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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID MATTHEW CARTER,

APPELLANT.

APPELLATE CASE NO. 2018-001032

Appeal from Lancaster County

Honorable Steven H. John, Circuit Court Judge

Opinion No. 5817

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, appellant requests that this Court grant rehearing because it 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 [appellant] 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.

As this Court will recall, the alleged victim's mother 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. She said her daughter would "shut down" if she had to testify, and that the child had "shut down" with her -- obviously outside of appellant's presence. R. 27, l. 20 – 28, l. 9.

> 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).

As this Court will also recall, and as seen again below, the twelve-year-old alleged victim maintained to the trial judge that she could answer one or two questions during the trial, and then she would "shut down." R. 35, ll. 3-18. Her personal therapist admitted the alleged victim no longer scored as still suffering from post-traumatic stress disorder at the time of trial. R. 22, l. 10 – 24, l. 17; r. 52, l. 9 – 54, l. 4.

The trial judge here ruled:

> In this particular matter, I do find that the child witness in this matter, [T.P.], would be traumatized by having to testify and face the Defendant in this matter, David Matthew Carter. I find that not only would her testimony be hindered, but based upon the testimony of the expert in this matter, Mr. Kellin, from her mother, Tiffany Carter, and from the minor witness herself that she would, basically, *freeze up and not be able to answer any questions whatsoever if she had to testify, give her story in front of the Defendant, David Matthew Carter.*
>
> I find that the procedure that is being established and used in this particular matter protects the Defendant's Constitutional right of confrontation of witnesses against him. He will have counsel present in the courtroom, who will, actually, observe the minor witness and be able to examine her directly. That counsel will have a communication system available to be able to communicate with co-counsel and the Defendant sitting in the other courtroom.
>
> And Counsel, I will give you some leeway. If there's some delay in communicating when you need to take -- be at ease for a minute to communicate with co-counsel by e-mail or however that is, certainly, the Court will accommodate you in that regard so that you're able to communicate and see if other questions need to be asked before the cross-examination is completed. Certainly, the Court will do that.
>
> But based upon the expert testimony, testimony of the child, testimony of the child's mother, I don't think there's any question that not only is justice being served as far as the facts being developed for a jury to make their decision on whether the State has proved the Defendant guilty beyond a reasonable doubt, we have protected the Defendant's Constitutional right of confrontation in this matter. *I do not find that he is harmed in any way, that he is prejudiced in any way* and being able to fully cross-examine the witness, and that the jury will have the ability -- and the reason -- I want to make sure this is clear.
>
> The reason I want the child in the courtroom facing the 12 jurors is the jurors judge credibility and believability. And they will have the opportunity to look at the child when she testifies, to hear and make their own observations and determinations, as they must, as to whether or not the witness is telling the truth, knows

> the difference between right and wrong, understands the gravity of the situation.
>
> So I think it's a much better process having the child in the courtroom with the jurors and the Defendant being in another courtroom because it's not necessary at that point in time for the jury to observe and/or judge the credibility or believability of the Defendant. And he is able to communicate *and have full confrontation rights regarding the victim.*

R. 41, l. 5 – 43, l. 7. (emphasis added)

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 (appellant 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.*"[1]

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 in 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 court. The alleged

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[1] 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 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.'"[2]

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

The applicable statute in this case is the result of 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" for the denial of appellant's right to confront his accuser. Self-serving testimony from the alleged victim's therapist, the alleged victim and her mother that she would "shut down" was not evidence that the child would suffer emotional distress by being in appellant's presence and that trauma caused by appellant's presence alone would prevent her from being able to functionally testify. This Court's current opinion affirming the denial of the right of confrontation should be reconsidered because it is not supported by applicable precedent – Maryland v. Craig, 497 U.S. 836 (1990) and State v. Bray,

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[2] Emphasis added.

342 S.C. 23, 535 S.E.2d 636 (2000). There was no evidence to support the trial judge's finding that the twelve-year-old alleged victim would "*freeze up and not be able to answer any questions whatsoever if she had to testify*" in appellant's presence. R. 41, ll. 8-14.

As this Court will recall, prior to the trial, 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 applicable 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.

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 appellant "not be in the same room 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.

Defense Counsel Steen objected to this procedure. Counsel 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." Defense counsel also correctly noted that Kellin's observations of the minor here were dated, and that Kellin could not currently diagnose the alleged victim as having post-trauma stress disorder. R. 18, l. 16 – 19, l. 6. (emphasis added).

The judge then asked Kellin to talk 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 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.

This Court found specific attacks on the trial judge's factual findings were "foreclosed by the abuse of discretion standard." State v. David Matthew Carter, Op. No. 5817, Shearouse's Adv. Sh. #13, at 56. Appellant understands that this Court does not weigh the evidence. However, the trial judge here erroneously found that the twelve-year-old would not be able to answer any questions in appellant's presence, and that appellant would suffer no prejudice by his removal from the courtroom. There was no evidence to support either of those findings, and the judge therefore abused his discretion.

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

The judge 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: [N]ow, 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).

This vague testimony – together with that of her mother and therapist above – did not support a finding the twelve-year-old would not be able to testify if appellant was present, and that her trauma was directly caused by appellant's presence in the courtroom. Again, Defense Counsel Steen 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. Steen also correctly argued that this twelve-year-old did not qualify as a "very young" witness in the manner meant by the legislature given its use of a similar age term in the forensic interview context.

This Court should grant rehearing and hold that the twelve-year-old alleged victim in this case does not qualify as "very young" under the statute. It is unfortunate that sometimes the

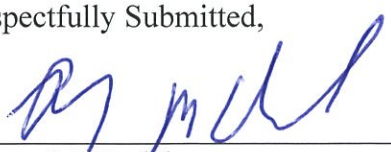
appellate court must fill in such gaps for the General Assembly, but our Supreme Court certainly has had to do so in the immunity statute context on matters on "which the Act is silent." State v. Isaac, 405 S.C. 177, 184-85, 747 S.E.2d 677, 680-81 (2013) referencing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

This Court should also grant rehearing and hold that the trial judge abused his discretion by ruling the evidence showed the twelve-year-old could not testify in the presence of appellant. There was no evidence that the alleged victim's trauma would be caused directly by her having to testify in the presence of appellant, and that trauma caused directly by appellant's presence would prevent her from testifying functionally.

Finally, as to prejudice, the trial court erred with its wishful ruling that appellant would suffer no prejudice from being removed from the courtroom while the alleged victim testified. If a trial court is ever going to dispense with the fundamental right of face-to-face confrontation, it must at least honestly weigh the prejudice the defendant is going to suffer, and that this defendant suffered, in its analysis.

The evidence during appellant's trial, as argued in appellant's brief, showed appellant's estranged wife had turned the alleged victim against him. The estranged wife was planting ideas into her mind and the assistant solicitor was so far outside the proper role of a prosecutor that the trial judge told her at one point not to "make comments and testify." R. 234, l. 11 – 255, l. 9. Appellant was very much prejudiced by the denial of confrontation in this highly unusual case, and for all of the other reasons above, rehearing should be granted.

Respectfully Submitted,



This 6th day of May, 2021.

Robert M. Dudek
Chief Appellate Defender

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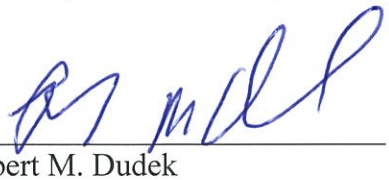
APPELLATE CASE NO. 2018-001032

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 6th day of May, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT