STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AARON BAYNARD GRISWOLD,

APPELLANT

APPELLATE CASE NO. 2016-001215

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding there was a sufficient basis for the chain of custody for the videos of children involved in sexual activity found on three computers from Appellant Griswold's residence after the judge found that the computers were non-fungible but the contents of the computers may be considered fungible, and the two people who extracted the evidence from the computers did not testify for the chain of custody which was a violation of the Confrontation Clause?

2. Did the trial court err in denying Appellant's motion to exclude from evidence the videos depicting the actual showing of children participating in sexual acts which was extremely prejudicial to Appellant because the videos were inflammatory and were not needed to substantiate material facts because the state presented the detailed summary prepared by Special Agent Wasaik, the SLED forensic computer examiner, which listed each video and included an explicit description of the child's sexual actions?

STATEMENT OF THE CASE

On January 22, 2015, the York County Grand Jury indicted Appellant Aaron Baynard Griswold on twenty-seven counts of sexual exploitation of a minor third degree, and four counts of sexual exploitation of a minor second degree that occurred in 2007. Tr. 8, ll. 20 – 23; Indictments 2015-GS-46-0058 through 2015-GS-46-0082, 2015-GS-46-0084, and 2015-GS-46-0085. On May 23-27, 2016, nine years after the incident, Griswold proceeded to trial before the Honorable John C. Hayes, III and a jury. Appellant Griswold was represented by Michael Atwater, and the state was represented by Lloyd Flores of the Attorney General's Office.[1] The trial judge granted defense counsel's motion at the close of the evidence to dismiss the four counts of sexual exploitation of a minor second degree, and instructed the jury not to consider those indictments. Tr. 565, ll.14 – Tr. 566, ll. 21; Tr. 612, ll. 5 – 13. The jury returned a verdict of guilty on all of the indictments for sexual exploitation of a minor third degree. Tr. 629, ll. 3 – Tr. 631, ll. 19. The judge sentenced Griswold to ten years on each of the twenty-seven charges with all to run concurrent, and required that he register as a sex offender. Tr. 642, ll. 1 – 20. Defense counsel requested an appeal bond since the sentences were for ten years concurrent. Pursuant to South Carolina Code Section 18-1-90, the judge did grant an appeal bond in the amount of fifty-four thousand dollars with the conditions for a sex offender to apply. Tr. 650, ll. 9 – 19. A notice of appeal was timely filed. This appeal follows.

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[1] This case was prosecuted by the Attorney General's Office under the Internet Crimes Against Children Division. Tr. 72, ll. 7 – 10.

STATEMENT OF FACTS

Brian Honig was a good friend of Appellant Griswold's when he lived near Griswold in Rock Hill in 2007. Honig called Griswold by his nickname "Bay." Tr 75, ll. 1 – 8; Tr. 76, ll. 1 – Tr. 77, ll. 22. Several other young men visited Griswold's home frequently during that time. These included George Masetti; Jim Burnette; Michael Walters; and Chris Parsons. Tr. 558, ll. 10 – Tr. 559, ll. 10.

Honig had "sporadic" employment during that time so he used Griswold's computer to look for jobs and respond to emails. Tr. 79, ll. 2 – 7; Tr. 81, ll. 4 – 10. On June 1, 2007, he had taken his MP3 player to listen to music while he used the computer. In order to use the MP3, he had to use Windows media player. When he opened Windows media, a video of child pornography began playing. He could see a "faint child" in the video. He said that he closed it quickly. He thought the child was between six and eight years old. The child was performing "fellatio." Tr. 81, ll. 2 – Tr. 82, ll. 11.

After he saw the video on Griswold's computer, Honig was very "conflicted" as he did not know what to because Griswold was a close friend. He did not report it to police immediately, but did contact the police a "day or two later." He went to the police station and gave a statement. His memory was very vague about the incident. He did not tell Griswold what he had seen on the computer. According to Honig, Griswold entered the password for him to use the computer. Tr. 83, ll. 4 –Tr. 85, ll. 21.

