STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

ARTHUR LAROME JEMISON

Defendant-Appellee.
_____/

Supreme Court No. 157812

Court of Appeals No. 334024

Lower Court No. 15-10216-01

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Attorney for Plaintiff-Appellee
_____

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Defendant-Appellant's Supplemental Brief

(Oral Argument Requested)

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Table of Contents

Index of Authorities

Cases

Constitution, Statutes & Rules

Other Authorities

Statement of Question Presented

I. Was Mr. Jemison denied his confrontation rights when the trial court allowed the prosecution to call a DNA expert to testify at trial by video over objection when the only reason for the "virtual" testimony was cost considerations? Is the proseutor unable to show that this preserved constitutional error was harmless beyond a reasonable doubt?

Court of Appeals answers, "No".

Arthur Larome Jemison answers, "Yes".

Summary of Argument

Allowing an expert witness to testify by video over objection violated Mr. Jemison's constitutional right to confront the witnesses against him. The right of face-to-face confrontation is a fundamental part of the right of confrontation. Allowing only "virtual confrontation" was contrary to MCR 6.006(C) and did not satisfy the requirements of either the Michigan or United States' Constitutions.

While the Court of Appeals agreed the trial court erred under MCR 6.006(C), the Court of Appeals wrongly found no confrontation violation relying on *Maryland v Craig*, 497 US 836 (1990). The Court of Appeals held that cost and convenience were important state interests justifying virtual confrontation. This Court cannot, and should not, adopt such a rule. This Court should reverse and find that use of the two-way video testimony was in error and that *Craig* was wrongly applied.

First, the survival of *Craig* is in question after *Crawford v Washington,* 541 US 36 (2004). Secondly, *Craig* should be read narrowly to apply only where a child would suffer trauma if forced to testify against a defendant face-to-face. Finally, even if *Craig* is read more broadly, "virtual confrontation" should only be allowed when there is a *legitimate* state interest in using such a procedure. Cost and convenience does not rise to that level.

This was preserved constitutional error and the prosecutor cannot show that the error was harmless beyond a reasonable doubt. This case centered around the DNA evidence, the only evidence identifying Mr. Jemison as the perpetrator in the

case. Without the expert's testimony about the DNA, the prosecution would not have been able to prove Mr. Jemison was guilty beyond a reasonable doubt.

Statement of Facts

In 1996, Talisha Dowe[1] reported to the police that she had been raped. 402a, 522a. A rape kit was taken but not tested for almost 20 years. 403-404a, 605a. Based on the results of the DNA test, Arthur Jemison was prosecuted for first-degree sexual conduct[2]. Ms. Dowe knew Mr. Jemison and told the police she did not think he was the assailant. 738a. At trial, the defense argued that the DNA was from consensual sex; the jury obviously disagreed. 325a, 850a.

A. Ms. Dowe testified that she was assaulted by an unknown man in 1996.

Ms. Dowe was working as an exotic dancer at an after-hours motorcycle club in 1996. 372-373a. One night in September, she left the club to get breakfast with a man she had met that night named Delano. 374a, 376a. They decided to skip breakfast and have sex at his cousin's house instead. 377a. Delano used a condom. 378a.

After they had sex, Delano parked his car in front of a house for thirty to forty minutes, leaving Ms. Dowe in the car with the engine running. 380a. Delano returned, moved the car down a few houses into an alley, and then left again. 381a.

An unidentified man came out of the alley and jumped inside of the car. 384a. He pointed a gun at Ms. Dowe and demanded money from her. 385-386a. He drove the car to the next street and then pulled the car over. 387a. At trial, Ms. Dowe

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[1] Talisha Dowe got married sometime before the trial and changed her name from her maiden name of Talisha Sams. 361a.

[2] MCL 750.520B

stated the assailant forced her to perform fellatio at gunpoint and then had vaginal sex with her. 387-388a. The man took Ms. Dowe's jewelry and money; Ms. Dowe got out of the car, and the man drove Delano's car away. 393-394a.

B. Ms. Dowe went to her friend's house, then home, and later decided to call the police.

Ms. Dowe walked to her friend Ebony's house. 396a. Ms. Dowe did not call 911 but told Ebony and her friends that she had been raped. 396-397a. The women did not believe Ms. Dowe, which led to a fight and Ms. Dowe getting a black eye. 397a.

Ms. Dowe went home to her grandmother's house. 398a. Ms. Dowe's grandmother told her to rinse out her mouth with peroxide and to take a shower. 399a. Ms. Dowe called her sister and told her what happened. 400a. Ms. Dowe's sister came over and convinced Ms. Dowe to tell the police. 401a.

Ms. Dowe made a police report later that day. 402a. In her statement, Ms. Dowe made no mention of being forced to perform fellatio at gunpoint. 652a. She made no mention of the consensual sex with Delano that evening. 439-441a. Ms. Dowe also told the police she had gone right home after the assault and never mentioned going to her friend's house or getting in a fight there. 652a. She had told police that her black eye was from the assailant striking her with a gun, which was not true.407a.

After making the report, Ms. Dowe went to Detroit Receiving Hospital, where someone swabbed her mouth and vagina for a rape kit. 403-404a. The attending physician could not remember if he had taken the swabs or if a nurse had done it.

359a. Ms. Dowe told the doctors that the last time she had sex before this was in June, not mentioning the sex she had with Delano that evening. 404-405a.

Ms. Dowe never went back to her job at the motorcycle club for fear of being accused of stealing Delano's car. 467-468a.

C. Nearly 20 years later, Ms. Dowe's rape kit was ultimately tested.

At trial, there were many questions about chain of custody with regards to the rape kit. The doctor from the hospital testified that he could not say for certain that he was the one that actually collected the swabs for the rape kit. 359a. The property control officer could only testify as to the standard procedures of the department, and not his experience of checking this particular rape kit into Property Control. 479a. Officers testified that the rape kit sat for three days before being retrieved by the police department and taken into storage, where it apparently sat until 2015. 484-485a.

In 2015, the Michigan State Police (MSP) assisted Detroit with testing back logged rape kits. 599a-600a. MSP sent the kits out to private laboratories. 600a. One such private lab, Sorenson Laboratory, tested Ms. Dowe's rape kit. 606a, 616a-617a. The technical and administrative reviews of the Sorenson data were outsourced to yet another laboratory at Marshall University. 607a.

D. The DNA analyst from Sorenson Laboratory testified by video over objection.

Derek Cutler, the DNA analyst from Sorenson Laboratory, tested the rape kit in question and testified by video at trial. 707a, 83-95a. Before trial, counsel objected to Mr. Cutler testifying by video. 111a. He argued that Mr. Jemison "has a

right to have all of his witnesses appear in court." 111a. Judge Antonio Viviano, who presided at the motion hearing, overruled his objection. 102a. He ruled that because it was an expert witness, "where all emotions are gone," his testimony would be admissible by video. 102a.

Counsel later renewed his objection at trial. 700a. The trial judge stated that he would not have allowed the witness to testify by video without the defense's consent, but that because Judge Viviano had already ruled on this issue, he would not overrule him. 704-705a.

As Mr. Cutler, began to testify, it became clear that he had not actually seen the rape kit. 718a. Nevertheless, Mr. Cutler testified that he had looked at another analyst's notes and the DNA data and was offering his conclusions. 708a, 721a, 729a.

Mr. Cutler concluded that there was a minimum of two contributors obtained, a major profile matching Ms. Dowe, and a minor contributor that was inconclusive. 722-723a. The sperm fraction was also a mixture of DNA profiles from at least two contributors. 723a. A "major DNA profile" was attributable to "unknown male number one," the first male profile that they obtained for the case. 723a. The second DNA profile was at such a low level that it was not suitable for comparison. 723a. Mr. Cutler testified that if a condom had not been used one would expect to see sperm cells present, and if a condom had been used, there would only be a "low amount." 726a.

E. An agent of MSP testified about the report from Sorenson and Marshall and gave her opinion that the DNA profiles were the same within a reasonable degree of scientific certainty.

MSP agent, Catherine Maggert, reviewed the data and the analysis done by Sorenson and Marshall University. 607-608a. Ms. Maggert testified about the findings of Sorenson lab and testified that, according to the report from Sorenson, authored by Mr. Cutler, there was a mixture of DNA with at least two contributors. 614a. There was a major donor attributable to an unknown male and suitable for comparison and a second minor donor, not Ms. Dowe, which was insufficient for testing. 614a, 640a.

