

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Fairfield County
Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2026-000109

THE STATE,

RESPONDENT,

v.

TIMOTHY JAMES THOMPSON,

PETITIONER.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY JANE BROWN
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

HON. RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit
Post Office Box 607
Lancaster, SC 29721-0607

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Petitioner's Issue

Whether the lower courts improperly diminished a fundamental aspect of petitioner's right to confront the witnesses against him and his inherent due process protections afforded by face-to-face confrontation before the jury in favor of a non-compelling interest of a third-party witness by allowing the witness to testify over remote video feed while in the same county as trial?

Respondent's Counterstatement of Issue

1. Did the Court of Appeals properly find the trial court did not abuse its discretion in allowing a seventy-six-year-old witness who was in pain from a ruptured back disk to testify remotely when (1) the majority of jurisdictions that have addressed this issue have concluded that allowing the remote testimony of a witness with a medical condition that prevents him from traveling to court is necessary to further an important public policy and creates an exception to the Confrontation Clause; and (2) unlike the court in *Pitts v. Mississippi*, 607 U.S. 1 (2025), the trial court here heard evidence on this issue that supported a finding that Bell had a medical condition that prevented him from traveling to the courthouse?
2. Based on the overwhelming evidence of guilt submitted by the State and the cumulative nature of Bell's testimony, was any error in allowing this remote testimony harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In December 2020, the Fairfield County Grand Jury indicted Petitioner for murder and hit-and-run involving death following the death of Bruce Gibbs (Victim). At trial, the State presented overwhelming evidence that Petitioner struck and killed Victim—who was walking on the side of the road—with his black Chevy Impala around 1:00 a.m. on September 6, 2020. Videos from surveillance cameras in the area showed Victim walking down the road when a dark early-model car with round brake lights passed in the opposite direction at a normal rate of speed, turned around, returned at an accelerated speed, and ran off the road—striking Victim. The car did not stop but continued driving in the direction of a nearby POPS convenience store. (State’s Ex. 13). According to the MAIT investigation, Victim was struck on the sidewalk or in the grass of a yard; the vehicle that struck him did not lose control before impact and was traveling approximately 47-48 mph at the time of impact in a 35-mph zone; the vehicle left the road, first striking a curb before hitting Victim; and all of the vehicle’s tires had left the road prior to impact with Victim. (R. 31-79, 123-48, 252-334).

Around the time of impact, Kelvin Sampson’s car passed the area and almost stopped. (State’s Ex. 13; R. 287-99). At trial, Sampson—who was friends with Petitioner—recalled being in the area that evening and seeing a dark Chevy Impala, consistent with the one Petitioner was driving earlier that evening, driving “wide open.” The car swerved off the road, and Sampson believed it hit a fence. Sampson did not see the car hit Victim. He stated the Impala jerked back and forth as if trying to regain control after it went off the road. Sampson recalled Petitioner stopped by his home between midnight and 1:00 a.m. that morning and asked for a gun, but Sampson told him he didn’t have a gun. Petitioner left in his Impala. (R. 183-92).

Deputy Al McCoy was patrolling the area shortly after 1:00 a.m. when he saw an early-model dark or black Chevy Impala. Deputy McCoy noticed the window tinting was “bubbling up,” the rear passenger-side tire was flat, and the passenger-side tires did not have hubcaps. At 1:14 a.m., shortly after seeing the Impala, Deputy McCoy responded to a dispatch of a dead body in the road in the same area where he had seen the Impala. (R. 31-38, 42).

Around 1:26 a.m., Deputy Jonathan Harris responded to a call about a stranded motorist. Deputy Harris noticed a man on the side of the road changing a tire on an older model black Chevy Impala; the man stated he did not need assistance. Deputy Harris left, but his car camera recorded the encounter, and the recording was played at trial. (R. 240-51; State’s Ex. 9).

Police retrieved surveillance footage from the nearby POPS convenience store that showed Petitioner driving a dark early-model Impala into the parking lot shortly before 1:00 a.m. Surveillance footage also captured him entering the store. (R. 225-30, 235; State’s Ex. 8).