Detective Charlene Blackwelder was with the Rock Hill Police Department in 2007. Tr. 117, ll. 16 – Tr. 119, ll. 25. On June 4, 2007, she was contacted by Lieutenant Vaughn who directed her to obtain a statement from Brian Honig which she did. She then proceeded to obtain a search warrant for Griswold's residence. She went to that residence and seized five computers

and turned them into evidence. That was the end of her involvement in the case. Tr. 120, ll. 4 – 22. The people at the home during the execution of the search warrant were Rebecca Griswold who was Griswold's mother, George Masetti, James Barnette, and two other officers. Griswold was not present. Tr.122, ll. 17 – 25. Detective Blackwelder at trial described the five computers and where they were found:

> State's Exhibit 6 (SLED Item 2) was found in the attic; Tr. 130, ll. 1 – Tr. 131, ll. 25.
>
> State's Exhibit 7 (SLED Item 4) found in Griswold's bedroom; Tr. 132, ll. 8 – Tr. 133, ll. 18.
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> State's Exhibit 8 (SLED Item 1) found in living room; Tr. 134, ll. 1 – Tr. 135, ll. 8.
>
> State's Exhibit 9 (SLED Item 5) found in Rebecca Griswold's bedroom; Tr. 135, ll. 10 – Tr. 136, ll. 8.
>
> State's Exhibit 10 (SLED Item 3) found in Griswold's bedroom; Tr. 136, ll. 10 – Tr. 137, ll. 2.

Detective Blackwelder reported that the computer from the attic was not operable and had not been used. Tr. 128, ll. 12 – 20.

Detective Kathy Harveston was with the Rock Hill Police Department in 2007. She was involved with Griswold's case. Tr. 97, ll. 25 – Tr. 99, ll. 25. She was to determine what material was on the computers. She sent the five computers to the South Carolina Law Enforcement Division (SLED) for a forensics evaluation where SLED would have to go inside the computers and retract any data in the computer. She became the case agent. Tr. 100, ll. 5 – 25.

According to Detective Harveston, she received a report from SLED Special Agent Farand Wasaik who did the forensics analysis of the computers in 2007. He compiled all of the information on a disc, and a password was needed to review it. Tr. 101, ll. 1 20. Detective Harveston indicated that the attorney general's office had the computers re-examined but she did not know when. Tr. 101, ll. 21 – 25.

At Griswold's trial on May 23 -27, 2016, in a pretrial motion, the state moved to admit the summary prepared by Special Agent Wasaik of the "contents of the digital electronic files" from the computers. The state also stated that they planned to show portions of the videos about five to ten seconds in length showing the minors engaged in sexual activity. The summary would include a description of the contents of all of the electronic files. Tr. 38, ll. 4 – Tr. 39, ll. 13.

Defense counsel argued against the showing of the videos to the jury because they were not needed and were prejudicial to Griswold under Rule 403, SCRE. Counsel argued that the videos were inflammatory and shocking to the conscience. Tr. 39, ll. 20 – Tr. 45, ll. 5. Counsel cited the case of United States v. David Cunningham, 694 F.3d 372 (3rd Cir. 2012) which held in that case that the videos were so inflammatory that they should not have been admitted to the jury. Tr. 41, ll. 2 – Tr. 45, ll. 14. Counsel argued that the videos and images were more prejudicial than probative and were cumulative. Tr. 107, ll. 8 – 21.

Defense counsel was willing to stipulate that each and every file admitted into evidence "contained a depiction of something that would meet the statutory requirement for the purpose of the indictments." Tr. 42, ll. 13 – Tr. 43, ll. 2. The state did not agree to the stipulation and argued that the "state did bear a burden of showing exactly what the videos contained." The state's counsel said that the state must prove their case. Tr. 43, ll. 5 – 25.

The judge ruled that the summary was admissible under Rule 1006, SCRE. Tr. 105, ll. 11 – 23. He also ruled that the unindicted crimes were not admissible. Tr. 106, ll. 1- Tr. 107, ll. 1. The judge also ruled that the videos were not cumulative but substantive. The judge found that pursuant to Rule 403, SCRE, that the "relevancy of the clips that's represented is not substantially outweighed by any unfair prejudice." He said that the contents were a type to influence prejudice, portions of the files were "relevant and necessary and essential" to the state proving its case. The judge disagreed with the Cunningham case. Tr. 108, ll. 1 – Tr. 116, ll. 5.

