THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0634

State of New Hampshire

v.

Erin Warren

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(Fifteen Minute Oral Argument)

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QUESTIONS PRESENTED

1. Whether the court erred by granting the State's motion to allow A.D. to testify remotely outside the presence of Warren.

2. Whether the court plainly erred in finding A.D. competent to testify.

3. Whether the court erred in admitting uncharged conduct evidence under Evidence Rule 404(b).

4. Whether the court erred by failing to disclose, after its in camera review, DCYF and Community Partners' records.

I. THE COURT ERRED IN ALLOWING A.D. TO TESTIFY REMOTELY OUTSIDE OF WARREN'S PRESENCE

On appeal, Warren argues that the court erred in allowing A.D. to testify remotely, outside of Warren's presence and without seeing Warren, in violation of Warren's federal and state confrontation rights. Among other arguments, the State contends that the Court should follow Maryland v. Craig, 497 U.S. 836 (1990), for purposes of analyzing the right to confrontation under the New Hampshire Constitution. This reply responds to that argument.

The State suggests that the Court has implicitly endorsed the Craig analysis for purposes of addressing state confrontation issues, citing State v. Hernandez, 159 N.H. 394 (2009) and State v. Peters, 133 N.H. 791 (1991). SB[1] at I.C. Hernandez and Peters, however, dealt with fundamentally different questions and these cases do not support endorsing Craig.

Hernandez involved trial testimony given by a witness testifying in the defendant's presence but wearing a mask covering his nose and mouth. Hernandez, 159 N.H. at 401-02. The confrontation concern in Hernandez was whether the mask impeded the jury's observation of the witness's demeanor such that it might impact their assessment of his credibility. Id. at 403-04. The concern in Hernandez did not

[1] "SB" refers to the State's brief.

implicate the fundamental principle that testimony be given "face-to-face" with the defendant, in the defendant's presence. Id. While "face-to-face" has been read into the federal confrontation right by judicial interpretation, see Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (discussing the origins of "face-to-face" as an element of confrontation), it is explicitly required by the state confrontation clause. The right to face-to-face confrontation is fundamental because it rests on a truth recognized for centuries: that "it is always more difficult to tell a lie about a person to his face than behind his back." Id. at 1019-20 (internal quotations and citations omitted).

While the United States Supreme Court recognized in Craig an exception to the federal right to face-to-face confrontation, the status of Craig is questionable given Crawford v. Washington, 541 U.S. 36 (2004) as discussed in Warren's opening brief.[2] In any event, the reasons proffered in Craig for allowing remote testimony should not apply when construing our constitution. Indeed, this Court recognized as much in Peters, which, like Hernandez, did not address the issue presented in this case. Peters addressed whether deposition testimony taken under RSA 517:13-a may be admitted in lieu of live trial testimony. Peters, 133 N.H. at

[2] Craig addressed whether a Maryland statute allowing witnesses to testify remotely out of the presence of a defendant violated the federal right to confrontation. Craig, 497 U.S. at 840-41. New Hampshire does not have any statute authorizing a witness to testify remotely.

793-96. In holding that, in some cases, deposition testimony given in the defendant's presence might be substituted for trial testimony, the Court cautioned that the use at trial of deposition testimony taken under RSA 517:13-a "does not raise a substantial confrontation problem since it involves testimony *in the presence of the defendant*." Id. at 797 (quoting Coy, 487 U.S. at 1023) (emphasis added).

The question identified but not addressed in Peters is presented here. Although the Peters Court indicated that there may be some exceptions to the constitutional requirement of face-to-face testimony, id., there is no room under the state constitution for the exception allowed in Warren's trial.

When construing our constitution, the Court looks to the "purpose and intent" of the provision, starting with the plain language of the text. State v. Mack, 173 N.H. 793, 801 (2020) ("[t]he simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption."). The Court also considers any available history related to the adoption of the provision and comparable state and federal case law for guidance. Id. at 801-02. In addition, "[g]iven that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on one adopted by Massachusetts four years earlier," the Court gives great

weight to interpretations that the Massachusetts Supreme Judicial Court has given to identical provisions in its constitution. Id. at 802.

The language of New Hampshire's confrontation clause is identical to the clause of the Massachusetts' constitution. Both constitutions guarantee a defendant's right to "to meet the witnesses against him face-to-face." N.H. Const. pt. I, art. 15; Mass. Const. art. XII (emphasis added). As the Massachusetts Supreme Judicial Court held in Com. v. Bergstrom, 524 N.E.2d 366 (Mass. 1988), the plain and ordinary meaning of the constitutional text requires trial witnesses to testify in the defendant's presence. Bergstrom, 524 N.E.2d at 371-72 (words used in the constitution should be "interpreted in the sense most obvious to the common intelligence," and should not be ignored). "All [the] words [of the Constitution] must be presumed to have been chosen advisedly." Id. (citation omitted). See Com. v. Johnson, 631 N.E.2d 1002, 1004-05 (Mass. 1994) ("[t]he 'most obvious' and plain interpretation of 'to meet the witnesses against him face to face,' a phrase explicitly included in our Constitution but not included in other then-existing Constitutions, is that a defendant must be given an opportunity to observe the face of all witnesses who testify against him at trial.").

