STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jun 17 2021

S.C. SUPREME COURT

Appeal from Lancaster County

Honorable Steven H. John, Circuit Court Judge

Opinion No. 5817 (S.C. Ct. App. Filed April 21, 2021)

THE STATE,

RESPONDENT,

V.

DAVID MATTHEW CARTER,

PETITIONER

APPELLATE CASE NO. 2018-001032

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 18, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred in ruling the lower court did not abuse its discretion by ruling that petitioner would be removed from the courtroom when the twelve-year-old testified, and that petitioner could watch the testimony on CCTV, since the twelve-year-old was not "very young" within the common meaning of that term, and defense counsel argued previous victims who testified via CCTV pursuant to S.C. Code §16-3-1550 (E), were ages 3-7. Further, (1) the minor here did not make a firm claim she could not testify with petitioner being in the courtroom, and petitioner was not the sole cause of her anxiety; (2) the PTSD testimony of the minor's social worker therapist was inconsistent; and (3) overall the in camera testimony did not justify the extreme measure of removing petitioner from the courtroom during the minor's testimony?

ARGUMENT

The Court of Appeals erred in ruling the lower court did not abuse its discretion by ruling that petitioner would be removed from the courtroom when the twelve-year-old testified, and that petitioner could watch the testimony on CCTV, since the twelve-year-old was not "very young" within the common meaning of that term, and defense counsel argued previous victims who testified via CCTV pursuant to S.C. Code §16-3-1550 (E), were ages 3-7. Further, (1) the minor here did not make a firm claim she could not testify with petitioner being in the courtroom, and petitioner was not the sole cause of her anxiety; (2) the PTSD testimony of the minor's social worker therapist was inconsistent; and (3) overall the *in camera* testimony did not justify the extreme measure of removing petitioner from the courtroom during the minor's testimony.

Procedural history

Petitioner was indicted by the Lancaster County Grand Jury for three counts of criminal sexual conduct with a minor in the first degree. R. 296 – 301. His case came on for trial on May 21, 2018, before the Honorable Steven H. John, and a jury. Ashley McMahon and Henry McMaster, III, were the assistant solicitors. Brandon Steen and Ryan Payne represented petitioner. R. 1.

On May 24, 2018, the jury found petitioner guilty on all three counts. R. 169, l. 16 – 170, l. 11. Judge John sentenced petitioner to forty years' imprisonment. R. 181, ll. 2-13. The Court of Appeals affirmed petitioner's conviction in a published opinion, State v. David Matthew Carter, Op. No. 5817, Shearouse's Adv. Sh. #13, at pp. 52-57 (filed April 21, 2021) (Hewitt, J,

Thomas and Hill, JJ., concur). Petitioner moved for rehearing on May 6, 2021. The Court of Appeals denied the Petition for Rehearing on May 18, 2021.[1]

This petition for a writ of certiorari to the Court of Appeals follows.

Relevant trial facts

Prior to the trial, the judge said he would hear "the matter of testimony of the minor victim in a different courtroom than the defendant. . ." R. 5, ll. 7-11. The state called David Kellin, who had a master's degree in social work and worked at the Palmetto Citizens Against Assault center. R. 7, ll. 9-25. Kellin was the minor's therapist in this case. "Most of my children that I'm working with are underneath the age of twelve, so we use a chest or crafts to work at the same time we're talking. So it makes it more of a comfortable environment for them to talk." R. 9, ll. 6-25.

Kellin said he "believed" that the alleged victim testifying in the same courtroom with the defendant would "impede her ability to fully and accurately testify in this case." R. 11, l. 23 – 12, l. 2. Kellin said, "I think T.P. [the alleged victim] is okay in front of a jury. I think that the fear that she's expressed is to be in front of David. And I think if that's not there, I think she will be okay to testify wherever she's at. The idea of me maybe looking at the CCTV was to be able to put a physical distance between her and David Carter." R. 14, ll. 18-25. Kellin opined that a distance *"of any kind"* would allow the alleged victim to testify without a problem. R. 15, ll. 1-3. (emphasis added).