During the trial, the state called Special Agent Farand Wasaik to testify about his forensics analysis of the computers. Before the agent's testimony, defense counsel asked the court for a motion in camera. Counsel argued that the information on the examination of the computers by SLED indicated that a man named Pantsari at SLED in 2007 extracted information from the computers and entered that information into a database; then prepared reports as to what he did; and then entered the information into a system that provided that information to Special Agent Wasaik. In 2014, when the computers were examined by SLED, a Mr. Suggs followed the same procedure as Mr. Pantsari. Then Agent Wasaik, on both occasions, looked at the information these two men removed from the computers on his own computer and prepared reports from that. Tr.146, ll. 16 – Tr. 147, ll. 23.

Counsel's objection was that neither Pantsari nor Suggs were present for cross examination and that was a violation of the Confrontation Clause. Counsel talked about the chain of custody but said this was more of a Confrontation Clause issue. The state argued that these were non-fungible items for the chain of custody. The judge explained that defense counsel's concern was the gap between recovery of the data from the non-fungible items and the person testifying as to what was on the non-fungible items. Tr. 146, ll. 16 – Tr. 149, ll. 10. Later,

defense counsel argued that he was "attacking" the chain of custody in that he did not think the "chain has got to Agent Wasaik." Counsel argued that the evidence of the chain went from the residence to the Rock Hill Police, and then there was Wasaik on the witness stand testifying as to what was on the computers. Counsel said he was arguing the chain of custody and the Confrontation Clause violation because Pantsari and Suggs were not present at trial. Counsel told the court that the 2014 examination was not covered in the chain of custody. The state explained that starting in 2007, the computers went from the house to the Rock Hill Police, to SLED, back to Rock Hill, to the attorney general's office, back to SLED, back to Rock Hill, and then to trial. Tr.168, ll. 10 – Tr. 170, ll. 22.

A proffer was then held with Special Agent Wasaik testifying. He explained that he was a forensic computer examiner with SLED. He explained the process SLED used in examining computers. The hard drive was removed, and a date time check was done. The hard drive was then connected to a write blocker which was one way traffic to transfer out the data so a "bit by bit" copy was made of the hard drive. Then the hard drive was placed back into the computer and locked in evidence. That process was called "imaging." Then the copy or image of the hard drive was put to a server and Wasaik worked from that image on a server from his desk. Tr. 149, ll. 15 – Tr. 151, ll. 13. Pantsari did all of the imaging in 2007, and Suggs did all of the imaging in 2014. Tr. 155, ll. 23 – Tr. 157, ll. 21.

The image was verified with a "hash value." A hash value number was assigned which represented all of the data within the "piece of media." That was called the "acquisition hash" which was the hash value at the beginning of the imaging process. When the process was completed, there was a "verification hash" which showed that the amount of data was the same

as at the beginning which meant that the data had not been manipulated. Tr. 151, ll. 14 – 25. The hash value was a summary of all the data in a device. Tr.159, ll. 21 – Tr. 160, ll. 8.

On cross examination during the proffer, Agent Wasaik admitted that he had never seen the hard drive and he could not testify that the hard drive that came from the computers was the same hard drive in them at the Rock Hill Police Station. Wasaik also did not see the hard drives when the computers were returned to SLED in 2014 by the attorney general's office for reexamination. He based everything on the paperwork. He relied on the work product of Pantsari and Suggs. The summary that he prepared (State's Exhibit 11), was part of the work product of Pantsari and Suggs. Tr. 155, ll. 13-22; Tr. 169, ll. 21 – Tr. 170, ll. 9; Tr. 159, ll. 15 – Tr. 160, ll. 8.

Defense counsel again objected to the two men, Pantsari and Suggs, not being available for cross examination which was the violation of the Confrontation Clause. Tr. 162, ll. 1 – Tr. 163, ll 7. The state argued that these imaging records were records kept in the regular course of business and were non-testimonial. Tr. 163, ll. 8 – 25. The judge inquired of Agent Wasaik how he verified that the information he reviewed was the one originally on the computer. Wasaik said the acquisition hash value and the verification hash value were the same showing no data was manipulated. Tr. 164, ll. 1 – 24.