Ms. Maggert testified that another analyst had taken a swab of Mr. Jemison's cheek and generated a DNA profile for Mr. Jemison. 624a. Ms. Maggert put the DNA profiles from the rape kit into the Combined DNA Index System (CODIS) and testified that, according to another agent, the major sample "hit" a profile "associated" with Mr. Jemison. 615a, 618a.

Ms. Maggert compared Mr. Jemison's DNA profile with the DNA profile of the major donor generated by Mr. Cutler and Sorenson Laboratory, and concluded that "to a reasonable degree of scientific certainty that the DNA from the major donor… and from Arthur Jemison are from the same individual.[3]" 630a, 634a.

[3] See *People v Urban,* __ Mich__; __ NW 2d __ (2019) (Vacating the Court of Appeals' opinion which indicated that the language "it can be concluded to a reasonable degree of scientific certainty that the DNA profile… is from the same individual" met the requirement of *People v Coy,* 243 Mich App 283 (2000). Such a phrase "is a legally created term of art that is unused by scientists outside of courtrooms." *Urban,* citing Kaye, *The Double Helix and the Law of Evidence* (Cambridge: Harvard University Press, 2010), p. 82.

F. Ms. Dowe was shown a lineup containing Mr. Jemison's photograph. Ms. Dowe did not identify Mr. Jemison as her attacker.

In 2015, Detective Mike Sabo showed Ms. Dowe a photographic array which included Mr. Jemison's picture. 417a. Ms. Dowe looked at the photographs and did not identify anyone in lineup as being her assailant. 417a. After Ms. Dowe did not choose anyone from the lineup, Detective Sabo showed her a single picture of Mr. Jemison and asked her if she knew who he was. 418a. Ms. Dowe told the detective, "oh, yeah, that's Artie." 738a. Detective Sabo then asked Ms. Dowe if she knew Mr. Jemison, why she had not identified him in the photo array. 738a Ms. Dowe told the detective that she did not think he could have been her assailant. 738a.

Ms. Dowe had met Mr. Jemison about four years after the night in question, in 2000. 422a. Ms. Dowe's sister was dating Mr. Jemison's brother. 422-423a. Ms. Dowe went out with Mr. Jemison and they had consensual sex, a fact that was excluded from the jury due to the prosecution's motion to preclude the evidence under MCL 750.520(j). 59a. Ms. Dowe had not recognized Mr. Jemison as being the man that had raped her then either. 424a.

G. Mr. Jemison was convicted of one count of criminal sexual conduct.

After two days of deliberation, the jury acquitted Mr. Jemison of one count of first-degree criminal sexual conduct for the alleged oral sex and convicted him of one count of first-degree criminal sexual conduct for the vaginal sex. 850a. Mr. Jemison was sentenced to 22 to 40 years in prison. 885a.

I. Mr. Jemison was denied his confrontation rights when the trial court allowed the prosecution to call a DNA expert to testify at trial by video over objection when the only reason for the "virtual" testimony was cost considerations. The prosecutor cannot show that this preserved constitutional error was harmless beyond a reasonable doubt.

Standard of Review and Issue Preservation

A violation of the Confrontation Clause is a constitutional question that is reviewed *de novo*. *People v Fackelman,* 489 Mich 515 (2011).

This issue was preserved by trial counsel at a pretrial hearing and renewed again at trial. 111a. 700a-705a. It was raised and addressed by the Court of Appeals. Preserved constitutional error requires this Court to reverse unless the prosecution proves beyond a reasonable doubt that the error did not contribute to the verdict. *People v Carines,* 460 Mich 750, 774 (1999).

Argument

The trial court violated Mr. Jemison's right to confront the witnesses against him by allowing the prosecution's expert to testify by video. The Court of Appeals erred in finding no violation of the Confrontation Clause. The court wrongly relied upon, and wrongly applied, *Maryland v Craig,* 497 US 836 (1990). The error was not harmless beyond a reasonable doubt and reversal is required.

