you to figure out is what aspect of
15 the allegation you actually believe versus what
16 you don't. If you do not believe oral sex took
17 place, then that is not a battery. A battery is
18 going to require penetration.

19 Again, it goes back to there are relevant
20 facts that play into that in terms of evaluating
21 memory. I am not sure you have enough
22 information to evaluate memory. You may feel you
23 do. But, if you go on the State's own principles
24 of core facts, the one thing that does stand out
25 is the sitting, standing, kneeling side of

1 things.

2 There are in the audio -- excuse me -- places
3 where Mrs. Carlberg is trying to in an
4 appropriate way, not an inappropriate way, but
5 the right way trying to get information to come
6 out. Not a whole lot really does. When you look
7 at the video, if you notice, the most information
8 comes in the very first blurb. When Mrs.
9 Carlberg asked JW what did your dad do or
10 why are you here, and she starts with well I was
11 about five or six years old. There was no
12 questions in between. She goes for a very long
13 period of time and just blurts out a lot of
14 facts. Okay. It is a stream.

15 After that, there is not a whole lot of --
16 she answers questions, not to say she did not
17 answer questions but there was never a long, as
18 long of a discussion. They don't really have a
19 long discussion. She answers the question and
20 Mrs. Carlberg tries to come up with another
21 question to help understand. I am not saying
22 that that is sinister or that she somehow was
23 trying to be evasive.

24 But there is a test of memory that is going
25 on here, whether it is a memory or whether it is

1 something you believe happened. You would have
2 to take some of the reality facts that you know.
3 That is why I think the standing, sitting is an
4 important tool with potential memory problems.
5 That is part of what your job is.

6 And at the end of the day, proof beyond a
7 reasonable doubt is not fancy. It is not
8 something off my sleeve. It is not a trick. It
9 is a way to make sure that it is not a mistake.
10 It is not an assumption. It is not purely gut
11 feeling about something. It is really actually
12 based on evidence, things that can be taken,
13 brought to you and you then evaluate and put the
14 pieces together and say now they do add up beyond
15 a reasonable doubt. It is not something I think
16 happened or I have a hunch that it happened.

17 What I am asking you to do in evaluating this
18 case is to do with all the evidence some of what
19 I have been doing with the small pieces of it.
20 It is certainly too much to go over in fine
21 detail. That is going to be your job. I trust
22 that if you do do that, at the end of the day,
23 you're going to find a just and fair verdict in
24 this case. I turn that over to you.

25 **MRS. SUSTAKOVITCH:** May it please the Court.

1 Good afternoon. I have a few notes with me
2 if you don't mind. What we are doing here is so
3 important I want to make sure that I remember
4 everything that I need to talk to you about. Do
5 you remember yesterday when you heard the words
6 "don't want to be here"? Do you remember the
7 young girl who spoke them, JW

8 Defense counsel spent a good bit of time
9 discussing the difference between Jazmine
10 yesterday and on the video. Do you know what the
11 biggest difference was between sitting in a
12 little room with a lady on a chair and yesterday?
13 It's right here. JW testified she had not
14 seen her father in over two years. She told you
15 she loves him. She does still love him according
16 to her testimony.

17 What is this case about? This case is about
18 a little girl who was sexually assaulted. The
19 issue in this case is do you believe, do you
20 believe her that she was sexually assaulted
21 between those ages, five, six by her biological
22 father. This case was about letting that little
23 girl know that she was right to tell an adult,
24 that she was right to get help.

25 **MR. SCALZO:** Judge, I'm going to object.

1 That's playing on the passage of the jury to say
2 the case is about letting her know that she did
3 the right thing.

4 **MRS. SUSTAKOVITCH:** Your Honor, I am moving
5 along.

6 **THE COURT:** Let me see you all up here for a
7 moment please.

8 (WHEREUPON, a bench conference is held off the
9 record at approximately 12:03 PM.)

10 (WHEREUPON, the bench conference concludes at
11 approximately 12:04 PM.)

12 **THE COURT:** Ladies and Gentlemen, let me take
13 just a moment. We always hate to interrupt a
14 lawyer during their closing argument which Mrs.
15 Sustakovitch understands. I don't mean to be
16 criticizing anybody in saying this. I'm just
17 letting you know as I think is obvious, your job
18 in this case is to determine the facts but really
19 to determine whether or not the State has proven
20 the elements that I will give you in a few
21 minutes of the crime beyond a reasonable doubt.

22 During closing arguments, it is the job of
23 the lawyers to argue to you as to how you should
24 interpret the facts. In doing so, they use
25 examples, they use illusions, they use metaphors,

1 other things of this nature try to illustrate to
2 you ways that you should think about the facts
3 and get you to adopt their version of the facts.
4 Your focus is on the facts. The focus is on
5 whether or not the State has proven the elements
6 of the crime beyond a reasonable doubt.

7 Mrs. Sustakovitch, you can continue.

8 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.

9 My next issue was exactly that, reasonable
10 doubt. I told you at the beginning of this
11 trial, we welcome that burden. It is a
12 significant important tenant in the criminal
13 justice system. This courtroom is about justice.
14 The State should meet that burden in each and
15 every case that we have. I submit to you in this
16 case the State has met that burden. The defense
17 attorney's job is to zealously defend their
18 client. My job is to present to you the
19 evidence.

20 What is reasonable doubt? Judge Few is going
21 to talk to you about that. Just briefly, there
22 is nothing in life that you're going to know with
23 all certainty. That is not what the State has to
24 prove. It is a reasonable doubt. Essentially,
25 as you sit there, you should be firmly convinced

1 that this Defendant had his daughter to perform
2 oral sex on him. That is the bottom line. Do
3 you believe the State proved that?

4 I want to go back to the Criminal Sexual
5 Conduct and make sure that just a few issues are
6 clear with you as jurors. One thing I guess the
7 defense counsel and I would agree on is when he
8 was discussing time. I want to make sure it is
9 clear. Time is not an element of CSC with a
10 minor. We do not have to prove what date this
11 happened on with this child.

12 The reason we get long time frames is
13 children don't know. You saw the testimony. This
14 child does not know. Isn't that more believable
15 than if she came in and there is no -- if she
16 came in and said it is exactly this date? She
17 does not know. Time is not -- and I want to put
18 that over here. That is not the guts of what you
19 have to determine.

20 As defense counsel was showing you this
21 timeline, we both agree there is a timeline that
22 he was incarcerated in different SC, the South
23 Carolina Department of Corrections and the
24 Greenville Detention Center. The bottom line is
25 during that two-year window, JW birthday

1 is in December of 2000 -- excuse me. Her date of
2 birth is [REDACTED]. She turned 5 December
3 2000. From 2000 to 2001, she was in
4 kindergarten. She was five years old. 2001 to
5 December 2002, she was in first grade, six years
6 old. I will submit to you that is not the guts
7 of what you have to determine. We don't have to
8 prove the date.

9 The other issue that I would say is we have
10 to prove a sexual battery. The State is not
11 alleging any penetration whatsoever in this case.
12 Sexual battery in this case -- sexual battery
13 comes in several ways. As I told you at the
14 beginning, it could be anal intercourse with a
15 child, vaginal or penile intercourse with a child
16 or engaging in oral sex. That is what your
17 sexual battery is.

18 So distilling this down, it goes back to what
19 I said in the beginning. Do you believe that
20 JW was telling you the truth? That is
21 basically what this boils down to in many senses.
22 It comes down to credibility and if you believed
23 her, what you heard is a horrible crime against a
24 little girl.

25 In Criminal Sexual Conduct cases, the State

1 can go forward and you could convict on the
2 uncorroborated testimony of a victim alone. That
3 is the starting point of a CSC. That is not what
4 you have in this case. You could have heard just
5 JW and that could have been it. The State
6 has provided you much more than just that.

7 When you assess her credibility, I say to you
8 consider what she is getting out of this. You
9 all come to this with her common sense. I
10 believe you can all assess the pain that was
11 evident in this courtroom from having to testify
12 against her father. What results have happened
13 to her by telling this terrible secret? She's
14 had to go through the system. She's had to have
15 pelvic exams. She had to go talk to a lady,
16 somebody she don't know in a room and give
17 embarrassing information. She had to come in
18 front of you and talk about all that and face her
19 own father in this courtroom.

20 It is important -- you talk about JW
21 memory. There was testimony about the fact that
22 JW was sexually assaulted once, she did not
23 disclose. She kept it to herself. She testified
24 to you she didn't even know it was wrong. She
25 didn't know what to make of it. The years go on

1 and she testified -- defense counsel asked her
2 did you think about it after you read this little
3 book. She's like no, I actually thought about it
4 off and on. It made me sad.

5 Essentially, it was something that followed
6 the child until eventually, one day, just by
7 chance, her mother checks out a book. A
8 triggering event for her. She read to you the
9 page that stuck out to her, would you keep it a
10 secret if someone touched you in a way that made
11 you feel uncomfortable and all yucky inside.
12 This kind of secret is a bad secret. It means you
13 need to get the help of a grownup so you can feel
14 better.

15 When you listen to this tape -- I thought
16 about going back and playing segments. But
17 frankly, you heard it yesterday, you read it. I
18 trust that you all recall what was said. You can
19 listen to this tape 20 times if you want to but
20 the words on the tape don't change. You won't be
21 taking the transcripts back but you can listen to
22 this to infinity.

23 One striking thing on that tape that stuck
24 out to me is when JW said, daddy, I just
25 have one more question. When granddaddy did that

1 to you, did it make you feel sticky inside? Did
2 it make you feel sticky inside? He said what.
3 He said did it make you feel that way. She said
4 I just feel sticky inside. He said yeah, it made
5 me want to blow my brains out, it was gross. It
6 is gross. It's a terrible thing.

7 You go back to the testimony of her
8 disclosure. You heard, as is common in these
9 cases, it's like a nuclear bomb goes off. A
10 child says her father made her perform oral sex
11 on him. That's awful. So the mom, at this point,
12 she said okay, you tell him you remember. That
13 was her gut reaction, you tell him you remember.

14 There is testimony that JW confronted
15 him on the phone. He says I did not do it. The
16 mother gets on, he denies it too. At that point,
17 she tells her husband Jeff. JW -- you heard
18 the testimony and you heard the mother on the
19 tape. She is crying a lot. She is upset. She
20 now has told her father this big secret that was
21 eating at her. He said no.

22 As parents, they say their testimony was they
23 needed to get to the bottom of it. They could
24 not let her go back over there and not know.
25 Ladies and Gentlemen, Jeff Grady told you he was

1 not prepared for this. Who would be? You heard
2 they started recording some calls. You heard the
3 mom's call.

4 I submit to you her demeanor, she is very
5 similar on the phone as she is in here. Very
6 laid-back, I guess, demeanor. It just Anna
7 Grady. She talks about how she is not going to
8 be enough for her daughter. The child is going
9 to need counseling. She is not going to be
10 enough to get her through it. Clearly, the
11 conversations are about disclosure. That is what
12 is going on.

13 So, then, you get to this big moment. I am
14 going to hit some highlights of it. He goes on
15 and on to make sure no one is listening, right
16 JW You don't have me on speakerphone,
17 right. It is just you and me. I'm your dad. We
18 going to keep this between us. You heard the
19 testimony that he was sexually assaulted as a
20 child. If that is true, that is a terrible
21 thing. But it does not excuse. It may explain
22 better why this happened. It does not excuse it.

23 I submit to you as you sat there and listen
24 to it, it is sad. It is pitiful. It is a crime.
25 He goes on and on, a mistake is a mistake. Do

1 you hear me? I cried. Do you hear me? You
2 don't remember me crying?

3 You go back to JW in her forensic
4 interview consistently recalling. She did not
5 know what was going on. She didn't even realize
6 it was wrong. She said daddy, it is okay. I do
7 forgive you. He is corroborating on the phone a
8 confession to the event itself. It goes on and
9 on and on and on.

10 Key points in it. It goes on to pretty much
11 explain it if you believe him. Again, if you were
12 sexually assaulted, it was a horrible thing. He
13 goes on to explain that his father did that to
14 him. He got on drugs really bad. It drove me to
15 a point where I was on drugs. It was bad. When
16 the incident, what happened to you, I was high of
17 my mind. I was tore up on Valium, cocaine, weed,
18 alcohol and everything. So that was not your
19 daddy, do you hear me? Uh-huh. That was
20 somebody totally out of their mind and out of
21 everything because I never took you through that
22 again, did I? Nope. According to JW he
23 didn't. The State does not believe that he did.

24 It goes on and on. She asked -- he asked for
25 forgiveness. He says I am responsible, you hear

1 me? I'm the one who has to deal with everything.
2 I am the one who's got to take what is coming.
3 This call explains a lot of the circumstances
4 surrounding it. You will hear Judge Few. It may
5 have hit you as it did me which is sad and
6 pitiful.

7 Judge Few will instruct you that voluntary
8 intoxication is not a defense to a crime in South
9 Carolina. It could help explain it but
10 ultimately there is responsibility. Your job as
11 sworn jurors is to determine do you believe
12 JW was telling you the truth that she was
13 sexually assaulted.

14 This was a difficult trial. At the beginning
15 of it, I told you that it was going to be hard to
16 listen to some portions of it. There is no
17 winner in this. This was not a great day. But
18 at the end of this trial, justice has to prevail.
19 The State has met its burden. We have proven
20 beyond a reasonable doubt that what this little
21 girl said happened happened. I ask now that you
22 return a verdict that speaks justice. Thank you.

23 **THE COURT:** Ladies and Gentlemen, now that
24 you have heard the evidence and the arguments of
25 the attorneys, it becomes my responsibility to

1 explain to you the law that is applicable in this
2 case. Under our Constitution Code of Laws here
3 in South Carolina, only the jury can make the
4 findings of fact. I am not permitted to indicate
5 to you how I might feel about the facts. If I
6 had said anything or if I have done anything
7 during the course of this trial that might lead
8 you to believe that I have an opinion about the
9 facts, you should disregard that.

10 To determine the facts, you will have to
11 evaluate the credibility which of course means
12 the believability of the witnesses who have been
13 called to testify. Some of the things you might
14 wish to consider as you decide whether to believe
15 that particular witness' testimony includes the
16 following: the manner and appearance of the
17 witnesses who testified; was he or she
18 straightforward or hesitate in answering
19 questions; was the testimony of a witness
20 consistent or inconsistent; how did witness come
21 to know the facts that he or she is testifying to
22 and what is that witness' ability to know those
23 facts; is there some reason that a witness would
24 want to give testimony that would help or hurt
25 one side or the other; is the testimony of the

1 witnesses strengthened or weakened by the
2 testimony and evidence?

3 As members of the jury, you can believe as
4 much or as little of each witness' testimony as
5 you believe it is appropriate to do. You can
6 believe the testimony of one witness against all
7 the rest of them and you can do just the
8 opposite. You are not required to accept
9 testimony as true even if it is uncontradicted.

10 You have heard the testimony of an expert
11 witness. Expert witnesses are those witnesses
12 who have special knowledge, skill, experience or
13 education in a particular profession or
14 occupation. Because of those special
15 qualifications, experts are allowed to give
16 opinions as to matters within their area of
17 expertise. In determining the weight of opinions
18 to be given by experts, you should consider the
19 qualifications and the credibility of the expert
20 and the reasons given for her opinions. You are
21 not bound by the opinion of an expert. Give it
22 the weight that you believe it should receive.

23 The same Constitution and Code of Laws that
24 make you the exclusive judges of the facts also
25 makes me the exclusive judge of the law. If you

1 have some idea as to what the law is or what the
2 law should be and that differs from what I now
3 tell you the law is, then you are obligated under
4 the oath that you have taken as jurors to set
5 your notion of the law aside and to accept and
6 apply the law precisely as I now explain it to
7 you.

8 The fact that the Defendant was arrested and
9 charged and indicted in this case is not evidence
10 and can not be considered by you in any way as
11 evidence of the Defendant's guilt. Nor does it
12 create any assumption or inference of guilt. The
13 indictment is simply the formal written
14 instrument that contains the charges that have
15 been made against the Defendant. It serves to
16 process the case and bring it into this court for
17 trial. The Defendant has pled not guilty to this
18 indictment. The plea of not guilty cast the
19 burden on the State to prove the Defendant guilty
20 beyond a reasonable doubt.

21 A person charged with a crime in South
22 Carolina is never required to prove themselves
23 innocent. It is a very important rule of law in
24 our country that a Defendant in a criminal trial
25 will always be presumed to be innocent of the

1 crimes with which he has been charged unless and
2 until his guilt has been proven by evidence that
3 satisfies you of that guilt beyond a reasonable
4 doubt.

5 As I mentioned to you the other day, this is
6 the presumption of innocence. The presumption of
7 innocence is not merely a legal theory or a legal
8 phrase. It is a substantial constitutional right
9 to which every Defendant is entitled. The
10 presumption of innocence accompanies the
11 Defendant from the time he is charged, throughout
12 the trial and into the jury room until you have
13 reached a verdict of guilt that is based on
14 evidence that has satisfied you of that guilt
15 beyond a reasonable doubt.

16 Ladies and Gentlemen, I instruct you and I
17 emphasize to you that the fact that the Defendant
18 did not testify in this trial cannot be
19 considered by you in any manner during your
20 deliberations. The Defendant has a
21 constitutional right to remain silent. The
22 exercise of that right can not and must not be
23 held against the Defendant.

24 Under the oath that you have taken as jurors,
25 you are to draw no inference and no conclusion

1 whatsoever from the fact that the Defendant did
2 not testify. Do not even discuss this in the
3 jury room. The burden of proof remains on the
4 State. The Defendant does not have to prove
5 anything.

6 A reasonable doubt is a doubt which makes an
7 honest, sincere, conscientious juror in search of
8 the truth in the case to hesitate to act. A
9 reasonable doubt must there -- I'm sorry. Proof
10 beyond a reasonable doubt must therefore be proof
11 of such a convincing character that a reasonable
12 person would not hesitate to rely on it and act
13 on it in the most important of his or her own
14 affairs. Proof beyond a reasonable doubt can
15 also be described as proof that leaves you firmly
16 convinced of the Defendant's guilt.

17 There are very few things in this world that
18 we know with absolute certainty. In criminal
19 cases, the law does not require proof that
20 overcomes every possible doubt. If, based on
21 your consideration of the evidence, you are
22 firmly convinced that the Defendant is guilty of
23 the crime charged, you must find him guilty. On
24 the other hand, if you think there is a real
25 possibility that he is not guilty, you must give

1 him the benefit of the doubt and find him not
2 guilty.

3 The State has charged the Defendant with
4 Criminal Sexual Conduct of a minor in the first
5 degree. In order to convict the Defendant of
6 this crime, the State must prove two elements,
7 each beyond a reasonable doubt. The first
8 element which the State must prove is that the
9 Defendant engaged in sexual battery with the
10 victim. Our code of laws define sexual battery
11 to include sexual intercourse, cunnilingus,
12 fellatio, anal intercourse or any intrusion,
13 however slight of any part of a person's body or
14 of any object into the genital or anal openings
15 of another person's body except when such
16 intrusion is accomplished for medically
17 recognized treatment or diagnostic purposes.
18 This definition does include oral sex. The
19 second element which the State must prove is that
20 the victim at the time was less than 11 years
21 old. Voluntary intoxication is not a defense.

22 Ladies and Gentlemen, your verdict in this
23 case must be unanimous. All 12 of you must agree
24 before you can write a verdict. In just a
25 moment, I'm going to send you back into the jury

1 room. Please do not begin your deliberations. I
2 have some matters of law that I need to take up
3 with the attorneys.

4 While I'm doing that, I would like for you
5 all to select a foreperson to serve the jury.
6 The job of the foreperson is to preside over the
7 deliberations and then when it becomes necessary
8 to do so, to communicate with me and those
9 communications will have to be in writing.

10 One of the times that you have the
11 communicate with me is when you have reached a
12 verdict. You will have with you in the jury room
13 the indictment. On the back of the indictment in
14 the lower left corner, you will see the word
15 "verdict". Below that word there are four blank
16 lines.