On re-cross, Wasaik admitted that the hash value was just the volume of information on the computer. It did not tell what the information was nor where anything was stored. It simply provided that the amount of information was the same. Or if any information had been added or removed. Tr. 166, ll. 9 – 168, ll. 5. Counsel also argued that the second time the computers were examined in 2014 was not included in the chain of custody. The state argued that the hash values

were the same for the first examination and the second examination which covered any chain issues. The judge agreed. Tr. 169, ll6 – Tr. 170, ll. 23.

The judge ruled that the hash values were sufficient for the chain of custody for both examinations. The judge found that the function performed by Pantsari and Suggs was a "mechanical" function. Therefore, the judge found, the information that was examined was the same as the information that was on the computers before they were "plugged in" by Pantsari and Suggs. He allowed Agent Wasaik to testify concerning these issues. Tr. 171, ll. 1 – Tr. 174, ll. 21.

Agent Wasaik then testified before the jury regarding the proffered testimony. He said that he investigated Internet crimes against children. Tr. 190, ll. 1 – 14. When the CD with the summary report he prepared from his examinations of the computer in 2007 titled "State v. Griswold, 2007 Forensic Examination" was admitted into evidence as State's Exhibit Four, defense counsel objected. The judge overruled the objection. Tr. 200, ll. 19 – Tr. 201, ll. 22.The state explained that State's Exhibit Four contained the videos and the report. Tr. 273, ll. 1 – 24. Agent Wasaik defined some of the search terms used to find child pornography on a computer which included "Kingpass, PTHC which stood for Preteen Hard Core, 8YO which meant eight years old, and Hussy Fan." Tr. 258, ll. 14 – Tr. 259, ll. 9.

Agent Wasaik testified that three of the five computers contained images of child pornography. These were:

> State's Exhibit Seven which was SLED's Item Four from Griswold's bedroom;
>
> State's Exhibit Eight which was SLED's Item one from the living room;

State's Exhibit Ten which was SLED's Item Three a Dell computer.

Tr. 206, ll. 1 – Tr. 207, ll. 2. He examined the other two computers but no items containing minors were found. Tr. 207, ll 4 – 8.

Wasaik also prepared forensic reports which did not include the images from the videos for those three computers. Tr. 209, ll. 1 – 17.

State's Exhibit Twelve for the computer in the living room or State's Exhibit Eight, SLED's one;

State's Exhibit Thirteen for the Dell computer or State's Exhibit Ten, SLED's Item Three;

State's Exhibit Fourteen for the computer from the bedroom or State's Exhibit Seven, SLED's Item Four.

Defense counsel objected to the admission of each of the reports. Tr. 209, ll. 23 – Tr. 210, ll. 7; Tr. 212, ll. 1 – 18; Tr. 214, ll. 1 – 19.

The state told the judge during a break that the state had selected five videos to show very short portions less than thirty seconds of the children in sexual activity. Defense counsel asked if these videos were already in evidence, and the state responded that they were. These videos were located on the 2007 forensic report by Wasaik that was admitted into evidence as State's Exhibit Four. Tr. 272, ll. 23 – Tr. 274, ll. 25.

On direct before the jury, the state told Agent Wasaik that the state was going to play a portion of five videos from the computer found in Griswold's room. This included State's Exhibit Thirteen which was the forensic report for that computer or State's Exhibit Ten. Tr. 280, ll. 16 – 25. The videos were published to the jury. Tr. 281, ll. 1 – 4.

The first one was Video Three which was entitled "PTHC, Hussy Fan exclamation point (3) new Tammy and Friends zero six dot avi." Video Two's title was "Hussy Fan, PTHC" exclamation point (3); "ALL IS NEW AND GOOD," and then Linda, zero, zero,zero, one, dash one, dot avi. Tr. 281, ll. 1 – 25. Video Seven's title was "Kinderficker PTHC PTSC." Video Twenty was titled "(PTHC Shocking, 6YO fuc, with some dot mpg, .mpg.) Video Twenty-Three was titled One (7.mpg). Tr. 282, ll. 1 – 25.