A. Mr. Jemison was denied the right to a face-to-face meeting, a fundamental part of the right of confrontation.

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right of confrontation and cross-examination as fundamental requirements of a fair criminal trial. US Const, Am VI; *Crawford v Washington*, 541 US 36 (2004); *Sheppard v Maxwell,* 384 US 333, 351 (1966). The Michigan

Constitution provides a similar protection to criminal defendants. Const 1963, Art 1, § 20; *Fackelman*, 489 Mich 515.

"[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses." *Coy v Iowa*, 487 US 1012, 1016. (1988). The United States Supreme Court in *Maryland v Craig,* noted that while this right is not absolute, it may not be "easily dispensed with." *Craig,* 497 US at 850. It may only be infringed upon when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 US at 850.

In *Craig,* the United States Supreme Court allowed a limitation on the face-to-face aspect of confrontation under a narrow set of circumstances. The Supreme Court upheld, over a defendant's Sixth Amendment challenge, a Maryland rule of criminal procedure that allowed child victims of abuse to testify by one-way closed circuit television from outside the courtroom. *Craig,* 497 US at 858.

The Court held that a defendant's right to face-to-face confrontation may be outweighed by the state's interest in "protecting child witnesses from the trauma of testifying." *Craig,* 497 US at 855. The Court elaborated that:

> [t]he requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify… 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. *Craig*, 497 US at 855.

B. The vitality of *Craig* is in doubt in light of the Supreme Court's decision in *Crawford*.

The Court of Appeals cited to, and relied upon, the test set out in *Craig* in denying Mr. Jemison relief. *People v Jemison,* unpublished per curiam opinion of the Court of Appeals, issued April 12, 2018 (Docket No. 334024), p 5. 893a. However, as noted in the Amicus' Brief, and by the Ninth Circuit, "the vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford." United States v Carter*, 907 F3d 1199, 1206 (CA 9, 2018).

The Supreme Court in *Craig* relied heavily on *Ohio v Roberts,* 448 US 56 (1980), a decision abrogated by *Crawford*. See *Craig,* 497 US at 847-850; *Crawford,* 541 US at 54. The Court in *Crawford* concluded that the Sixth Amendment prohibits admission of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 US at 51. The Court found a Confrontation Clause violation even in the face of "judicial determination[s] of reliability." *Crawford,* 541 at 54.

While *Crawford* does not overturn *Craig, Crawford* stands in "marked contrast" in several respects, and subsequent cases have raised doubts about *Craig* in light of *Crawford. United States v Cox*, 871 F3d 479, 492–95 (CA 6, 2017) (Sutton, J., concurring), cert. denied, —— US ——, 138 S Ct 754 (2018). Statements in *Crawford* such as: "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts" and "[i]t is not enough to point out that most of the usual safeguards of the

adversary process attend the statement, when the single safeguard missing is the one that the Confrontation Clause demands" seem to undermine the fundamental holding in *Craig*. *See Crawford*, 541 US at 54, 65. Indeed, it seems likely the United Supreme Court will soon be faced with having to decide between overruling *Craig,* in light of *Crawford,* and dismissing as dicta these sorts of explanatory phrases in *Crawford*. See Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and Crawford v Washington as a Prelude to Reversal of Maryland*, 19 Regent UL Rev 469, 474 (2007).

C. There was no legitimate state interest which justified the court depriving Mr. Jemison of his right of confrontation.

Even though the vitality of *Craig* may be in doubt, it remains controlling and so an analysis under *Craig* is still appropriate. Reversal is warranted under *Craig*.

First, *Craig* should be narrowly construed. *Craig* analyzed a Maryland statute which was specifically intended to protect the well-being of children. *Craig,* 497 US at 854. The Supreme Court's analysis centered around the state interest in protecting children against suffering trauma from testifying. *Id.* This Court should read *Craig* narrowly as only allowing for limitation on confrontation rights in the context of children suffering from trauma if they are forced to testify face-to-face against a defendant, particularly given *Craig's* tenuous analysis post-*Crawford*.

