The Wisconsin Court of Appeals
District III

21-AP-1062-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Ryan L. Bessert
Defendant-Appellant

Appeal from The Circuit Court of Langlade County
The Honorable John B. Rhode, presiding

Brief of Appellant Ryan L. Bessert

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Statement of the Issues

On appeal, Mr. Bessert raises two arguments:

1. Did the circuit court's decision to allow G.B. to testify from a remote location using closed circuit audiovisual equipment violate his right to confront the witnesses against him?
2. The Courthouse was closed to the public while the court deliberated and announced its verdict; did this violate Mr. Bessert's right to a public trial, and, if so, what is the appropriate remedy?

Statement on Oral Argument and Publication

Oral argument is requested. This court may only direct the appeal be submitted on the briefs when the arguments of the appellant are plainly contrary to sound relevant legal authority, are meritless, involve solely questions of fact clearly supported by sufficient evidence, or the briefs fully present and develop the issues. Mr. Bessert's arguments are not contrary to sound legal theory, they are not meritless, and they are not factual arguments. Further, Mr. Bessert's arguments involve the Confrontation Clause, which has seen dramatic shifts in the past two decades. Oral argument will help this court to fully develop these complex constitutional questions.

Publication is also requested. This case surveys a two developing area of constitutional law, collects a large number of relevant authorities, and harmonizes Wis. Stat. 972.11(2m) with the Confrontation Clause, which may otherwise be unconstitutional. Additionally there is only a single published decision addressing Wis. Stat. §972.11(2m), and only three decisions related to the closure of a trial to the public. Further guidance to courts and practitioners in the state will be beneficial to the administration of justice.

Statement of Facts and the Case

The crimes Mr. Bessert is accused of, and was found guilty of committing, are amongst the most severe, reprehensible, and heinous crimes possible to commit. Mr. Bessert has maintained his innocence since police first spoke with him. (R.1:6). After a court trial, Mr. Bessert was found guilty of two counts of each: First Degree Child Sexual Assault- Intercourse with Person under Twelve; and Incest with Child. (R.111:1).

Prior to trial, the State sought permission to have the child witness, G.B., testify from an alternate location using closed circuit audio visual equipment. (R.48:1). This issue was addressed at length in a pretrial hearing. (R.124:18-69; App. 2). Counsel for Mr. Bessert objected to this procedure on the grounds the State had not met its burden to demonstrate G.B. would not be able to reasonably communicate, or that she would suffer serious emotion distress, and that Mr. Bessert has a constitutional right to confront the witnesses who testify agains him in court. (R:.124, 50-51; 46-47). Despite the circuit court noting it had not heard any specific statement about G.B. being afraid of seeing her father, the circuit court found:

> I am going to find that forcing [G.B] to testify in the presence of her father…will result in suffering serious emotional distress such that I am concerned she could not reasonably communicate effectively in this courtroom during the trial, and that video testimony…is necessary to provide a setting that is more amenable to securing [G.B]'s uninhibited and truthful testimony. (R.124:68-69).

At trial, A.H. testified she watched Mr. Bessert change G.B.'s diaper and play with her vagina while doing so. A.H testified that after doing so, Mr. Bessert would want to "finger" her. (R.128:34:37). She also testified Mr. Bessert put his finger inside of G.B.'s vagina while bathing with her. (R.128:39). A.H.

freely admitted to using methamphetamine around the time she claims to have observed these events. (R.128:49).

G.B. testified via closed circuit television from an alternate, out of court, location. (R.128:104). Understandably, G.B. was quite nervous, and could not remember what she ate for lunch. (R.128:109). G.B. told the court when she woke up that morning, Mr. Bessert was under her blankets, "doing the bad stuff". In fact, Mr. Bessert was in the custody of law enforcement the morning of trial. G.B. told the court Mr. Bessert used his private to touch her private two times. (R.128:115-116).

Mr. Bessert testified in his own defense. He stated it would have been impossible to take a bath at the time A.H. alleged he did, as his leg had just been amputated and he had 63 staples in his leg. (R.128:168). When asked if he had ever molested his daughter, or touched his genitalia to hers, Mr. Bessert denied these allegations. (R.128:176-177).

After closing arguments, the court adjourned to deliberate at approximately 4:30. (R. 129:3). The trial resumed at 4:56, the verdict was announced, and the trial was adjourned in finality at 5:00. (R.129:3). At 4:30, the courthouse doors locked, preventing any additional members of the public from entering the courtroom and observing the most critical stage of the trial: the verdict. The circuit court took judicial notice of these facts, and no party contested them. (R.129:3-4).

The issue of the courthouse closing was brought to the circuit court's attention in a motion for a new trial. (R.98). Rather than grant a new trial, the circuit court elected to announce the verdict again in a now open court. (R.129:5). Shortly thereafter, Mr. Bessert was sentenced to twenty-six years of incarceration and ten years of extended supervision on counts one and three,

and fifteen years of incarceration and ten years of supervision on counts two and four. These counts run concurrently. (R. 129:55).

A notice of intent to pursue post-conviction relief was filed on September 14, 2020. (R. 115). A notice of appeal was filed on June 18, 2021. (R. 131).

