IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 22-0199

STATE OF IOWA,
Plaintiff-Appellee

vs.

ABEL GOMEZ MEDINA,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SCOTT BEATTIE AND HEATHER LAUBER

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 8, 2023 PURSUANT TO IOWA R. APP. P. 6.205(2)

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Application for Further Review with the Electronic Document Management System with the Appellate Court on the 28th day of November 2023.

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I hereby certify that on the 28th day of November 2023, I did serve the Defendant-Appellant's Application for Further Review on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

Abel Gomez Medina
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QUESTIONS PRESENTED FOR REVIEW

I: Is protecting an adult with mental illness that is able to communicate an important public interest for the purposes of the Confrontation Clause?

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STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW, the Appellant, Abel Gomez Medina, and hereby applies for further review of this case before the Iowa Supreme Court. In support of his application, Appellant respectfully states:

1. This matter was timely appealed and the case transferred to the Iowa Court of Appeals by this Court.

2. On June 21, 2023, the Iowa Court of Appeals entered its decision and opinion affirming the decision of the District Court, Hon. Ian K. Thornhill. A true and correct copy of the Iowa Court of Appeals decision is attached hereto.

3. Pursuant to Iowa R. App. P. 6.205(2), Appellant applies for further review.

4. Further review is appropriate in this case as the Iowa Court of Appeals issued an opinion in this matter in conflict with the decisions of the Iowa Supreme Court on an important matter. Iowa R. App. P. 6.1103(1)(b)(1). It is in conflict with the Iowa Supreme Court's precedent in State v. Rogerson, 855 N.W.2d 495, 498 (Iowa 2014). The Iowa Court of Appeals stated "But, Gomez Medina overlooks our own state precedent on remote testimony by adult witnesses, and our rule that:

'before permitting a witness to testify via two-way videoconference, the court must make a case-specific determination that the denial of the defendant's confrontation right is necessary to further an important public interest. If the court finds such an interest, it must assure the reliability of the remote testimony.' Rogerson, 855 N.W.2d at 505 (citing Craig, 497 U.S. at 851)." This quotes Rogerson, but strips it of incredibly important context: Rogerson held that there was a "general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation." State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014). At no point did the Iowa Supreme Court hold that an adult could testify remotely via two-way videoconference. At no point did the Iowa Supreme Court hold that mental illness alone was a sufficiently important public necessity to justify depriving the defendant of face-to-face confrontation. Rather, the Iowa Supreme Court reversed a district court finding of necessity and remanded the case. In holding out the court's opinion in Rogerson as being in support of remote testimony for adults, the Iowa Court of Appeals has misapprehended and misinterpreted the Iowa Supreme Court's holding, and in doing so conflicted with the Iowa Supreme Court on an important matter.

5. The Iowa Supreme Court should take this case because there is an important question of changing legal principles. Iowa R. App. P. 6.1103(1)(b)(3). These issues require clarification by the Iowa Supreme Court to both the bench and

the bar. If video testimony is regularly available for adults with mental illness after a hearing on the matter, then prosecutors and defense attorneys across the State are in need of guidance on when this is acceptable. Because of this need for guidance, it is an issue of broad public importance that the Iowa Supreme Court should ultimately determine. Iowa R. App. P. 6.1103(1)(b)(4).

6. This is a matter of first impression that has not been, but should be, decided by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c). The Iowa Supreme Court has never held that an adult may testify by video conference and stilly comply with the Confrontation Clause. If such situations are justified by important public necessity, then the Iowa Supreme Court should determine what those important pubic necessities are, and not a reference by the Iowa Court of Appeals about what could potentially be an important public necessity.

WHEREFORE, Appellant respectfully requests this Court grant further review, vacate the decision of the Court of Appeals and grant the requested relief in the conclusion of this application.

STATEMENT OF THE CASE

Abel Gomez Medina lived with his wife, Tiffany Gomez, and her four children, K.D., A.S, L.G., and R.M. in Des Moines, IA. (Trial Tr. Vol. 2 136: 5-137:16). The family lived in a small home with a basement and main level, with one bedroom on the main level and one and a half bedrooms downstairs in the basement.

(Trial Tr. Vol. 2 139:5-17). K.D. and A.S, the two girls, slept in bunk beds in the bedroom on the main floor. (Trial Tr. Vol. 2 140:3-7). L.G. and R.M., the two younger boys, slept in the basement bedroom. (Trial Tr. Vol. 2 142:6-18). Through the door, Mr. Gomez and Tiffany Gomez slept in another bedroom in the basement. (Trial Tr. Vol. 2 143:1-5). Mr. Gomez's father, Efrain, also lived with the family for several years. (Trial Tr. Vol. 2 165:22-166:11). When Efrain lived there, he would sleep in a bed in the front room. (Trial Tr. Vol. 2 193:1-4).