17 On one of those blank lines, the foreperson
18 would write the unanimous verdict of the jury.
19 Your verdict options are either guilty or not
20 guilty. The foreperson should then sign it and
21 date it and notify the bailiff that you have a
22 verdict. We will get you back out here in the
23 courtroom to receive your verdict.

24 One of the exhibits that has been introduced
25 is the video and audio recording of the interview

1 that has been referred to, I think as the, uh,
2 -- what did you call it?

3 **MRS. SUSTAKOVITCH:** Forensic interview..

4 **THE COURT:** Forensic interview. You will not
5 have that tape with you in the jury room. If you
6 want to see it, you just need to let us know.
7 We'll get you back out here into the courtroom
8 and let you see it in here. We got might not be
9 able to do that immediately as soon as you
10 request it but we will get it done shortly.

11 It is lunchtime. I have instructed the
12 bailiffs to get you some menus. When you go back
13 into the jury room, they will have them.

14 Do you have them?

15 They will have menus from the Savory Corner.
16 You can order yourself a sandwich. We should
17 have it here in about 45 minutes. You can eat
18 it. In the meantime, you can begin deliberating.
19 Don't begin deliberating until I have sent back
20 to the jury room the exhibits that have been
21 introduced and the indictment. At that time, the
22 bailiff will let you know that you can begin. If
23 you tell us who the foreperson is going to be, we
24 will put that on the record.

25 All right. Mrs. Kramer, if you will remain

1 in your seat.

2 The rest of you can go back to the jury room.

3 (WHEREUPON, the jury exit at approximately
4 12:27 PM.)

5 THE COURT: Can you put Ms. Kramer in the
6 other jury room?

7 Ma'am, they are going to go ahead and get you
8 a menu. You can order some lunch. I'm going to
9 need you to stick around with us. Please don't
10 talk about the case to anybody. We'll get back
11 with you shortly. They will get you some lunch.
12 If you need something to read or whatever it is
13 you need, they will get it for you. All right.

14 THE JUROR: Yes, sir.

15 THE COURT: Thank you.

16 Any exceptions to the charge?

17 (WHEREUPON, the juror exits at approximately
18 12:28 PM.)

19 MRS. SUSTAKOVITCH: No, sir.

20 MR. SCALZO: The only exception is regarding
21 voluntary intoxication, Judge, --

22 THE COURT: Okay.

23 MR. SCALZO: -- that we discussed earlier.

24 THE COURT: All right. I want you all to
25 agree on what is the proper set of exhibits.

Jury Charge

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1 Then, as soon as you have done that and they told
2 us who the foreperson is, we will send them back.
3 You all, if you would like, can go get some
4 lunch. Just make sure that your cell phone
5 numbers are with the Clerk of Court. We will
6 call you if we need you. Let's get the exhibits
7 done first. Here is the indictment. I will be
8 right back to put this on the record.

9 (WHEREUPON, deliberations begin at approximately
10 12:29 PM.)

11 (WHEREUPON, the Court resumes at approximately
12 12:31 PM.)

13 THE COURT: Have you all agreed on the
14 exhibits?

15 MR. SCALZO: Yes, sir.

16 THE COURT: Okay. As soon as they tell you
17 who the foreperson is, you can give them the
18 exhibits. You have the indictment?

19 MR. SCALZO: The indictment is next to the
20 Court Reporter.

21 THE COURT: As soon as they tell you who the
22 foreperson is, you can give them the exhibits and
23 the indictment. Tell them they can begin their
24 deliberations. We'll be in recess until we hear
25 further from the jury.

1 (WHEREUPON, a recess is taken at approximately
2 12:32 PM.)

3 (WHEREUPON, the Court resumes at approximately
4 2:00 PM.)

5 THE COURT: We have a verdict as I am sure
6 you all know. So we will bring in the jury. Are
7 you ready?

8 MRS. SUSTAKOVITCH: Yes, sir.

9 MR. SCALZO: Yes, sir.

10 THE COURT: The foreperson is Kathleen
11 Bitsura, number 20.

12 (WHEREUPON, the jury enter at approximately
13 2:01 PM.)

14 THE COURT: Has the jury reached a verdict?

15 THE JUROR: We have, Your Honor.

16 THE COURT: Pass it to the bailiff please.

17 (WHEREUPON, the verdict is handed up.)

18 THE CLERK: Your Honor, this is case number
19 2009-GS-23-1072. The State versus Samuel Lamont
20 Whitner indictment for Criminal Sexual Conduct
21 with a minor in the first degree. The verdict is
22 guilty, Kathleen Bitsura, foreperson.

23 Is this your verdict? If so, please raise
24 your right hand.

25 (WHEREUPON, each juror raises right hand.)

1 **THE CLERK:** Thank you.

2 **THE COURT:** Thank you. Mr. Scalzo, is there
3 anything to take up at this time before we move
4 into sentencing?

5 **MR. SCALZO:** No, sir.

6 **THE COURT:** Bring him around, please.

7 **THE COURT:** Mr. Scalzo, I'm going to hand you
8 the sentencing sheet and ask you and your client
9 to review the information in the caption for its
10 accuracy. I would like for you to sign it and
11 give your client the option of signing it if he
12 would like.

13 **MRS. SUSTAKOVITCH:** Your Honor, the one thing
14 I would note, the State is not --

15 **THE COURT:** Just a minute, please.

16 **MR. SCALZO:** I just X'd mandatory GPS on the
17 sentencing sheet.

18 **MRS. SUSTAKOVITCH:** That was the question I
19 was going to raise. I did not know what Your
20 Honor's feelings was on this issue. This event
21 did occur prior to Jessie's law where GPS became
22 mandatory for sexual criminal conduct. That is
23 strictly for Your Honor to determine.

24 **THE COURT:** Is it optional or is it just
25 nonexistent?

1 **MRS. SUSTAKOVITCH:** Back prior to 2006, it
2 was not mandatory. I've seen different judges do
3 different things on that.

4 **MR. SCALZO:** I don't have the CDR code in
5 front of me. I know CDR code isn't actually the
6 law. Obviously in this case, the incident is
7 alleged to have happened in the early part of the
8 decade before the law was changed. The sentence
9 is 0 to 30 years as opposed to the current law.
10 It starts at 30 years. I don't know if the CDR
11 code that is reflected on here.

12 **THE COURT:** What is on there?

13 **MR. SCALZO:** 0385. It should not matter. The
14 statute is exactly the same. For purposes of
15 SCDC, I want to make sure that you deal with that
16 on the record.

17 **THE COURT:** That is not the right CDR code.

18 **MR. SCALZO:** Okay. Under the old statute, --
19 I've got a copy of the old statute if you want to
20 look at it. It would not have been 16-3-655(a),
21 it would be 16-3-655, I believe, (1) because they
22 changed the code.

23 **THE COURT:** All right. I don't think they
24 have the old one in the system.

25 **MR. SCALZO:** You want me to hand you the

1 statute or you are just looking for the CDR code?

2 THE COURT: I'm just looking for the CDR code.
3 You had 385?

4 MR. SCALZO: On the sentencing sheet, it's
5 0385.

6 THE COURT: Apparently, they have all the CSC
7 First on a Minor under the same CDR code. The
8 correction is not going to go under the CDR code.

9 MR. SCALZO: Okay.

10 THE COURT: All right. Let me, let me,
11 uh, --

12 MR. SCALZO: The statute would not be the
13 same, right? You see it that way, Judge? In other
14 words, we would have to correct the statute.

15 THE COURT: 655(1)?

16 MR. SCALZO: Yes. Instead of (a)(1).

17 THE COURT: All right. I have corrected that.
18 It's not mandatory GPS. Where is Jessie's law?

19 MR. SCALZO: The electronic monitoring is 23-
20 3-540.

21 THE COURT: You got it?

22 MR. SCALZO: Yeah.

23 THE COURT: Do you have the pre-2006?

24 MR. SCALZO: No, I do not. This is Jessie's
25 law. I don't know that there was --

1 **THE COURT:** Where did the GPS requirement
2 come before 2000 --

3 **MRS. SUSTAKOVITCH:** There wasn't one for CSC,
4 Lewd Act, any of that. In 2006, they made it
5 mandatory for all CSCs and all Lewd Acts.

6 **MR. SCALZO:** This was not the only statute on
7 it.

8 **THE COURT:** All right.

9 **MR. SCALZO:** Judge, do I need to put on the
10 record any objection? Are you ruling that the
11 mandatory GPS applies or does not apply?

12 **THE COURT:** I am not ruling yet. I guess I
13 will have to in a minute. That actually is a
14 question that I would plan to take under
15 advisement. That will require some study.

16 **MR. SCALZO:** Okay.

17 **THE COURT:** 17-23 what?

18 **MR. SCALZO:** That is 23-3-540.

19 **THE COURT:** 23?

20 **MR. SCALZO:** Yes.

21 **THE COURT:** All right. Anything else from the
22 State?

23 **MRS. SUSTAKOVITCH:** Yes, sir, Your Honor.

24 **THE COURT:** Any prior record?

25 **MRS. SUSTAKOVITCH:** He has the one conviction

1 in 1999 for PWID Cocaine.

2 **THE COURT:** Mr. Scalzo?

3 **MR. SCALZO:** May it please the Court, Your
4 Honor. Uh, I guess let me get some details out of
5 the way and then I will get to the meat, kind of,
6 of it. He was incarcerated from September 19,
7 2007 until May 1, 2009 when he posted bond on
8 this charge. It was the only charge he was
9 incarcerated on for that time.

10 Judge, he has two children. Obviously,
11 JW being one of them. There is an 11-year
12 old daughter, another 11-year old daughter that
13 he has as well. There are two others, children
14 in the courtroom.

15 The lady rubbing her eyes and crying is
16 Danni, his girlfriend for the last four years but
17 they've also had a relationship prior to that.
18 They lived together for the past four years. She
19 is the mother of the other 11-year old. She has
20 two other children that essentially all of her
21 children have treated him as dad. They have
22 known him as dad even if he had not been their
23 biological father.

24 Sitting next to Danni is Sharon Whitner, his
25 twin sister. His mother was here earlier. We

1 have been trying to call her to get her back. She
2 had planned on coming back. Some other family
3 members were present as well earlier.

4 Judge, you heard a lot about his history. It
5 is undisputed. I have talked to his mother even
6 earlier today. The best I could determine with
7 his family is that the abuse at the hands of his
8 father started about two years old until about 17
9 when he left the house. That was how it ended.
10 His father had custody. His mother did not.
11 They were separated at that time. He was not in
12 her custody. It was sexual abuse.

13 In the tape that you heard, his descriptions
14 of dealing with that, I think, were accurate. I
15 don't think that that was something he was
16 inventing to sort of rationalize or to create an
17 excuse. It seems to me in talking with the
18 family and in dealing with Samuel that you have
19 an emotional Samuel and you have an intellectual
20 Samuel. Usually, in people, the intellectual
21 helps be more rational. Him, it is sort of
22 reversed.

23 The emotional responses I think you get from
24 the taped conversation with JW and what you
25 saw during the trial when he wanted to stop and

1 we considered a plea and then he stopped again,
2 those were emotional responses. He knew JW
3 was going to testify. Then she was in the middle
4 of the testimony and hearing the tape. He had
5 emotional responses. His instinct was to do the
6 right thing.

7 Once his brain gets in the way, he then gets
8 trapped in what has never been a resolved issue
9 for him which is the abuse and all of the sort of
10 mis-wiring that happened in his brain. That is
11 not an excuse. I'm not offering it that way. I
12 think that you find somebody who probably deep
13 down has the desire to, in essence, acknowledge
14 but can not bring himself to do it. It is not
15 the same as what we normally think of, hey, I got
16 caught, just own up to it. It is an emotional
17 thing that he can't untangle or has not been able
18 to untangle.

19 He never really had any therapy for it. Has
20 not used drugs in a long time. I don't think he
21 ever got treatment to untangle that. I think he
22 just stopped doing it. I say all that not to
23 offer an excuse for his conduct but to help
24 understand perhaps the irrationality that we
25 observed in him.

1 I will point out that it is a situation where
2 it is agreed upon that this was one instance.
3 Whatever messed up wiring, if I could use that
4 metaphor, occurred in him did not manifest itself
5 into then becoming a person who commits this kind
6 of crime again to sort of act it out. For
7 whatever reason and it may not be understood,
8 that happened in an isolated situation.

9 Even though he struggled with the problems,
10 he did not revert to doing that as something more
11 than that one instance. The reason I point that
12 out is I think it is relevant to the kind of
13 punishment and the kind of treatment he should
14 receive obviously after this verdict. I would
15 ask you, in talking with him and talking with the
16 family, the request would be for you to consider
17 a 10-year or less sentence.

18 One of the things to point out is one is a
19 day-for-day sentence, a no offense. He
20 automatically would have community supervision.
21 We would have the sort of two-year community
22 supervision that comes along with those kinds of
23 sentences. There is a monitoring that is
24 involved with that. He has also obviously the
25 sex offender registry. That is a lifetime issue.

1 As you discussed earlier, the mandatory GPS
2 monitoring for life which you obviously said you
3 would take under advisement. That is a potential
4 in the case.

5 It appears that from a community safety
6 standpoint, I don't think you have somebody who
7 is going to go out and sort of commit this crime
8 again and therefore put the community in danger.
9 You have someone who obviously needs to fix the
10 underlying problem. That is why I put out there
11 a 10-year sentence monitoring after the fact that
12 could require, probably should require an ability
13 to address the underlying problem.

14 The community safety aspect of it, I think,
15 is diminished in this particular case as compared
16 to perhaps other cases. That would be our
17 request. I've talked to Samuel about if he
18 wanted to talk to you that you would indicate to
19 him when would be the appropriate time.

20 **MR. WHITNER:** Your Honor, I'm just right now
21 just happy for my daughter and glad that
22 everything is, a big burden has come out, come
23 out from over her and me as well. I would like
24 to say to the parents Anna and Grady that I
25 apologize for all the burdens that have caused

1 them too as well.

2 I stand here to stand full accountable for my
3 actions. That is the only way I can get pass
4 with anything and deal with everything that has
5 done happened with myself. Not using it as an
6 excuse or anything like that. I just really had
7 to get that off my chest and get that out to
8 everybody, especially my daughter.

9 **THE COURT:** Anything else?

10 **MR. WHITNER:** That is all.

11 **THE COURT:** You're not done with your
12 daughter. This is all just beating around the
13 bush.

14 **MR. WHITNER:** I don't understand.

15 **THE COURT:** She needs a straight answer.

16 **MR. WHITNER:** The straight answer is I
17 apologize for any burdens that I put upon her.
18 That's how straight I can be, Your Honor. You
19 know, uh, that I love her.

20 **THE COURT:** Why don't we take a moment and let
21 you go talk to him and then we will resume in
22 just a few minutes.

23 **MR. SCALZO:** Okay.

24 (WHEREUPON, a recess is taken at approximately
25 2:19 PM.)

1 (WHEREUPON, the Court resumes at approximately
2 2:20 PM.)

3 MR. WHITNER: I understand clearly now. I am
4 saying that I'm acknowledging full responsibility
5 for everything that was brought up on me regarding
6 JW

7 So the record what I was saying, I
8 apologize for the burden. I'm glad that this has
9 come to this for myself and my daughter.

10 THE COURT: Mr. Scalzo, I don't want to
11 question him. Is there any clarification that
12 you want to offer to what he just said?

13 MR. SCALZO: Yes, Judge. When I took him
14 back there, what I said to him is do you
15 understand that the judge was asking you? What
16 he was asking you -- you said beating around the
17 bush. I explain what beating around the bush was
18 saying you said burden. The judge is asking you
19 do you acknowledge what JW has alleged, what
20 she claimed. You said burden. That does not mean
21 you are acknowledging what she claimed. He said
22 okay, I did not understand that that is what he
23 is getting at. So to clarify, I think that is
24 what he is saying now is that he is acknowledging
25 her allegation.

THE COURT: All right. Mr. Whitner?

1 **MR. WHITNER:** Yes.

2 **THE COURT:** As you are very well aware, you
3 have the right to remain silent. Until the
4 conviction, at least until the conviction might
5 become final after a direct appeal, that right
6 remains with you. Nobody can make you talk about
7 what happened or what didn't happen but you can
8 if you want to. If you do, then it can be used
9 against you, if necessary, if there is ever a
10 retrial.

11 You bought this up. I did not intend to get
12 into this. This does not happen in sentencing
13 hearings. You bought it up. You brought it up
14 as though you wanted to do something to help your
15 daughter. You stopped the trial in the middle of
16 that tape because you did not want her to have to
17 listen and you did not want to have to listen to
18 the crux of the allegation and the details of the
19 incident.

20 You wanted, like Mr. Scalzo explained so
21 artfully in his presentation to me just a few
22 minutes ago, from an emotional standpoint, you
23 want this to be fixed somehow. But it is not
24 ever going to get any better than it is right now
25 unless you just come right out and admit that you

1 did what she said you did. You can use the word
2 acknowledge if you would like to but that does
3 not get us any farther than where we are right
4 now.

5 You can say I want to take the burdens off if
6 you want to. That is not just any farther than we
7 are right now. The only way we get farther than
8 we are right now is for you to straight up
9 straight out unequivocally admit that you did.
10 And you don't have to do that. I'm just telling
11 you. You bought it up. You don't have to do it
12 right now.

13 MR. WHITNER: Okay. I choose not to. I
14 choose not to, Your Honor. The only thing that I
15 can offer right now is what I have offered.

16 THE COURT: Okay. Is there anything further,
17 Mr. Scalzo.

18 MR. SCALZO: No, sir.

19 THE COURT: Any further, Mr. Whitner?

20 MR. SCALZO: No, sir.

21 THE COURT: The sentence is 30 years.

22 (WHEREUPON, the Defendant exits at approximately
23 2:24 PM.)

24 THE COURT: Ladies and Gentlemen, uh, we
25 appreciate your service. I'm going to ask you to

1 step back into the jury room for just a moment.
2 I'll come back and visit with you for a moment
3 and then I will dismiss you from there.

4 And ma'am, if you would like to join the jury
5 back in the back, you are welcome to do that.

6 (WHEREUPON, the jury exit at approximately
7 2:25 PM.)

8

9

(END OF PROCEEDING)

10

11

Sentencing of the Court

450

1 I, the undersigned, Teresa Johnson, Official Court
2 Reporter for the Thirteenth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete Transcript of Record of all
5 the proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Greenville, South Carolina, on this
8 5th day of February, 2010.

9 I do further certify that I am neither of kin, counsel
10 nor interest to any party hereto.

11

12

13

14

15

16

17



Teresa B. Johnson

Official Court Reporter

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL L. WHITNER,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

CHRISTOPHER D. SCALZO
Deputy Public Defender

Office of the Public Defender
13th Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

The Court of Appeals erred when it ruled that the South Carolina legislature intended for the vicarious consent exception to be included in the South Carolina wiretap statute codified in S.C. Code § 17-30-10 *et seq.*

2.

The Court of Appeals erred when it ruled that the vicarious consent exception applied in this case without first finding that appellant's daughter, the minor child J.W., lacked the capacity to consent to having her private telephone conversation tape recorded.

3.

The Court of Appeals erred when it ruled that the mother of appellant's daughter had an objectively reasonable basis for believing it was necessary to protect the best interest of the minor child by intercepting and recording her telephone conversation with appellant.

4.

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

5.

The trial court erred by ruling that the videotaped forensic interview was admissible even if it was bolstering on the grounds that the statute providing for the videotape in a child sex case took precedence over the Rules of Evidence since the

forensic interview impermissibly bolstered the child's testimony and it should have been excluded on that basis.

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That motion was granted.

This appeal follows.

ARGUMENT

1.

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

Relevant Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

¹ Section 17-30-20 states:

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

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

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

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

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

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

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

A.

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

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

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

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

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

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

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

Id. at 1544.

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

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

² Section 2511(1)(a) states:

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1991. See Heggy, 944 F.2d at 1540.⁴ The Eleventh Circuit rejected the inter-spousal exception in 2003. See Glazner, 347 F.3d at 1213.⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

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

* * *

(3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic

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

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

It is obvious that S.C. Code § 17-30-20 was taken directly from 18 U.S.C.A. §

2511, which, in relevant part, reads:

(1) Except as otherwise specifically provided in this chapter
any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

18 U.S.C.A. § 2511(1) (emphasis added).

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

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

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

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

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

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

2.

