IN THE
SUPREME COURT OF THE UNITED STATES

November 2022 Term

No. 22-_____

David Matthew Carter,

Petitioner,

vs.

State of South Carolina,

Respondent

PETITION FOR WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

Did the trial Court commit reversable error by removing Petitioner from the courtroom and forcing him to watch his trial via closed circuit monitoring during the minor victim's testimony in violation of his Sixth Amendment right to be present for his own trial and confront the witnesses against him?

II.

Should the Court overrule *Maryland v. Craig,* 497 U.S. 836 (1990) and declare S.C. Code Ann. § 16-3-1550(E) (2012) unconstitutional given the Court's ruling in *Crawford v. Washington,* 541 U.S. 36 (2004)? If not, did the process employed by the trial Court comply with this Court's ruling in *Craig* and the South Carolina statute?

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

PARTIES

David Matthew Carter and the State of South Carolina are the only parties to this petition.

CORPORATE DISCLOSURE

Petitioner David Matthew Carter is a natural person. The respondent is the State of South Carolina. No corporations are parties to this petition.

LIST OF PRIOR PROCEEDINGS

The State of South Carolina charged David Carter with three counts of Criminal Sexual Conduct with a Minor in the First Degree in the Lancaster County General Sessions Court. Petitioner was convicted on all counts on May 24, 2018, and the Court imposed a prison sentence of forty years on each charge to run concurrently. Appendix (hereinafter "A.") 1-3.

Petitioner appealed his conviction to the South Carolina Court of Appeals. On April 21, 2021, the South Carolina Court of Appeals affirmed Petitioner's convictions. *State v. David Matthew Carter,* 433 S.C. 352 (2021). On December 10, 2021, the South Carolina Supreme Court granted Certiorari to review the decision of the South Carolina Court of Appeals.

Oral arguments were held on June 8, 2022, in the South Carolina Supreme Court. On August 10, 2022, the South Carolina Supreme Court dismissed Petitioner's appeal as improperly granted. In a footnote in the South Carolina Supreme Court's opinion the Court stated, "Our disposition of this case should in no

manner be viewed as a comment one way or the other on the merits of Petitioner's Confrontation Clause argument. *State v. David Matthew Carter*, Opinion No. 28104 (S.C. 2022).

OPINIONS AND ORDERS

The sentence imposed by the Court of General Sessions for Lancaster County is unpublished and reprinted in the appendix. Sentencing sheets from the Court of General Sessions are included in the appendix. A. 1-3

The opinion of the South Carolina Court of Appeals is Published at *State v. David Matthew Carter,* 433 S.C. 352, 857 S.E.2d 910 (2021), and reprinted in the appendix. A.4-5. The opinion of the Supreme Court of South Carolina is Published at *State v. David Matthew Carter*, Opinion No. 28104 (S.C. 2022), and reprinted in the appendix. A. 9-10.

JURISDICTIONAL STATEMENT

The Supreme Court of South Carolina issued its opinion on August 10, 2022, in which it dismissed Petitioner's appeal as improperly granted and affirmed the South Carolina Court of Appeals. Counsel for Petitioner, at the time of the Supreme Court of South Carolina's opinion, did not petition for rehearing. The Supreme Court of South Carolina issued remittitur on August 30, 2022. A. 11-12.

This Court has jurisdiction to review this petition, seeking review of the decision of the Supreme Court of South Carolina pursuant to 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, applicable to the State of South Carolina through the Fourteenth Amendment, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

U.S. Const. amend. VI. The Fourteenth Amendment to the United States Constitution states that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Questions I and II implicate both the Sixth and Fourteenth Amendments of the Constitution of the United States, along with this Court's holdings in *Maryland v. Craig*, 497 U.S. 836 (1990) and *Crawford v. Washington*, 541 U.S. 36 (2004).

FACTS OF THE CASE

Petitioner was arrested on October 4, 2016 and charged with three counts of Criminal Sexual Conduct with a Minor in the First Degree for allegedly engaging in sexual battery with his stepdaughter, T.P, over a five-year period from May of 2011 until September of 2016. A. 13-15. A jury was impaneled on May 21, 2018. and Petitioner's trial began on May 22, 2018. Petitioner was represented by T. Brandon Steen, Esq. and M. Ryan Payne, Esq. Ap. 13. The State was represented by Ashley McMahan, Esq. and Henry McMaster Jr., Esq. *Id.*