Later that day, police located Petitioner’s Impala abandoned at a truck stop. The front grill and hood were damaged and bleach was running down the sides of the car—as if someone had poured bleach on it. Police found a bottle of bleach in the back of the car. The window tinting was bubbling and the passenger-side tires were missing rims—similar to the car Deputy McCoy observed earlier that night. One of the front headlights was held in place by a tie wrap, and a broken clip found at the scene matched the clip of the headlight.

Petitioner later turned himself in. Although he denied hitting Victim, he admitted he was driving his Impala both before and after the crime, and he left his car at the truck stop. He also admitted he was upset or agitated that night, and it took him three hours to calm down. (R. 193-208, 220-24, 228-29, 252-334, 359-60, State’s Ex. 18).

In addition to the foregoing, the State presented evidence that Petitioner had gotten into an

argument with Victim the prior evening at a fish fry. (R. 91-120, 166-83). Miranda Sawyer and Annie Roach both testified they heard Petitioner approach and threaten Victim after Victim and Petitioner's sister (who was dating Victim) were arguing. (R. 91-97, 166-69). Victim's mother, Felicia Johnson, heard about the argument and took Victim inside. (R. 104-09). Petitioner left in his Impala by 10:00 p.m. (R. 98).

The State also called Tommy Bell, Victim's grandfather who was also friends with Petitioner.¹ According to Bell, Petitioner stopped by his home between 11:00 and 11:30 p.m. the night of the fish fry, threatened to kill Victim, and asked Bell for a gun. Bell stated he did not have a gun and instead encouraged Petitioner to talk to Johnson—who would straighten everything out. However, Thompson refused and left in his Chevy Impala between 12:00 and 12:30 a.m. Bell attempted to notify Johnson, but Johnson did not receive the voice mail until after Victim was killed. (R. 153-65, 236).

Petitioner did not testify or present a defense. The jury convicted him as indicted, and Judge Gibbons sentenced him to concurrent terms of life imprisonment for murder and ten years for hit-and-run, death resulting. Petitioner filed a direct appeal, and the Court of Appeals affirmed. Thereafter, Petitioner filed a Petition for a Writ of Certiorari in the Supreme Court of South Carolina. This Court granted certiorari and specifically instructed the parties to brief the potential impact of *Pitts v. Mississippi*, 607 U.S. 1 (2025), on this specific issue.

¹ Bell was allowed to testify virtually over Petitioner's objection.

STANDARD OF REVIEW

“A trial court’s decision to allow videotaped or closed-circuit testimony is reversible ‘only if it is shown the trial court abused its discretion in making such a decision’” *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting *State v. Murrell*, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). “Where there is evidence to support a trial court’s ruling, it will not be overturned for an abuse of discretion.” *State v. Johnson*, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018).²

² Petitioner relies on *State v. Frasier*, 437 S.C. 625, 879 S.E.2d 762 (2022), in asserting review of a constitutional question involves a two-step analysis, with the final legal conclusion being subject to de novo review. However, *Fraiser* addressed a motion to suppress based on the Fourth Amendment, and in clarifying the standard of review, the Court clarified that it applied to Fourth Amendment cases—not *any* case presenting a constitutional question. *See id.* at 632, 879 S.E.2d at 765. Further, the rationale underlying *Frasier*—that advances in technology now allow appellate courts to review the same video evidence that trial courts review when considering Fourth Amendment questions—does not apply here where the trial court’s review of this issue is limited to the transcript rather than video of the testimony. *See id.* at 632-34, 879 S.E.2d at 766. Respondent submits the proper standard of review is the standard of review that Petitioner set forth in his brief to the Court of Appeals—an abuse of discretion standard of review. (App. 6).

ARGUMENT

1. The Court of Appeals properly found the trial court did not abuse its discretion in allowing a seventy-six-year-old witness who was in pain from a ruptured back disc to testify remotely when (1) the majority of jurisdictions that have addressed this issue have concluded that allowing the remote testimony of a witness with a medical condition that prevents him from traveling to court is necessary to further an important public policy and creates an exception to the Confrontation Clause; and (2) unlike the court in *Pitts v. Mississippi*, 607 U.S. 1 (2025), the trial court here heard evidence on this issue that supported a finding that Bell had a medical condition that prevented him from traveling to the courthouse.