Argument

I. Wisconsin Statute §972.11(2m)(a) Violates Mr. Bessert's Right To Confront Witnesses Against Him

A. Standard of Review

The constitutionality of a statute presents a question of law which is reviewed *de novo*. *State v. Smith*, 2010 WI 16 ¶8, 323 Wis. 2d 377, 780 N.W.2d 90 (Wis. 2010). Mr. Bessert raises this constitutional challenge as-applied to him; in an as-applied challenge, courts asses the merits of the challenge by considering the facts of the particular case, not of hypothetical facts in other situations. *See, League of Women Voters of Wis. Educ. Network, Inc. V. Walker*, 2014 WI 97 ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (Wis. 2014).

In interpreting the text of the constitution, courts are to be guided by the principle the constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary meaning. *District of Columbia v. Heller*, 554 U.S. 570, 576, 128 S.Ct. 2783 (2008). Constitutional rights are enshrined with the scope they were understood to have when the people adopted them. *Id.* at 634.

B. The Confrontation Clause Requires in Person, Face to Face Confrontation

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…" This right applies to state prosecutions by incorporation through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965). The Wisconsin Constitution is more explicit, providing "[I]n all criminal prosecutions the accused shall enjoy the right…

to meet the witnesses face to face. Despite the explicit wording of our State constitution, the Wisconsin Supreme Court has held the state and federal right to confrontation are coextensive. *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (Wis. 1983).

The root of the right to a face-to-face confrontation with ones accusers traces to the earliest beginnings of Western legal culture. The Roman Governor Festus stated "it is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges." Acts 25:16. To paraphrase Justice Harlan, as a simple matter of English, the confrontation clause confers at the very least the right to meet face-to-face all those who appear and give evidence at trial. *California v. Green*, 399 U.S. 149, 175 (1970). The Latin roots of the word "confront" confirm this understanding, as the word derives from the prefix "con", meaning against, and the noun "frons" (forehead). *Coy v. Iowa*, 487 U.s 1012, 1016, 108 S.Ct. 2789 (1988). In *Pa. v. Ritchie*, the Court plainly explained the Confrontation clause as providing "the right physically to face those who testify against him". *Pa. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989 (1987).

The profound effect upon a witness of standing in the presence of a person the witness accuses cannot be denied. *Coy*, at 1020. Face-to-face presence may unfortunately upset the truthful rape victim or an abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. *Id*. Constitutional protections have costs. *Id*.

C. At Common Law, There Are Three Exceptions to the Confrontation Requirement. As Applied to Mr. Bessert, Wis. Stat. 972.11(2m) Does Not Meet the Criteria for an Exception to This Guarantee.

After Sir Walter Raleigh's trial for treason in 1603, English law developed the right of in person confrontation, and after the infamous proceedings against Sir John Fenwick, the vital importance of securing the right of cross-examination had been burned into the general consciousness. *Crawford v. Washington*, 541 U.S. 36, 46, 124 S.Ct. 1354, (2004). At the time of the ratification of the Sixth Amendment, there were three established exceptions to the face-to-face confrontation required by the constitution: (1) a dying declaration; (2) when the defendant engages in some course of conduct designed to prevent a witness from testifying; and (3) a prior examination if the witness were demonstrably unavailable and the defendant had the opportunity to cross-examine the witnesser the time of the examination. *Crawford* at 45, *Giles v California*, 554 U.S. 353, 361, 128 S. Ct.2678 (2008).

1. G.B. Is Not Dead, the Exception of a Dying Declaration Cannot Apply

While G.B. has certainly had a traumatic childhood, she is still alive. As such, the exemption of a dying declaration cannot apply to her testimony.

2. Mr. Bessert Did Not Act in a Manner Which Would Implicate the Doctrine of Forfeiture by Wrong Doing

The United States Supreme Court clarified the doctrine of forfeiture by wrong doing in *Giles v. California.* Writing for the Court, Justice Scalia engaged in an extended review of the

history of the doctrine, and concluded the rule applies only when the defendant engages in conduct designed to prevent the witness from testifying. *Giles*, 544 U.S. at 359. The theory advanced by the State to justify allowing G.B. to testify remotely was based on the trauma Mr. Bessert's alleged crimes have inflicted would cause her to become unavailable to testify. This theory is rejected in *Giles*. While surveying a number of homicide cases, the Court noted the "[c]ourts in all these cases did not even consider admitting the statements on the ground that the defendant's crime was to blame for the witness's absence". *Giles*, at 363. Under *Giles* it is clear there must be some other act or acts which the defendant engages in which are designed to prevent the witness from testifying.

Certainly, a circuit court could justify the use of closed-circuit testimony from a remote location when the defendant has engaged in some course of conduct to dissuade the child witness from testifying. If the defendant engaged in threatening or menacing behavior toward the child the circuit court could preemptively invoke the statute. If a defendant engaged in behavior in the courtroom which was intended to distress the child, the circuit court would be well within its discretion to use an alternate means of testimony. Mr. Bessert engaged in none of these behaviors. The record is devoid of any act by Mr. Bessert which would justify the doctrine of forfeiture by wrongdoing.