Tiffany worked at Potbelly from six in the morning until two in the afternoon. (Trial Tr. Vol. 2 145:2-4). Tiffany would pick up the children from school. (Trial Tr. Vol. 2 145:23-146: 5). Mr. Gomez would drop the children off at school, then work at Culver's at around eight or nine in the morning, and after he finished his work at Culver's, would go to a second job at Firestone until ten at night. (Trial Tr. Vol. 2 148:3-24). The various schools that the children attended started class between 7:45 AM and 8:30 AM. (Trial Tr. Vol. 4 79:10-16).

On April 1, 2019, Abel Gomez Medina took away the phone of his fifteen-year-old stepdaughter, K.D., for inappropriate sexting with a boy. (Trial Tr. Vol. 3 118:15-21; 128:10-14). Later that day, after she completed band, she told her counselor that Mr. Gomez had abused her. (Trial Tr. Vol. 3 118:22-25; 121:18-24).

K.D. testified that when she was eleven years old and in fifth grade that Abel would touch her on her breasts and her vagina. (Trial Tr. Vol. 3 129:2-14). She

testified that there was an instance Mr. Gomez put his penis into her vagina. (Trial Tr. Vol. 3 131:6-25). K.D. testified that Mr. Gomez would touch her, have her touch him, or insert his penis into her five times a week by 2019. (Trial Tr. Vol. 3 129:18-24). She testified that he would put his penis in her mouth and lick her vagina. (Trial Tr. Vol. 3 136:1-9). She testified that he put his penis into her anus. (Trial Tr. Vol. 3 138:13-19). She testified that it would usually happen before Mr. Gomez took her and the other children to school. (Trial Tr. Vol. 3 146:9-14). Mr. Gomez would still be in the home in the morning after her K.D.'s mother, Tiffany Gomez, left for work. He would assault her in the same room with her sister Angela. (Trial Tr. Vol. 3 147:9-15). She testified that the abuse mostly did not happen when she was away from the home. (Trial Tr. Vol. 3 162:21-23).

L.G. testified at the trial that he never saw his father rape his sister and that he never saw anything appropriate at the house. (Trial Tr. Vol. 3 37: 1-10; 29:16-18). In a CPC video interview, he said that he saw K.D. and his father having "sex" or "inappropriate things." (Trial Tr. Vol. 3 49:10-22).

Tiffany never saw Mr. Gomez acting inappropriately with K.D. and she was fairly aware of where everyone in the house was at all times due to creaking floorboards. (Trial Tr. Vol. 2 197:11-198:21). Efrain, Mr. Gomez's father, also testified that he never saw anything inappropriate between K.D. and Mr. Gomez, and never found anything suspicious about how they interacted. (Trial Tr. Vol. 4

101:21-102:20). Efrain never saw Mr. Gomez have sex with K.D., but if he dd, he would have called the police. (Trial Tr. Vol. 4 103:9-17). Tiffany's father, Terrance Dean, lived close by and would stop over unannounced. (Trial Tr. Vol. 4 111:21-112:9). Dean never saw anything unusual about how K.D. and Abel interacted and never saw them alone together in the house. (Trial Tr. Vol. 4 112:19-113:25). A.S., K.D.'s younger sister and roommate, testified that she never saw K.D. and Mr. Gomez alone or doing inappropriate things. (Trial Tr. Vol. 4 129:11-25). Tiffany's sister and aunt to K.D., Crystal, also never saw anything unusual about how K.D. and Mr. Gomez interacted. (Trial Tr. Vol. 4 142:17-143:5).

Before trial, the State motioned for closed-circuit testimony for K.D., citing Iowa Code § 915.38 and arguing that the court should protect K.D. as a minor protect a minor, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate. (App. 5). Mr. Gomez resisted the motion, arguing that there was no indication that K.D. would be unable to communicate and that it would infringe on Mr. Gomez's 6th Amendment right of confrontation. (App. 8). At hearing, the GAL testified that being in the presence would affect her ability to truthfully testify at trial. (Tr. Closed-Circuit Hearing 15:21-25). K.D.'s reports to her counselor did not indicate that she could not be truthful when testifying in front of Mr. Gomez. (Tr. Closed-Circuit Hearing 15:21-25). The defense additionally argued that K.D. was able to push back concerning the

allegations, maintain academic attendance and grades, and verbalize her concerns and her thoughts. (Tr. Closed-Circuit Hearing 45:5-25). The court granted the motion for K.D. to testify via closed-circuit equipment over Mr. Gomez's objection, noting that the court considered the arguments of the parties. (App. 13).