Petitioner contends the trial court and the Court of Appeals diminished a fundamental aspect of his right to confront witnesses as well as inherent due process protections by allowing Bell to testify remotely. Specifically, he maintains the trial court allowed the remote testimony for Bell's mere convenience. This framing, however, ignores the evidence presented to the trial court: the seventy-six-year-old witness had a ruptured disc in his back that was flaring up ("upset") and prevented him from going to the courthouse. (R. 149-50, 153). Here, where law enforcement informed the court they were unable to move the witness to the car, the distance of the witness to the courthouse was irrelevant. (R. 149-50). Further, because the majority of courts addressing this issue have concluded that allowing remote testimony from a witness with a medical condition that prevents him or her from travelling to court is necessary to further an important public policy, and because the trial court heard evidence that supported a finding that Bell's medical condition prevented him from attending court, the Court of Appeals properly found the trial court did not abuse its discretion in allowing Bell's remote testimony. Finally, due to overwhelming evidence of guilt—specifically, overwhelming evidence that Petitioner's car struck Victim and Petitioner intended to strike the victim—and the cumulative nature of Bell's testimony, any error was harmless beyond a reasonable doubt.

Although the Sixth Amendment Confrontation Clause guarantees criminal defendants the

right to face-to-face meetings with witnesses at trial, this right is not absolute. *Maryland v. Craig*, 497 U.S. 836, 844 (1990). Rather, the Clause’s preference for face-to-face confrontation “must occasionally give way to considerations of public policy and the necessities of the case.” *Id.* at 848 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Id.* at 845. Thus, the essence of the right to confrontation “includes the right to observe, cross-examine, and have the jury view the demeanor of the witness.” *Id.* at 842. “The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing” *Id.* at 846. Under the foregoing policy, “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial [1] only where denial of such confrontation is necessary to further an important public policy and [2] only where the reliability of the testimony is otherwise assured.” *Id.* at 850.

Prior to trial, the trial court held a hearing on whether Bell—who lived in Pennsylvania at the time—could testify remotely. After being sworn, Bell testified, “the doctor won’t let me call—come because of my breathing heavy and my health condition.” (R. 3). The court clarified, “[Y]ou’re not able to fly and you can’t drive that long or travel that long?” Bell responded, “That’s right.” The court questioned whether that was based on doctor’s orders, and Bell responded, “Yes, sir.” Petitioner maintained his objection, expressing concerns about technical difficulties and his “right to full confrontation,” but the court overruled the objection and indicated it would allow the remote testimony. (R. 5).

At trial, Petitioner renewed his objection as follows:

I believe he is now in Fairfield County. He is down the road. I would ask that we get him transported here so I could have live testimony. My chief concern is, if I need to ask him about his previous statement, I think this is going to be problematic and very difficult. I'm not exactly sure how we're going to execute that.

I've got him cued up and ready to go to attempt it though.

(R. 148). After swearing Bell, the following exchange occurred:

The Court: What is your current health situation right now?

Mr. Bell: I've got—I've got my back—lower lumbar disc in my back is ruptured. So that's why and my back is all upset and I can't go to court.

The Court: All right. And who is sitting with you?

Mr. Bell: We've got two—there's a—

Mr. Lewis: Judge, it's myself Keith Lewis, Julie Hall and we've got Bill Dove from the sheriff's office, he had a WiFi hotspot that we need.

The Court: Did y'all attempt to try to get him in the car to bring him up to the courthouse?

Mr. Lewis: Yes, sir. We tried to get him up out of his chair, but he's in a lot of pain when he tries to move. And he says he's been sitting here at this table for a good while this morning.

The Court. Thank you.

Based upon my prior ruling, I'm going to allow this witness to testify over the objection of the defense. I'm gonna allow this witness to testify remotely via my virtual courtroom. We'll just deal with the sound issues, the acoustics issues, the best we can. But you're protected for the record, Mr. Frick.

Mr. Frick: Thank you, your Honor.

(R. 149-50).

a. Petitioner’s arguments regarding the sufficiency of the evidence and the distance of travel were not preserved at trial or properly presented to the Court of Appeals and thus should not be considered by this Court.