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

Relevant Facts

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

Id. at 1544, n. 8 (emphasis added).

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

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

Given that J.W. was eleven-years-old at the time of the recording it seems very likely she was capable of giving consent. An eleven-year-old child has the capacity to understand Miranda warnings given by the police as well as the capacity to subsequently voluntarily waive their Fifth Amendment right to remain silent and submit to interrogation. See In re Christopher W., 285 S.C. 329, 329-31, 329 S.E.2d 769, 769-79 (Ct. App. 1985) (applying a totality of the circumstances test). Similarly, a court, using a totality of the circumstances test, can find a minor has the capacity to understand Faretta warnings⁷ and waive the Sixth Amendment right to counsel. In re Christopher H., 359 S.C. 161, 166-70, 596 S.E.2d 500, 503-05 (Ct. App. 2004). The Fifth and Sixth Amendment rights are much more complex rights than is the right to have a private telephone conversation.

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

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

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

3.

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

Relevant Facts

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

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

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

Discussion

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

4.

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

Relevant facts

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

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

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

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

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

Discussion

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

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

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

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

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

5.

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

Relevant facts

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

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

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

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

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

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

Q. JW why don't we start with were you awaked?
Were you asleep? Where were you when this happened?

A. I was sleeping.

Q. Do you recall where you were sleeping?

A. I think it was Cricket's room.

Q. You think it was. You are not certain? Yes or no?

A. I'm not sure.

Q. All right. So you were sleeping. Was it daytime or nighttime?

A. Night.

Q. Tell me what you recall you dad doing.

A. I was sleeping and he [appellant] woke me up. He asked me did I want to meet his little friend. I was like yeah. So he turned around. Then he turned back to where I

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

R. 296, l. 24- 297, l. 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

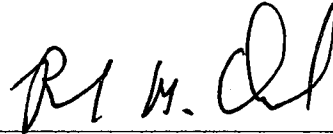
As seen, during the trial and during the forensic interview, the child went far beyond the prior consistent statement of a sexual assault victim that was limited to time and place. See State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct.App. 2002); State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct.App.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

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

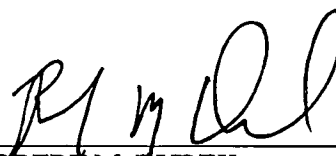
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 23rd day of June, 2011.

CERTIFICATE OF COUNSEL

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

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

ROBERT M. DUDEK
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

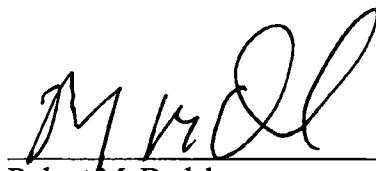
V.

SAMUEL L. WHITNER,

APPELLANT

CERTIFICATE OF SERVICE

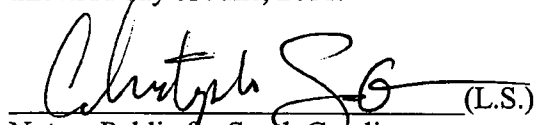
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 23rd day of June, 2011.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

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



(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 23, 2011

William M. Blitch, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Samuel L. Whitner

Dear William:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "R. M. Dudek", is placed above the printed name of the Chief Appellate Defender.

Robert M. Dudek
Chief Appellate Defender

RMD/cms

Enclosure

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL L. WHITNER,

APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185
(864) 467-8282

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. The three judge panel of the Court of Appeals sitting as the Reviewing Authority correctly determined that the exception for consent by a party included vicarious consent by a parent for a child.
- II. The Reviewing Authority correctly applied the doctrine of vicarious consent in the instant case. (Appellant's Issues 2 and 3).
- III. The Reviewing Authority did not violate Appellant's right to privacy by defining consent to include vicarious consent and allowing the recording of Appellant's conversation with the minor victim.
- IV. The videotape of the forensic interview was properly admitted and did not impermissibly bolster the minor victim's testimony.

STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter:

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

Further, the Wiretap Act provides:

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

S.C. Code Ann. § 17-30-30(C) (2002).

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

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

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

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

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

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

The federal statute reads:

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

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

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

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

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

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

Id. at 1544.

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

It is important to note both Thompson and Pollock² were decided well before the South Carolina Legislature decided to adopt almost verbatim the language used in the federal statute for section 17-30-30(C). The legislature clearly knew the interpretation of the federal statute by the courts and, as a result, made a conscious decision to adopt the language in the federal statute. This is a very clear indication the legislature intended consent in the exception of section 17-30-30(C) to include vicarious consent.

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

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

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

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

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

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

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

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

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

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

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

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

I. Capacity to Consent

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

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

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

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

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

II. Pollack Standard

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

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

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

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

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

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

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

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

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

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

The South Carolina Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

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

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

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

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

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

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

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

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

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

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

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

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175 (Supp. 2007) (emphasis added). Additionally, the South Carolina Rules of Evidence specifically state that they can be preempted by statute or other rule. See Rule 101, SCRE (“Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101.”).

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

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

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

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

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

Additionally, the statute shows the Legislature of our State has made a public policy decision that admitting evidence of the child's prior statement will be beneficial to finding the truth in sexual crimes where there is a child victim. As a result, the court need not partake of the same analysis required of other evidence, and the videotape should not be excluded on the basis that it bolstered the minor victim's testimony. See State v. Russell, 383 S.C. 447, 451, 679 S.E.2d 542, 544 (Ct. App. 2009). The videotape was properly admitted because it clearly met the requirements of section 17-23-175.³ The statute provides the sole means for admitting the videotape, and does not prohibit admission when the tape bolsters the credibility of a witness or the victim.

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

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

BY:


William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 29, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

The State,

Respondent,

v.

Samuel Lamont Whitner,

Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

By: 
WILLIAM M. BLATCH, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 29, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

The State,

Respondent,

v.

Samuel Lamont Whitner,

Appellant.

PROOF OF SERVICE

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

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

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



ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

OFFICE OF THE PUBLIC DEFENDER
13th JUDICIAL CIRCUIT
Greenville County Courthouse
305 East North Street (Rm 123)
GREENVILLE, SOUTH CAROLINA 29601

John I. Mauldin
Public Defender

TEL (864) 467-8522
FAX (864) 467-8521

July 20, 2009

The Honorable Jeanette F. Barber
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Samuel L. Whitner
Indictment No.: 2009-GS-23-01072

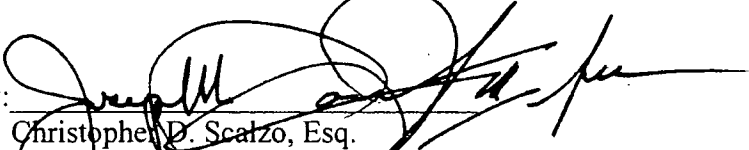
Dear Ms. Barber:

Enclosed for filing please find the original and six (6) copies of a Petitioner's Reply to the State's Response in the above referenced matter. Also enclosed please find proof of service.

Thank you for your attention to this matter.

Very truly yours,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

Christopher D. Scalzo, Esq.
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
Attorney for Petitioner

cc: Christine Kednocker Sustakovitch, Esq.
Enclosures

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
Court of General Sessions

Indictment No. 2009-GS-23-01072

The State, ... Respondent

v.

Samuel L. Whitner, ... Petitioner.

PETITIONER'S REPLY TO THE STATE'S RESPONSE

Christopher D. Scalzo, Esq.
GREENVILLE COUNTY PUBLIC DEFENDER OFFICE
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
Attorney for Petitioner

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I. PETITIONER RESPECTFULLY SUGGESTS THAT THE COURT DETERMINE FIRST WHETHER, AS A MATTER OF LAW, PRIOR CONSENT WAS OBTAINED FROM AT LEAST ONE PARTY.

The State is the party seeking admission of the August 5th Intercepted Conversation into evidence. Thus, the State has the burden of providing the Court with the proper foundation for admissibility. It is undisputed that neither party to the August 5th Intercepted Conversation gave prior consent to their private telephone conversation being intercepted. In light of this undisputed fact and the “prior consent” provision of the South Carolina Wiretap Statute, the State has argued that the Court should *adopt* a definition of the term “consent” to include the “vicarious consent” exception. That is not the law in South Carolina by the clear and unambiguous language of the statute.

As a consequence of both the State’s proposed adoption of a new definition of “consent” and the express provisions of the South Carolina Wiretap Statute, this Court is being asked to rewrite the South Carolina Wiretap Statute under the guise of statutory interpretation.

The interpretation of a statute is a matter of law to be determined by a court. Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 154, 659 S.E.2d 171 (Ct. App. 2007). The undisputed fact here is that neither party to the conversation consented to it being intercepted. Petitioner respectfully recommends that the Court first determine the matter of law through legal argument by the parties on the statute. However, should this Court adopt the new provision the State is requesting this Court read into the statute, then an evidentiary hearing would be necessary for the State to provide the proper foundation for admissibility of its evidence.

II. THE LEGAL ISSUE BEFORE THE COURT IS WHETHER CONSENT WAS OBTAINED BY AT LEAST ONE PARTY PRIOR TO THE PRIVATE TELEPHONE CONVERSATION BEING INTERCEPTED—NOT WHETHER SOUTH CAROLINA SHOULD “ADOPT” VICARIOUS CONSENT.

The State asserts the issue for the Court’s review is “whether South Carolina should *adopt* the doctrine of ‘vicarious consent’.” State’s Response at p. 1. That is not the issue before this Court. Pursuant to the South Carolina Wiretap Statute, this Court has subject matter jurisdiction as a “reviewing authority” to hear all pre-trial motions to suppress intercepted wire communications. S.C. Code Ann. §§ 17-30-15 (9) and -110 (A). In this matter, the Court sits not as an appellate court but as a trial court. Petitioner has moved this court as if it were the Circuit Judge in General Sessions: filing a pre-trial motion for an order suppressing an illegally intercepted wire communication. Petitioner has not moved the Court relative to a pending appeal. Rather he has moved this court relative to a pending trial. The contention that the issue is whether to adopt a doctrine is incorrect. The posture of this matter is a trial court review. A trial court cannot “adopt” law; it can only follow law. Hence, the correct issue for review is whether prior consent was obtained from at least one party to the intercepted telephone conversation.

This is not a distinction without a difference. The framing of the issue by the State underscores what is wrong with what the State is ultimately asking this court to do: *i.e.*, legislate policies. The Court is not conducting an appellate review of Judge C. Victor Pyle, Jr.’s pre-trial ruling. What was incorrect about Judge Pyle’s ruling was the lack of subject matter jurisdiction; it was correct on the underlying law that neither party consented. There is no South Carolina legal authority, statutory or otherwise, that permits a private telephone conversation to be intercepted without the prior consent of at least one party. By framing the issue as one of appellate review instead of a trial level review, the State is incorrectly positioning the matter to

permit the declaration of a new rule of law. A trial court does not create new law; it follows established law.

III. THE STATE IS ASKING THE COURT TO “ADOPT” A LAW THAT DOES NOT EXIST IN SOUTH CAROLINA AND THUS IS ASKING THE COURT TO ACT AS A SUPER-LEGISLATURE.

The State’s first argument in its response asserts that “South Carolina should *adopt* the doctrine of ‘vicarious consent’.” State’s Response at p. 8 (emphasis added). The State’s framing of its own argument demonstrates that what it is asking the Court to do is legislate. A trial court does not “adopt” a policy. A trial court adheres to the law set forth in statutes and case precedent. The argument that this state “should adopt the ‘vicarious consent’ doctrine” is a policy argument to be made to the legislature, not this court.

Throughout the State’s response it asks this court to make legislative policy considerations. Here are some examples.

Policy Consideration: The “Vicarious Consent” Exception is a Social Imperative.

The State argues that it is “socially imperative” to recognize the “vicarious consent” exception. State’s Response at p. 18. While a court may necessarily need to understand the legislature’s social policy considerations, it cannot create its own social policy or, on its own, “adopt” a policy on behalf of the legislature as the State is suggesting in its response. The social consequences or necessities of enacting a particular law are policy considerations for a legislature to make—not a court.

Policy Consideration: Child Sex Abuse Prosecutions Require Loosening of Privacy Protections and Constitutional Rights.

After asking the Court to “divine” the “real” purpose of the legislature—thus suggesting that the true purpose cannot be ascertained by the plain meaning of the term “prior consent”—the State proposes this court consider two additional policy concerns. First, whether the strict privacy protections of the South Carolina Wiretap Statute should be loosened in criminal prosecutions of child sexual assaults; and, second, whether the civil and criminal penalties resulting from violation of the express terms of the South Carolina Wiretap Statute should be excepted for parents or guardians of child victims in such criminal prosecutions. See State’s Response at p. 19. The State couches these policy concerns as being part of interpreting legislative intent. However, the State provides nothing to support its claim that the legislature specifically meant to address these issues over the many other circumstances (criminal, civil, and/or domestic) that would be raised by the addition of “vicarious consent” as an exception to the prior consent of at least one party requirement.

The State suggests the legislature “certainly did not intend to protect the criminal acts of defendants in child sexual assault cases, while casting aside the rights of [child victims of sexual assault].” State’s Response at p. 21. Wiretaps, in large part, involve the interception of communications involving illegal or wrongful conduct. There are legal wiretaps and illegal wiretaps. Merely positing the “protection of children” as an all encompassing rule of statutory construction—if the statute was, in fact, ambiguous—really does not advance the ball in the argument. To be blunt: you could drive a truck through the breadth of legal exceptions created by such an expansive legislative intent. Citing the concern for an alleged child victim, the State could argue that the legislature also intended exceptions to statutory protections (*e.g.*, physical and mental health records or financial records) and, most dangerously, to constitutional

protections (e.g., Fourth and Fifth Amendment rights). More importantly, though, the State is suggesting that, out of the universe of competing legislative interests, the legislature chose “vicarious consent” as the one it meant to imply but not expressly state. Can it be that the legislature considered the competing rights of potential criminal defendants and potential child sexual assault victims and then balanced those rights by using the single term “prior consent” to reflect all of its efforts and intent?

The State fails, also, to square this assertion with the legislature’s clear choice in many other circumstances to protect privacy rights over the collection and use of evidence in criminal prosecutions. The Fourth Amendment to the U.S. Constitution is a good example. Regardless of the substance of the evidence or its importance to proving guilt, suppression is required if evidence is obtained without adherence to the Fourth Amendment’s requirements. The South Carolina Constitution went a step further than the federal constitution and has provided for a right to privacy for all of its citizens, including Petitioner. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

The Fifth Amendment to the United States Constitution’s right to remain silent provides a similar example of the choice of protection of personal rights regardless of the significance of evidence to proving guilt of a crime.

The South Carolina Wiretap Statute itself provides an example of the legislature’s choice to protect the rights of the accused over the collection and use of evidence in criminal prosecutions. There are no exceptions in the South Carolina Wiretap Statute for criminal prosecutions. If a person is using a wire communication to further a criminal conspiracy, then failure to obtain prior consent or a court order to intercept will result in the suppression of that interception.

The State's argument creates a false dichotomy. It assumes that the legislature (and by implication this Court) has only one option: criminal defendants or child victims. The legislature and the courts both, within their respective spheres of authority, have protected the rights of potential criminal defendants while also protecting the rights of victims of all crimes.

IV. SOUTH CAROLINA PROVIDES A GREATER DEGREE OF PRIVACY PROTECTION THAN DOES THE FEDERAL GOVERNMENT.

The South Carolina Legislature has made a clear choice to provide a greater degree of privacy protection to its citizens than the federal government. The choice begins with the explicit language of S.C. Const. Art. 1 § 10, where the legislature took the language of the Fourth Amendment to the United States Constitution and added an express right to privacy.¹ As noted by our Supreme Court in State v. Forrester, South Carolina and the five other states who have added an express right to privacy into their search and seizure provisions have held that “such a provision creates a distinct privacy right that applies both within and outside the search and seizure context.” 343 S.C. at 645. Also noted in Forrester is the legislature's concern in drafting the additional privacy protection was “the emergence of new electronic technologies.” Id. at 647.

Out of the ten states that also provide greater protection of privacy rights than the federal government,² only two have judicially adopted the “vicarious consent” exception. Arizona and Louisiana have both adopted “vicarious consent” as an exception to the prior consent requirements of their respective wiretap statutes. See State of Arizona v. Morrison, 203 Ariz.

¹ “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, ...” S.C. Const. Art. 1 § 10 (emphasis added).

² As noted by the Forrester court, Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington all provide a greater protection of privacy rights than does the federal government or the other states. 343 S.C. 637 Fn. 3.

489, 56 P.3d 63 (2002) and Smith v. Smith, 923 So.2d 732 (La.Ct.App. 2005). Neither court addressed the inconsistency of their respective holdings with the greater protection of privacy rights their states provide over that of the federal government. Yet both courts cite to the interpretation by other courts (who do not provide greater privacy protection) of the federal wiretap statute as support for interpreting their state statutes. Morrison, at 490-91; Smith at 740. While it is not clear the exact arguments put before those two courts, the Court should not “adopt,” as the State urges, a doctrine of third-party consent that the legislature could have added—or may add in the future—after proper and full debate on the issue of permitting a third party consent to the interception of private telephone conversations.

The federal wiretap statute was intended as a baseline for the states. States are not permitted to provide less protection but are permitted to provide greater protection. See e.g. Forrester. The federal constitution does not provide the same increased protection of privacy rights as the South Carolina constitution. Consequently, relying on cases that interpret the federal wiretap statute is a risky analysis. Gauging legislative intent from the federal statute does not take into account that the South Carolina legislature’s intent would have an additional concern for “unreasonable invasions of privacy.” S.C. Const. Art. 1 § 10.

V. CONSENT IS NOT AN AMBIGUOUS TERM BEAUSE THE SOUTH CAROLINA WIRETAP STATUTE IS AIMED AT PROVIDING PROTECTION OF PRIVACY RIGHTS TO ALL CITIZENS.

The aim of the South Carolina Wiretap Statute is to protect the rights of South Carolina citizens. Much like the Fourth and Fifth Amendments to the federal constitution and their state counterparts, the South Carolina Wiretap Statute seeks to provide privacy protection to all citizens. When it comes to protecting personal rights, the legislature is expansive in those it

protects. Citizens can waive important rights but the legislature rarely allows one person to waive important rights for another (*e.g.*, minors and adults can waive constitutional rights but cannot have them waived by a third party). Consent is not an ambiguous term in the South Carolina Wiretap Statute because the aim of the statute is to provide broad privacy protections for all citizens.

Some courts have held that consent as it relates to minors is an ambiguous term. For instance, in State of Iowa v. Spencer, 737 N.W.2d 124 (2007), the Supreme Court of Iowa held that the term consent in its wiretap statute was ambiguous. Id. at 129. The Spencer court relied on the different ways in which the Iowa legislature dealt with consent by and for minors to hold the term was ambiguous. At first glance, this is an attractive analysis. A close inspection, however, reveals an analysis not built by one premise logically leading to another but on an ends-oriented analysis.

The Spencer court was called upon to analyze “consent” in Iowa’s state wiretap statute. Id. at 128. Much like the law in South Carolina, the law in Iowa would not permit a court to go beyond the plain meaning of a statute absent the finding of an ambiguity. Id. at 129 (“Before engaging in statutory construction, we must first determine whether the statute is ambiguous.”); see Thompson ex rel. Harvey, 377 S.C. at 158 (“If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself”). The Spencer court could not have looked to other case law without finding an ambiguity; it would have had no link to the doctrine it wanted to adopt.

An analysis built by one premise leading logically to the next would have included an inquiry into the legislative intent of the Iowa wiretap statute itself. Even with the finding of an ambiguity, the Spencer court was still required by its own law to look to the intent of its

legislature when it adopted the state's wiretap statute. See Spencer at 129-30 ("We determine legislative intent from the words chosen by the legislature, not what it should or might have said. ... Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.") (internal cites omitted). The Spencer court, however, made no effort to determine the Iowa legislature's intent in adopting the statute; nor did it analyze whether the "vicarious consent" exception was consistent or inconsistent with the overall purpose of Iowa's wiretap statute.

The Spencer court did state that there was no legislative history on the specific issue of "vicarious consent" in its wiretap statute. Id. at 130. However, no legislature has any history on this specific exception. Detailed discussion of "vicarious consent" is not even found in the legislative history of the federal wiretap statute, which the Spencer court and other courts have relied upon to interpret state statutes. Lack of such specific legislative history on "vicarious consent" should not have prevented the Spencer court from looking at its own legislature's overall intent; or offering an explanation for why that intent was not necessary. Neither should it have prevented the court from looking at the way in which the Iowa legislature designed statutes when it intended to provide parental consent and when it did not. In fact, even when its flawed logic leads to the issue of analyzing the privacy rights of children, and how the "vicarious consent" exception affects those rights, the Spencer court ignores its own state law. The Spencer court cites to authority for the general propositions that parents must protect their children, to look out for them, and account for their vulnerabilities (mainly by citing United States Supreme Court cases). However, rather than analyzing how the Iowa legislature enacted these general propositions, the Spencer court simply concludes that the "vicarious consent" exception does not conflict with the privacy rights of children. Id. at 132.

What the Spencer court wanted to get to was that the language of the federal wiretap statute is similar to the Iowa wiretap statute. If it got there, the court could then rely on the analysis of other jurisdictions—which could then get it to the “vicarious consent” doctrine. This is the pattern of several other courts: do not truly analyze the state statute, but get to the federal statute so that law from other jurisdictions interpreting their own state statutes using federal law can be used to interpret yet another state statute based on federal law. It is a circular analysis. The analysis never truly analyzes the legislative intent of the particular legislature that enacted the statute.

The result in several states rely on the analysis of one court: Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993). The problem, of course, is that Thompson v. Dulaney is a federal lawsuit based on the federal wiretap statute. An analysis based solely on the federal wiretap statute and its legislative history, while relevant and perhaps instructive, cannot substitute for the analysis of a state statute that may have been adopted in a state, such as South Carolina, with a more expansive right to privacy than the federal government provides.

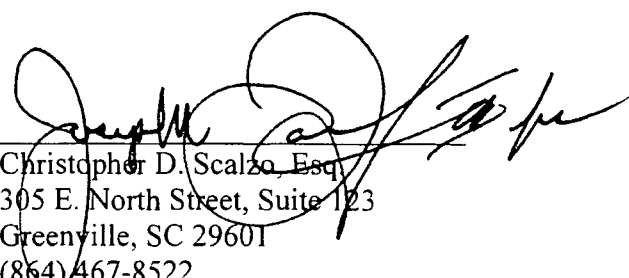
Regardless of these analyses, Iowa and the federal government do not have a right to privacy in their constitutions. This state does.

CONCLUSION

For the foregoing additional reasons, the Court should suppress the August 5th Intercepted Conversation and any evidence derived there from at trial. It is, respectfully, the province of the legislature, and not this Court, to “adopt” vicarious consent if, after full debate of the privacy considerations inherent in this policy decision, it so chooses.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

Christopher D. Scalzo, Esq.
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
Attorney for Petitioner

July 20, 2009

THE STATE OF SOUTH CAROLINA
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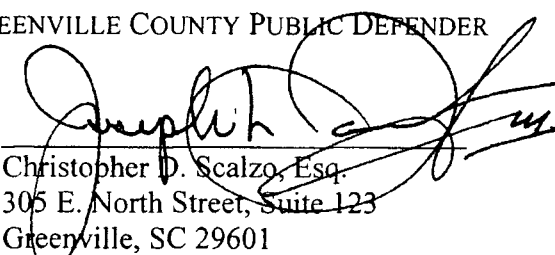
Samuel L. Whitner, ... Petitioner.

PROOF OF SERVICE

I certify that I have served Petitioner's Reply to the State's Response on the State by personally delivering a copy of the same to Christine Kednocker Sustakovitch at the Office of the Solicitor for the Thirteenth Judicial Circuit, at the Greenville County Courthouse, Suite 325, Greenville, South Carolina 29601 on the date reflected below.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

Christopher D. Scalzo, Esq.
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
Attorney for Petitioner

July 20, 2009
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Samuel Whitner,

Appellant.

Appeal from Greenville County
John C. Few, Circuit Court Judge

Opinion No. 27142
Heard October 18, 2011 – Filed July 11, 2012

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and
Christopher D. Scalzo, of Greenville, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John
W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,
and Assistant Attorney General William M. Blich, Jr., all of
Columbia, and W. Walter Wilkins, III, of Greenville, for
Respondent.

JUSTICE KITTREDGE: Appellant Samuel Whitner was convicted and sentenced for the offense of criminal sexual conduct (CSC) with a minor in the first degree. The victim of the sexual abuse was Appellant's then five- or six-year-old daughter. Appellant assigns error to two evidentiary rulings. The first ruling was the denial of Appellant's motion to suppress a tape recording of his telephone conversation with the victim wherein he admitted the abuse. The second ruling was the denial of Appellant's motion to exclude evidence in connection with a forensic interview of the minor victim. We find no error in the admission of the challenged evidence and affirm.

I.

Appellant is the victim's biological father. According to the victim's testimony, when she was five or six years old, Appellant exposed his penis to victim and forced her to perform oral sex on him twice.

In 2007, when the victim was eleven years old, the victim disclosed the abuse to her mother (Mother). According to Mother, she encouraged the victim to confront Appellant. The victim telephoned Appellant to confront him, and he denied the incident. Mother subsequently informed her husband (Stepfather) about the abuse. The couple decided to record telephone calls between Appellant and the victim. Several days later, Mother consented to Stepfather recording a telephone conversation between the victim and Appellant without the victim's knowledge or consent. During the thirty-one-minute conversation, Appellant admitted the sexual abuse and stated that the incident was a mistake he deeply regretted.

Mother supplied the recording to law enforcement, and Appellant was arrested and charged with CSC with a minor in the first degree. As part of the investigation, a forensic interview of the victim was conducted.

Appellant filed a motion to suppress the recorded telephone conversation, claiming the recording, intercepted without the prior consent of either party, violated the South Carolina Homeland Security Act (Wiretap Act), S.C. Code Ann. § 17-30-10 *et. seq.* (Supp. 2010), which generally

prohibits the interception of communications. A circuit court judge granted the motion to suppress.¹

The State filed an interlocutory appeal with the court of appeals and sought to vacate the trial court's suppression order pursuant to the Wiretap Act. The court of appeals correctly granted the State's motion to vacate and found that the trial court lacked subject matter jurisdiction because the Wiretap Act requires that a motion to suppress be made before a panel of judges of the court of appeals.

Thereafter, the court of appeals held a suppression hearing, including the taking of testimony and oral arguments. Stepfather testified that he believed recording the conversation would aid the parents in deciding the best course of action for the victim, including determining whether she needed sexual abuse counseling. Likewise, Mother testified she believed recording the conversations would be useful because she did not know what the conversations between the victim and Appellant entailed, the victim was crying often, and she needed to determine if it was appropriate to permit Appellant to have contact with the victim.

On the legal issue of consent, the court of appeals held that the Legislature, in enacting the Wiretap Act, intended to adopt the vicarious consent doctrine. Mother could, therefore, lawfully vicariously consent to the recording on behalf of the victim. On the factual matter, the court of appeals found that Mother had a good faith and objectively reasonable basis for believing the recording was necessary and in the victim's best interest, and it therefore denied Appellant's motion to suppress. The court of appeals sent the case back to the trial court.

At trial, the recording of the phone conversation between Appellant and the victim was admitted, over Appellant's continuing objection. The State also introduced a videotape of the victim's forensic interview. The contents of the interview were similar to the underlying allegations the victim first

¹ The judge who granted the motion to suppress was not the judge who presided over the trial.

disclosed to Mother and the testimony given by the victim at trial. The videotape was admitted over Appellant's objections of improper bolstering and hearsay. The jury convicted Appellant of CSC with a minor in the first degree, and he was sentenced to prison. This appeal follows.

II.

Appellant claims the Wiretap Act was violated because neither he nor the victim, the parties to the communication, consented to the recording. Conversely, the State claims the Wiretap Act was not violated because the recording fell within the consent provision. Specifically, the State contends the statute allows Mother, as a guardian to the minor victim, to vicariously consent on behalf of the victim to record the telephone conversation between the victim and Appellant.

The South Carolina Wiretap Act is patterned after the Omnibus Crime Control and Safe Streets Act of 1968 (Federal Act). This Court must determine whether the Wiretap Act allows or bars the admission of the recording.

Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below. Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect.

City of Rock Hill v. Harris, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011). "Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

The Wiretap Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17-30-30. Evidence intercepted in violation of the Wiretap Act must be suppressed. See S.C. Code Ann. § 17-30-110. However, when a party to a communication gives consent for the communication to be intercepted, such recording does not violate the law. The full text of the consent provision states:

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

S.C. Code Ann. § 17-30-30(C) (emphasis added).

Appellant argues that because there is no explicit provision permitting vicarious consent, parental consent on behalf of a minor was not intended to be an exception to the Wiretap Act. We disagree.

Our Wiretap Act parallels the Federal Act passed by Congress in 1968, which similarly permits lawful interception where one party to the communication consents.² Because no South Carolina cases have addressed

² "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any

a parent's ability to vicariously consent to the recording of a child's telephone conversations and because the Federal Act is substantively the same as South Carolina's Wiretap Act, we look to the federal courts' interpretations regarding vicarious consent. See Orr, 277 S.C. at 540, 290 S.E.2d at 806 ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation.").

The leading federal case is Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998). In Pollock, the Sixth Circuit Court of Appeals held that a mother did not violate the Federal Act when she recorded conversations between her daughter and the daughter's stepmother. The Pollock court, adopting the rule first enumerated in Thompson v. Dulaney, 838 F.Supp. 1535, 1544 (D. Utah 1993), articulated the doctrine of vicarious consent as follows:

[A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

154 F.3d at 610; see also Wagner v. Wagner, 64 F.Supp.2d 895, 896 (D. Minn. 1999) (holding a guardian may consent on behalf of a minor to the interception of a communication); Campbell v. Price, 2 F.Supp.2d 1186, 1191 (E.D. Ark. 1998) (holding a parent's good faith concern for his minor child's best interest may empower the parent to legally intercept the child's conversations); Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (D. Utah 1993) (finding the vicarious consent doctrine permissible under the federal wiretap statute because of a parent's duty to act in the best interest of their child).

criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C.A. § 2511 (2006).

South Carolina's Wiretap Act, modeled after the Federal Act, was enacted in 2002. As the above federal jurisprudence indicates, when our Legislature enacted the Wiretap Act, it was well aware of the majority rule concerning construction of the Federal Act in allowing for vicarious consent.³ We are persuaded that the consent provision in the Wiretap Act encompasses vicarious consent. In reaching this conclusion, we join the majority of state courts that have confronted the same question of statutory construction and have followed the federal interpretation. Accord Silas v. Silas, 680 So.2d 368 (Ala. Civ. App. 1996); G.J.G. v. L.K.A., No. CN93-09835, 2006 WL 2389340 (Del. Fam. Ct. 2006); State v. Spencer, 737 N.W.2d 124 (Iowa 2007); Smith v. Smith, 923 So.2d 732 (La. App. 1 Cir. 9/28/05); Kroh v. Kroh, 567 S.E.2d 760 (N.C. App. 2002); State v. Diaz, 706 A.2d 264 (N.J. 1998); People v. Clark, 19 Misc.3d 6 (N.Y. Sup. Ct. 2008); Lawrence v. Lawrence, No. E2010-00395COA-R3-CV, 2010 WL 4865516 (Tenn. Ct. App. 2010); Alameda v. State, 235 S.W.3d 218 (Tex. 2007).

We further find that Appellant misconstrues the scope of the term "consent." "Consent" is a broad term and is defined as "agreement, approval, or permission as to some act or purpose." Black's Law Dictionary 346 (9th Ed. 2009). The law recognizes different kinds of consent, including express, implied, informed, voluntary, and parental. Parental consent is defined as "[c]onsent given on a minor's behalf by at least one parent, or a legal guardian, or by another person properly authorized to act for the minor, for the minor to engage in or submit to a specific activity." Id. We believe the

³ In fact, prior to the adoption of the Wiretap Act, this Court's jurisprudence relied on federal courts' interpretations of the Federal Act in permitting the recording of a telephone conversation where only one party to the conversation consented. See Mays v. Mays, 267 S.C. 490, 229 S.E.2d 725 (1976) (holding that one party to a telephone conversation may lawfully record the conversation without the other party's knowledge or consent, and subsequently disclose it); State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996) (where one party consents to a recording, it does not violate a person's right to privacy).

various types of consent recognized in the law support the result we reach today in discerning legislative intent to include vicarious consent.⁴

In sum, we believe the court of appeals correctly determined that the consent provision in the Wiretap Act includes vicarious consent.

III.

Appellant contends that even if the Wiretap Act encompasses vicarious consent, that doctrine is not applicable in the instant case. Initially, Appellant asserts that before the vicarious consent doctrine may be applied, a court must find the minor lacked capacity to consent. Additionally, Appellant argues Mother and Stepfather did not have a good faith and objectively reasonable basis for believing it was necessary and in the best interest of the victim to record the telephone conversation.

⁴ Appellant's argument rests in part on various federal courts' rejection of the inter-spousal consent doctrine, which permits one spouse to intercept an electronic communication of the other spouse. See e.g., Pritchard v. Pritchard, 732 F.2d 372, 373 (4th Cir. 1984) (finding no exception exists under the federal wiretapping statute for instances of willful, unconsented to electronic surveillance between spouses). However, the fact that there is no inter-spousal consent exception does not preclude an adoption of a parent-child vicarious consent exception. Moreover, we view the vicarious consent doctrine as a natural consequence of the unique relationship of parent and child. The doctrine's adoption is far more compelling and justifiable than the inter-spousal consent, as fundamentally different considerations are implicated. The United States Supreme Court and this Court have held it is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 65 (2000); Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003) (citing Troxel and stating "[i]t is well-settled that parents have a protected liberty interest in the care, custody, and control of their children"). Furthermore, parents have a duty to protect their child because children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979).

A.

Appellant argues that the victim was capable of consenting because she was eleven years old at the time of the recording. But a minor's actual ability to consent does not preclude a parent's ability to vicariously consent on her behalf. See Pollock, 154 F.3d 601 (applying the vicarious consent doctrine to a fourteen-year-old); State v. Spencer, 737 N.W.2d 124 (Iowa 2007) (applying the vicarious consent doctrine to a thirteen-year-old); Alameda v. State, 235 S.W.3d 218 (Tex. 2007) (applying the vicarious consent doctrine to a thirteen-year-old). Further, we believe it inadvisable to create a bright-line age limit for the application of vicarious consent because "not all children develop emotionally and intellectually on the same timetable." Pollock, 154 F.3d at 610. Thus, the ability to invoke the vicarious consent doctrine prior to the age of majority does not turn on an age-mandated bright-line rule, nor does it require a minor's lack of capacity.

B.

Appellant next contends that the court of appeals erred in finding Mother had a good faith and objectively reasonable basis for intercepting the telephone conversation between the victim and Appellant. Pursuant to the procedure prescribed by the Wiretap Act,⁵ the court of appeals acted as the trial court in the motion to suppress hearing. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

⁵ S.C. Code Ann. § 17-30-110 states: "The motion [to suppress] must be made before the reviewing authority and must be decided on an expedited basis." The "reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

The parents' motivation in recording the telephone conversation is a question of fact. Given our standard of review, the issue before us is limited to a determination of whether there was any evidence supporting the court of appeals' finding that the parents had a good faith basis for intercepting and recording the phone conversation.

Mother and Stepfather testified they believed the recordings would assist them in deciding the best course of action and in determining whether the victim needed counseling. Likewise, Mother testified it was necessary to determine if it was in the victim's best interest to have continued visitation with Appellant. We believe the evidence supports the court of appeals' finding that Mother had a good faith and objectively reasonable belief that intercepting the telephone conversation was necessary and in the victim's best interest.⁶ Thus, we conclude the court of appeals did not abuse its discretion in denying the motion to suppress.

⁶ Although we recognize the fundamental right of parents to make decisions concerning the care, custody, and control of their children, we also recognize, as does the concurrence, that such right is not without limits. As the concurrence states, "constitutional protection does not confer on parents an unlimited right to control their children." While we agree, in the abstract, with the concurrence's sweeping recognition of parents' fundamental right to make decisions concerning the welfare of their children, we must confront the issue in the context presented and not venture into areas never raised, argued or briefed by any party. Appellant argues only that the Wiretap Act does not provide for vicarious consent; we have not been presented with a challenge or discussion of the viability of Pollock post-Troxel. Assuming that issue were squarely before us, we would adhere to the Pollock doctrine in this case. In this criminal case against the Appellant father, we are presented with one parent, Mother, vicariously consenting to recording her child's telephone conversation with the other parent, Appellant. In the context where one parent vicariously consents to record a child's electronic communication with the other parent, we believe the Pollock doctrine, by imposing a good faith standard linked to the child's best interest, sets forth a

IV.

Appellant also contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protections afforded by our state's constitution. See S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . ."). We disagree. Appellant's argument is dependent upon a rejection of the vicarious consent doctrine. Because the Wiretap Act provides for vicarious consent of a minor child, Appellant's constitutional argument must be rejected.

V.

Appellant's final issue on appeal addresses the admissibility of the forensic interview videotape, contending it was cumulative repetition of the minor victim's testimony at trial and improper bolstering. We disagree. As with any issue regarding the admissibility of evidence, we review the trial court's ruling for abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias. Rule 801(d)(1)(B), SCRE. However, in CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under the proper circumstances. See S.C. Code Ann. § 17-23-175 (Supp. 2010) (prescribing the requirements that must be met for a child victim's out-of-court statement to be admitted). Moreover, the South Carolina Rules of Evidence explicitly recognize the authority of the Legislature to enact evidentiary rules. See Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina . . ."). Unless a legislative enactment

proper and reasonable limitation on a parent's right to make decisions concerning the child.

concerning a matter of evidence violates the constitution, the legislative enactment is valid. See City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (holding that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions).

Section 17-23-175 is a valid legislative enactment. Admittedly, we have confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim. However, this is not such a case. In fact, the forensic interview of the child and mere foundational trial testimony of the interviewer serve as a model of how the statute is designed to work. Specifically, the forensic interviewer did not improperly lead or influence the victim in any way, and the victim answered the questions on her own accord. Moreover, the forensic interviewer's testimony was for the limited purpose of laying the proper foundation for the admission of the videotape.⁷ It offered no improper testimony, and included no bolstering testimony that would invade the province of the jury. Compare State v. Jennings, --- S.C. ---, 716 S.E.2d 91 (2011) (finding the trial court erred in admitting portions of forensic interviewer's written reports that went to the victims' veracity for truth regarding the allegations of abuse) with State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that trial court's admission of testimony from a forensic interviewer did not prejudice defendant as interviewer testified as to her personal observations and did not vouch for the victim's veracity). Thus, there was no error in the admission of the forensic interview into evidence.

VI.

In sum, we believe the Legislature intended the consent provision in the Wiretap Act to encompass the vicarious consent of a parent on behalf of a

⁷ We recognize that the State sought on direct examination to venture into the forbidden area of improper bolstering, but Appellant's objections were promptly sustained.

minor child. Moreover, there was evidence from which the court of appeals could conclude the parents had a good faith and objectively reasonable basis for recording the phone conversation and, accordingly, the court of appeals did not abuse its discretion in denying the motion to suppress. Additionally, we find no error in the trial court's admission of the forensic interview videotape.

AFFIRMED.

TOAL, C.J., and BEATTY, J., concur. PLEICONES, J., concurring in a separate opinion in which Acting Justice Eugene C. Griffith, concurs.

JUSTICE PLEICONES: I concur with the result reached by the majority but write separately to express my concerns regarding the majority's adoption of the Pollock test, which I believe places an undue burden on a parent to justify his vicarious consent on behalf of his child under South Carolina's Wiretap Act. I also write separately regarding the admission of bolstering testimony under S.C. Code Ann. § 17-23-175 (Supp. 2010).

I.

I agree with the majority that the Wiretap Act permits the substitution of a parent's consent for that of a minor who is a party to the communication. However, the Pollock test, articulated in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998), and adopted by the majority without alteration, fails to fully account for the scope of parental rights under the United States Constitution.⁸

Under the Pollock test, "a clear emphasis is put on the need for the 'consenting' parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." 154 F.3d at 610. The test is said to "create[] *important limitations* on the ability of a parent or guardian to vicariously consent to the recording of his or her child's conversations." State v. Spencer, 737 N.W.2d 124, 131 (Iowa 2007) (emphasis added). The "good faith, objectively reasonable basis" limitation in the Pollock test was adopted from Thompson v. Dulaney, the first case to consider the question whether the federal Wiretap Act should be interpreted to include a vicarious consent exception. 838 F.Supp. 1535 (D. Utah 1993).

⁸ The majority believes that consideration of the Pollock test's viability post-Troxel is not appropriate because this issue has not been raised by any party. I do not believe we can avoid considering the implications of Troxel on this basis while also explicitly adopting and applying a particular test without qualification. Avoiding Constitutional issues not raised and argued could be dealt with by holding that even if the Pollock test is unconstitutionally restrictive, its demands would be met in this case. Moreover, I would respectfully urge that the majority's conclusion that it would adhere to the Pollock test after consideration of Troxel based on its view that the good faith standard is "a proper and reasonable limitation" under these circumstances is an interest-balancing test of the sort inappropriate for treatment of fundamental rights.

In Thompson, the parent argued that she had a constitutional right to direct the upbringing of her children. However, in finding that a vicarious consent exception was implied in the Wiretap Act, the court based its reasoning on the parent's statutory duty. The court found that in order for the parent to fulfill her duty under a Utah statute to protect her children, she must be able to supervise their communication with third parties, at least when the children are very young, as they were in the case it was considering. Id. at 1544. The Thompson court did not explain what interests created a need for a limitation on parents' authority to vicariously consent for their children under the federal Wiretap Act. Other courts that have adopted the vicarious consent doctrine have noted in passing that a parent has a constitutional right to guide the upbringing of her children, but they have not directly addressed the constitutionality of the "good faith, objectively reasonable basis" limitation or explained why it is important.

Some commentators have criticized the Pollock test for failing to adequately account for a minor's right to privacy. Spencer, 737 N.W.2d at 131-32 (citing commentators who raise this concern). Presumably it is a minor's right to privacy that concerned the Thompson, Pollock, and other courts and that they sought to protect through the good faith limitation, even though the result does not provide as much privacy to minors as some commentators would desire.

Minors do have some legally recognized right to privacy, most notably the "privacy" of being able to make some choices that are essential to a person's most basic autonomy. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992). In Casey, the United States Supreme Court found that under certain narrow circumstances a minor's fundamental right to privacy would be violated by a government-enforced parental veto of the minor's choice. Aside from the right of a mature minor to make some irreversible and life-altering decisions, however, a minor's interest in privacy has barely been accorded legal recognition. It has been accorded least recognition vis-à-vis parents.⁹ Moreover, Casey

⁹ See, e.g., Benjamin Shmueli and Ayelet Blecher-Prigat, Privacy for Children, 42 COLUM. HUM. RTS. L. REV. 759, 763, 793, 794 (Spring 2011)

involved state action operating to override the choice of a minor with the capacity to make the choice at issue. That is, insofar as the Constitution protects the privacy interests of minors, it protects them from governmental intrusion, not from parental intrusion unaided by government.

On the other hand, a parent has a right under the Constitution to guide the upbringing of her child. In Troxel v. Granville,¹⁰ decided after both Thompson and Pollock, the Court identified as “*fundamental* [the] right of parents to make decisions concerning the care, custody, and control of their children.” 530 U.S. 57, 66 (2000) (plurality opinion) (emphasis added). Seven justices agreed that the constitutional right of a parent to direct the upbringing of her child is violated when her judgment regarding the child’s associations is not accorded deference by the courts. 530 U.S. at 67 (plurality), 78-79 (Souter, J., concurring), 80 (Thomas, J., concurring), 94 (Kennedy, J., dissenting). Of course, as with other constitutional rights, the constitutional protection does not confer on parents an unlimited right to control their children, but it limits the extent of governmental involvement in a particular area and places a heavy burden on the state to justify any governmental restriction of parental rights. The Wiretap Act, read without an exception, would substantially restrict parental rights in favor of an interest

(surveying American jurisprudence and concluding that privacy rights “do[] not exist for children vis-à-vis their parents”; noting that even the U.N. Convention for the Rights of the Child, “which is the most comprehensive legal document ever written on children’s rights, and which brought more than twenty countries around the world to adopt a ban on parental corporal punishment and to grant a plethora of children’s rights, has not clarified this children’s right”; and acknowledging that legal intervention in this area poses a significant risk of damaging families and “must be very delicate”).

¹⁰ In Troxel v. Granville, a Washington state statute permitted any party to petition for visitation rights and permitted the court to award visitation rights if it concluded that they were in the child’s best interest without according any deference to the parent’s judgment. The Court found that a mother’s substantive due process rights were violated when the state court awarded visitation to the children’s paternal grandparents based on its disagreement with the mother regarding the appropriate amount of visitation.

that has received little if any legal protection in any other context. Read with a limited exception, the Wiretap Act subjects the exercise of parental constitutional rights to substantial state supervision, again in favor of a barely recognized interest. In my view, either of those readings fails to withstand the strict scrutiny ordinarily applied to governmental restrictions on fundamental rights.

Troxel concerned the appropriate treatment of parental constitutional rights when a court was reviewing a fit parent's decision regarding the social activities of her child, much as the Pollock test involves a court in reviewing a presumptively fit parent's decision regarding the social activities of her child. The plurality opinion in Troxel states that the fundamental constitutional right of parents to guide the upbringing of their children mandates "a presumption that fit parents act in the best interests of their children." *Id.* at 68. The Pollock test reverses this presumption by placing the burden of proof on the parent to demonstrate that his motives for recording his child's conversation were proper and based on objectively reasonable concerns. Thus, the Pollock test is not viable after Troxel, at least as to its allocation of the burden of proof.

Moreover, I am concerned with the import of the majority's discussion of a child's age and capacity to consent as being relevant to a determination whether a parent's vicarious consent was valid. The majority eschews any bright-line rule based on the minor's age and capacity to consent. Presumably this means that a court reviewing a parent's decision to invade the minor's privacy should deem that decision less objectively reasonable the more mature the minor is. But a sliding-scale test provides such little constraint on courts as to transfer nearly limitless discretion to them to override the judgment of a fit parent, in direct contravention of Troxel.

Further militating against the adoption of the Pollock test, at question here is a statute that, in the absence of an exception, *criminalizes* a parent's

recording of his child's conversation with a third party.¹¹ Thus, under the Wiretap Act the primary adversarial parties are the government and the parent, not the parent and child or the parent and a third party.¹² Under the Pollock test, a parent cannot exercise her fundamental constitutional right to guide the upbringing of her child without risking criminal penalty should a court disbelieve her stated motives, disagree with her assessment of the threat posed by the particular circumstances, or find that the child's age or capacity to consent sufficiently negates the parent's otherwise valid concerns. Such treatment of fundamental rights protected by the Constitution is impermissible. See, e.g., Casey, 505 U.S. at 893-95. The majority's rejection of a bright-line rule exacerbates the constitutional problem with the good faith test by creating greater uncertainty for parents of maturing but unemancipated minors in discerning the line between protected and criminalized conduct.

In light of the fact that the Wiretap Act criminalizes violations and that the parental right is fundamental under the Constitution, I do not believe there is room for any qualification of the vicarious consent exception. At the very least, the majority's test must be recast in order to place the burden on the party asserting that the parent's consent was invalid to prove that the parent did not act in good faith or in reliance on objectively reasonable concerns.

¹¹ A person who violates the provisions of the South Carolina Wiretap Act must be imprisoned not more than five years or fined not more than five thousand dollars, or both. S.C. Code Ann. § 17-30-50 (Supp. 2010).

¹² The issue typically arises in cases that do not involve the state attempting to prosecute a parent, such as in the present case, in which a third party seeks to have evidence excluded as obtained in violation of the Wiretap Act. The fact that the issue may be raised by a third party does not alter my analysis for two reasons. First, our interpretation of the consent exception will apply in all contexts. Second, one party to a protected communication has no expectation of privacy under the Wiretap Act if the other party consents to recording or disclosure. Thus, the third party's interest in nondisclosure has no bearing on the question whether a parent may vicariously consent on behalf of his child.

II.

With regard to Appellant's argument regarding impermissible bolstering, I would note that Appellant has not raised a challenge to the statute on constitutional grounds or challenged the admission of the interviewer's testimony or opinions. Rather, Appellant challenges as improper bolstering the admission of duplicative testimony from the child herself via the videotape. I agree with the majority that the Rules of Evidence recognize the authority of the General Assembly to enact statutes that create exceptions to the evidentiary rules. Rule 101, SCRE. Section 17-23-175 by its terms permits the duplication of a child's testimony through the admission of a video recorded interview in addition to the child's testimony in court. Thus, there is no basis for an improper bolstering argument when prior testimony is admitted pursuant to § 17-23-175, and I agree with the majority that the trial judge did not abuse his discretion when he admitted the videotaped interview.

For the reasons set forth above, I would hold that parental vicarious consent satisfies the Wiretap Act's consent exception for all fit parents of unemancipated minors regardless of the minor's age or capacity to consent. I would also modify the discussion of admissibility under § 17-23-175. Because I agree with the result reached by the majority on each issue, I concur in the judgment.

Acting Justice Eugene C. Griffith, Jr., concurs.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)Samuel Lamont Whitner #263066)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2013-CP-23- 08765

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence Greenville county General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-23-1072 / CSC 1st degree
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 5, 2009 / Thirty Years
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) ☒ after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The Supreme Court of South Carolina
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. July 11, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 27142
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistant of Trial Counsel

~~(b)~~

(c) Ineffective Assistant of Appellant Counsel

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial counsel acted jointly in concert with the state and illegally

~~(b)~~ gain jurisdiction of the South Carolina Court of appeals / 6 amendment violation.

(c) Appellate Counsel failed to challenge this jurisdictional defect.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? None

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? None

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None

(d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. 42 U.S.C.A. § 1983 Claim: Samuel L. Whitner v. Disciplinary Counsel --

~~(b)~~ - No 129784 - 3:12-CV-01876 - CMC

iii. _____

iv. Pending Appeal

(b) the name and location of the Court in which each was filed:

i. District Court of South Carolina

ii. _____

iii. _____

iv. United States Court of Appeal for the fourth circuit

(c) the disposition thereof:

i. Dismissed without prejudice

ii. _____

iii. _____

iv. Pending in the U.S. Court of Appeals for the fourth Circuit
 (d) the date of each such disposition:

i. September 13, 2012 order Case No 3:12-1876-CMC-JDA

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) These issues is mandated by law to be raised within P.C.R proceedings

(b) _____

(c) These issues are to be attacked in initial review collateral Proceedings

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes _____
- (c) your sentencing? Yes _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? None _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Esq Christopher D. Scalzo : Trial Counsel _____
- ii. Esq Robert M Dudek : Appellate Counsel _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial proceedings and Appeal proceedings _____
- ii. Appellate proceedings _____
- iii. _____

19. State clearly the relief you seek in filing this application:

Conviction and sentence to be reverse and Vacated _____

20. Are you now under sentence from any other court that you have not challenged?

No _____

STATE OF SOUTH CAROLINA

)

VERIFICATION

County of Greenville

)

)

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Samuel Samuel Wilson

SWORN to and subscribed before me this 22
day of Jan, 2013.

Eugene Keith (L.S.)
Notary Public

My Commission Expires: _____ My Commission Expires April 4, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2013-CP-23-0765
COUNTY OF GREENVILLE	)	
	)	
Samuel Lamont Whitner,	)	
S.C.D.C. No. 263066,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed February 8, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Applicant was indicted at the February 2009 term of the Greenville County Grand Jury for first-degree criminal sexual conduct with a minor (2009-GS-23-1072). Christopher D. Scalzo, Esquire represented the Applicant.

After the State took the case to trial, the Applicant was found guilty. On November 4, 2009, the Honorable John C. Few sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire perfected the appeal. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence on July 11, 2012. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). The Remittitur was sent on July 27, 2012.

Attached herewith and incorporated herein by reference are the records of the Greenville

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. "Trial counsel acted jointly in concert with the State and illegally gain jurisdiction of the South Carolina Court of Appeals/6 amendment violation."
2. Ineffective assistance of appellate counsel.
 - a. "Appellate counsel failed to challenge this jurisdictional defect."

III.

The Respondent asserts the Applicant's allegations that his attorney was ineffective are without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where

the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

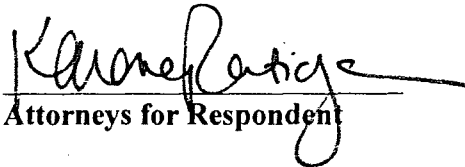
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 
Attorneys for Respondent

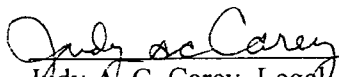
Oct. 23, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2013-CP-23-0765
	)	
SAMUEL LAMONT WHITNER, 263066	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Samuel Lamont Whitner, 263066
Broad River Correctional Institution
4460 Broad River Road
Columbia SC 29210

DATED this 23rd day of October, 2013.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	2013-CP-23-0765
	)	
	)	
SAMUEL LAMONT WHITNER	)	
	)	APPLICANT)
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA	)	
	)	RESPONDENT)

June 19, 2014
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

CAROLINE HORLBECK, ESQ.
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

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There were no exhibits.

Certificate of Reporter 57

1 MS. RATIGAN: Thank you, Your Honor, may it
2 please the Court. This is the case of Samuel Whitner
3 vs. State of South Carolina. The docket number is
4 2013-CP-23-0765. This has a bit of unusual
5 procedural history, Your Honor. I actually filed an
6 amended return earlier this week in that packet.
7 I'll just basically hit the high points. Mr. Whitner
8 was indicted for first degree criminal sexual conduct
9 with a minor. He was represented by Mr. Scalzo. The
10 case was originally brought to trial March 11th of
11 2009 before Judge Pyle. On that date Judge Pyle
12 granted the Applicant's motion to suppress an audio
13 recording of a telephone conversation he had with the
14 victim in the case. The State then filed a
15 interlocutory appeal and a motion to vacate Judge
16 Pyle's Order.

17 On June 11th, 2009, the Court of Appeals issued
18 an Order vacating Judge Pyle's Order. Found no
19 subject matter jurisdiction. Then on July 22nd, 2009
20 a three Judge panel of the Court of Appeals presided
21 over a suppression hearing pursuant to the South
22 Carolina Homeland Security Act, it's sometimes called
23 the Maritime Act. He was represented by Mr. Scalzo
24 at that hearing. It was just a standard suppression
25 hearing as one would have usually in General

1 Sessions. By an Order issued July 27th of 2009, the
2 Court of Appeals denying the motion to suppress.

3 So, the matter was brought back to General
4 Sessions. This was before Judge Few. The case was
5 brought to trial in November of 2009. At the
6 conclusion of which Mr. Whitner was found guilty. On
7 November 4th of 2009 Judge Few sentenced Mr. Whitner
8 to 30 years imprisonment. And the appeal was filed.
9 The matter was actually certified up to the Supreme
10 Court of South Carolina. The appeal was perfected,
11 however, the Supreme Court affirmed the sentence in
12 July of 2012. And the application in this case was
13 timely filed. The State is ready to proceed.

14 THE COURT: All right, Ms. Horlbeck.

15 MS. HORLBECK: Judge, at this point Mr. Whitner
16 has a motion for a continuance. And let me just
17 explain for the basis for that.

18 THE COURT: Yes, ma'am.

19 MS. HORLBECK: Mr. Whitner had wanted me to
20 obtain some phone records. It's his position that
21 the taped conversation between himself and his
22 daughter, that it was not taped at the time that The
23 State says it was taped. The grounds for him wanting
24 to obtain -- let me just start with what I think.
25 Mr. Whitner could not give me any phone numbers. So,

1 I looked through Mr. Scalzo's files, the discovery
2 portion of it, got the phone numbers that I could
3 find. I did what I could to find out what company
4 was in charge of that phone number. And I contacted
5 that phone company. It was actually one of the
6 AT&T's. Might have been -- I think BellSouth is what
7 I contacted. They told me that they don't maintain
8 phone records all the way back to 2007. Not on
9 landline. So, I explained to Mr. Whitner that I'm
10 unable to get any phone records.

11 He explained to me, he still wants a continuance
12 and let me explain why. His sister who is here
13 today, tried to do apparently this BellSouth phone
14 count -- the phone account is delinquent. And his
15 sister tried to contact one of the credit agencies
16 and get a copy of the phone records that way. It's
17 my client's position that the credit company would
18 maintain a detailed account, I don't know whether
19 they mean of the bill or the phone calls made on a
20 particular day, I just don't know that. But they
21 feel like the credit company is going to maintain a
22 detailed account of all phone calls made on the day
23 in question. I don't know whether that's true or
24 not. I would have to look into that. But my client
25 feels that because this credit company would maintain

1 these detailed records, that we need time to obtain
2 those records.

3 Now, my understanding is that my client would
4 have to be the one requesting it because it's his
5 credit that we're talking about. I'm not going to be
6 able to do that. So, I'm a little bit unsure how I
7 would do this anyway if a continuance was granted.
8 However, I'm certainly willing to try. The other
9 alternative is we can go forward today, we can hold
10 the record opened and I'll try to move heaven and
11 earth. I'll contact SCDC, see if he can make the
12 request without me having to be involved at all, that
13 would be the easiest. However, it's SCDC and we know
14 that sometimes that they may not be able to help me,
15 I don't know.

16 I'm sorry, I just found this out today. I
17 didn't think there was any possible way that I would
18 be making a motion for more records. In anticipation
19 I see the AG rising, this is the second time -- this
20 is the second continuance we have requested. The
21 first time I requested it because I really just had
22 been appointed and just had not been able to get up
23 to speed. So, I certainly understand the Attorney
24 General's position.

25 THE COURT: Okay.

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1 MS. HORLBECK: And we are ready to proceed.

2 THE COURT: Okay. Good enough.

3 All right, you may articulate your argument
4 which I'm anticipating.

5 MS. RATIGAN: I believe you can already forecast
6 what I'm going to say, Judge. But we object to any
7 continuance at this point. Not only because one
8 continuance has already been granted but
9 Mr. Whitner's been transported here today, Mr. Scalzo
10 is here today. And furthermore, I don't really think
11 that the date the phone call was made is going to
12 have really any kind of relevance to the case.
13 However, if, Your Honor, is so inclined to try to get
14 that -- have Ms. Horlbeck try to get that
15 information, The State would submit that we should go
16 forward today and take testimony today while everyone
17 is here. And if Your Honor is inclined, just leave
18 the record open for a certain amount of time to maybe
19 get that information. Although, again, The State's
20 position is that it's not going to be relevant or
21 dispositive.

22 THE COURT: Okay. All right. Well, this is
23 what we'll do. We'll go ahead and proceed with the
24 evidentiary hearing today. And I'll take -- as I
25 hear the evidence, I'll determine whether that

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1 information, that evidence would be relevant to my
2 determination in this case. If I find based on the
3 evidence that's presented today that it is, then I'll
4 hold it open. But I'm not prepared to make that
5 determination as I sit here right now. Because I
6 just don't know enough about the case yet. So, let's
7 go ahead and proceed.

8 Ms. Horlbeck, you may call your first witness.

9 MS. HORLBECK: Judge, we would call Mr. Whitner
10 to the stand.

11 THE COURT: Mr. Whitner, come on up.

12 THE CLERK: Mr. Whitner, please place your left
13 hand on the Bible, raise your right hand.

14 SAMUEL WHITNER, after being duly
15 sworn, testified as follows:

16 THE CLERK: Please state your full name for the
17 record.

18 THE WITNESS: Samuel Lamont Whitner.

19 THE CLERK: Thank you, you may be seated.

20 MS. HORLBECK: Judge, before we begin, I did
21 want to make a verbal addition to Mr. Whitner's
22 petition.

23 THE COURT: Yes, ma'am.

24 MS. HORLBECK: We are also alleging ineffective
25 assistance of counsel for his failure to look into

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 the phone records issue.