The assistant solicitor argued that she was not asking for closed-circuit television for the minor is this case but asking instead that the minor and petitioner "not be in the same room

[1] Pursuant to the Supreme Court's amended order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), Appellate Case No. 2020-000447, subsection (e), an appendix containing the above-referenced documents has not been e-filed with this certiorari petition since that requirement has been suspended.

together, they'd be okay. She will be in the courtroom. And if Mr. Carter is next door in Courtroom B, we can video stream in there the ability to see and hear." R. 16, ll. 1-11.

The judge said he understood that if he granted the state's motion, petitioner would be in a different courtroom with counsel, and he would be able to hear and communicate. R. 16, l. 12 – 18, l. 7.

Defense Counsel Steen strongly objected to this procedure. Counsel Steen argued, "Your Honor, she's twelve years old. I went through pretty much -- I've attached it and given it to the solicitor, too – all the case law with CCTV. The ages of the witnesses testifying by CCTV are three, six, five, seven, five, four, and seven. Miss T.P. [the alleged victim] is 12 years old and she's almost a teenager. This statute is not meant to protect people of her age. With a forensic interview a child is 12 years old, but yet, and *they say very young witness*, I would assume the Court means less than 12." R. 18, l. 16 – 19, l. 6. (emphasis added).

Defense counsel also noted, as seen below, that Kellin's observations of the minor here were dated, and that he could not currently diagnose the alleged victim as having post-trauma stress disorder (PTSD). R. 18, l. 16 – 19, l. 6.

The judge then asked Kellin to speak again with the alleged victim. Kellin did so, and then offered that he "redid the UCLA PTSD RI index that we used initially to look at her PTSD symptoms. Her initial scores when she first started were 34, *today they're 25*. So there's still the presence of symptoms there. They're less than what they initially were." Kellin claimed the alleged victim still had PTSD in his opinion. "It would be more classically looked at as either moderate or beginning of remission." R. 22, l. 10 – 24, l. 17. In the presence of the jury shortly thereafter, Kellin *admitted even the minor's [high] score of 34* "[w]as one point below" the score of 35 necessary "[f]or a diagnosis of PTSD . . ." As seen, it now was 25. R. 52, l. 9 – 54, l. 24.

The alleged victim's mother, Tiffany Carter, then claimed that if her daughter testified "in front of the Defendant," "[t]here's not going to be any good reaction whatsoever." R. 26, ll. 1-8. She said the alleged victim was on "Vistaril" for anxiety. R. 26, ll. 17-24. The following occurred on cross-examination of Tiffany Carter:

> Q: And you mentioned she would not have a good reaction if she had to testify?
>
> A: No, she'd shut down.
>
> Q: She would shut down?
>
> A: Yeah.
>
> Q: *Do you ever talk to her about this case?*
>
> *A: Sometimes. Not really asking her any questions, just giving her the opportunity to whatever she feels like she needs to talk about.*
>
> Q: *Does she ever shut down with you?*
>
> *A: Yes.*
>
> Q: Does she ever talk to you and tell you stuff? I don't need to know what she told you --
>
> A: Very limited. It's very -- I barely know any details just coming from her.

R. 27, l. 20 – 28, l. 9. (emphasis added).

The alleged victim, T.P., then testified. She was twelve-years-old. R. 30, l. 20 – 31, l. 9. She was in sixth grade. R. 31, ll. 24-25. The minor attended Andrew Jackson Middle School. R. 34, ll. 3-4.

The judge then questioned T.P. She said she understood there would be twelve adult men and women constituting the jury. R. 35, l. 18 – 36, l. 3. The following occurred on examination of T.P. by the judge:

Q: Okay. All right. And you know that you're going to be asked questions by the young lady that just asked you some questions about what happened? You understand that?

A: Yes, sir.

Q: And the attorney over there is going to be asking you some questions, also? You understand that?

A: Yes, sir.

Q: And you're telling me you're going to tell the truth, correct?

A: Yes, sir.

Q: All right. Now, I know it may be a tough question, but if David Carter were sitting at that table over there, *could you answer any of the questions?*

A: One or two.

Q: Okay. And what do you think would happen after that?

A: I'd probably freeze up and have a meltdown.