Throughout his brief, Petitioner frames the trial court’s decision to allow Bell to testify remotely as one of “mere convenience” and “personal convenience” to Bell. Specifically, he asserts the trial court erred in not considering “distance of travel and medical support for claimed infirmities.” (BOP 14). He likewise insinuates that Bell could travel to the courthouse because he had moved from Pennsylvania to South Carolina ten days before trial. (BOP 9-10). At trial, however, Petitioner never took issue with the sufficiency of the evidence or—more specifically—he never argued Bell’s statements about his medical conditions needed to be supported by medical evidence, leaving that argument unpreserved. Likewise, although he noted Bell was in the same county as the courthouse on the day of trial, after Bell testified his back hurt too much that day to travel to court, Petitioner did not argue that Bell’s prior move indicated he could attend or that the distance between Bell and the courthouse was too close for any exception to the Confrontation Clause to apply. These arguments thus are not preserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”); *id.* at 142, 587 S.E.2d at 693-94 (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.”).

Likewise, in his Brief to the Court of Appeals, Petitioner did not raise any issue with the sufficiency of the evidence, nor did he argue that Bell’s prior move indicated he could attend court³

³ Admittedly, Petitioner’s brief referenced that Petitioner renewed his objection at trial by noting Bell was now located in the same county as the courthouse. (App. 11). However, he did not raise this argument at all in his analysis—leaving it (to the extent it was preserved) abandoned. (App. 22-25).

or that the distance between Bell and the courthouse was too close for any exception to apply. (App. 22-25). Rather, Petitioner argued the limited exceptions to the Confrontation Clause set forth in *Craig, Coy v. Iowa*, 487 U.S. 1012 (1988), and *State v. Murrell*, 302 S.C. 77, 393 S.E.2d 919 (1990) did not apply. (App. 22-25). More specifically, he argued *Craig* did not apply because this case did not involve a child or a child sex case. (App. 22-25). In other words, Petitioner’s brief to the Court of Appeals was purely legal—does the Confrontation Clause create an exception to in-person testimony in a situation such as this when a witness has a medical condition that prevents him from traveling to court?

Petitioner raised these arguments for the first time in his Petition for Rehearing. (R. 2-7, 148-50; App. 1-25, 83-84). Because they were not raised at trial or in his brief to the Court of Appeals, this Court should not consider these additional arguments.

b. The majority of jurisdictions have concluded that allowing the remote testimony of a witness with a medical condition that prevents him or her from traveling to court is necessary to further an important public policy and thus creates an exception to the Confrontation Clause.

Although Petitioner repeatedly frames this as an issue of “mere convenience,”⁴ the trial court’s findings were based on Bell’s inability to travel due to a ruptured disc in his back that was flaring up so much that he was unable to leave the table where he was sitting and make it to the car. It was a medical condition that prevented his physical attendance—not mere convenience. Thus, the trial court did not abuse his discretion in allowing him to appear remotely.

⁴ In an attempting to frame the remote testimony as one of mere convenience to Bell, Petitioner argues the trial court and Court of Appeals “allowed the ‘upset’ witness to avoid face-to-face confrontation.” (Pet. 14). This argument takes Bell’s testimony out of context. Specifically, Bell told the trial court that he had a ruptured lower lumbar disc in his back, and “my back is all upset and I can’t go to court.” (R. 149). The only reasonable inference from this statement is that his back pain was too aggravated at that time to travel—not that Bell himself was upset and just did not want to attend out of mere convenience.

Although this Court had not yet addressed whether an exception to the Confrontation Clause applies when a witness is unable to travel due to a health condition, our Legislature has enacted a statute that requires trial courts to “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) (2015). While not dispositive to the constitutional question, the statute is relevant when considering what constitutes state public policy. The Legislature’s enactment of this statute is a recognition of a public policy that elderly witnesses or those with “special needs” should be treated sensitively when appropriate. Further, it is relevant when considering the options available to the trial court and whether the court properly exercised its discretion. In other words, if the trial court found Bell and the law enforcement officers credible (which, based on its ruling, it implicitly did), then the only real options available to the court were to allow the remote testimony or prohibit Bell from testifying at all. Forcing Bell to attend court under these circumstances would violate the statute and its underlying public policy.