The state then asked Wasaik if he had seen the twenty-seven movies or electronic files found on the computer listed as State's Ten which were listed in his forensic report marked as State's Exhibit Thirteen. Agent Wasaik said he had seen all twenty-seven videos. Each was listed in the summary he prepared for the state marked as State's Exhibit Eleven. His summary contained:

> The title, the name of the movie or how it's titled, a description of it, a detailed description of it, and also the length of the movie, or the video file.

Tr. 283, ll. 1 – Tr. 284, ll. 3.

The state then asked for the summary or State's Eleven be admitted into evidence. The judge said it was admitted subject to the earlier ruling and over objection. The state confirmed with Agent Wasaik that all of the videos listed in his summary were found on the computer marked as State's Ten. Tr. 284, ll. 1 – 21.

Agent Wasaik admitted that there was nothing to show that Griswold actually viewed the videos. If the time the file was created and the last time it was accessed as shown by time on the computer were the same, that meant that the file was only downloaded onto the computer but was not opened. Wasaik agreed. Tr. 318, ll. 18 – Tr. 320, ll. 19.

On cross examination, defense counsel asked Agent Wasaik about each of the thirty-one indictments and compared each with the computer file where that description in the indictment was located. It was also cross referenced to Agent Wasaik's forensic report. On each of the files described in the indictments, the date the file was created and the date it was last accessed were the same. Tr. 285, ll. 7 – Tr. 320, ll. 23; Tr. 325, ll. 13 – Tr. 409, ll. 22.

The defense did call a witness, Pat Boone, who was the lady that had lived at Griswold's residence in 2007. Her son lived there also. She described the young men who were frequent visitors in Griswold's home. Brian Honig came over frequently and used the computers. Others who came over frequently included George Masetti, Jim Burnette, Michael Walters, and Chris Parsons. Ms. Boone eventually moved to the duplex nest door when Griswold's mother moved in with him. Tr. 556, ll. 1 – Tr. 559, ll. 25.

In his closing argument to the jury, the state argued that they had to show the jury some of the videos. The state's attorney said that when Brian Honig saw the videos, that was something "you never forget." He said that Honig was in shock. Tr. 604, ll. 12 – Tr. 605, ll. 9.

Defense counsel told the jury that he did not believe it was necessary that the jury had to see the videos. He said the facts and their inferences were sufficient for the jury to make a decision. He apologized to the jury for their having to see the videos. Tr. 576, ll. 25 – Tr. 577, ll. 17.

While the jury was out deliberating, the trial judge said he wanted to put something on the record. He said he thought "we're in the twilight zone involving the chain of custody." He then said: "I think the Court's going to kind of have to address this." Tr. 625, ll. 16 – 23.

He went on to explain that there was no question that the computers were non-fungible items. However, they contained material which was not real fungible but it was too. He called it

the "twilight zone" again. He cited the case of State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) regarding the chain of custody. The case talked about fungible and things "relatively and impervious to change." Then he said: I don't know enough about computers but obviously the comments are not impervious to change, but term is relative and impervious to change." Tr. 625, ll. 24 – Tr. 626, ll. 13.

Then the judge reaffirmed that his ruling on the Confrontation Clause issue with the chain of custody was correct that the technicians who extracted the evidence were not witnesses against Griswold. They performed only mechanical functions. The judge said it was hard to make a point as it was "kind of abstract." He said the issue of fungible and non-fungible came up when Agent Wasaik siad there was no evidence to indicate that anything had been added since the seizure of the computer on June 4, 2007. But the judge continued to say that while it was somewhat fungible like "corn in a silo," he believed that the fact that nothing changed between June 4, 2007 and the subsequent examinations established a sufficient chain of custody. Tr. 626, ll. 23 – Tr. 627, ll. 25.

The judge then stated:

> Again, I think it's a twilight zone. It's the first time I've had it. Some of you may have already but I think the Courts are going to have to give us some guidelines on that. I just wanted to make sure the record reflected that.

Tr. 628, ll. 1 – 6.

The jury found Griswold guilty on all twenty-seven indictments of sexual exploitation of a minor third degree. Tr. 629, ll. 1 – 631, ll. 19. The judge sentenced Griswold to ten years on each count with all to run concurrent. He was required to register as a sex offender. Tr. 642, ll. 1 – Tr. 643, ll. 25. Defense counsel asked for an appeal bond which the judge granted in the amount of fifty-four thousand dollars. Tr. 644, ll. 7 – Tr. 651, ll. 3.