R. 35, ll. 3-18. (emphasis added).

Defense Counsel Steen again requested that the judge deny the state's motion to have the defendant removed from the courtroom during the minor's testimony. Steen argued there was no "testimony introduced here today that says she would not be able to testify with Mr. Carter in the room. I believe the necessity requirement requires that she not be able to testify if Mr. Carter is here. She testified that she would be able to testify some. Mr. Kellin testified that she would only not be able to testify accurately and fully." R. 39, ll. 11-23.

The judge then cited S.C. Code § 16-3-1550(E) and ruled for the state. The judge said he thought petitioner's constitutional right to confrontation would be protected by him having counsel present in one courtroom with the testifying minor, and a communication system available to communicate with petitioner in another courtroom. R. 40, l. 24 – 43, l. 12. Thus,

when the twelve-year-old T.P. would testify, petitioner would extremely noticeably not be in the courtroom.

Testimony in the presence of the jury

David Kellin testified that in his opinion the alleged victim suffered from post-traumatic stress disorder. R. 68, ll. 21 – 22. Kellin testified that the "cutoff score" on the UCLA PTSD test for diagnosing post-trauma stress disorder was 35. He testified the alleged victim scored 34 but nonetheless maintained that in his opinion, she had PTSD.[2] R. 70, l. 6 – 71, l. 2.

T.P. then testified that she was twelve-years-old. R. 78, ll. 4-5. Petitioner was her stepfather. She said she only learned that he was her stepfather in the first grade. R. 79, ll. 3-6.

T.P. remembered that in a fourth-grade guidance class, the teacher read the class a book called Not in Room 204, which was about a girl being sexually abused by her father. She said a few months after this book was read to her class, she told her mother, "he [petitioner] sexually abused me." R. 79, l. 5 – 80, l. 11. T.P. claimed petitioner repeatedly had sexual intercourse and anal intercourse with her. R. 80, ll. 4-22; R. 81, l. 1 – 52, l. 14.

T.P. testified that petitioner had a "smiley skull tattoo and it had momma's name, her first name on top and last name on the bottom." The import of the solicitor's questioning about tattoos was that the minor had seen petitioner without his clothes on. R. 85, ll. 19-21.

Tiffany Carter, the mother, testified that T.P. told her on September 24, 2016, about the alleged sexual assaults. She took T.P. to Piedmont Medical Center for an evaluation which was "normal."[3] Carter recalled when she returned to the house two days later with a police escort,

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2 As seen above, the minor's rescore on this test was 25. 34 was her prior score which was still objectively insufficient.

3 The nurse, Stephanie Schaller, said the "normal examination" essentially was meaningless since only a small percentage revealed trauma. R. 131, l. 4 – 134, l. 7.

T.P.'s room "was a mess." Carter offered: "[E]verything was pulled out, not anything like how it was when we left." Carter said T.P. became more withdrawn, talked back and acting differently after she made the accusation of the abuse. R. 139, l. 14 – 141, l. 17.

Petitioner testified in his own defense. He was thirty-three years old. He was born in Lancaster, South Carolina. R. 215, ll. 15-24. Petitioner had been in the Army, and then he pursued a career in welding. R. 216, l. 12 – 217, l. 18. Petitioner testified that his wife, T.P's mother, was angry with him about his affairs or alleged affairs she learned about. She even carved the word "cheater" into his truck with a knife. R. 221, l. 11 – 225, l. 24.

Petitioner testified that his wife and children returned to live with him about "three weeks before the allegations" in this case were made against him by T.P. R. 224, l. 13 – 225, l. 24. Petitioner said, "I noticed that my kids knew about the affairs because Tiffany had admitted to me that she told the kids that I had an affair on her and I cheated." R. 226, l. 6 – 227, l. 17.

Petitioner denied he ever sexually molested the minor. R. 233, l. 4 – 234, l. 5. Petitioner remembered that he went to DSS to talk with Jacqueline Hicks about the alleged abuse. Petitioner found a journal that was used by his wife and T.P. to communicate. "The journal had some disturbing stuff in it that I didn't know about because, you know, it was between a mother and daughter. And I took that journal with me that Monday morning to talk to the cops, and they told me to hang on to it." R. 228, ll. 4-21; R. 229, l. 8 – 230, ll. 12. Petitioner said the journal contained explicit sexual discussions and sexual pictures. R. 229, l. 8 – 230, l. 24. DSS employee Hicks said she saw this journal. It was a collection of writings between the minor and her mother, but she maintained: "I did not have a copy." R. 195, ll. 5-13.