During trial, K.D. went from being 17 years old on her first day of testimony, to turning 18 on her second day of testimony and becoming the age of majority. (Trial Tr. Vol. 4 5:22-25). Mr. Gomez renewed his objections to the continued use of closed-circuit testimony and particularly argued that it should no longer apply due to K.D.'s majority. (Trial Tr. Vol. 4 6:19-7:4). The court overruled the objection, revising its ruling to find that under 915.28(1)(c) that K.D. could continue to testify using closed-circuit testimony due to her mental illness, and that it would make it difficult for her to communicate and testify in the same room as the defendant because of the stress it would cause due to her PTSD, depression, and anxiety. (Trial Tr. Vol. 4 10:21-13:13).

The jury found that Mr. Gomez guilty of Count I: Sexual Abuse in the 2nd Degree, in violation of Iowa Code § 709.3(1)(b), a Class B Felony, Count II: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count III: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count IV: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§

709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count V: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, and Count VI: Indecent Contact with a Child in violation of Iowa Code § 709.12, an Aggravated Misdemeanor. The court sentenced Mr. Gomez to a total of sixty-seven years with Count I to be served at 70% of the term before Mr. Gomez was eligible for parole. (App. 27). Mr. Gomez timely filed a notice of appeal. (App. 33).

I. THE IOWA COURT OF APPEALS IS WRONG THAT PROTECTING AN ADULT WITH MENTAL ILLNESS THAT IS ABLE TO COMMUNICATE IS AN IMPORTANT PUBLIC INTEREST FOR THE PURPOSES OF THE CONFRONTATION CLAUSE

The court reviews Confrontation Clause claims de novo. State v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007). The erroneous admission of evidence in violation of the Confrontation Clause mandates reversal unless the State establishes that the error was harmless beyond a reasonable doubt. State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003). To determine harmlessness, the ask does not ask whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered. State v. Newell, 710 N.W.2d 6, 25 (Iowa 2006). Rather, the court asks whether the guilty verdict actually rendered in this trial was surely unattributable to the error. Id. In assessing whether error was harmless, the court reviews the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

points, the extent of cross examination permitted, and the overall strength of the prosecution's case. State v. Brown, 656 N.W.2d 355, 361-62 (Iowa 2003). "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." Coy v. Iowa, 487 U.S. 1012, 1022-23 (1988). The court reviews decisions granting closed-circuit testimony protection under Iowa Code § 915.38(1) for errors at law. State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995).

The Confrontation Clause of the United States Constitution guarantees to Mr. Gomez the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Framers intended the Confrontation Clause to preclude admission of "testimonial" statements made by unavailable witnesses who have not been subjected to cross-examination was based, in part, on the Confrontation Clause's express reference to "witnesses against the accused" — that is, to those who "bear testimony" against the accused, whether in court or out of court.

The Confrontation Clause expresses a strong preference for face-to-face confrontation, but that requirement must occasionally give way to considerations of public policy and the necessities of the case. State v. Rogerson, 855 N.W.2d 495,

499 (Iowa 2014).

In Maryland v. Craig, 497 U.S. 836, 849-50 (1990), the U.S. Supreme Court set forth a two-prong test to determine when face-to-face confrontation with a child victim of alleged sexual abuse may be excused and closed-circuit television testimony used in its place. Id. In such cases, the State must prove: (1) that the denial of face-to-face confrontation is necessary to further an important public policy, and (2) that the reliability of the testimony is otherwise assured. Id.

The U.S. Supreme Court determined that protecting child witnesses from the psychological harm of testifying, when they could not communicate, was a sufficiently important public policy concern to justify denying face-to-face confrontation. Maryland v. Craig, 497 U.S. 836, 840-42 (1990).

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855. The critical inquiry is whether the use of the procedure is necessary to further the important state interest of protecting the child witness. Id. at 852.

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the

> evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857 (emphasis added). Craig sets forth a three-part test for determining necessity. First, the trial court must hear evidence and determine whether use of the closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. Id. at 855. Second, the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Id. at 856. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Id.

> [T]he Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom in the presence of the defendant would result in the child suffering serious emotional distress such that the child could not reasonably communicate.

Id. at 858 (emphases added).

Since deciding Craig, the U.S. Supreme Court has not returned to the issue of the constitutionality of remote video testimony and has not expanded its jurisprudence to adults. See State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Some courts have found that closed-circuit testimony is sufficiently "necessary" for public policy reasons if the witness has a serious medical condition that left them unable to travel or if the witness is in a foreign jurisdiction beyond the subpoena power of the courts. Id. at 506. Convenience, efficiency, and cost-saving are not

sufficient public policy reasons for dispensing with face-to-face confrontation. Id. at 5007.

Iowa Code § 915.38(1) is the statute allowing for close-circuit testimony in Iowa. While the first provisions only apply to minors, Iowa Code § 915.38(1)(c) provides "upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness." A child is defined as a "person under the age of fourteen years." Iowa Code § 702.5.

Expanding Craig to adults, and therefore anyone with a mental illness, cannot be sufficient public policy to overcome the preference for face-to-face confrontation.

> [Flace-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. It is a truism that constitutional protections have costs.

Coy v. Iowa, 487 U.S. 1012, 1023 (1988). More than 50% of Americans will be diagnosed with a mental illness at some point in their lifetime. Kessler RC, , et al., Lifetime prevalence and age-of-onset distributions of mental disorders in the World Health Organization's World Mental Health Survey Initiative. World Psychiatry 6(3):168-176 (2007). There is a strong preference for face-to-face confrontation. State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Accusers will be more

reluctant to make false accusations when they were in the personal presence of the accused. Id. at 504. The social pressure to tell the truth can be diminished when the witness is far away rather than physically present with the defendant in the courtroom. Id. Face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. Id.

Expanding the use of closed-circuit testimony for all adults does more than make the right to confrontation occasionally give way to considerations of public policy and the necessities of the case, it opens the floodgates so that any crime with a victim no longer needs to have face-to-face confrontation, and apposition never authorized by the U.S. Supreme Court. K.D. was an adult when she testified. While allowing her to testify via videoconferencing surely was efficient and helpful to the State, it was not such an important public policy to prevent adult witnesses from testifying about painful experiences that it should have violated the preference for face-to-face confrontation. In addition, the court had already granted videoconferencing under Iowa Code § 915.38(1) even though K.D. was an adult under Iowa Code § 702.5. Expanding this practice to adults, based solely on mental illness, makes it so that video conferencing is available even in unconstitutional situations, such as mere nervousness or excitement or some reluctance to testify. See Maryland v. Craig, 497 U.S. 836, 856 (1990).

What the Iowa Court of Appeals gets wrong is that the Iowa Supreme Court

and Supreme Court of the United States have never said that protecting an adult with mental illness is sufficient public policy to overcome the preference for face-to-face confrontation. That is an issue that deserves the attention of the Iowa Supreme Court.

This was not harmless error. The court cannot be sure that the guilty verdict actually rendered in this trial was unattributable to the error. See State v. Newell, 710 N.W.2d 6, 25 (Iowa 2006). K.D. was the star witness of the prosecution's case, her testimony was not cumulative, the only corroborating evidence of her claims were the out-of-court statements made by L.G. that he saw "sex", every other witness around the family testified that they had never seen any inappropriate behavior between Mr. Gomez and K.D., and the prosecution's case relied on one eyewitness with no physical evidence. The court must reverse because error cannot surely be said to be harmless without the face-to-face testimony of K.D..

As stated above, part of the Craig test is that the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Maryland v. Craig, 497 U.S. 836, 856 (1990).

> [T]he Confrontation Clause requires the trial court to make a *specific finding* that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child *could not reasonably communicate.*

Id. at 858 (emphasis added).

Iowa Code section 915.38(1) "preserves the defendant's basic right to confrontation while protecting minor victims from the trauma which often results from testifying in a defendant's physical presence. *If this trauma impairs or handicaps a child's ability to communicate,* protective measures must be adopted." State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995) (emphasis added).

While the court made findings regarding this issue, those findings were not based on sufficient evidence that K.D. was unable to truthfully testify in the presence of Mr. Gomez. At hearing, the GAL testified that being in the presence would affect her ability to truthfully testify at trial. (Tr. Closed-Circuit Hearing 15:21-25). However, this was the opinion of a lay witness without any support from K.D.. K.D.'s reports to her counselor did not indicate that she could not be truthful when testifying in front of Mr. Gomez. (Tr. Closed-Circuit Hearing 15:21-25). Additionally, K.D. was able to push back concerning the allegations, maintain academic attendance and grades, and verbalize her concerns and her thoughts. (Tr. Closed-Circuit Hearing 45:5-25). At no point in time during the court's questioning did K.D. ever say that she could not give truthful testimony in the presence of Mr. Gomez.

This serves as an independent reason for reversal outside of just expanding closed-circuit testimony to adults, and the court should apply the same harmless error analysis as in that subsection of the brief.

CONCLUSION

The Iowa Court of Appeals has issued a decision in conflict with the Iowa Supreme Court's precedent. The court should take this case up on further review to correct these errors, then reverse and remand Mr. Kron's case for a new sentencing hearing.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) (no more than 5,600 words) because this brief contains 4,439 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

/S/ Alexander Smith
Dated: November 28, 2023
Alexander Smith