Even reading *Craig* as applying outside of this context, reversal is still warranted because there was no legitimate state interest which justified the deprivation of Mr. Jemison's confrontation rights. *Craig* stands most broadly for the proposition that a limitation on face-to-face confrontation, "where necessary to

further an important state interest, does not impinge upon… the Confrontation Clause." *Craig,* 497 US at 851. Cost or convenience is not a sufficient state interest for use of video testimony, and as that was the only state interest identified here, the procedure was not constitutionally permissible.

Under *Craig*, and as acknowledged by the Court of Appeals below, there are four components of confrontation: "(1) a face-to-face-meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor." *Jemison,* unpub op at 5, citing *People v Pesquera*, 244 Mich App 305, 309 (2001). 893a; see *Craig,* 497 US at 846; see also *California v Green,* 399 US 149, 162 (1937).

Even though Mr. Jemison was denied a face-to-face meeting, the Court of Appeals found that because the trial court had "met three of the Confrontation Clause criteria… defendant's right to confrontation was not violated." *Jemison,* unpub op at 6. 894a. Dispensing with one of the four main pillars of confrontation was a "necessity" because "[t]he expert witness was testifying from Salt Lake City, Utah, regarding his findings from the victim's rape kit. It would have been costly and difficult for the expert witness to appear in person at trial." *Jemison*, unpub op at 5. 893a.

It cannot be, and has never been the rule, that a defendant's confrontation right can be thrown aside because of money or convenience sake. Such a rule would be against the holding in *Craig* and grossly out of line with other states and the federal circuits.

Most state courts, the District of Columbia, and six of the federal circuits have issued opinions reiterating the holding of *Craig,* that protecting child witnesses from the trauma of testifying face-to-face against a defendant is a sufficient enough state interest to justify the use of one or two-way video testimony. 899a-900a[4]. Three other states, Arizona, California, and Florida have applied *Craig* to find that protecting adult witnesses from the trauma of face-to-face testimony was also a sufficient interest that would justify the use of one-way or two-way video testimony. 900a. Seven states and three circuits have extended *Craig* further to find that one or two way-video is allowed when a witness has physical or medical limitations to travel. 900a.

Counsel has only found *one* state*,* Montana, that has issued a published opinion finding that distance or costs justified the use of video testimony. *City of Missoula v Duane*, 380 Mont 290 (2015). In *Duane,* the Montana Supreme Court upheld the city prosecutor's use of Skype testimony for a doctor who performed a necropsy on a dog in a misdemeanor animal cruelty case. *Id.* at 293. While the

[4] The appendix contains two charts surveying published opinions from state and federal courts dealing with limitations on face-to-face confrontation in light of *Craig.* 898a-902a. The first chart shows reasons given by the state that were found to be sufficient state interests, with case citations. 898a-900a. The second chart lists reasons given by the state where a state or federal court specifically found there was not a sufficient state interest, with case citations. 901a-902a.

opinion cites to *Craig,* the opinion relies only on Montana's constitution for the legal analysis. *Id.* at 293. Moreover, the court noted that the cost of requiring travel to the city would have been both a "prohibitive expense" and a "significant burden" on the witness himself given that there were three separate trials involved. *Id.* at 296.

It is hard to imagine that the *Duane* court would have made the same cost analysis for a criminal sexual conduct trial as a misdemeanor trial. Mr. Jemison was facing two felonies that carried up to life in prison and was ultimately sentenced to 22 years. 885a. Duane was convicted of misdemeanor animal cruelty, which by definition means that he was facing at most a year in jail. *Duane,* 380 Mont at 292.

It is noteworthy that several states and federal circuits have specifically held that busy schedules, conflicts or other inconveniences, distance, or mere economic considerations are not sufficient state interests to justify the use of video testimony. 902a.

While this Court has not specifically addressed whether costs are a sufficient state interest to justify infringing upon a defendant's confrontation rights, the Court did note the distinction between "necessity" and mere "good cause" in *People v Buie*, 491 Mich 294 (2012). In *Buie,* the Court granted leave to appeal to consider "whether witness testimony taken by two-way interactive video was properly admitted during defendant's trial." *Buie,* 491 Mich at 297.