The cross-examination by the Assistant Solicitor McMahon of petitioner about his affairs, work history, and what he did for relaxation made petitioner out to be a bad person irrespective

of the allegations in this case. The trial judge sustained a badgering the witness objection, a relevance objection about petitioner's tattoos, and he even told the solicitor at one point not to "make comments and testify." R. 234, l. 11 – 255, l. 9.

Court of Appeals opinion

In its published opinion, State v. David Matthew Carter, Op. No. 5817, Shearouse's Adv. Sh. #13, at pp. 52-57 (filed April 21, 2021), the Court held:

> The law favors face-to-face confrontation but requires the court to "treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate." § 16-3-1550(E). . . We respectfully reject Carter's argument that Victim's age prevented the court from employing any special procedures. . . We also respectfully disagree with Carter's argument that the court could not adopt special procedures unless Victim claimed she would be completely unable to testify with Carter in the court room. An "adequate showing of necessity" exists when the special procedure is needed to protect the child's welfare, when the child would be traumatized by the defendant's presence, and when the child's emotional distress caused by the defendant's presence is "more than mere nervousness or excitement or some reluctance to testify." State v. Lewis, 324 S.C. 539, 545, 478 S.E.2d 861, 864 (Ct. App. 1996) (quoting Craig, 497 U.S. at 856—857). . . Carter argues Victim's counselor's testimony was inconsistent and specifically points to the counselor's admission that Victim's PTSD had improved while also standing by his diagnosis that Victim was still experiencing PTSD. This argument is foreclosed by the abuse of discretion standard. . .

State v. David Matthew Carter, Op. No. 5817, Shearouse's Adv. Sh. #13, at pp. 55-56 (filed April 21, 2021).

Rehearing

Petitioner argued, inter alia, in his rehearing petition that the Court of Appeals should reconsider its opinion and grant rehearing because:

> [I]t may have overlooked the fact that a teenager cannot be considered a "very young" person as meant in the statute without straining the English language to its breaking point. Yet the

twelve-year-old alleged victim in this case was going to be a teenager within less than twelve months. Defense counsel correctly noted the General Assembly had limited forensic interviews to "children under twelve." That was the age standard the General Assembly had set for special treatment of alleged young victims. See S.C. Code §17-23-175 (C)(1) "[a] child is a person who is under the age of twelve years at the time of the making of the statement . . ." This under the age of twelve standard for forensic interviews was set by the legislature for a similar matter in that forensic interviews are the admission of a prior consistent statement by the alleged victim otherwise violative of the Rules of Evidence.

Here, the controlling statute, S.C. Code §16-3-1550 (E), pertains to "very young" witnesses – which logically has to be less than the "under twelve year old standard" for forensic interviews. The statute here is used to dispense with the defendant's fundamental Constitutional right of confrontation.

Further, the twelve-year-old's personal therapist, hardly an unbiased witness, admitted the witness no longer tested positive for post-traumatic stress disorder at the time of trial. That finding was not given the significance it deserved.

Third, the parroting conclusionary testimony that the twelve-year-old would "shut down" if she had to testify in the defendant's presence was insufficient to satisfy the requirement that a finding must be made that the alleged victim must "be traumatized" by having to testify in the defendant's presence, and that trauma alone would prevent her from functionally testifying. See State v. Bray, 342 S.C. 23, 28, 535 S.E.2d 636, 639 (2000) ("[I] think she will 'shut down' and not talk at all."). Still, critically, Bray contained evidence of specific emotional trauma that would be caused by face-to-face confrontation alone that does not exist in this case. The Supreme Court nonetheless reversed in Bray because of the lack of specific case findings on trauma that would cause an inability to functionally testify.