ARGUMENT

1.

The trial court erred in finding there was a sufficient basis for the chain of custody for the videos of children involved in sexual activity found on three computers from Appellant Griswold's residence after the judge found that the computers were non-fungible but the contents of the computers may be considered fungible, and the two people who extracted the evidence from the computers did not testify for the chain of custody which was a violation of the Confrontation Clause.

Defense counsel objected to the chain of custody for the evidence on the three computers showing child pornography because the two men who extracted the pornography videos or files in 2007 and 2014 were not present at trial for cross examination. Tr. 146, ll. 16 – Tr. 149, ll. 10. The judge ruled during the trial that the chain was sufficient because the function the two men performed was mechanical. Tr. 171, ll. 1 – Tr. 174, ll. 21.

While the jury was out, the judge reaffirmed that his ruling on the Confrontation Clause issue with the chain of custody was correct that the technicians who extracted the evidence were not witnesses against Griswold. They performed only mechanical functions. The judge said it was hard to make a point as it was "kind of abstract." The judge continued to say that while it was somewhat fungible like "corn in a silo," he believed that the fact that nothing changed between June 4, 2007 and the subsequent examinations established a sufficient chain of custody. Tr. 626, ll. 23 – Tr627, ll. 25.

The judge described it as a twilight zone and said that the Courts needed to provide guidelines on this issue, and he wanted the record to reflect that. Tr. 628, ll. 1 – 6.

In State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013), which the trial judge cited, the South Carolina Supreme Court held that the log establishing the chain of custody for items recovered by the investigators was not testimonial in nature, so the custodian's testimony about the chain did not implicate the defendant's right of confrontation under Crawford. [2]

That Court said that the Sixth Amendment did not grant the defendant the right to secure the testimony of all witnesses. In order to demonstrate a Compulsory Process Clause violation, the appellant must "make some plausible showing of how the testimony of an absent witness would have been both material and favorable to his defense." The Court also confirmed that the admission of evidence was within the discretion of the trial court and would not be reversed absent an abuse of discretion.

In Brockmeyer, the log establishing the chain of custody for the t-shirt the defendant was wearing on the night of the shooting in this murder case, and the shell casing, magazine, pistol, and the fired projectile from the victim's neck was not testimonial because the evidence log did not purport to prove any fact necessary to conviction. And the non-testifying custodians were not involved in testing nor the analysis of the recovered items. Therefore, the primary purpose of the statements by the non-testifying custodians regarding the evidence log did not constitute evidence. The Court held that when the challenged evidence was not fungible, strict chains of custody were not required for admission into evidence. The Court ruled that the evidence logs were business records for the purpose of identifying and storing the items.

Appellant Griswold's case is distinguished from Brockmeyer in that the evidence in Griswold's case is both fungible and non-fungible. The computers themselves were fungible, but

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[2] Crawford v. Washington, 541 U.S. 36 (2004).

the material on the computers was fungible in that it could be manipulated. The videos could have been changed or moved which could have affected the outcome depending on where the child pornography files were located.

In contrast to Brockmeyer, the evidence on the computer was for the "sole purpose of providing evidence against the defendant" which was not the purpose in Brockmeyer according to the Court. Therefore, the Confrontation Clause was triggered. The two men, Pantsari and Suggs, were directly involved in the testing when they extracted the videos and performed the imaging. Appellant Griswold had the right to confront them and question them on exactly what functions they performed. Although the trial judge ruled that their functions were mechanical, the evidence involved computers and the material on computers which could change at the touch of a finger. It was especially important to question the two men because the information was removed from one computer to a database and then another computer and eventually placed on CD's. There was no evidence that these computers and the videos and files were ordinary business records.

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause, unless the witnesses are unavailable and the defendant had prior opportunity to cross-examine the witnesses regardless of whether such statements were deemed reliable by the court. In Griswold's case, the chain of custody for the computers was essential in providing evidence against Griswold. That evidence material was necessary to prove the facts needed for the conviction. Therefore, it was a violation of the Confrontation Clause for Griswold not to be able to question the men who obtained the evidence from the computers.