Prior to the start of the trial, Counsel for the State moved for the alleged victim to testify using closed circuit television outside of Petitioner's presence citing S.C. Code § 16-3-1550(E) which provides in part, "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate." S.C. Code Ann. § 16-3-1550(E) (2012). In support of their motion the State called T.P.'s therapist, David Kellin. Mr. Kellin testified that T.P. would not be able to testify fully and accurately if she had to remain in the courtroom with Petitioner. A. 16-21. During Mr. Kellin's initial diagnosis of T.P. for PTSD, he used the UCLA PTSD scale. A. 19. T.P. was under the required score to support a diagnosis of PTSD. *Id.* Despite this, Mr. Kellin still diagnosed her with PTSD during his initial visits with her. *Id.* Mr. Kellin testified that he had continued to see T.P. after her initial diagnosis. *Id.* However, he had not met with her since August of 2017. A. 21. Mr. Kellin stated that T.P.'s fear was that Petitioner would "come get her and take her away." A. 22-

23. Mr. Kellin stated that for T.P. to be able to testify fully and accurately that there would need to be some distance between T.P and Petitioner. A. 23. The State and trial Court began to briefly discuss the possibility of having Petitioner placed in another courtroom during T.P.'s testimony. A. 25-27. Due to the length of time between Mr. Kellin's assessments of T.P., the trial court ordered Mr. Kellin to reevaluate T.P. before deciding on the State's CCTV motion. A. 28-29.

After Mr. Kellin's reevaluation of T.P., he scored her PTSD at 25 on the UCLA PTSD scale meaning that her PTSD was in remission. A. 30-31. However, he still opined that if T.P. would have to testify in front of Petitioner, that she would freeze up and not be able to talk. A. 30. He then stated that she would not be able to answer fully and accurately. *Id.*

After testimony from Mr. Kellin, Tiffany Carter (T.P.'s mother), and T.P., the trial court decided to remove Petitioner from the Courtroom during T.P.'s testimony. A. 32. Under the trial court's procedure, Petitioner, co-counsel for the defense, and co-counsel for the State would stay in an adjacent courtroom and watch the proceedings through a real time video stream. A. 32-33. The trial court allowed counsel for defendant to communicate only via email. *Id.* The trial court then concluded that this process did not violate Petitioner's constitutional right to confrontation and did not "harm" or "prejudice" Petitioner in any way. A. 32.

Before T.P.'s testimony, defense counsel renewed his objection to this process by stating, "I object to [T.P.] being able to testify outside the presence of the Defendant. It violates his Constitutional and statutory right to confront the

witnesses against him face to face." A. 35. This objection was overruled. A.36. Petitioner was convicted on all counts and sentenced to forty years imprisonment. A. 37-40. Petitioner's convictions were affirmed by the South Carolina Court of Appeals on April 21, 2021. *State v. David Matthew Carter,* 433 S.C. 352 (2021). The Supreme Court of South Carolina granted certiorari, but dismissed it as improperly granted after oral arguments on August 10, 2022. *State v. David Matthew Carter*, Opinion No. 28104 (S.C. 2022). However, in their dismissal of Petitioner's appeal the Supreme Court of South Carolina noted that, "Our disposition of this case should in no manner be viewed as a comment one way or the other on the merits of Petitioner's Confrontation Clause argument." *Id.* Remittitur was sent on August 30, 2022. A. 11-12.

I.

The Trial Court violated Petitioner's Sixth Amendment Right to be present for his trial and to confront the witnesses against him by removing Petitioner from the courtroom during the victim's testimony.

This Court has long upheld the right of a criminal defendant to be present for all aspects of his or her trial. In *Lewis v. United States*, 146 U.S. 370, 372 (1892), the Court stated, "A leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the prisoner." Citing *Prine v. Commonwealth*, 18 Penn.St. 103, the Court stated, "It would be contrary to the dictates of humanity to let him [a defendant] waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence." *Id.* at 373. Petitioner was not

afforded the opportunity to remain in the courtroom while T.P. testified. Instead, Petitioner was removed from the courtroom and made to watch his trial through closed circuit television. The jury was unable to observe his demeanor during the minor child's testimony. Further, Petitioner's communication was limited to emails between his two trial attorneys.