Further, as recognized by our Court of Appeals, other jurisdictions have concluded that allowing the remote testimony of a witness with a medical condition that prevents him or her from traveling to court is necessary to further an important public policy and thus constitutes an exception to the Confrontation Clause.⁵ Admittedly, these cases from other jurisdictions are

⁵ See *State v. Johnson*, 422 S.C. 439, 453, 812 S.E.2d 739, 746 (Ct. App. 2018) (“[O]ther courts have generally permitted [remote] testimony only in cases in which the witness’s health prevents him or her from traveling or possibly when a witness is beyond the subpoena power of the court.”); *White v. State*, 116 A.3d 520 (Md. Ct. App. 2015) (concluding an out-of-state witness with debilitating back condition could testify remotely); *People v. Wrotten*, 923 N.E.2d 1099, 1100 (Ct. App. N.Y. 2009) (finding 85-year-old out-of-state witness in poor health who could not travel could testify remotely); *Bush v. State*, 193 P.3d 203, 214 (Wyo. 2008) (finding testimony from out-of-state witness with coronary heart failure did not violate Confrontation Clause, but concluding his wife’s remote testimony was not necessary to further an important public policy); *State v. Oliver*, 112 N.E.3d 573, 580-82 (Ohio Ct. App. 2018) (finding out-of-state witness whose husband had undergone liver transplant and needed dialysis could testify remotely because of

distinguishable in that they address out-of-state witnesses. However, it is not the distance to the courthouse, standing alone, that is dispositive. Rather, the issue is whether an important public policy justifies an exception to the Confrontation Clause. Here, the Court of Appeals properly concluded that a seventy-six-year-old witness who was in active pain from a ruptured back disc—so much so that he could not stand up from the table—constituted an important public policy exception to the Confrontation Clause.

Throughout his brief, Petitioner attempts to frame the “travel” necessary to support the public policy exception as something that requires significant distance. As noted, this argument was not raised to the trial court or in Petitioner’s brief to the Court of Appeals⁶—making it improper to raise to this Court. Further, this definition of “travel” is too narrow. For a witness

necessity but wife’s sister could not because she was only inconvenienced by testifying in person); *Horn v. Quartermann*, 508 F.3d 306, 317 (5th Cir. 2007) (concluding on federal habeas review the state court did not unreasonably apply federal law in permitting remote testimony of out-of-state terminally ill witness whose doctor advised against travel); *Harrell v. Butterworth*, 251 F.3d 926, 931 (11th Cir. 2001) (finding state court’s conclusion that an important public policy existed to allow virtual testimony was not contrary to federal law when one of the witnesses was in poor health and could not travel from Argentina to the United States, the witnesses were “absolutely essential” but lived beyond the subpoena power of the court, and it was in the state’s interest “to expeditiously and justly resolve criminal matters”), *cert denied*, 535 U.S. 958 (2001); *State v. Sewell*, 595 N.W.2d 207, 211-13 (Minn. Ct. App. 1999) (affirming remote testimony when out-of-state witness had undergone surgery and his doctor informed the court the witness would risk paralysis if he traveled to Minnesota); *Stevens v. State*, 234 S.W.3d 748, 781-83 (Tex. Ct. App. 2007) (finding 75-year-old out-of-state witness with tenuous health conditions documented by cardiologist could testify remotely); *Lipsitz v. State*, 442 P.3d 138, 144 (Nev. 2019) (finding victim admitted into an out-of-state treatment center for prolonged period could testify remotely); *United States v. Benson*, 79 Fed. Appx. 813, 820-21 (6th Cir. 2003) (finding “elderly and infirm witness” who lived out of state could testify remotely); *see also State v. Johnson*, 584 P.3d 77 (Mont. Sup. Ct. 2026) (finding 86-year-old out-of-state witness who accompanied wife to dialysis three times a week and cared for two adopted children under the age of ten could testify remotely), *pet. for cert. pending*, 25-127; *Cervantes v. State*, 594 S.W.3d 667, 671 (Tex. App. 2019) (finding out-of-state witness who was breast-feeding a baby and had four other children could testify remotely).