The Supreme Court in State v. Hatcher, 392 S.C. 86, 708 S.E.2d (2011), held that the ultimate goal of the chain of custody requirements is simply to ensure that the item is what it is purported to be. Without being able to question Pantsari and Suggs, Griswold could not confirm that the computers and the images extracted were what the state claimed they were.

The trial judge was confused and asked for guidance from the appellate courts on how to handle the chain of custody for a non-fungible item that contained fungible material.

ARGUMENT

2.

The trial court erred in denying Appellant's motion to exclude from evidence the videos depicting the actual showing of children participating in sexual acts which was extremely prejudicial to Appellant because the videos were inflammatory and were not needed to substantiate material facts because the state presented the detailed summary prepared by Special Agent Wasaik, the SLED forensic computer examiner, which listed each video and included an explicit description of the child's sexual actions.

When the state moved pretrial to show portions of the digital electronic files containing child pornography, defense counsel argued that the videos were not needed and were prejudicial to Appellant Griswold under Rule 403, SCRE. Counsel argued that the videos were more prejudicial than probative and were cumulative. Tr. 38, ll. 4 - Tr. 45, ll. 14; Tr. 107, ll. 8-21.

The judge found that the videos were not cumulative but were substantive. He ruled that the videos were "relevant, and necessary and essential" to the state proving their case. Tr. 108, ll. 1 – Tr. 116, ll. 5.

In United States v. Cunningham, *supra*, the Supreme Court held that the probative value of the video excerpts of pre-pubescent children being bound, raped, and violently assaulted was substantially outweighed by needless presentation of cumulative evidence. The district court had witness testimony, still images and proffered stipulations of the child pornography. The Court also ruled the abuse of discretion by the district court in admitting the excerpts was not harmless. The Court held that the district court's refusal to view the video excerpts of child pornography to assess their prejudicial impact and instead rely only on written descriptions prior to admitting them was arbitrary and unreasonable.

As in Cunningham, the admission of the videos showing children involved in sexual activity was cumulative as the court had Agent Wasaik's summary which presented the explicit details of the videos. The court also had the forensic report prepared by Agent Wasaik that provided information about the videos but did not include the videos. The videos in Griswold's case showed children being forced into sexual intercourse, oral sex with adults, and other inflammatory sexual activities. The videos did not provide any additional information or facts. The trial judge in Griswold's case did not review the videos before they were admitted as he disagreed with the Cunningham court on that issue. Tr. 112, ll. 8 – 18.

The South Carolina Supreme Court held in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) that the trial court did not abuse its discretion in admitting pre-autopsy photographs of the victim, who had been mauled by dogs. The Court wrote that the pre-autopsy photos were necessary to show the unaltered condition of the victim and to show the extent and nature of the victim's injuries. And the Court wrote that the dog bites were not ordinary dog bites and most jurors would not be familiar with the type of bite. There were no witnesses. The pathologist felt compelled to document the injuries prior to the autopsy because he had never seen a situation this extreme.

Griswold's case is distinguished from Collins because the child pornography videos did not provide additional facts or information for the jury. The scenes were not like unusual dog bites. The videos were unusual for the average juror because they depicted minor children in sexual activities. This fact was already confirmed by the summary and indictments.

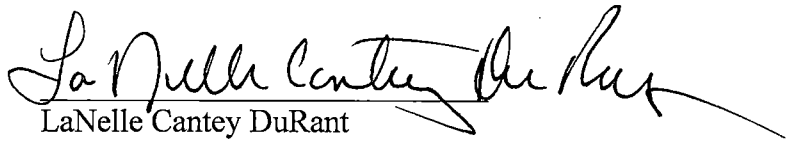
In State v. Brockmeyer, *supra,* the Supreme Court held that photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. However in Brockmeyer's case, the

photographs of the defendant taken shortly after the shooting was not substantially outweighed by the danger of unfair prejudice in the murder trial. The photographs were necessary to show the defendant's agitated demeanor following the shooting in order to rebut the defendant's claim that he was distraught and crying after the shooting.

The videos in Griswold's case were not needed to show any particular facts and should have been excluded. They were inflammatory and shocking to the conscience.

CONCLUSION

Based on the above, Appellant's convictions and sentences should be reversed, and his case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of March, 2017.