Finally, this Court should reconsider its opinion because appellant, the defendant at trial, was seen by the jury throughout the trial and his sudden disappearance when the alleged victim testified was going to be strongly considered negatively by the jury. No limiting instruction could change that fact, and *that fact* should have been considered in the overall analysis of this abuse of discretion issue. Instead, the trial judge found, based on nothing,

> that "I do not find that he [petitioner] is harmed in any way, that he is prejudiced in any way . . ." R. 42, 42, ll. 14-18.
>
> That was not the only finding by the judge that was not supported in any way by the record. As seen below, the alleged victim was allegedly traumatized by *subject of the abuse alone* regardless of appellant being present or appellant being present in the courtroom.

Petition for rehearing at 1-3. Rehearing was denied.

Discussion

"It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult" Maryland v. Craig, 497 U.S. 836, 846-47 (1990) *citing* Coy v. Iowa, 487 U.S. 1012, 1019 (1988). "The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness, the right of confrontation `contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.'" Lee v. Illinois, 476 U.S. 530, 540 (1986)." Coy v. Iowa, 487 U.S. 1012, 1018 (1988)

In Coy v. Iowa, 487 U.S. 1012 (1988) the Court held the defendant's right to face-to-face confrontation was violated by the placement of a screen between the defendant and the alleged victims. The Court also determined that if there could be an exception to this core right it would have to be based on an individualized finding that a particular witness needed special protection.

In Maryland v. Craig, 497 U.S. 836 (1990), the Court determined if there was a case specific finding of necessary that the child would be traumatized by the defendant's presence, and that the emotional distress suffered by the child because of the defendant's presence was more than *de minimis,* the state's interest in the physical and psychological well- being of the

child abuse victim could outweigh the defendant's right to face-to-face confrontation. Maryland v. Craig, 497 U.S. 836 (1990) involved one-way closed-circuit television.

S.C. Code §16-3-1550(E) states, "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. . . ." (emphasis added). Defense counsel correctly argued in this case that the alleged victim was twelve-years-old. This was not "very young," and counsel also very specifically noted in his memorandum that this statute was used for victims ranging from three to seven years old. R. 290 – 295. The alleged victim here was "almost a teenager," as she was twelve-years-old. Counsel used the analogy of the forensic interview which was limited to those below twelve-years-old. R. 18, l. 16 – 19, l. 6. See S.C. Code §17-23-175(C)(1) defining a child as one "under the age of twelve years at the time of the making of the statement. . . ."

Twelve-years-old is not "very young" in common usage of the term "very young," and for that reason alone the judge erred in mandating that petitioner not be present in the courtroom when his stepdaughter testified against him. Nonetheless, there still is so much more to this confrontation violation in this case.

Kellin's PTSD testimony was inconsistent yet quite calculated. While he did admit this twelve-year-old minor was improved, he stood by his claim she had PTSD despite her score of 25 on the day of court, and her score of 34 on a prior occasion despite 35 being the lowest score

on the UCLA-PTSD test for having PTSD.[4] R. 22, ll. 10-16; R. 53, l. 20 – 54, l. 24. He asserted he believed that the twelve-year-old testifying in the same courtroom would impede her ability to testify "fully and accurately." Yet Kellin admitted to the Assistant Solicitor on re-direct examination that "any kind" of distance between T.P and petitioner would protect her from the trauma he claimed she would feel. "The idea of me maybe looking at CCTV was to be able to put a physical distance between her and David Carter." R. 14, l. 18 – 15, l. 3.

In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), cited by the trial judge, the victim was five years old. This Court in Murrell noted that the United States Supreme Court in Coy v. Iowa, 487 U.S. 1012 (1988), had found unconstitutional, on confrontation clause grounds, an Iowa statutory procedure which permitted the placement of a screen between the defendant and witnesses so that the witnesses could not see the defendant. As stated in Coy v. Iowa, the United States Supreme Court suggested that exceptions to the right to personal confrontation could exist if based on individualized findings of need. State v. Murrell, 302 S.C. 77, 81, 393 S.E.2d 919, 921-922 (1990).