⁶ In his brief to the Court of Appeals Petitioner merely argued the *Craig* exception did not apply because this case did not involve sexual abuse of a minor.

suffering from a ruptured disc that is flaring up so much that he cannot even stand up from the table or make it to the car, the distance of even one mile would be difficult. The distance between the witness and the courthouse is not dispositive; rather, it is the nature of the medical condition and whether it prevents the witness from traveling to the courthouse. Here, where the witness could not even stand or make it to the car due to back pain, the trial court did not abuse its discretion in allowing remote testimony.

Petitioner also contends the trial court could have accommodated this witness by allowing his testimony “when Bell generally felt better”—i.e., “early morning, late afternoon.” (Pet. Br. 13). However, this argument was not raised to the trial court (or in his brief to the Court of Appeals)—leaving it unpreserved. Further, this trial lasted only a day, and it is speculative as to whether waiting an hour or two would have even made a difference in Bell’s back pain. This argument likewise ignores the nature of a jury trial and the court’s interest in balancing the jury’s time with the presentation of the case. In other words, while it may be feasible in a bench trial to resume a hearing at a later date to accommodate a witness, doing so in a jury trial poses different issues. Regardless, Petitioner did not ask the trial court for this relief—not only leaving it unpreserved, but making it impossible to know how the court (or the State⁷) would have handled the request.

c. The Court of Appeals properly found the trial court did not abuse its discretion in allowing a seventy-six-year-old witness who was in pain from a ruptured back disc to testify remotely when the trial court heard evidence on this issue that supported a finding that Bell had a medical condition that prevented him from traveling to the courthouse.

In affirming, the Court of Appeals found the trial “court did not abuse its discretion in allowing the witness to testify remotely because there was evidence demonstrating the elderly

⁷ For example, if asked, the State may have agreed to call other witnesses first to see if Bell’s back pain improved.

witness was unable to travel to court without a risk to his health.” (App. 80). More specifically, the Court of Appeals found:

Although the witness was within the county on the day of the trial, the trial court allowed the witness to testify via remote communication technology based on his advanced age and the “risk to [his] health and safety.” The witness testified under oath that his health prevented him from traveling and agents of the court sent to transport him to the courthouse confirmed he was in too much pain to be moved. Accordingly, the trial court’s finding of necessity does not lack evidentiary support.

This finding by the Court of Appeals is supported by testimony from Bell that he had a ruptured lower lumbar disc in his back that was “upset” and prevented him from attending court. (R. 149-150). Likewise, Keith Lewis from the Sheriff’s Department informed the trial court that he, Julie Hall, and Bill Dove—also from the Sheriff’s Department—were with Bell and had attempted to transport him to the courthouse: “We tried to get him up out of his chair, but he’s in a lot of pain when he tries to move. And he says he’s been sitting here at this table for a good while this morning.” (R. 149-50). Bell was 76 years old at the time of trial. (R. 153). Here, where evidence supports a finding that Bell could not travel to the courthouse due to a medical condition, the Court of Appeals properly found the trial court did not abuse its discretion in allowing Bell to testify remotely.

Further, in reaching this conclusion, the Court of Appeals properly relied on *Craig* as well as *State v. Davis*, 371 S.C. 170, 638 S.E.2d 57 (2006), and *State v. Carter*, 433 S.C. 352, 857 S.E.2d 910 (2021), *cert. dismissed as improvidently granted*, Aug. 10, 2022 (S.C. Sup. Ct), *cert. denied*, Jan. 9, 2023 (U.S. Sup. Ct.). Likewise, as discussed, jurisdictions addressing this issue have concluded that a witness with a health condition that prevents him from attending court constitutes sufficient public policy consideration to allow virtual testimony under *Craig*, and

Petitioner has not cited any case from any jurisdiction that has held otherwise.⁸

The facts of this case are distinguishable from *Pitts v. Mississippi*, 607 U.S. 1 (2025), a case involving child sexual abuse. There, the prosecution moved to place a screen between the testifying minor witness and the defendant, pointing to a statute that provided a “child witness ‘shall have the . . . righ[t]’ to ‘a properly constructed screen that would permit the judge and the jury in the courtroom . . . to see the child but would obscure the child’s view of the defendant.’” *Id.* (citing Miss. Code Ann. § 99-43-101(2)(g)(2020) (alterations in original)). Pertinently, the trial court determined the statute was mandatory and “expressed ‘concerns about [his] ability to declare the statute unconstitutional and fail to follow it.’” *Id.* (alterations in original) (quoting App. to Pet. For Cert.36(a)). As a result, the trial court allowed the screen without hearing any evidence or making a case-specific finding of necessity. *Id.* at 3. In reversing and remanding, the United States Supreme Court clarified that a court considering an exception to the Confrontation Clause “must ‘hear evidence’ and make a ‘case specific’ finding of ‘[t]he requisite . . . necessity.’” *Id.* at 2 (citing *Coy*, 487 U.S. at 1021)).