In *Buie,* trial counsel consented to two witnesses testifying by video under MCR 6.006(C). *Buie,* 491 Mich at 298. While the Court briefly addressed *Craig,* it

ultimately did not find a constitutional violation because trial counsel had agreed to the procedure and the Court found waiver. *Buie,* 491 Mich at 304-305, 315, 320. Because there was consent, and the court rule applied, the prosecution was only required to show "good cause" for use of the video rather than a reason "necessary to further an important public policy." *Buie,* 491 Mich at 319.

While costs or convenience might be a sufficient enough reason under a "good cause" standard, neither are enough to satisfy the standard in *Craig*. To allow video testimony over objection the prosecution must show that video testimony is a *necessity*. As this Court noted in *Buie,* " '[a]ny sound reason' is sufficient for good cause whereas 'necessary' means 'essential' or 'indispensable.' " *Buie,* 491 Mich at 319. Calling Mr. Cutler as a witness by video and dispensing of the face-to-face requirement of confrontation simply to save money was not *necessary* to further an important policy. The trial court erred by finding as much, and the Court of Appeals erred by holding that cost and convenience made the use of a video a necessity.

Recently, the Ninth Circuit in *United States v Carter,* 907 F 3d 1199 (CA 9, 2018), vacated several of a defendant's convictions when the state admitted testimony via two-way video over the defendant's objection. The prosecution admitted testimony of the complaining witness by video because she was living in another state and had been instructed not to travel due her pregnancy. *Id.* at 1204. In its opinion, the court made it clear that the use of remote video must be "reserved for rare cases in which it is 'necessary' " and that a short continuance or added

expense is not a sufficient necessity to warrant use of video. *Id.* at 1206, citing *Craig,* 497 US at 850.

Just as in *Carter,* a short delay or added expense in bringing Mr. Cutler to testify face-to-face against Mr. Jemison did not justify the use of two-way video. Moreover, there was not even evidence presented that Mr. Cutler would not have been able to testify had the video equipment not been used. The "need" for the video testimony was cost or convenience, but the record is absent of any evidence that these were prohibitive hurdles. Just because testifying in person might have been "costly and difficult" does not mean that it was not possible and that the video was a necessity. *See Jemison,* unpub op at 5. 893a. There was not a sufficient state interest to justify the constitutional violation.

Also, contrary to the trial court's ruling, the fact that the witness was an expert did not diminish Mr. Jemison's right of confrontation or the importance of a face-to-face meeting. Since *Craig,* the United States Supreme Court has ruled on three cases centering around expert witnesses and the Confrontation Clause: *Melendez-Diaz v Massachusetts,* 557 US 305 (2009), *Bullcoming v New Mexico,* 564 US 647 (2011), and *Williams v Illinois,* 567 US 50 (2012).

In *Melendez-Diaz* the Court found a confrontation violation when the state admitted analysts' affidavits without prior opportunity for cross-examination because the Court found the affidavits were testimonial. *Melendez-Diaz,* 557 US at 311. In *Bullcoming,* the Court held that a defendant has the right to be confronted with the analyst who makes a laboratory report containing a "testimonial

certification" and that "surrogate testimony" of an expert who did not actually sign, observe, or perform the tests does not meet the constitutional requirement. *Bullcoming,* 564 US at 652. *Williams*, a plurality opinion, dealt with whether out-of-court statements that are solely for the purpose of explaining assumptions used by the expert in making his or her opinion fall outside the scope of the Confrontation Clause. *Williams*, 567 US at 58.

In each case, the Court discussed the importance of confrontation rights in the context of expert testimony. The Court in *Melendez-Diaz,* specifically rejected that experts should not be subject to the confrontation requirements because they are "not conventional." *Melendez-Diaz,* 557 US at 315. The Court in *Bullcoming*, likewise rejected the state's argument that the witness in question was an "independent scientis[t]" with a "non-adversarial duty." *Bullcoming,* 564 US at 664.

Justice Thomas, in his concurring opinion in *Williams,* reiterated that it was not until the Federal Rules of Evidence were adopted, that the facts experts relied upon in reaching their opinions could be admitted into evidence, and expressed his belief that he did "not think that rules of evidence should so easily trump a defendant's confrontation right." *Williams*, 567 US at 105-106 (Thomas, concurring in the judgment). The importance of a face-to-face meeting applies to all witnesses against a defendant, including experts.

