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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID MATTHEW CARTER,

PETITIONER

APPELLATE CASE NO. 2021-000632

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ARGUMENT IN REPLY

Petitioner has always challenged the trial judge's ruling dispensing with face-to-face confrontation based upon the alleged victim's age and based on a "special needs" grounds. Petitioner strongly attacked the treating therapist's PTSD testimony as being flawed, hopelessly inconsistent and not justifying special treatment pursuant to the statute. Petitioner also argued that the testimony of the alleged victim, her mother, and her therapist together were insufficient under the statute to dispense with face-to-face confrontation. The state's assertion that petitioner did not challenge a "special needs" finding in addition to age is patently false.

The state's "gotcha" attempt on certiorari asserting that petitioner did not challenge the trial judge's ruling based on "special needs" pursuant to S.C. Code §16-3-1150 (E) in addition to age is simply not true. See state's return at 8 & 10-12. Any fair reading of petitioner's certiorari petition reveals petitioner continued to challenge the trial judge's ruling based on the minor's age (twelve-years-old), the purported PTSD "special needs" testimony of her personal therapist, and the combined "special needs" partial "shut down" testimony of the alleged victim, her mother, and her therapist overall. See, Question Presented at 2; Argument heading at 3; challenge based on age *and* PTSD at 4-5; challenge based on the alleged victim's testimony and her mother's testimony in the certiorari petition at 6-7; continued legal argument challenge of the personal therapist's PTSD claim at 13-14; and the continued argument that the generalized partial "shut down" testimony of the alleged victim, her mother, and her therapist were all inadequate to support the judge's ruling at 16-21 of the certiorari petition.

Each of these challenges were fairly made at trial, in the appellate brief before the Court of Appeals, and on rehearing. Simply put, petitioner has challenged the trial judge's ruling based

on "special needs" in addition to age throughout. The state's assertion to the contrary is, most respectfully, totally bogus.

The state also asserted petitioner "misapprehended" this Court's holding in State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000). As to Bray, inter alia, petitioner wrote:

> 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.

Petition for writ of certiorari at 16. (emphasis added in reply).

Petitioner did not misapprehend the holding of Bray.

In addition, as this Court has recognized in child sex allegation cases, the allegation itself can be sufficiently devastating to make obtaining a fair trial before an impartial jury very difficult. This Court has an admirable history of trying to assure a fair trial in these difficult sex allegation cases. For example, it has limited forensic interviewers to laying the foundation for the introduction of the videotape to prevent the forensic interviewer from being used as a "human lie-detector" pursuant to State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), fn. 4. See State v. Anderson, 413 S.C. 212, 220-221, 776 S.E.2d 76, 80 (2015) (Assuming the court determines that the interview is admissible under the statute, the forensic interviewer will be called to testify before the jury. The sole purpose of her jury testimony is to lay the foundation

for the introduction of the videotape, and the questioning must be limited to that subject. There is to be no testimony to such things as techniques, the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted).

Further, this Court's recent opinion in State v. Ontario Stefon Patrick Makins, Op. No. 28039, Shearouse's Adv. Sh. 21 at 23-32 (filed June 23, 2021), which held the minor's treating therapist's testimony that she provided therapy to the minor, without more, did not convey to the jury that she believed the minor was a clarification of this Court's opinion in Anderson, not a retreat from its principle. This Court also reiterated its warning that using one witness as a characteristics expert and the treating witness "is a risky undertaking." State v. Ontario Stefon Patrick Makins, Op. No. 28039, Shearouse's Adv. Sh. 21 at 32 (filed June 23, 2021).

This Court has also held that a trial judge has the authority to bifurcate these child sex abuse trials to prevent the jury from learning of the defendant's prior sex conviction or the fact he was on the sex offender registry during the "guilt or innocence" portion of the trial to aid in providing him or her a fair trial. In addition, in that same case, State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), this Court held the trial judge committed an error of law in denying the motion to bifurcate the trial.

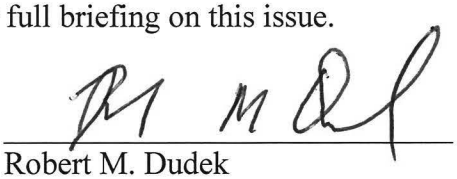
The prejudice from the jury, as in this case, seeing that the defendant is no longer in the courtroom when his minor accuser testifies cannot be underestimated. It is a devastating blow to a defendant's right to a fair trial in a sex case.

Petitioner understands that current precedent allows face-to-face confrontation to be dispatched with under certain very limited circumstances. The opinion of the Court of Appeals in this case -- on this important constitutional confrontation clause issue -- is published. See

State v. Carter, ___S.C. ___, 857 S.E.2d 910 (2021). This Court has not spoken on this confrontation clause issue in the recent past and the present opinion of the Court of Appeals, if left unaddressed by this Court, will lead to considerable problems or mischief in the trial courts. It will serve as a blow to this Court's precedents which attempt to assure a fair trial in these difficult sex abuse allegation cases. For the benefit of the bench and bar, and to assure fairness to this petitioner, certiorari should be granted.

CONCLUSION

For the reasons contained in the petition for writ of certiorari and in this reply to the state's return, certiorari should be granted to allow full briefing on this issue.



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This 2nd day of July, 2021.