While in the years since *Lewis* was decided, this Court has allowed for the removal of a criminal defendant from the courtroom, it has generally been held that the defendant's behavior must warrant his or her removal from the Courtroom. In *Illinois v. Allen*, 397 U.S. 337 (1970), this Court examined whether a criminal defendant who became noisy, disorderly and disruptive in court could be removed from his or her trial. In *Allen*, the Court started with the premise that, "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to present in the courtroom at every stage of his trial." *Id.* At 338. However, the Court reasoned that a defendant could not claim the benefit of a constitutional right to remain in the courtroom while, at the same time, engaging in conduct that disrupted court. *Id.* at 339. In *Allen,* the defendant conducted himself in a childish manner by threating the presiding judge, tearing his attorney's file and throwing papers on the floor. *Id* at 340. Mr. Allen was then warned that another outburst would result in his removal from the courtroom. *Id.* Mr. Allen ignored this warning and continued to talk back to the judge. *Id.* Mr. Allen was then removed from the courtroom by the judge. *Id.* Mr. Allen was given a second chance by the judge to be present in the courtroom if he could behave. *Id.* However, Mr. Allen again began to

talk back and create a disturbance in the courtroom. *Id.* He was then removed from the courtroom again. *Id.* at 341. The Court concluded that:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, . . . we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343. Finally, the Court stated that, "Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did." *Id.* at 347.

Petitioner's case is vastly different from *Allen* and thus gives rise to an important constitutional question that should be considered by this Court. Petitioner, unlike Mr. Allen, did not disrupt court in anyway or act in an abusive or corrosive manner. Instead, Petitioner was removed from the courtroom to make the minor witness more comfortable while testifying in front of the jury so that she wouldn't freeze up and be unable to testify fully and accurately. There was no proactive action by Petitioner that gave rise to his removal from the courtroom. Rather, the trial court sought to accommodate a minor witness testifying against him. Despite Mr. Allen's actions, this Court still stated that it was deplorable to remove a man from his own trial. This is largely because of the perception that removing a defendant from his or her trial is overwhelming in the eyes of a jury. In *Allen*, the Court had to weigh whether any constitutional alternatives could have

been used to allow Mr. Allen to remain in the courtroom as his trial proceeded. *Id.* at 344. However, the Court reasoned that even an alternative of shackles and gags would be prejudicial to the defendant. *Id.* The Court warned that it was possible that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant. . ." *Id.* Here, the trial court's removal of Petitioner from the courtroom created the possibility of a significantly prejudicial impression of Petitioner to the jury that could not be undone. Before the minor witness testified, Petitioner had been present for every part of his trial. The trial court sent the jury out of the courtroom before T.P.'s testimony by telling the jury that the next witness involved video and it would take a few minutes to get everything set up. A.41-42. When the jury returned to the courtroom from their break, Petitioner was no longer in the courtroom. *Id.* T.P. was then called to the stand. *Id.* Once her testimony was completed, the jury was sent out again and Petitioner was allowed to return to the courtroom. *Id.* This created the perception to the jury that Petitioner had done something to warrant his removal for the courtroom. Further, the action of removing Petitioner from the courtroom improperly vouched for the victim's credibility by creating the perception that Petitioner had done something to T.P. to warrant a removal during her testimony. While the trial court believed that Petitioner was not "harmed" or "prejudiced in any way" by the process it employed, it is very clear that any removal of a Defendant from his or her own trial is, on its face, harmful and prejudicial according to this Court's holding in *Allen.*

The important fundamental right to be present at one's own trial has been codified in federal rules of criminal procedure. Rule 43 (a)(2) states that a "defendant must be present at every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a)(2). While not as strongly worded South Carolina Rule 16 states that a defendant may voluntarily waive his or her presence at trial in non-capital cases. Rule 16, SCRCrimP. Here, Petitioner never waived his right to be present in the courtroom during his trial. Instead, the trial court removed Petitioner to accommodate a minor witness in violation of Petitioner's Constitutional rights.

This error was also not harmless in nature. There is nothing that Petitioner could have done, nor curative jury instruction that could have been given, to correct the damage caused by removing Petitioner from the courtroom during T.P.'s testimony. For this reason, this Court should grant *certiorari* to review this process and, ultimately, grant Petitioner a new trial as his Sixth Amendment Rights were violated by the process employed by the trial court.

II.

This Court should overrule *Maryland v. Craig*, 497 U.S. 836 (1990) given its holding in *Crawford v. Washington*, 541 U.S. 36 (2004) and declare S.C. Code Ann. § 16-3-1550(E) (2012) unconstitutional. Even if *Craig* is Constitutional, the trial court did not comply with *Craig* because Petitioner was removed from the courtroom during the minor's testimony.

In his dissent in *Craig*, Justice Scalia warned:

> Because of this subordination of explicit constitutional

> text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife. . . is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I – your father (or mother) whom you see before you – did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Maryland v. Craig, 497 U.S. 836, 861 (1990)(Scalia, J., dissenting). Unfortunately, Petitioner is the person that Justice Scalia was describing in his dissent. In *Craig*, this Court dispensed with the notion that the Confrontation Clause grants a Defendant an absolute right to confront the witnesses against him. The Court held that the right to confront a witness face-to-face could be dispensed with by a showing of an important public policy. *Id.* at 857. In *Craig*, the victim was allowed to testify against the defendant, Mrs. Craig, via a one-way closed-circuit television. *Id.* at 840-843. In this process, the victim, defense attorney and prosecutor relocate to another room to examine and cross-examine the victim. *Id.* at 841. The judge, jury and defendant remain in the courtroom. *Id.* The defendant is allowed to remain in electronic communication with his or her lawyer. *Id.* In dispensing with Craig's right to confront the minor witness against her, the Court, relying heavily on *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Mattox v. United States*, 156 U.S. 237 (1895), stated, "In sum, our precedents establish that 'the Confrontation Clause

reflects a *preference* for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849. Further, the Court stated, "[O[ur precedents confirm that a Defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to face confrontation only where the denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. *Id.* at 496. The Court reasoned in *Craig* that the state of Maryland had a compelling public policy interest in protecting a minor child from possible trauma should they have to face the defendant in court and that by maintaining other aspects of confrontation, such as the ability to cross-examine the minor witness, that it would guarantee reliability of the testimony.

In accordance with this Court's holding in *Craig* and *Roberts*, South Carolina, like many other states, adopted a statute to allow for the closed-circuit testimony of minor witnesses. That statute states that "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate." S.C. Code Ann. § 16-3-1550(E) (2012). This allows a South Carolina judge, upon motion of the State, to make a case specific determination if someone has a special need in order to warrant a circumvention of the right of confrontation.

Almost a decade after its decision in *Craig*, this Court once again had to weigh the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). In overruling *Roberts*, the Court stated that, "Although the results of our decisions

have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales." *Id.* at 60. Further:

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' Citing *Roberts* at 448 U.S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Id. Further, the Court stated, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes." *Id.* at 62. The Court reasoned that:

> The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Id. at 62-63. Further, "Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable;" *Id.* at 63. In overturning the Washington Supreme Court, this Court stated:

> [T]o reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns.

Id. at 67. Further, "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Id.*

Given this Court's reasoning in *Crawford* and its decision to overturn *Roberts*, it becomes hard to see how *Craig* can co-exist with *Crawford*. *Craig* does what *Crawford* says cannot be done: it replaces the constitutionally approved method of determining the reliability of testimony, i.e. face to face confrontation in open court, with a method devised by courts and Legislatures. *Craig* allows for a process of circumventing the right to confront by saying that the process employed is virtually constitutional and that it still creates the likelihood of significantly reliable testimony to satisfy the Sixth Amendment. However, *Crawford* reaffirms the absolute right to confrontation that does not bend to the whim of public policy.

In his dissent in *Craig*, Justice Scalia laid the framework for the Court's opinion in *Crawford* by stating:

> To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right to not give testimony against himself when that would prove him guilty.

Craig at 867 (Scalia, J., dissenting). To allow statutes like the South Carolina statute in Petitioner's case to stand runs afoul of the condemnation that this Court handed down on reliability analyses in *Crawford*. The right of confrontation should not bend at the whim of public policy. Constitutional rights are absolute, not

preferred, as the Court stated in *Craig.* The Court's opinion in *Crawford* reestablishes the absolute right of confrontation by stating that the Constitution, not law makers or judges, prescribes the correct manner for determining reliability of a witness's testimony. Given the strong wording of this Court's opinion in *Crawford,* the fact that *Crawford* overturns *Roberts* and the heavy reliance by the Court in *Craig* on *Roberts,* this Court should grant certiorari to decide whether *Crawford* overrules *Craig* and thus makes S.C. Code Ann S.C. Code Ann. § 16-3-1550(E) (2012) unconstitutional.

Even if *Craig* should not be overturned, this Court should then consider whether *Craig* authorizes the process employed in Petitioner's trial. *Craig* envisions the minor victim testifying in a separate courtroom. It does not envision or proclaim that a defendant may be removed from his own trial to accommodate a minor victim's testimony.

CONCLUSION

Petitioner was denied his constitutional right to be present at his own trial and to fully be able to confront the witnesses against him. This Court should grant certiorari to consider both important constitutional questions presented by Petitioner.

Respectfully Submitted,

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