D. The prosecutor cannot show that the error was harmless beyond a reasonable doubt. Without the DNA evidence there would be nothing to identify Mr. Jemison as the perpetrator of the offense.

Harmless error analysis of Confrontation Clause violations looks at the effect of excluding the witness in question's testimony. *Coy,* 487 US at 1012. The Supreme Court in *Delaware v Van Arsdall*, 475 US 673 (1986) set out four factors courts should consider: "the importance of the witness' testimony in the prosecution's case, 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 otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall,* 475 US at 684. The Court of Appeals did not examine any of the V*an Arsdall* factors in finding the error harmless, because it found the admission of the evidence to be only non-constitutional error.

Because this is preserved constitutional error, however, the court should have gone through the factors with the understanding that the burden is on the prosecution to establish that the error was harmless beyond a reasonable doubt. *Carines,* 460 Mich 750, 774, citing *People v Anderson* (After Remand), 446 Mich 392 (1994). Counsel objected to Mr. Cutler testifying by video and argued that Mr. Jemison had "a right to have all of his witnesses appear in court." 109a.

Mr. Cutler's testimony was crucial to the prosecution's case. Without it, the prosecution would not have been able to establish that Mr. Jemison's DNA matched the DNA from the rape kit. Without the DNA, there was nothing to establish Mr.

Jemison was the suspect in question. While counsel argued in opening that the sex was consensual, he called no witnesses to support this defense, and only did so after knowing that the DNA evidence was coming in.

Ms. Dowe did not identify Mr. Jemison; only the DNA identified Mr. Jemison. 417a. The prosecutor pointed this out in her closing argument stating, "Catherine Maggert and Derek Cutler, they are the forensic scientists and also the lab reports when you look at the evidence admitted that I.D. the Defendant. The identification of the Defendant comes through these witnesses." 775a. The jury clearly agreed that the DNA evidence identified Mr. Jemison by finding him guilty.

The Court of Appeals' opinion focuses on the fact that another witness from MSP testified about the DNA match itself. *Jemison,* unpub op at 7. 895a. However, the expert from MSP, Ms. Maggert, testified using, and about, Mr. Cutler's conclusions. 606a. She described her own report as a "cover report" which was attached to the report authored by Mr. Cutler. 606a. She testified that she had only reviewed the data "to an extent" because the "technical and administrative reviews that were done on the Sorenson data were actually outsourced to another laboratory at Marshall University." 607a. MSP was responsible for looking at the DNA profiles that had already been identified by Sorenson and Marshall. 607a.

Had the prosecution tried to use just Ms. Maggert, and not called Mr. Cutler, the prosecution would have had a different confrontation problem, the one that the Supreme Court found in *Melendez-Diaz. Melendez-Diaz,* 557 US 305. Ms. Maggert

would not have been able to testify about Mr. Cutler's conclusions and report as it would have been testimonial hearsay without an opportunity for cross-examination.

This is the case even in light of the plurality opinion in *Williams,* 567 US 50. Only four Justices joined the plurality opinion, with the fifth vote, Justice Thomas, resting on an entirely different rationale. *Williams,* 567 US at 103. Justice Thomas, unlike the plurality, found "no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Williams,* 567 US at 106.

While Justice Thomas agreed with Williams as to the question asked, that out-of-court statements even for the purpose of explaining assumptions used by the expert can still fall within the purview of the Confrontation Clause, he ruled against Williams because he determined that the forensic report at issue was not testimonial. *Williams,* 567 US at 111. Unlike the reports in *Melendez-Diaz* and *Bullcoming*, the report in *Williams* was not sufficiently "formal" or "solemn" to rank as testimonial. *Id.* at 112-113.

This Court is not bound by the *Williams* decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v United States*, 430 US 188, 193 (1977). In *Williams*, there is no overlap between the rationales relied upon by the plurality and the rationale relied upon in the Thomas

concurrence. Because the rationales of the plurality were rejected by a majority of the court, *Williams* cannot be relied upon as precedent.