This Court in Murrell found no error in that case involving the five-year-old victim. This Court reasoned the judge did not abuse his discretion in concluding that testimony by the five-year-old victim in the defendant's presence would have had a traumatic effect on the child. The Court further noted the child was placed in a courtroom setting. Petitioner was allowed to view and hear the child, and petitioner's counsel was permitted to cross-examine the child. "Petitioner

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[4] Petitioner is aware that Kellin said he could take other factors into account when "diagnosing" PTSD. Although not an issue in this case, Kellin had a master's degree in social work, and a BS degree in psychology. Kellin was not a doctor, and he could not prescribe medication. While he claimed there was no limitation of diagnosis he could make, he was very much an advocate as his sentencing comments to the court revealed. R. 7, ll. 21-24; r. 9, ll. 10-15; r. 171, l. 23 – 173, l. 15. "I'm speaking on behalf of T.P. as her counselor. . . . He is not her dad and never will be and should never have any contact with her or any kids again. . . . She wants nothing to do with him. He is no longer anything to her. Thank you." R. 171, l. 23 – 173, l. 15.

not only had counsel present with him and in the courtroom, but a communication procedure between all three was made available." State v. Murrell, 302 S.C. at 82, 393 S.E.2d at 922.

In Maryland v. Craig, 497 U.S. 836 (1990), the Court held that the confrontation clause did not categorically prohibit a child witness in a child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television. However, a finding of necessity for use of one-way closed-circuit television procedure had to be made on case specific basis. The child in that case was six years old.

In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), the Court established the special circumstances and procedures under which a child witness may testify outside the presence of the defendant via videotaped testimony:

> First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

More recently, our Court stated:

> The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.... Denial of face-to-face confrontation is not needed to further state interest

> in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma.
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> State v. Bray, 342 S.C. 23, 30, 535 S.E.2d 636, 640 (2000) *quoting* Maryland v. Craig, 497 U.S. 836, 856-7, 110 S.Ct. 3157, 3169-70, 111 L.Ed.2d 666, 685 (1990).
>
> In State v. Bray, the Court indicated its unwillingness to adopt any categorical prerequisites in order for a child witness to testify outside the defendant's presence. The Court nonetheless emphasized the trial judge must make case-specific reasons for use of a procedure which excludes the defendant from being present during the child victim's testimony.

South Carolina Dept. of Social Services v. Wilson, 352 S.C. 445, 454, 574 S.E.2d 730, 734-35 (2002).

In State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000), this Court reversed the defendant's conviction where the alleged victim, who was five at the time of the alleged abuse, and seven years old at the time of trial, testified via CCTV. This Court found that the decision to allow videotaped or closed-circuit television testimony is reversible "only if it is shown the trial judge abused his discretion in making such a decision." State v. Bray, 342 S.C. at 27, 535 S.E.2d at 639. The Bray Court found that, while there was evidence the victim was afraid of the defendant, there was also more generalized testimony concerning her fear of the courtroom and her relatives. State v. Bray, 342 S.C. at 30-31, 535 S.E.2d at 640-41. Thus, while this Court disagreed with the Court of Appeals holding in Bray, since this Court found there was sufficient evidence to support use of CCTV, it nonetheless reversed because the findings of the lower court were not sufficiently precise.

In this case, the situation is not much different except in one very important respect: The minor was twelve-years-old here rather than seven-years-old, which obviously cuts strongly against the state's position and the opinion of the Court of Appeals in this case. Further, the

minor's mother said she thought that the minor would "shut down" if she had to testify. However, as seen supra, the minor had "shut down" before just talking to her mother in a seemingly relaxed environment. R. 27, l. 20 – 28, l. 9. This was generalized testimony of the subject matter itself being dramatic or traumatizing, not petitioner, or not just petitioner alone.

Further, as defense counsel noted, the minor did not claim she could not testify in petitioner's presence in the courtroom. She maintained she could answer a question or two in petitioner's presence. Why she claimed she could only answer two questions in petitioner's presence is unknown. Regardless, she did not claim she could not testify in petitioner's presence. Further, as seen infra, her therapist told the assistant solicitor that he "would be okay with her testifying as long as there's a distance of any kind [between them]." That "any distance between them" was, in fact, the reason he suggested CCTV. R. 14, l. 18 – 15, l. 3.

The testimony of T.P., her mother, and her therapist together were very similar to the testimony in State v. Lewis, 324 S.C. 539, 548,478 S.E.2d 861, 866 (1996) that the child at issue would be scared to talk about "private things" and would be "nervous or uncomfortable" in the defendant's presence that the Court of Appeals found "insufficient to support the trial court's ruling," and held the defendant's Confrontation Clause rights were therefore violated.