2 THE COURT: Okay. Fair enough. I'll consider
3 the same.

4 MS. HORLBECK: Thank you, Judge.

5 DIRECT EXAMINATION

6 BY MS. HORLBECK:

7 Q Mr. Whitner, you proceeded to trial on these
8 charges, is that correct?

9 A Yes.

10 Q Who represented you at that trial in this case?

11 A Christopher Scalzo.

12 Q And there were actually two proceedings. There
13 was the first proceeding that was scheduled in front of
14 Judge Pyle, is that correct?

15 A Yes.

16 Q Did Mr. Scalzo represent you at that proceeding?

17 A Yes.

18 Q All right. At the appeal of Judge -- well, let
19 me back up. At the end of the proceeding before Judge
20 Pyle had actually granted the suppression of the tape, is
21 that correct?

22 A Yes, he did.

23 Q All right. And The State appealed?

24 A Yes, The State appealed his decision.

25 Q Did Mr. Scalzo continue to represent you at the

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1 suppression hearing that happened in front of the Court of
2 Appeals?

3 A Yes.

4 Q And after the Court of Appeals overturned Judge
5 Pyle's ruling and the second trial was held in front of
6 Judge Few, did Mr. Scalzo represent you there as well?

7 A Yes.

8 Q All right. And you were ultimately found
9 guilty, is that correct?

10 A Yes.

11 Q And as a result of that verdict, did you file
12 this petition for post-conviction relief?

13 A Yes.

14 Q Okay. All right. Now, let me just sort of give
15 a little bit of background. This was sort of a situation
16 that involved -- did this situation involve you and your
17 daughter JW

18 A It was alleged. Yes, that's what was alleged.

19 Q Okay. All right. And she made -- is it correct
20 that she made allegations against you that you had acted
21 inappropriately towards her?

22 A According to the case, yes.

23 Q Okay. All right. And she alleged that you had
24 made her perform oral sex on you, was that pretty much the
25 sum of the allegations?

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 A That's what it is.

2 Q All right. And you were actually arrested as a
3 result of a taped phone conversation between yourself and
4 your daughter, is that correct?

5 A Yes.

6 Q All right. Do you recall who recorded that
7 conversation between yourself and your daughter?

8 A Well, after coming into the precinct and
9 everything, I had discovered that it was my child's mother
10 and husband who made the actual recording.

11 Q All right. Did you know that this phone
12 conversation was being recorded?

13 A No.

14 Q To your knowledge did you daughter know?

15 A According to the case, no.

16 Q Okay.

17 A I was not made aware or anybody told me that I
18 was being recorded.

19 Q All right. And did you at all at any time give
20 anybody any permission to record your phone conversation?

21 A It's impossible, ma'am--

22 Q Well, let me finish my question before you
23 answer. I know you're -- I know you are anxious but just
24 let me make sure I get my question on the record, okay?
25 And then we'll get you're answer on the record.

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1 A All right.

2 Q Okay. So, at any point did you consent to this
3 conversation or any other conversation being recorded?

4 A No, ma'am.

5 Q All right. Now, and your position is that -- it
6 is your position today that a recording of these
7 conversations amounted to eavesdropping?

8 A Yes.

9 Q All right. And you recall that Mr. Scalzo
10 objected to the introduction of this conversation into
11 evidence, correct?

12 A Yeah. Well, according to the records Mr. Scalzo
13 had introduced the notion whether or not if the tapes were
14 going to be admitted. This was in trial. But as far as a
15 motion to suppress or anything in that nature, you know,
16 it wasn't according to due process brought upon the record
17 as he -- Judge -- moving to suppress these [verbatim]
18 evidence here today.

19 Q So, what did you want Mr. Scalzo to do in order
20 to argue and properly preserve this issue?

21 A Well, according to, from what I learned down
22 here at Broad River in the law library, it was required
23 that the attorney appraise the trial Court;
24 C. Victor Pyle Jr. of the actualities of why the tapes
25 were suppressed as far as being illegally obtained,

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1 violation of privacy, constitutional type things, you
2 know?

3 Q Uh-huh.

4 A We know that we cannot be secretly taped without
5 our knowledge and knowing so. And these, according to the
6 State case, coming all the way to the Supreme Court, that
7 these tapes were admitted pursuant to the Pollock
8 Standards. Now, the Pollock Standards do not have a
9 surreptitious elements in this ruling. They say that A
10 mother can use a child secretly to record a conversation.
11 That is not the standard.

12 Now, these matters came before the Court,
13 came before the Court when it was within the Court of
14 Appeals and Chris Scalzo did noted bring adequate facts to
15 the Court of Appeals as far as how these types were
16 recorded, did not when he object, he did not preserve the
17 record. As far as I know he preserved the record pursuant
18 to completeness. But I think it was fundamental that the
19 Courts know that these tapes were not acknowledged or --
20 excuse me, that nobody knew that these tapes were being
21 recorded. Essentially myself because this is my phone
22 line.

23 Q And --

24 A -- that's being recorded.

25 Q -- your position is that Mr. Scalzo's argument,

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1 the argument that he made before the Court of Appeals and
2 before Judge Pyle and any additional arguments he would
3 have made in front of Judge Few, that those were not
4 sufficient to preserve this issue and to explain to the
5 Court that these tapes were just eavesdropping?

6 A Well, the matter should have been brought before
7 the Court of Appeals when The State made its appeal
8 concerning eavesdropping according to the statute, you
9 know. I know we have a Statute 17-30-50 that says that
10 that's a crime.

11 Q Uh-huh?

12 A That you cannot just eavesdrop and record on
13 anybody. The matter should have been brought to the Court
14 of Appeals. This would have certainly preserved on the
15 record and provided the Supreme Court and following
16 courts, would have remedy to seal the record adequately to
17 correct the process regarding because C. Victor Pyle's
18 Order was made in rights to both of the parties. The
19 State as well as mine. So, his Order protected everybody
20 rights there.

21 Q Uh-huh.

22 A To prevent anything or stop anything like a
23 lawsuit. I wasn't really concerned about a lawsuit, it
24 was the fact that it needed to be presented. To protect
25 The State's as well as my rights. These evidence should

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1 have been clearly made -- made clear before the record
2 within the Court of Appeals process, nonetheless before
3 C -- John C. Few.

4 Q Okay. You do know that there was a suppression
5 hearing held before the Court of Appeals on July the 22nd,
6 2009, you do understand that?

7 A Yes, ma'am.

8 Q All right. But you -- and you're -- it is your
9 allegation today that Mr. Scalzo didn't make the proper
10 arguments in front of the Court of Appeals?

11 A Well, within the Court of Appeals, certain
12 questions wasn't asking about the phone records, Judge.
13 Is that the phone records would prove that the last
14 possible dates when these tapes were made, and also the
15 date of August 5th, 2007 and the date of August 2nd of
16 2007. That allegation was made by the mother within the
17 Court of Appeals that this abuse comes from my child
18 reading a book. This is what triggered her memory. But
19 testimony that comes from the second trial before Few
20 provides that Valerie Bishop, which is the librarian who
21 checks out the books or whatever, she testified that the
22 books were not in the house at the time. When the mother
23 solely testified that the child read the book. Now,
24 looking at the testimony from the child, there's no period
25 to say that JW read this book in July and then came

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1 here, all the way here in August and read this book.

2 Q Let me stop you because you're getting a little
3 bit ahead of me.

4 A Okay.

5 Q On the book. When you talk about the book, do
6 you recall what this book was about?

7 A Good and Bad Secrets.

8 Q Okay. Just to provide the Court a little bit of
9 background, the facts -- do you recall whether or not
10 JW read this book?

11 A Well, according to the mother statement JW
12 read the book.

13 Q And after reading the book is that when these
14 allegations were presented?

15 A According to the testimony and the Court of
16 Appeals.

17 Q I guess a better way to say it is, is that when
18 JW disclosed to her mom?

19 A According to what was said in the Court of
20 Appeals by the mother.

21 Q Okay. All right. All right. And regarding
22 that book, did Mr. -- do you recall whether or not
23 Mr. Scalzo objected to introducing that book at the
24 State's introduction of that book into evidence?

25 A No, he did not. It's not shown in the record

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1 that he did.

2 Q Did you and Mr. Scalzo discuss the book and any
3 grounds he may have had for objecting to the introduction
4 of the book?

5 A Well, the book was never mentioned in the first
6 trial. So, it was totally a surprise to me. I didn't
7 know what was going on.

8 Q Did you and Mr. Scalzo ever discuss it in your
9 conferences?

10 A No.

11 Q The book, I mean?

12 A No, I never -- as far as -- as far as anything
13 involving a book was never brought to my attention until
14 we were in Court of Appeals.

15 Q Okay.

16 A And according to the date of when things was
17 supposed to be recorded, these dates -- not when -- when
18 Christopher Scalzo made his objection before C. Victor
19 Pyle, Jr.

20 Q Okay.

21 A He never preserved that book or never said
22 anything about August 15th, 2007 and when the tape was
23 actually recorded.

24 Q After you first heard about the book at the
25 Court of Appeals hearing, did you and Mr. Scalzo ever talk

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1 about that book after the Court of Appeals hearing?

2 A No.

3 Q All right. He did not discuss it in preparation
4 for the trial in front of Judge Few?

5 A As far as I was concerned then I knew these
6 tapes were -- I did not consent to these tapes nor did I
7 know that it was being recorded. And I didn't expect the
8 Court of Appeals to come back with a ruling as far as to
9 modify the Judge's decision.

10 Q Okay.

11 A So we didn't discuss anything.

12 Q All right.

13 A He didn't discuss any. I did make to him before
14 the trial, before C. Victor Pyle, Jr., which was the first
15 trial for Mr. Scalzo to obtain the phone records. I did
16 ask him to do that.

17 Q Okay. Why do you think -- explain to the Court
18 why you think the phone records are relevant to your case?

19 A Because the phone records, according to the
20 testimony, the phone records is what triggered my daughter
21 to disclose this. The phone records was not in the
22 proximity of the mother's home. Wherein the issue that
23 she just amended today, has hand up a copy of that and you
24 can see that, Your Honor.

25 That this book was not within the proximity of

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1 the home at the time when she claimed that JW read
2 the book. This is what supposed to have started
3 everything, you know, per se. On the testimonies that the
4 librarian had given, and Mr. Scalzo did ask the librarian,
5 You mean to tell me this stuff was -- she came to you in
6 August and not in June?

7 She said, No, she came to me in August.

8 That's impossible, the book is not in the house.

9 Furthermore, the phone records will pinpoint the
10 last date when my calls were intercepted. And it will
11 prove that those conversations were intercepted. Then the
12 mother subsequently went and checked out this book, Your
13 Honor. To corroborate this case. That's why it's so
14 important that those phone records been here today. And I
15 did send a copy to Ms. Ratigan, as well as Judge Verdin,
16 who removed Mills Ariail off my case due to conflict of
17 interest. And this matter was brought before the Judge
18 and served to the parties, ask if anything that I done
19 wrong to please respond and let me know. And I sent a
20 copy to my lawyer asking for the subpoenas for these phone
21 records. But it's detrimental that they be here.

22 Q Did you and Mr. Scalzo discuss the phone records
23 in preparation for any of your trials?

24 A Yes, we did.

25 Q Okay. And as a result of your discussions, did

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 Mr. Scalzo try to obtain these phone records for you?

2 A Well, he kept telling me that he sending his
3 investigator to go get these phone records. And I kept
4 asking him repeatedly.

5 Q Did he produce any phone records for you to
6 review?

7 A No.

8 Q But it's -- is it your position today that those
9 phone records are imperative --

10 A Yes --

11 Q -- and relevant to this case?

12 A Yes, they are.

13 Q Are you asking the Court to grant you to leave
14 the record open to allow additional time for us to try to
15 obtain those?

16 A If that's the best remedy. But I'm asking the
17 Court also, if I may, if we could have a continuance to
18 bring forth those phone records, Your Honor. Because it
19 provides exculpatory evidence. It shows what's going on
20 as far as this case coming into the court. As far as the
21 mother's testimony.

22 Q Well, I think he's already -- I mean, the Judge
23 has already ruled on that point so let's go forward. And
24 we're just asking the Judge for a little bit of extra
25 time, okay?

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 A I understand.

2 Q Now, just briefly back to the book, your
3 position on the relevance of the book is what? Explain
4 that clearly to the Court.

5 A Is bringing the fact that the mother, you know,
6 her motives could have been argued of why this is before
7 the courts. Like, you know, it is truly what JW is
8 saying or, you know, it's credibility to the witness in
9 other words.

10 Q What is your recollection of when the librarian
11 stated that the book had been checked out?

12 A Well, the recollection reflects in the record
13 before John C. Few. And she testified to when the books
14 was checked out and turned in. And also agreed that there
15 was never in the house nowhere within August.

16 Q Okay. And August was time that your daughter,
17 JW said she read the book and disclosed to the
18 mother?

19 A According to -- yes.

20 Q All right. And that's the relevance of the
21 book?

22 A Well, yes. And the relevance of the book would
23 be the actual time when this was disclosed to the mother.
24 Because that's important. Because we know that if the
25 child actually read the book -- or excuse me, my daughter,

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 read the book in August 2007, which is impossible. It's
2 not in the home.

3 Q All right. Did Mr. Scalzo object to the
4 introduction of the book into evidence on those grounds?
5 To your recollection?

6 A No. As far as the record, no.

7 Q All right. Did Mr. Scalzo make that argument in
8 front of the jury?

9 A No.

10 Q Do you think if he had done those things that
11 the outcome of this case would have been different?

12 A Surely because we could have moved to impeach
13 some statements of both witnesses.

14 Q Okay.

15 A And possibly could have come to the fact finding
16 in this matter.

17 Because the tapes, Your Honor, are all compiled
18 up to everything, you know. We don't know what was
19 actually being talked about. What was said or what these
20 matters were -- actually what relevance I'm being accused
21 of confessing when I ain't confessing stuff like this.

22 Q Now, let's talk about that a little bit. It is
23 your position that the taped conversation between yourself
24 and your daughter, it is your position that that
25 conversation was not a confession?

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 A No, it's not a confession.

2 Q What was it then?

3 A It was a conversation, a private conversation I
4 was having with my child.

5 Q Okay.

6 A In regards to why I'm being accused or why you
7 doing this here? So, what is going on?

8 Q Okay.

9 A I know some things was said that may probably
10 would lean or probably stir the jury, make a jury believe
11 this is exactly what was going on. But the matter is
12 these evidence that I'm speaking of, that they should have
13 been presented before the courts to give me at least a
14 fair trial and a fair bit at this thing here.

15 Q All right. It is your position today that The
16 State, I guess, engaged misconduct by introducing a
17 private -- a tape of a private conversation into evidence?

18 A Yes.

19 Q That your attorney should have objected on those
20 grounds as well?

21 A Yes, because the law forbids that for anybody to
22 disclose contents of a surreptitious taped conversation,
23 that's pursuant -- and I think the Statute is 17-30-65,
24 17-31-05 Federal Code 18, 25, 15, 16 through 17. U.S. vs.
25 Arm says that all surreptitious unauthorized tapes are

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 illegal and held as a crime. Without the Pollock factors
2 as me knowing that these tapes are being recorded. That's
3 exactly what we have here. It's a product of illegal
4 interception. Excuse me with my mumbling of my words.

5 But this is what the law says. Of course, it
6 should have been presented to the Courts to know that.
7 Because Gailberg says, possible things that go before the
8 Grand Jury, as a witness of a grand jury testifying the to
9 actual -- the officers being in possession of these tapes.
10 17-30(a), 17-30-75, you know.

11 Q Okay. All right. And based on this misconduct
12 do you believe -- it is your position today that
13 Mr. Scalzo should have requested a mistrial?

14 A Yes. Because the -- The State is claiming that
15 they had rights to an appeal upon 14-3-30. Which is
16 dealing with intermediate or impairment or state or
17 ability to prosecute. Being that C. Victor Pyle, Jr.
18 suppressed those tapes and I think the codes give him the
19 power to do as the Judge of contempt jurisdiction, which
20 is Circuit Judge, 17-30-15-8, exactly. Being that he did
21 suppress those tapes, he had all rights to suppress the
22 tapes because they are surreptitious. Which they are
23 eavesdropping.

24 So therefore, there was no foundation. And I
25 think The State knew that there was no foundation because

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1 17-31-10 tells them that this application or order or
2 approval must be substantiated in the Court of Appeals,
3 where review it, review the fact from those, why the tapes
4 were -- or excuse me, why the application was approved or
5 denied, etcetera. And they make they decisions from
6 there. So, The State knew very well that these tapes are
7 illegal and that had no appealability to challenge the
8 Judge decision that holds -- holds -- that can materially,
9 ultimately determine any litigation pursuant to the
10 Interlocutory Appeals Act.

11 Q And it's your position that Mr. Scalzo should
12 have done something to prevent The State from appealing
13 Judge Pyle's ruling?

14 A Well, pretty much goes back to --

15 Q Please explain to the Court what you thought
16 Mr. Scalzo should do to try to prevent The State from
17 appealing?

18 A Well, Mr. Scalzo, all he had to do was tell the
19 truth about the tapes and be honest about his methods when
20 he claimed that he raised this motion to suppress which is
21 not shown in the record as an action we can preserve. But
22 motions in limine don't preserve issues. Especially, when
23 they have not been preserved constitutionally. I mean,
24 consider things of Fourth Amendment and privacy and
25 statutory law that's prohibiting things to be done. No

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1 matter what is done. We all have Bill of Rights Sale, we
2 have all right. We have rights to have a fair trial. And
3 being in for violation of Fourth Amendment has occurred,
4 that's the number one thing that I'm sure in this country
5 that needs to be addressed to the Judge so he can make
6 adequate-able consideration.

7 Q When did you want Mr. Scalzo to raise an
8 objection about the tape?

9 A All through the trial mainly.

10 Q But your position is that a motion in limine is
11 not sufficient?

12 A Okay, this is when The State moved to admit
13 the -- Judge Pyle asked [verbatim], What basis does the
14 state have to introduce these tapes?

15 Mainly objection right there should have been
16 made. Your Honor, these tapes are violating the Fourth
17 Amendment, they are surreptitious, there's no exception to
18 these tapes, I'd like to preserve on the record to wit
19 instead of preserving the rule of completeness.

20 Q But at what point did you think Mr. Scalzo
21 needed to make that objection?

22 A Right there in the trial. And at the point when
23 The State was moving -- when The State was moving for its
24 appeal.

25 Q Before or after the jury was sworn in?

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1 A The jury was never sworn in.

2 Q You didn't even pick a jury, did you?

3 A No, we just struck one but they were never
4 sworn.

5 Q Okay. All right. Okay. What other grounds did
6 you have to allege against Mr. -- to support your position
7 against Mr. Scalzo?

8 A Well, the mistrial like -- like you aksed
9 [verbatim] earlier.

10 Q Any new grounds that you haven't already
11 explained?

12 A Well, according to phone recordings, as far as
13 investigating the phone records, where are the evidence
14 where extremely [verbatim] right then. You could have
15 protected it from spoilage. That's what we're having a
16 problem with here today. The phone records would have
17 prove what I testified to today.

18 Q Okay. What additional allegation do you have to
19 present today?

20 A That the prosecutor -- the prosecutor did act
21 with prosecutorial misconduct by not being truthful with
22 the Court of Appeals when it made its appeal before --
23 they stated within the court before the Court of Appeals
24 in his motion that the Honorable Pyle is errorful
25 [verbatim] -- suppressing -- for denying -- well

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1 suppressing the evidence pursuant to a motion to suppress.
2 It's clearly on the record that The State is moving, and
3 according to the chronology and the conversation when
4 Judge Pyle asked, What right does a person have to
5 unknowingly -- The State told him, We do not have any
6 South Carolina or federal law to introduce these tapes.
7 But yet went on.