Nevertheless, the report and testimony in Mr. Jemison's case are much different than that discussed in *Williams.* The report in *Williams* was never admitted into evidence, while Mr. Cutler's report was. 716a. Williams had a bench trial, where presumably a judge would know how he or she was allowed to view the evidence in question, whereas Mr. Jemison had a jury trial. *Williams,* 567 US at 72. Mr. Cutler's report was a formal report admitted into evidence for the truth of the matter asserted.

Ms. Maggert had not merely used, or was testifying about, raw data generated by Mr. Cutler. She testified about Mr. Cutler's final report and conclusions and attached his report to her report. Ms. Maggert's testimony and report would not have been admissible without Mr. Cutler testifying. Without his testimony, the prosecution could not have presented evidence about the DNA match. The prosecution cannot establish that the error was harmless beyond a reasonable doubt.

Even if this Court finds no constitutional violation, the error was still outcome determinative. For preserved nonconstitutional error, "[t]he defendant has the burden of establishing a miscarriage of justice under a 'more probable than not standard." *Carines,* 460 Mich at 774, citing *People v Lukity,* 460 Mich 484 (1999).

When determining whether an error was harmless, the focus is on the nature of the error "in light of the weight and strength of the untainted evidence." *People v Mateo*, 453 Mich 203, 215 (1996).

For the reasons argued above, absent Mr. Cutler's testimony, it is more probable than not that Mr. Jemison would not have been convicted. The evidence against Mr. Jemison was far from overwhelming. The complaining witness never identified Mr. Jemison as her attacker. There were no eye witnesses from the night in question. Mr. Jemison never made a statement to police. There was no other physical evidence. This case rose and fell on the DNA evidence and Mr. Cutler's testimony.

The case was so close in fact, that even Mr. Cutler testifying by video could have been what made the difference. Cross-examining a witness remotely about a 20-year-old sample where there were serious questions about chain and custody, storage of the sample, and where the sample was a mixture, could not have been an easy task.

"[C]onfrontation through a video monitor is not the same as physical face-to-face confrontation." *United States v Yates*, 438 F 3d 1307, 1315 (CA 11, 2006). There are practical and technical risks with video testimony, such as transmission issues, glitches, lags, and audio problems. Keyes, Case Note, *The Skype is the Limit in Montana,* 76 Mont L Rev Online 163, 170 (2015). Body language and facial expressions are not viewed the same when the witness is on video rather than in person. Gertner, *Videoconferencing: Learning Through Screens*, 12 Wm. & Mary Bill

Rts J. 769, 786 (2004). There are increased risks of off screen coaching or interference with virtual testimony. Friedman, *Remote Testimony,* U Mich J L Reform 35 no. 4, 713 (2002). Finally, there is inadequate information about the psychological impact of virtual testimony on witnesses and jurors. Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 Cath U L Rev 683, 700 (2007).

Lastly, Mr. Cutler not only provided a final report and conclusions which allowed the prosecution to establish the DNA match, his conclusions also provided corroboration for Ms. Dowe's testimony about other events that evening. Ms. Dowe testified that she had consensual sex with Delano before her attack and that he had worn a condom. 377a-378a. Mr. Cutler's testimony provided that there were two donors of DNA present in the rape kit, a major and a minor and that if someone was wearing a condom, this would be consistent with his findings. 723a, 726a. Without his testimony it more probable than not that Mr. Jemison would have been acquitted.

E. This Court should reverse.

This Court should find that *Craig* was wrongly applied and that there was not a sufficient state interest to deny Mr. Jemison his confrontation rights. Confrontation by video was insufficient. Cost and convenience are not sufficient state interests which justify infringing upon confrontation rights. "It is a truism that constitutional protections have costs." *Coy*, 487 US at 1020. "The Confrontation Clause…is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 557 US at 325, reiterated in *Bullcoming*, 564 US at 665.

The error was not harmless beyond a reasonable doubt given the lack of other corroborating evidence against Mr. Jemison. It would be a miscarriage of justice to let Mr. Jemison's conviction stand.

Summary and Relief

Mr. Arthur Jemison asks this Honorable Court to reverse the decision of the Court of Appeals and find that cost and convenience are not sufficient state interests to justify infringing upon confrontation rights. The Court should also find that the error here was not harmless beyond a reasonable doubt and vacate Mr. Jemison's conviction.

Respectfully submitted,

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