Notably, "[t]he Constitutions of Virginia, Pennsylvania, Delaware, Maryland, North Carolina, and Vermont contain

different words: 'to be confronted with' or 'to confront' language." Subsequently, Massachusetts and New Hampshire adopted their constitutions and were "the first to use the language 'to meet the witnesses against him face to face.'" Bergstrom, 524 N.E.2d at 371, n. 9. We must presume, as the Massachusetts Supreme Judicial Court did, that the framers of our constitution "were aware of the other States' provisions and chose more explicit language to convey unequivocally their meaning." Id. See also People v. Fitzpatrick, 633 N.E.2d 685, 366-67 (Ill. 1994) (holding that the reasoning in Craig does not apply to the Illinois confrontation right which "clearly, emphatically and unambiguously requires a 'face to face' confrontation"), *superseded by constitutional amendment*, Ill. Const., art. I, § 8; Com. v. Ludwig, 594 A.2d 281, 284 (Pa. 1991) (declining to follow Craig because "we have no right to disregard or (unintentionally) erode or distort any provision of the constitution, especially where, as here, its plain and simple language make its meaning unmistakably clear."), *superseded by constitutional amendment*, Pa. Const. art. 1, § 9.

Face-to-face confrontation promotes the truth-seeking function of a trial. As the Bergstrom Court explained:

> Underlying the confrontation guarantee is the concept that a witness is more likely to testify truthfully if required to do so under oath, in a court of law,

> and in the presence of the accused and the trier of fact. Constitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine. The plain meaning of assuring a defendant the right "to meet the witnesses against him face to face " is that the accused shall not be tried without the presence, in a court of law, of both himself and the witnesses testifying against him. To interpret the words of this mandate as requiring only that the defendant be able to see and hear the witness renders superfluous the words "to meet" and "face to face."

Bergstrom, 524 N.E.2d at 371-72 (citations omitted) ("[m[ost believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge.). "The witness who faces the accused and yet does not look him in the eye when he accuses him may thereby cast doubt on the truth of the accusation." Com. v. Amirault, 677 N.E.2d 652, 662 (Mass. 1997).

Notwithstanding an "awareness of and concern for the acute problem of child abuse, including sexual abuse, that plagues society," the Court should "hold firm to [the] belief that the right of the accused to be tried in the manner which our Constitution guarantees cannot dissolve under the pressures of changing social circumstance or societal focus."

Id. (quoting Bergstrom, 524 N.E.2d at 377). The Supreme Judicial Court in Amirault accordingly held firm when it reaffirmed Bergstrom after Craig. "When the Declaration of Rights speaks to us with such unmistakable insistence, we are not free to ignore it nor to mitigate its rigors by balancing countervailing considerations and approving alternatives that may seem to serve the values behind those words well enough." Amirault, 677 N.E.2d at 631.

As this Court has emphasized, "[i]t is well-established that '[w]hile the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court ... has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution,' and '[t]he [United States] Supreme Court has recognized this authority.'" Mack, 173 N.H. at 813 (quoting State v. Ball, 124 N.H. 226, 231-32 (1983) (other citations omitted). As in Mack, given the "substantial linguistic differences" between the federal and state constitutional rights and the values underlying the explicit words of our confrontation right, if the Court finds no federal constitutional violation here in light of Craig, it should decline to adopt the Craig reasoning for purposes of construing the state confrontation right. Id. at 813-14.

Although there may be room for limited exceptions to the state confrontation right, as the Court noted in Peters, those exceptions cannot undermine the "indispensable element of face-to-face confrontation" expressly guaranteed by our constitution. See Johnson, 631 N.E.2d at 1006-07 (quoting Craig, 497 U.S. at 862 (Scalia, J., dissenting)). Other accommodations could be provided when there is a compelling need, such as allowing testimony in a less formal setting as long as defendant is present, admitting videotaped testimony so long as the defendant is present during the testimony, and providing counseling before and after testifying. Id. (citations omitted). See also Amirault, 677 N.E.2d at 664 (cautioning that videotaped testimony should allow the jurors to see everyone present so they can observe the impact of the confrontation between the witness and defendant). As Justice Scalia stated in his dissenting opinion in Craig:

> It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact disserve the Confrontation Clause's truth-seeking goal." If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and

> thus null and void. . . . We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.

Craig, 497 U.S. at 870 (Scalia, J., dissenting).

CONCLUSION

WHEREFORE, Warren respectfully requests that this Court reverse her convictions.

Undersigned counsel requests fifteen minutes of oral argument.

The appealed decisions are in writing and were appended to her opening brief.

This reply brief complies with the applicable word limitation and contains 1898 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Pamela E. Phelan
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DATED: May 28, 2024