8 So, according to that, you know, you know, the
9 State knew, knew very well they were out of order.
10 Because she said herself, We do not have any law to
11 support the admission of these tapes.

12 Q Okay. Let me ask you this too, do you recall
13 when your daughter testified, do you recall the time
14 period in the trial where she was testifying?

15 A Vaguely.

16 Q Okay.

17 A Somewhat.

18 Q Okay. Do you recall where you consider at that
19 point that you might want to plead guilty to the charges?

20 A Well, because--

21 Q Just answer yes or no.

22 A Yes, I do.

23 Q Here's what I'm getting to. Judge Few asked you
24 if you had -- you had told Judge Few that the case was not
25 properly prepared. Do you recall telling Judge Few that?

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 A Yes.

2 Q And then you also said that you were not blaming
3 this counselor, meaning Mr. Scalzo. Why at that point did
4 you -- why didn't you tell Judge Few at that point your
5 concerns?

6 A Well, because -- actually, as I stopped, he
7 tells my attorney to consult with me. So, I'm listening--

8 Q Who's he?

9 A Judge Few.

10 Q Okay.

11 A Excuse me. So, at the same time my family, my
12 sister was there, everybody was there. Extremely
13 pressured. Because, you know, everything is like coming
14 at me at one time with everything, you know. So, then I'm
15 thinking it's for the best interest of my future to do
16 this. But some -- I just couldn't do it that day. I just
17 couldn't.

18 Q Why didn't you tell Judge Few, though, your
19 concerns that you were having about the way the case was
20 prepared?

21 A Ma'am, the way I'm talking right now, I don't
22 think I had really just can express that at that time. I
23 was overwhelmed.

24 MS. HORLBECK: Okay. All right. Okay. Well,
25 answer any questions that Ms. Ratigan may have for

SAMUEL WHITNER-DIRECT BY MS. HORLBECK

1 you.

2 CROSS-EXAMINATION

3 BY MS. RATIGAN:

4 Q Explain to me -- I don't think that I was
5 following your argument. Why did you want Mr. Scalzo to
6 make a motion for a mistrial again?

7 A Because The State knew that they were violating
8 the Wire Tape Statute that prohibits to disclose contents
9 or bring in evidence when a tape is being unauthorized or
10 intercepted pursuant to 17-30-65.

11 Q Okay. Did you want him to make that before
12 Judge Pyle or before Judge Few?

13 A Before any Judge in the proceeding.

14 Q Okay. And I believe you testified that that
15 audio taped conversation between you and JW that was
16 not a confession?

17 A I didn't make a testimony. This is within my
18 briefs, within my supplements here before the Court.

19 Q Okay. But what you're saying today is you don't
20 think that was a confession?

21 A I'm telling you today I know that wasn't a
22 confession.

23 Q Okay. But didn't you tell JW that you had
24 made a mistake?

25 A I spoke with -- according to my argument here

SAMUEL WHITNER-CROSS BY MS. RATIGAN

1 today --

2 Q Okay --

3 A -- if I can--

4 Q Okay, but you need to answer my question first.

5 Did you tell JW --

6 A Yes, I did--

7 Q -- that you had made a mistake --

8 A I did say that --

9 Q Okay. And didn't you also ask her to forgive
10 you?

11 A Yeah, for the multiple conversations that I was
12 having with her then because I was upset with the way I
13 was talking to her.

14 Q And didn't you also say that your father had
15 done the same thing to you when you were a child?

16 A Well, I said -- I said my father done many
17 things but I never told my child that my father had
18 sexually abused me. That would have been clear on the
19 tapes. If so.

20 Q Well, you listened to the tapes, correct?

21 A Yes, I did.

22 Q And you still say it wasn't a confession, it was
23 just you having a conversation with JW

24 A That's exactly what it was according to my
25 rights.

SAMUEL WHITNER-CROSS BY MS. RATIGAN

1 MS. RATIGAN: Okay, that's all I have, Your
2 Honor.

3 THE COURT: Any redirect?

4 MS. HORLBECK: I don't have anything further.
5 I didn't know if you -- you sounded like you
6 might have something else to say.

7 MR. WHITNER: Yes, because I didn't make clear
8 about the issue of confession. I never -- when the
9 first trial took place, I think it was Bobby Bradford
10 who was questioning me about these tapes. I told
11 him -- I denied all this here. It's not just what
12 she's bringing up here and telling you this, there's
13 other things that's going on. These was other
14 matters considered that my child wellbeing for it,
15 healthy, which I got her to the hospital. If I
16 wouldn't don't that, she wouldn't be here today. She
17 wouldn't been here due to a bad appendix. Which
18 these -- which the parents on the other side, they
19 weren't paying attention to her health. So, when she
20 came, her mother did not come back and pick her up.

21 We told Mr. Scalzo that. Then I come back, pick
22 her up, I had to put her in school, I went to the
23 school looking for her. Couldn't find the parents,
24 couldn't find nobody. They stayed in a gaited
25 community. Nobody could find them. Until JW

SAMUEL WHITNER-CROSS BY MS. RATIGAN

1 went to the hospital and it was me who took care of
2 her.

3 And the doctor told me said, Hey, why y'all
4 didn't you pay attention to her health?

5 I said, Doc, she was with her mother, she wasn't
6 with me.

7 And so, he went and talked to her and the same
8 thing came about. But anyway, the inflammation was
9 bad and her appendix so bad and it was a rupture.
10 And if I didn't get her there on time, she wouldn't
11 have been here.

12 So, it was a lot of things that I was discussing
13 with my daughter at the time because I just didn't
14 understand what was going on. Just -- just dropped
15 you off upon your -- upon your -- upon you wanting to
16 see your brothers and sisters before you come to stay
17 with me. See, these issues was going on. This is
18 why I was upset with my daughter. This is the reason
19 why I was saying some of the things. But I never
20 told my child that your granddaddy done this here to
21 me.

22 Q Okay.

23 A Verbatim. And that is not a part of the
24 transcript.

25 MS. HORLBECK: Okay, that's all I have.

SAMUEL WHITNER-CROSS BY MS. RATIGAN

1 THE COURT: Okay. All right, sir, you may step
2 down. I appreciate you being here.

3 MS. HORLBECK: Judge, we have nothing further.

4 THE COURT: All right. Anything from The State?

5 MS. RATIGAN: Your Honor, we call Mr. Scalzo.

6 THE CLERK: Mr. Scalzo, place your left hand on
7 the Bible, raise your right hand.

8 CHRIS SCALZO, after being duly sworn,
9 testified as follows:

10 THE CLERK: Please state your full name for the
11 record.

12 THE WITNESS: Christopher Scalzo.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MS. RATIGAN:

16 Q Mr. Scalzo, do you recall representing
17 Mr. Whitner on this charge?

18 A I do.

19 Q Were you appointed or retained?

20 A Appointed.

21 Q Did you file the usual Brady and Rule 5 Motions?

22 A I did.

23 Q Did you receive materials from The State?

24 A I did.

25 Q As part of that discovery, was there a series of

CHRIS SCALZO-DIRECT BY MS. RATIGAN

1 audio taped phone calls?

2 A Yes. It's really one audio tape but yes.

3 Q Did you have a chance to review that with your
4 client?

5 A Yes.

6 Q Did he explain to you his version, kind of his
7 side of what that phone call was?

8 A Yes.

9 Q Okay. And you discussed with him -- well did
10 you discuss with him that you were going to file a motion
11 to suppress?

12 A I guess we did. I think he was talking about a
13 formal written motion versus the oral motion that was made
14 at the trial in front of Judge Pyle.

15 Q Uh-huh.

16 A I don't have a specific recollection of our
17 conversation but obviously the issue was a pretty big
18 issue. Basically, the main issue in the case. How
19 detailed I got with him in terms of the legal specifics
20 and procedures about how I was going to make that, I don't
21 know. But ultimately, I made an oral motion to suppress
22 at the beginning of the trial.

23 Q And what was your basis for that motion?

24 A Well, to be honest it was sort of an evolving
25 basis as we were going through it. It was a -- this was a

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1 very technical issue legally because procedurally the
2 statute created several bars about how you could bring the
3 motion. And some of what I was doing was reading what the
4 Judge was willing to do and what the prosecutor was
5 willing to do. I made a general motion to suppress. And
6 as we evolved I was able to be more specific in front
7 Judge Pyle. And quite honestly that was -- I was
8 searching for issues that I considered the Judge might
9 take and made as a broad motion as I could and we found an
10 issue that worked. And it was legitimate. I don't say
11 it's not legitimate. And that ended up being the issue
12 that we ultimately took all the way to the South Carolina
13 Supreme Court. Which was the violation of the Wire Tap
14 Statute.

15 Q And your argument to Judge Pyle visive the Wire
16 Tap Statute, was it basically what Mr. Whitner was saying
17 which is that since he didn't consent to the call it was
18 improper?

19 A Yes.

20 Q Okay.

21 A That -- South Carolina is a one party -- at
22 least one party to the conversation has to consent.
23 Mr. Whitner did not consent, there wasn't going to be any
24 evidence presented by The State that he had consented.
25 And it was undisputed that he had not consented. And it

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1 was pretty -- well, it was undisputed that his daughter,
2 who was the other participant in the conversation, had not
3 consented. The issue -- we thought that was a pretty
4 straightforward issue that meant neither party had
5 consented. The State argued that the mother could consent
6 on behalf of the child. We obviously argued that that was
7 not the law in South Carolina. And that is where the
8 issue evolved out of that.

9 Q And that was kind of the posture before the
10 Court of Appeals?

11 A That was our posture in front of the Court of
12 Appeals during the suppression hearing --

13 Q Right.

14 A And it was our posture in front of the Supreme
15 Court as well.

16 Q But ultimately the Court of Appeals found --
17 they denied your motion?

18 A Yes.

19 Q And did you explain to Mr. Whitner, basically,
20 what that meant for your case at that point?

21 A Yes. I mean, we would have had several
22 conversations about it. It was the biggest issue in the
23 case. It was complicated. And, in fact, this was the
24 very first case that I had ever gone up to the Court of
25 Appeals in a trial level suppression motion. A lot of the

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1 procedure that was going on had never been done and
2 thought through as far as even from the Court. So, a lot
3 of it we were really learning, all of us, the lawyers, as
4 well as Mr. Whitner, as we were going along procedurally.

5 And it was complicated because once the Court of
6 Appeals panel ruled, when we went back to the trial, a new
7 trial, we couldn't re-litigate that issue. The Court
8 of -- it's unusual because normally in a trial if you make
9 a motion in limine, when the issue comes up again, you
10 almost get a little chance to re-litigate or reargue
11 because you're now in front of the Judge. We weren't
12 allowed to do that in this situation. So, there was a
13 complicated scenario. We would have discussed that but I
14 would not be surprised if a lay person, because I'm not
15 sure many lawyers would have understand all the ins and
16 outs of it.

17 Q Once the Court of Appeals did deny your motion
18 to suppress, was there any thought to try to plead at that
19 point or was it going to go right back on the trial
20 docket?

21 A No, we negotiated. You know, we were doing two
22 things at the same time. We were working on the appeal
23 and that process. Because that process took several
24 months. And we were also negotiating. I think The State
25 was interested in negotiating to a certain extent so there

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1 was no some negotiation that took place.

2 Q And you would have conveyed those negotiations
3 with Mr. Whitner?

4 A Yes, ma'am.

5 Q And I assume he would have turned all that down
6 since y'all did end up going the trial?

7 A Ultimately. I mean, the nature of this case
8 before it went to trial, through the trial, the first one
9 and even the second trial, there was a lot of negotiation,
10 a lot of various deals, so to speak, that were laid out
11 from us, from The State. And there was a lot of -- it
12 went from assault and battery of high and aggravated
13 nature, criminal -- I mean, we had a lot of various
14 scenarios that we tried to work out. Some came from us,
15 some came from them. But ultimately, yes, we did not
16 agree.

17 Q Did Mr. Whitner ever tell you why he wanted to
18 go trial? Did he ever give you a reason why he turned
19 down all these pleas and insisted on a trial?

20 A Well, I guess I disagree with your
21 characterization.

22 Q Okay.

23 A We negotiated.

24 Q Uh-huh.

25 A We couldn't come to an agreement.

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1 Q Okay.

2 A Ultimately, The State decide they were going to
3 go to trial.

4 Q Okay.

5 A I mean, we didn't demand it, that was just
6 ultimately what was going to happen.

7 Q Okay. So, you just weren't ever able to come up
8 with something that was in his liking enough to plead
9 guilty?

10 A No. I mean, we just never came to a disposition
11 that we agreed to. And ultimately The State said, I
12 guess, we need to go to trial. That was their call. If
13 it was up to us we would have said, No, we don't have the
14 trial, we'll go home.

15 Q Okay. Now, getting into some of the specific
16 issues Mr. Whitner raised, were you aware of this library
17 book issue prior to going to trial before Judge Pyle?

18 A Absolutely. I've got the subpoena and the copy
19 of the book that I got from the Greenville Library System.

20 Q Okay. And in looking into the book issue did
21 you discovery any kind of discrepancy as to timeline or
22 anything that Mr. Whitner would have just testified about?

23 A No, I had a little bit of trouble following the
24 testimony today. I wasn't sure I got the issue. In
25 looking at the record that I've got, while Mr. Whitner was

CHRIS SCALZO-DIRECT BY MS. RATIGAN

1 testifying, I believe the record shows that the book was
2 taken out in June and then renewed in July, I think it's
3 '07 of the -- right before the phone conversation take
4 place. We had that record. I'm not sure I understand the
5 timing issue that was presented. But that's what we had.
6 I did not raise a timing issue in the trial. I don't
7 believe.

8 Q Okay. And did Mr. Whitner ever ask you to
9 obtain the phone records in this case?

10 A He may have, I don't recall the subpoena. I
11 looked through the subpoena that file I've got. There's
12 no subpoena to any of the phone companies for,
13 essentially, the log that would show the number, the date,
14 the length of the call, that kind of information. I had
15 the phone conversation on tape, I didn't get the actual
16 dates and length of a call and things like that, no.

17 Q In your opinion would it have been helpful to
18 have the phone records or not really?

19 A I didn't think it was necessary because the
20 issue was what was said. That's the only issue that I
21 found. Now, I could be wrong but that was the only issue
22 that I found. Which was what was said and who was saying
23 it.

24 Q Okay. In your opinion, again, this is one of
25 the issues that Mr. Whitner has brought up today, would

CHRIS SCALZO-DIRECT BY MS. RATIGAN

1 you had had a basis to make a motion for a mistrial
2 because of a violation of the Wire Tap Act?

3 A I don't -- certainly not after the Court of
4 Appeals suppression issue, hearing, decision and into the
5 second trial, I don't see that. With regard to the first
6 trial when The State, essentially, made a motion, an oral
7 motion, for, I don't even know what it was, they just
8 basically set the case aside. I guess I could have made a
9 motion for a mistrial at that point but I don't really
10 know I would have characterized it. That's about the only
11 time where I thought, potentially, a mistrial could have
12 been made. But it didn't cross my mind to make a motion
13 for a mistrial at that point.

14 Q About Page 308 of the trial transcript, it's
15 brought up to Judge Few that Mr. Whitner is considering to
16 plead guilty, do you recall that?

17 A Yes, sir -- yes, ma'am.

18 Q Was that something y'all were still kind of
19 talking about during the trial is whether or not he could
20 still plead or did he just bring it up to you just kind of
21 out of nowhere?

22 A Well, it didn't come out of nowhere. What
23 happened was that was the point at which they were about
24 to call JW to the stand. And it was a pretty normal
25 reaction. I think that was probably about to be the most

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1 dramatic point at the trial. And because of that we
2 needed Mr. Whitner, essentially, signaled to me that we
3 sort of needed -- could we talk? That talk ended up
4 becoming, let's see what we can negotiate with The State.

5 Q Okay. And what did you and Ms. Sustakovitch at
6 that point?

7 A We discussed a plea and I'm trying to remember
8 the specifics because there was several negotiations over
9 a long time about what the specifics would have been. And
10 to be honest with you,, I don't remember the specific deal
11 we were trying to come to in the middle of the trial. At
12 one point there was assault and battery of a high and
13 aggravated nature put on the table. But I don't think
14 they went that far at the trial. I do not believe it was
15 criminal sexual conduct with a minor in the first degree.
16 It was some other charge but to be honest with you I don't
17 remember. I didn't have a chance to write it down like I
18 normally do because we were running and shuttling back and
19 forth in the middle of the trial.

20 Q Can you think of any other -- I mean, the
21 gravity of Mr. Whitner's main complaint seems to be that
22 you didn't properly argue the facts and the law at each
23 step before Judge Pyle, before the Court of Appeals and
24 before Judge Few. Can you think of anything else,
25 factually, you could have kind of thrown into the mix that

CHRIS SCALZO-DIRECT BY MS. RATIGAN

1 may have effected the outcome? I know that's kind of a
2 speculative question but?

3 A Well, to me the issue from appellate standpoint
4 would have been the suppression of the tapes, or the audio
5 recording. The testimony of the forensic interviewer.
6 And this is pre-Jennings and several cases that came out
7 afterwards that, in essence, vindicated what we wanted to
8 do in that trial but this is before that. I think that --
9 those are the main issues that sort or stand out to me.
10 With regard to audio tapes, I don't know what factually we
11 have done to preserve the issue. Once we got to the Court
12 of Appeals, at that suppression hearing, I mean you got a
13 full blown suppression hearing. You also had a full blown
14 appellate level briefing. So, it wasn't a normal argument
15 like you do at a trial level where you make -- you put the
16 witness up then you make an oral argument. We actually
17 submitted appellate level briefs before we went to the
18 hearing, did the hearing and then followed up with an
19 appellate type oral argument all at the same time. So,
20 that was about as thorough kind of hearing on that issue
21 as you could have gotten.

22 With regard to the forensic interviewer, there's
23 not much to do there, it sort of speaks for itself.
24 You're really preserving the issue with a pretty simple
25 objection. So, you know, there may be other issues but I

CHRIS SCALZO-DIRECT BY MS. RATIGAN

1 doubt it. Those are the two issues that I felt were the
2 most important to preserve in the trial.

3 MS. RATIGAN: That's all I have, Your Honor.

4 THE COURT: Okay.

5 CROSS-EXAMINATION

6 BY MS. HORLBECK:

7 Q Mr. Scalzo, you testified that there were some
8 negotiations that went on between you and The State?

9 A Yes, ma'am.

10 Q All right. And that the offer at one point may
11 have been assault and battery, high and aggravated?

12 A Yes.

13 Q Was that an offer that you put on the table or
14 did the state ever put that on the table at any time?

15 A It was on table. How it came about, whether I
16 kind of put it out there or whether Ms. Sustakovitch put
17 it out there, I don't recall. In this case there was one
18 written letter, initial letter, of an offer which I have
19 in the file.

20 Q Okay.

21 A And that was, I believe, to what he was charged
22 with --

23 Q Right.

24 A -- kind of that. And that's really early on.

25 Q Okay.

1 A Everything else happened really through email
2 which never really solidified any kind of offer. And then
3 an oral conversation between me and Ms. Sustakovitch on
4 various court dates when he had been brought over.

5 Q Okay.

6 A I would think ABHAN might have come from us but
7 it could have come from her because of the advantages to
8 pleading to ABHAN with regard to registry and things like
9 that. But I'm not sure if she came up with it first or if
10 I came up with it first or me and Mr. Whitner came up with
11 it first.

12 Q Okay. And were all these plea negotiations,
13 were they discussed with Mr. Whitner?

14 A Yes.

15 Q All right. And is it fair to say that a part of
16 your trial strategy would have been to keep out any
17 testimony regarding the abuse of Mr. Whitner when he was a
18 child?

19 A Absolutely.

20 Q Okay.

21 A And I believe there's a motion, not in the first
22 trial because I don't think we got far enough into the
23 trial.

24 Q Right.

25 A But I believe we dealt with it in the second

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 trial with Judge Few --

2 Q Right.

3 A -- about that issue. And then there was a issue
4 regarding of the age of JW mother --

5 Q Okay.

6 A -- when she -- when JW was conceived.

7 Q Right.

8 A That was an issue of the trial as well.

9 Q Okay.

10 A That was handled. And I don't believe anything
11 came in regarding either of those two.

12 Q Okay. Well, I was going to say, I don't -- the
13 Solicitor did not ask any questions regarding
14 Mr. Whitner's abuse when Mr. Whitner was a child. Not on
15 her direct, is that fair to say?

16 A I think you're right. I don't recall that issue
17 really being developed in front of the jury in terms of
18 the trial.

19 Q All right. Do you have your transcript?

20 A I don't have it in front of me. I know I got it
21 downstairs.

22 Q I'm going to just hand you mine, if that's all
23 right.

24 A Yes.

25 Q Unless you want me to -- I have not tampered

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 with this. I've got it turned to Page 203 --

2 A Sure.

3 Q -- is what I'm looking at.

4 A All right.

5 Q I'm looking at Lines 8 through 11.

6 A Okay.

7 Q And is that -- if you would review that then
8 I'll ask you some questions.

9 A All right. Okay.

10 Q Okay. Okay. And at that point, if you don't
11 mind I'll borrow The State's transcript because you got
12 mine. At that point -- and I know it says up at the top
13 that we're on redirect examination. That's actually --

14 THE COURT: What page, I'm sorry?

15 MS. HORLBECK: I'm on Page 203 Lines 8 through
16 11, Judge.

17 THE COURT: Okay, good enough.

18 BY MS. HORLBECK:

19 Q And that's actually part of your
20 cross-examination, is that correct, Mr. Scalzo?

21 A It looks like, yes.

22 Q Okay. At that point -- at that point the father
23 is mentioned. I think Ms. Grady is mentioning that she
24 did not want to leave JW with Mr. Whitner's father?

25 A Yes.

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 Q Okay. And she was able to get into that on
2 cross-examination a little bit?

3 A Yeah, she was close. What she did was she was
4 asking about -- she -- the issue was presented as was
5 JW ever left with other family members, not anybody
6 in specific. And then as a good lawyer she narrowed her
7 way down and then ultimately ended with asking about
8 Mr. Whitner's father.

9 Q Okay. All right. And I see The State tried to
10 get into -- get more information about Mr. Whitner's abuse
11 when Mr. Whitner was a child on Page 204, Lines 8 through
12 10, is that correct?

13 A Yes.

14 Q I understand you overruled -- I mean, you
15 objected and that objection was overruled?

16 A Yes.

17 Q Why do you think that -- do you think you opened
18 the door any on your cross-examination? Just in
19 hindsight? I know it can be difficult, these things
20 happen but?

21 A I guess it's possible. We were really going
22 after whether or not the access to her was solely --
23 Mr. Whitner was the only one who had access. We did -- I
24 don't believe any of my questions were related to what did
25 his father do or not do to him or her.

1 Q Right.

2 A It was just simply there were other
3 possibilities if this happened. There may have been other
4 people either to who did it or who could have seen or
5 observed something that would have been consistent or
6 inconsistent. That's sort of where we were going.

7 Q Okay.

8 A I don't know if that opened the door or not.

9 Q Okay. All right. Were you ever able to develop
10 Mr. Whitner's father as a potential, some kind of
11 alternative suspect in this case against JW

12 A No.

13 Q Okay. Did you try to investigate that as a
14 potential defense?

15 A Yeah. I mean, Mr. Whitner and I discussed it.
16 I did not interview his dad. It was discussed by
17 Mr. Whitner and I in terms of the overall story,
18 obviously, about what happened in history. But was not
19 used. I just simply didn't use that -- I don't know if
20 it's a defense but I just simply didn't use that set of
21 facts as an argument.

22 Q Okay. Did you have anything to support that set
23 of facts as an argument?

24 A The only thing I would have had were probably
25 would have been either Mr. Whitner's testimony about the

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 abuse or in cross-examination of these witnesses pulling
2 out what they would have known about the abuse which would
3 have been hearsay. It was a complicated issue but we
4 would have had to decided to go right into that abuse.

5 Q Okay.

6 A And so he had competing issues.

7 Q Okay. All right. And at the close of the case
8 after the jury had rendered their verdict, do you recall
9 standing in -- you and Mr. Whitner standing in front of
10 Judge Few and Judge -- I think Mr. Whitner was trying to
11 do some speaking, is that correct?

12 A I remember that very, very well.

13 Q All right. And do you recall what Judge Few
14 said to Mr. Whitner?

15 A (The witness nods.)

16 Q Okay. I don't know if you can summarize that
17 for us today?

18 A Yeah. What had happened was we were doing our
19 normal sentencing. And, I believe, Mr. Whitner and I had
20 talked prior to going up there, in anticipation of going
21 up there. It's a pretty routine thing for me to do,
22 particularly in a case that I knew had appellate issues
23 and this was a very obvious one. I would have said to
24 Mr. Whitner, we're going to go up there, we're really not
25 going to say anything unless you really need to say

1 something.

2 Q Uh-huh.

3 A Because we're going -- this is going to be an
4 appeal and we don't really need to get into much at this
5 stage. We'll go in and the Judge is going to sentence
6 you, you're probably going to get a pretty significant
7 sentence because of the nature of the case. When we went
8 up there, Judge Few began to get into -- I guess the only
9 way to really characterize it is he was trying to get
10 Mr. Whitner to essentially acknowledge what he did. Which
11 in Judge Few's mind was the abuse. And it was a very
12 difficult situation for me, I can't imagine how difficult
13 it was for Mr. Whitner because that was a very complicated
14 scenario. You had the Judge who was about to sentence you
15 and you don't want to get a long sentence. You have a
16 trial where you denied what happened. Now, the Judge is
17 now trying to get you to essentially say, Yeah, I did it.
18 And that's a very difficult situation.

19 Q Did you feel like you were in a position to be
20 able to object to Judge Few's questions and the line that
21 he was taking?

22 A I certainly could have objected.

23 Q Do you think that would have changed the
24 outcome?

25 A In terms of what the Judge did?

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 Q Yes.

2 A I don't think it would have changed what the
3 Judge did, no. Whether something else could have been
4 done later on, that's a different story. But what the
5 Judge did, no.

6 Q Okay. And were you able to speak to Mr. Whitner
7 about how to handle Judge Few's questions and the
8 appropriate way to answer?

9 A Yeah. At one point in the sentencing, again,
10 there's a lot of unusual things. At one point I believe
11 we take a break..

12 Q Uh-huh.

13 A From the sentencing and I go in the holding cell
14 with Mr. Whitner and -- essentially, I had to say to make
15 sure that Mr. Whitner realized and I think he did but I
16 needed to make sure, he realized what the Judge was really
17 asking him.

18 Q Yeah.

19 A But that the Judge was, essentially, trying to
20 get him to acknowledge that he did this. And I had to
21 explain that to him, yes.

22 Q Okay. And just briefly on the phone records,
23 you testified on direct that you don't recall whether or
24 not Mr. Whitner specifically asked you to get the phone
25 records, he may have?

CHRIS SCALZO-CROSS BY MS. HORLBECK

1 A Yeah. He very well may have.

2 Q Okay.

3 A It just simply was not on my plan to challenge
4 the dates.

5 Q Okay. Is that something that you would have
6 gotten if Mr. Whitner had asked you, even if it weren't
7 kind of on your -- even if that issue was not on your
8 radar?

9 A Probably. If he -- if he sort of demanded it or
10 felt like this was that absolutely necessary document that
11 needed to be done and really wanted me to get it, then I
12 probably would have filed a subpoena to get it.

13 Q Okay.

14 A It may have been that we just didn't have a
15 conversation that I realized that he wanted it as badly as
16 he says he wants it now, I don't know.

17 Q All right.

18 That's all I have. Thank you.

19 MS. RATIGAN: I have no redirect, Your Honor.

20 The State would rest.

21 THE COURT: Thank you, Mr. Scalzo, I appreciate
22 it.

23 Anything further from the Applicant?

24 MS. HORLBECK: Your Honor, Mr. Whitner had
25 wanted me to call a witness regarding his appellate

1 issues. However, my position was that Mr. Scalzo
2 also participated in this appeal and that I just -- I
3 thought it was duplicative to have both. And I just
4 wanted to put that on the record because Mr. Whitner
5 had raised that issue to me.

6 THE COURT: It's the same issue and that's
7 regarding the preservation --

8 MS. HORLBECK: Right--

9 THE COURT: -- and the argument --

10 MS. HORLBECK: Yes--

11 THE COURT: -- of the suppression issue before
12 the board --

13 MS. HORLBECK: Yes --

14 THE COURT: -- at appellate level.

15 MS. HORLBECK: Yes, sir, that's correct. And
16 all of the arguments that were made to the Supreme
17 Court regarding the Supreme Court matter as well.
18 But Mr. Scalzo, my understanding, is that he
19 participated in all of it. And I just didn't need
20 to -- I didn't see the need to be duplicative. And
21 that's all I have, Judge.

22 THE COURT: All right. Good enough.

23 All right, this is what I'll do, I'll take it
24 under advisement. I'll give you 30 days to supplement the
25 record with any phone records.

1 MS. HORLBECK: Okay.

2 THE COURT: I tell you right now, I'm not
3 certain how it would be relevant to my consideration.
4 However, when and if you get those you'd like to make
5 a written argument as to how it's relevant and how I
6 should consider it, I'll be happy to consider it.

7 MS. HORLBECK: Okay.

8 THE COURT: So, 30 days from today's date. The
9 19th, I believe, if I'm not mistaken they're 30 days
10 in June. Which means that I look to receive any
11 additional information by July 19th. Okay.

12 MS. HORLBECK: Thank you, Your Honor.

13 THE COURT: Good luck to you, sir.

14 (WHEREUPON, the proceedings were concluded.)
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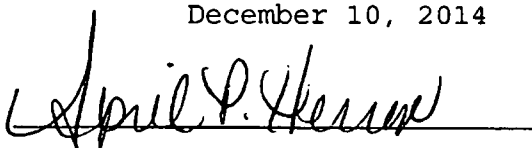
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Greenville County, South Carolina, on the
19th day of June, 2014.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

December 10, 2014

A handwritten signature in cursive script, reading "April P. Herron", is written over a horizontal line.

APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2013-CP-23-0765
COUNTY OF GREENVILLE	)	
	)	
Samuel Lamont Whitner,	)	
S.C.D.C. No. 263066,	)	
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 13 PM 3 50

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 8, 2013. The Respondent made its return on October 23, 2013 and an amended return on June 16, 2014. An evidentiary hearing into the matter was convened on June 19, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Christopher D. Scalzo, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.¹

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections. The Applicant was indicted at the February 2009 term of the Greenville County Grand Jury for first-

¹ At the conclusion of the hearing, the record was left open for thirty days in order to allow PCR counsel to obtain telephone records. These records were unavailable.

degree criminal sexual conduct with a minor (2009-GS-23-1072). He was represented by Christopher D. Scalzo, Esquire.

A.

The State brought the case to trial on March 11, 2009 before the Honorable C. Victor Pyle, Jr. On that date, Judge Pyle granted the Applicant's motion to suppress an audio recording of a telephone conversation between the Applicant and the victim.

The State filed a notice of appeal and a motion to vacate Judge Pyle's order. On June 11, 2009, the South Carolina Court of Appeals issued an order vacating Judge Pyle's order and finding he lacked subject matter jurisdiction. On July 22, 2009, a three-judge panel of the Court of Appeals presided over a suppression hearing pursuant to the procedure set forth in the South Carolina Homeland Security Act. See S.C. Code Ann. §§ 17-30-10 et seq. Mr. Scalzo represented the Applicant at this hearing. By order issued July 27, 2009, the Court of Appeals denied the Applicant's motion to suppress.

B.

After the State brought the case to trial before the Honorable John C. Few, the Applicant was found guilty. On November 4, 2009, Judge Few sentenced the Applicant to thirty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals and – upon the Applicant's motion – the case was certified to the South Carolina Supreme Court. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Supreme Court affirmed the Applicant's conviction and sentence on July 11, 2012. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). The Remittitur was sent on July 27, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:²

1. Ineffective assistance of trial counsel.
 - a. "Trial counsel acted jointly in concert with the State and illegally gain jurisdiction of the South Carolina Court of Appeals/6 amendment violation."
2. Ineffective assistance of appellate counsel.
 - a. "Appellate counsel failed to challenge this jurisdictional defect."

At the PCR hearing, the Applicant proceeded solely upon several allegations of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

² This Court notes the Applicant filed a pro se document titled "Supplement of Issues to the Above Cited Civil Post Conviction Relief" on February 17, 2014. As the Applicant was represented by counsel, however, this document cannot be considered by the Court. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he was arrested because of a recorded telephone call between him and the victim. The Applicant stated this was illegal because he did not know he was being recorded. The Applicant stated trial counsel failed to obtain his telephone records. The Applicant stated trial counsel should have requested a mistrial (both before Judge Pyle and Judge Few) because the State knew the wiretap law had been violated. The Applicant stated trial counsel should have objected to the audiotape under the Fourth Amendment. The Applicant stated trial counsel should have argued prosecutorial misconduct because the State was not truthful in its motion to the Court of Appeals. The Applicant stated trial counsel did not argue adequate facts to the Court of Appeals to show the audio recording was illegal. The Applicant stated trial counsel did not object to the reference to the library book at the Court of Appeals. The Applicant stated he considered pleading guilty at trial but felt pressured and that he could not do so.

Trial counsel testified he filed discovery motions and received those materials (including

audio recordings of telephone calls). Trial counsel testified he reviewed those materials with the Applicant, who explained his side of the story. Trial counsel testified he did not recall the Applicant asking him to obtain telephone records and said there were no such subpoenas in his file. Regardless, trial counsel testified he did not believe he would have needed those records. Trial counsel testified he did not know how he could have moved for a mistrial when the case was before Judge Pyle. Trial counsel testified there was no basis to move for a mistrial when the case was before Judge Few because the Court of Appeals had already ruled upon the wiretap issue. Trial counsel testified he discussed the suppression motion with the Applicant and that the basis of the motion was a technical legal issue. Trial counsel testified he argued neither the Applicant nor the victim consented to the telephone calls being recorded. Trial counsel testified the biggest issue in the case was the potential suppression of the audio recordings. Trial counsel testified that, once the Court of Appeals ruled against him, he could not re-litigate this issue. Trial counsel testified they were aware of the issue with the library book before the case was first brought before Judge Pyle. Trial counsel testified there were plea negotiations throughout the appeal process to the Court of Appeals, that he relayed those negotiations to the Applicant, and that the Applicant rejected them and went to trial. Trial counsel testified the Applicant spoke of pleading guilty during the victim's testimony and that this was a normal reaction. Trial counsel testified he spoke to the assistant solicitor at that point but could not recall whether there was a specific offer.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not make proper arguments in challenging the legality of the recorded telephone calls. The Applicant's complaints are centered around his belief that the recordings of his telephone calls with the victim were illegally obtained and inadmissible. Trial counsel moved to suppress these

recordings, arguing neither the Applicant nor the victim consented to being recorded. The Court of Appeals, however, presided over the suppression hearing and found that – through the doctrine of vicarious consent – the victim’s mother consented to the recording on her daughter’s behalf.³ Trial counsel testified he did not know what else he could have argued with regard to this issue. This Court notes trial counsel is an experienced criminal defense lawyer who expertly argued this legal issue. The Applicant has failed to demonstrate what else trial counsel could have argued that would have led to a different result. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a mistrial before both Judge Pyle and Judge Few. The Applicant, furthermore, has failed to “show error and resulting prejudice.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). As the Applicant failed to articulate a legal error that would support the granting of a mistrial in his case, he cannot prevail on this issue.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have obtained his telephone records. This Court cannot speculate as to what impact these records may have had upon the defense case because they were unavailable. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Regardless, as the

³ The South Carolina Supreme Court upheld this ruling in the Applicant’s subsequent direct appeal. See State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012).

telephone conversations between the Applicant and the victim were recorded – and not disputed by the Applicant – this Court does not believe the telephone records would have been relevant to the defense case. This Court notes trial counsel’s testimony that the issue was the content of the calls and that they were never planning to challenge the timing or dates.

This Court finds the Applicant failed to meet his burden of proving there was prosecutorial misconduct. Prosecutorial misconduct. “[T]he test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor’s remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant’s substantial rights so as to deprive the defendant of a fair trial.” United States v. Chorman, 910 F.2d 102, 103 (4th Cir. 1990). In order to establish prejudicial misconduct on the part of the prosecutor the alleged misconduct must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S. Ct. 2464, 2471 (1986) (quotation omitted). While the Applicant argued there was prosecutorial misconduct in his case because the State was not truthful in its representations to the Court of Appeals, this Court finds this allegation is unfounded. This Court finds this allegation is without merit, as the Applicant has failed to articulate either improper conduct or any resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving he had considered pleading guilty but felt pressured into continuing with the trial. Trial counsel testified there were ongoing plea negotiations in this case – including during the trial. Trial counsel testified any offers were conveyed to the Applicant, who turned them down. Trial counsel testified the parties could not reach a disposition the Applicant would agree to. This Court finds trial counsel’s testimony is credible. This Court finds trial counsel fulfilled his obligations and responsibilities

in conveying plea offers to the Applicant. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance); see also Rule 1.2(a), RPC, Rule 407, SCACR (an attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client). This Court does not find credible the Applicant's assertion that he was pressured into proceeding with trial instead of pleading guilty. The Applicant did not mention feeling any such pressure to either the trial judge or trial counsel.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

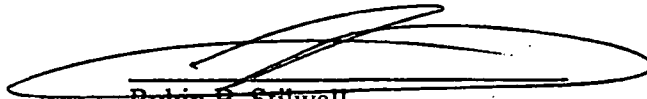
proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of AUG, 2014.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

Givice, South Carolina.

STATE OF SOUTH CAROLINA)

IN THE SUPREME COURT

COUNTY OF GREENVILLE)

Samuel Lamont Whitner)

C.A. No. 2013-CP-23-0765

Appellant,)

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina,)

Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Caroline M. Horlbeck
Caroline M. Horlbeck

Greenville, South Carolina

September 11, 2014

CAROLINE M. HORLBECK
ATTORNEY AT LAW

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601
horlbecklawfirm@gmail.com

863
PLC
(864) 315-9919
Fax(864) 232-4756

RECEIVED

September 11, 2014

SEP 16 2014

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

Re: SAMUEL LAMONT WHITNER v. State

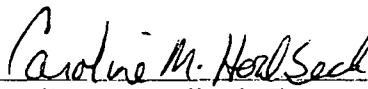
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

WITNESSES

R Bradford

Greenville Police Department

9/19/2007

DOCKET NO. 2009-GS-23-

CLK

The State of South Carolina

County of Greenville

001072

COURT OF GENERAL SESSIONS

February TERM 2009

THE STATE

VS.

SAMUEL LAMONT WHITNER

ARREST WARRANT NUMBER

J483581

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for
0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-3-655(A)(1) [formerly 16-3-655(1)]

Foreperson of Petit Jury Date: 11-4-2009

[illegible]

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on _____ the Grand Jurors of Greenville
County present upon their oath:

That SAMUEL LAMONT WHITNER did in Greenville County, between the 28th day of December, 2000, and the 28th day December, 2002 commit a sexual battery on J.W., who was less than eleven years of age. This is in violation of §16-3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ary to the statute in such case made and provided.

Christy Susa
SOLICITOR

866

COUNTY OF
STATE

Greenville

VS.

Samuel Lamont Whitner

AKA:

Race: B Sex: M Age: 34

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED] Rd

DL#: 999999999 SID#:

In disposition of the said indictment comes now the Defendant who was
TO: CRIMINAL SEXUAL CONDUCT WITH A MINOR <11 YR 1ST DEGin violation of § 16-03-0655(1) ^{2002 version} of the S.C. Code of Laws, bearing CDR Code # 0385☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST
Christy Kechner
Sustakovich, Christy Kechner

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2009)

INDICTMENT/CASE#: 2009GS2301072

A/W#: J483581

Date of Offense: 7/1/2003

S.C. Code § : 16-03-0655(A)(1)

CDR Code #: 0385

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSATTEST
Christy Kechner
Sustakovich, Christy Kechner

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

11/21/23
11/4/19