Here, unlike *Pitts*, the trial court heard evidence: specifically, the sworn testimony of Bell that he had an “upset” ruptured lumbar disc in his back that prevented him from traveling to court. (R. 149). The court also heard the statement of law enforcement officers who indicated they tried

⁸ The cases Petitioner relies on in his Brief to this Court do *not* support an argument that a witness with a medical condition that prohibits traveling to court is not an important public policy that constitutes an exception to the Confrontation Clause. The cases Petitioner relies on are fact-based and involve either (1) witnesses with a medical condition, where the courts found remote testimony was necessary to further an important public policy, or (2) witnesses *without* a medical condition, where the courts found the remote testimony violated the Confrontation Clause. (BOP 11-13). The cases allowing remote testimony based on a medical condition support the trial court’s decision here. The cases that did not allow remote testimony for witnesses without a medical condition are distinguishable because the evidence here showed Bell had a medical condition that prevented him from traveling to court.

to “get him up out of his chair” to transport him, but Bell was “in a lot of pain when he trie[d] to move.” In its ruling, the trial court also referenced the prior hearing, where it heard Bell’s sworn testimony that his doctor had advised him not to travel due to health issues. (R. 3, 5, 150). Although the initial hearing addressed whether Bell could travel from Pennsylvania to South Carolina—which was not the issue when this was raised again at trial—the court could still properly consider Bell’s sworn testimony that due to his health conditions his doctor had advised him not to travel. That testimony (which supported he had medical conditions that prohibited travel) coupled with Bell’s sworn testimony that he had an “upset” ruptured lumbar disc that prevented him from traveling to court was sufficient to support a finding that Bell had a medical condition that prevented him from traveling to court.

Likewise, unlike *Pitts*, the ruling here was not based upon a statute that the court concluded was mandatory. Rather, the court considered the circumstances of this case—i.e. Bell’s medical condition and the resulting pain that hindered his ability to stand up from where he was sitting—when ruling on this issue. Thus, *Pitts* is distinguishable.

Finally, although Petitioner does not clearly address this issue, the evidence supports that the reliability of Bell’s testimony was otherwise assured. *See Craig*, at 846 (“The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing”); *id.* at 850 (“[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial [1] only where denial of such confrontation is necessary to further an important public policy and [2] only where the reliability of the testimony is otherwise assured.”).

Here, Bell was placed under oath (R. 149, 152-53), the jury was able to observe his demeanor through video, and counsel was able to cross-examine Bell—including by later playing a portion of Bell’s statement to police to impeach his testimony that the threat occurred on a Saturday (the same night as a fish-fry) rather than a Thursday (what Bell initially told police). (R. 148, 161-64, 236-37). Although there was a brief technical issue during cross-examination, counsel was able to continue cross-examination without further issue. (R. 163-64). On balance, nothing suggests the virtual appearance prevented Petitioner from cross-examining Bell to the extent he sought to cross-examine him. *See Craig*, 497 U.S. at 845 (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”). The trial court properly found an important public policy exception based on Bell’s age and health, and the reliability of Bell’s testimony was otherwise assured. Thus, the Court of Appeals properly found the trial court did not abuse its discretion in allowing Bell to testify virtually.

2. Based on the overwhelming evidence of guilt submitted by the State and the cumulative nature of Bell’s testimony, any error in allowing this remote testimony was harmless beyond a reasonable doubt.

Even without considering Bell’s testimony, the State presented overwhelming evidence of Petitioner’s guilt. Further, although Petitioner frames Bell as a “key witness,” his testimony was cumulative to the testimony of other witnesses presented by the State. Thus, any error in his virtual testimony was harmless beyond a reasonable doubt.