Again, defense counsel correctly argued and presented a memorandum which sufficiently informed the court that the minor here was twelve-years-old, and "almost a teenager." This was not "very young" as was required. That was what the Legislature provided for in the limited exception contained in S.C. Code § 16-3-1550(E).

The right to confront an accuser is obviously a very important fundamental right of a criminal defendant as the Court found in Coy v. Iowa, and Maryland v. Craig, supra. It seems intuitive that a defendant not being present when the accusing minor, here a twelve-year-old,

testifies is going to make an average juror draw a very negative inference about the character of the defendant from that fact alone. Courts are correctly concerned about "bad character" evidence in a related manner because of its impermissible tendency to invite a verdict on an impermissible spurious basis. The prejudice from petitioner being removed from the courtroom during the twelve-year-old's testimony cannot be overstated.

In Maryland v. Craig, 497 U.S. 836, 855-866 (1990), the 5-4 majority held that if the state made an adequate showing of necessity, a closed circuit procedure similar to the one at issue in the this case (petitioner being moved into a separate courtroom) could be used so long as the finding of necessity was a case specific one that the child witness would be traumatized by having to testify in the defendant's presence and that emotional distress suffered by the child *was caused by the defendant's presence alone.* Further, that emotional distress had to be more than *de minimis*, such as "*mere nervousness or excitement or some reluctance to testify.*"5

The majority in Maryland v. Craig, 497 U.S. 836, 849-50 (1990), citing Ohio v. Roberts, 448 U.S. 56 (1980), strongly reasoned that it had already held that testimony that would otherwise be hearsay and deny the right of confrontation was allowed where circumstances otherwise showed that testimony was "trustworthy."

However, fourteen years after Maryland v. Craig and Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court abrogated Ohio v. Roberts, 448 U.S. 56 (1980) and held out-of-court statements by witnesses that were testimonial were barred under the Confrontation Clause, unless witnesses were unavailable and defendants had a prior opportunity to cross-examine the witnesses, regardless of whether such statements were deemed reliable by the court. The alleged

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5 Emphasis added.

reliability of the evidence could no longer justify the denial of the fundamental right of confrontation where the evidence was testimonial.

Justice O'Connor, the author of the majority opinion in Maryland v. Craig dissented in Crawford from the decision to overrule Ohio v. Roberts. Justice O'Connor cited her opinion in Maryland v. Craig for the proposition that "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." Crawford v. Washington, 541 U.S. 36, 74 (2004)

Justice Scalia, who later authored Crawford, in his earlier dissent in Maryland v. Craig, along with Justices Breenan, Marshall, and Stevens, found the departure in that case from the words of the constitution on the right of confrontation was unacceptable:

> "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution *against the tide of prevailing current opinion.* The Sixth Amendment provides, with unmistakable clarity, that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' The purpose of enshrining this protection in the Constitution *was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.* The Court, however, says:
>
> 'We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.' *Ante,* at 3167.
>
> 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, or a mother whose young son has been taken into custody by the State's child welfare department, 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.*
>
> Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent.
>
> According to the Court, 'we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers.' *Ante,* at 3166. That is rather like saying 'we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial.'"[6]

Maryland v. Craig, 497 U.S. 836, 861-62 (1990).

The applicable statute in this case is the result of a such a policy interest. However, in the final analysis, the majority opinion in Maryland v. Craig cannot be precedent to justify what occurred in this case based upon the lack of evidence of "necessity" specifically attributed to petitioner's presence in the courtroom.

This Court should grant certiorari because the published opinion of the Court of Appeals in this case affirming the denial of the right of confrontation is not supported by the record, and it is erroneous. Indeed, it is in derogation of applicable precedent of this Court and the United States Supreme Court – State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000); State v. Murrell, 302

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[6] Emphasis added.

S.C. 77, 393 S.E.2d 919 (1990), and Maryland v. Craig, 497 U.S. 836 (1990). The bench and bar need this Court's guidance on this important right to confrontation constitutional issue.

CONCLUSION

A writ of certiorari should be issued to allow full briefing on this issue.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2021.