“A violation of a defendant's Sixth Amendment right to confront the witness is not per se reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt.” *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). “[W]hether an error is harmless depends on the particular circumstances of the case.” *Id.* “Error is only harmless

when it could not reasonably have affected the result of the trial.” *Id.* at 181-82, 638 S.E.2d at 63 (internal quotation marks omitted).

In *Pitts*, the United States Supreme Court clarified that the harmless error doctrine applies to a Confrontation Clause violation:

Just because a constitutional error took place at trial does not necessarily mean a new one must be held. Even constitutional errors are sometimes subject to a “harmless-error” rule and do not require a new trial if the prosecution can show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”

607 U.S. at 6 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

Here, the error complained of did not contribute to the verdict beyond a reasonable doubt. At trial, the State presented overwhelming evidence that Petitioner struck Victim in his Chevy Impala. The State found Petitioner’s Impala abandoned at a truck stop with damage to the hood and a broken clip around the headlight that matched a clip found at the scene of the collision. (R. 193-208, 220-24, 228-29, 252-334, 359-60). Police introduced surveillance video from a nearby gas station showing Petitioner getting out of an Impala about 15-20 minutes before Victim was struck. (R. 42, 225-30, 235; State’s Ex. 8). Although Sampson did not identify Petitioner as the driver of the Impala he saw at the time of the collision, he identified the vehicle as an Impala similar to Petitioner’s Impala and testified he saw Petitioner earlier that night driving his Impala. (R. 183-92). Sawyer also testified Petitioner was driving his Impala that night. (R. 98). Finally, although he denied hitting Victim, Petitioner admitted to police that he was driving his Impala that evening and he left it at the truck stop. (State’s Ex. 18). The foregoing constitutes overwhelming evidence that Petitioner did, in fact, hit Victim in his Chevy Impala.

Further, the overwhelming evidence showed the impact was *not* accidental. Critically, a video depicted the vehicle passing Victim, turning around, and accelerating before swerving off

the road to hit Victim. (State's Ex. 13). The MAIT team concluded Victim was struck on the sidewalk or in the grass of a yard; the vehicle that struck Victim did not lose control before impact and was traveling approximately 47-48 mph in a 35 mph zone; the vehicle left the road, first striking a curb before hitting Victim; and all of the vehicle's tires had left the road prior to impact with Victim. (R. 31-79, 123-48, 252-334). Additionally, Sawyer and Roach both testified they saw Petitioner arguing with and threatening Victim earlier that evening, and Sampson testified Petitioner stopped by his house between midnight and 1:00 a.m. that morning looking for a gun. (R. 91-97, 166-69, 183-92). Petitioner himself told police he was upset or agitated that night, and it took him three hours to calm down. (State's Ex. 18). The following constitutes overwhelming evidence that the collision was not accidental, but rather that Petitioner intentionally swerved his vehicle to hit Victim—thus acting with malice aforethought.

Finally, the crux of Bell's testimony was that Petitioner stopped by his home around 11:00-11:30 p.m. that evening, threatened to kill Victim, was looking for a gun, and left in his Chevy Impala. (R. 153-57). However, this testimony was cumulative to the testimony of other witnesses. Specifically, Sawyer and Roach testified they saw Petitioner argue with and threaten Victim earlier that evening, and Sampson testified Petitioner stopped by his home between midnight and 1:00 a.m. looking for a gun. (R. 91-97, 166-69, 183-92). Additionally, Sawyer and Sampson both testified Petitioner was driving his Impala that night, and Petitioner admitted the same to police. Thus, the critical portion of Bell's testimony—that Petitioner threatened to kill Victim, was looking for a gun, and was driving his Impala that evening—was already before the jury. Due to the cumulative nature of Bell's testimony and the other overwhelming evidence of guilt submitted by the State, any error in allowing Bell's virtual testimony was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, this Court should affirm.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY JANE BROWN
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

s/*Daneille Dixon*
S.C. Bar No. 73999

OFFICE OF ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211
(803) 734-6665

HON. RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit
Post Office Box 607
Lancaster, SC 29721-0607

ATTORNEYS FOR RESPONDENT

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