3. Wis. Stat. §972.11(2m)(a)(1)(a) Acts as a Means of Declaring the Child Witness Unavailable

The third and final exception to the right to face to face confrontation is where the declarant is unavailable. At common law, a declarant's examination could only be admitted after it was demonstrated the witness was unavailable to testify. In some

ways, Wis. Stat. §972.11(2m)(a)(1)(a) mimics this unavailability requirement, by requiring the circuit court find the child cannot reasonably communicate due to the emotional distress the defendants presence causes.

The exception of an unavailable declarant to the confrontation clause's guarantee of a face to face examination is longstanding. *See Crawford* 541 U.S. at 45. Wisconsin has codified five scenarios in which a declarant may be deemed unavailable. Wis. Stat. §908.04(1). When a declarant persists in refusing to testify, or is unable to testify due to mental illness or infirmity, a court may deem the declarant unavailable. Wis. Stat. §908.04(1). Only after this finding is made can a declarant's out-of-court testimonial statements be admitted. Wis. Stat. §908.045(1)

Similarly, Wis. Stat. §972.11(2m)(a)(1)(a) permits a child to testify outside of court if the stress of seeing the defendant would cause serious emotional distress (i.e. mental illness or infirmity) and the serious emotional distress causes the child to not be able to reasonably communicate (i.e. refuses to testify, or is unable to testify).

a) There Is Insufficient Evidence To Declare G.B. Was Unable To Testify in Person.

A circuit court's determination of historical fact are upheld unless clearly erroneous, but the application of those facts to the constitutional standards is conducted independently. *State v. Vogelsberg*, 2006 WI App 228, ¶3, 297 Wis. 2d 519, 724 N.W.2d 649 (Wis Ct. App 2006). Given this case marked the first time Wis. Stat ¶972.11(2m) was invoked in Langlade County, the circuit court made a meticulous record. This record involves testimony only from G.B.'s guardian. G.B. did not offer any

testimony, nor did G.B.'s counselor offer her thoughts or conclusions.

G.B.'s guardian, T.P., testified G.B. is generally happy-go-lucky, but has nightmares about Mr. Bessert taking her away or killing her. (R.124:25-26). G.B. did not want to go to trial, and was scared; she did not want to see Mr. Bessert. (R.124:29). G.B. is able to communicate at school, and was talkative at the preparatory meetings with the District Attorney's Office, although they had yet to discussed the allegations against Mr. Bessert. (R.124:32). G.B. also has a counselor, and the counselor developed a plan to help cope with the trauma of trial. (R.124:39).

Trial and cross-examination are undoubtably stressful. Cross examination has frequently been referred to as a "crucible".[1] Given the stress and anxiety many adults experience when subpoenaed, it is perfectly understandable for G.B. to not want to go to court and to be scared. While the record establishes G.B. was a reluctant participant, there is nothing in the record which supports the finding she would not be able to communicate. Indeed, the circuit court watched G.B.'s forensic interview and noted:

> I did not perceive or sense any fear or trepidation or trauma by [G.B.] when she spoke about her father or of her father or the dealing or interactions she had with her father…I was sort of stunned or shocked how matter of fact when she spoke about those things. (R.124:23)

As the record is completely silent regarding this central question, could G.B. reasonably communicate, the judges factual determination she could not may not stand.

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[1] A crucible is a vessel used for melting metals at very high temperatures, with some crucibles being able to withstand temperatures in excess of 5000 degrees Fahrenheit.

4. Alternatively, The Finding G.B. Would Suffer Serious Emotional Distress Violates the Presumption Every Defendant Is Presumed Innocent Until Proven Guilty.

As noted above, Wis. Stat. 972.11(2m) requires the severe emotional distress to come from the presence of the defendant. Concededly, a defendant who engages in an additional course of conduct in attempts to dissuade a witness from testifying waives their right to confront the witness face-to-face. It goes without saying, the right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057 (1970). If Mr. Bessert did not engage in an additional course of conduct to dissuade G.B. from testifying, and had not engaged in conduct which disrupts court proceedings, why would Mr. Bessert's presence cause G.B. severe emotional distress?

Assuming Mr. Bessert's presence would cause severe emotional distress rests on the notion he is guilty of the crimes alleged. The presumption of innocence is the "undoubted law…its enforcement lies at the foundation of the administration of our criminal law. *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). A decision to violate a defendants right to in-person confrontation based on an assumption the defendant is guilty is utterly repugnant to our system of justice and cannot be allowed to stand.

D. *Maryland v. Craig* Was Incorrectly Decided, and Subsequent Supreme Court Cases Indicates the Decision Is No Longer Good Law

Arguably, the United States Supreme Court created a fourth exemption to the confrontation clause in *Maryland v. Craig*, when it upheld Maryland's law allowing a child to testify from outside the defendants physical presence, by closed circuit

television. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157 (1990). *Craig*, was highly questionable when it was decided over vigorous dissent, and subsequent Supreme Court case law clearly indicates it is no longer "good law".

1. When the *Craig* Court Refused To "Second-Guess the Considered Judgement of the Maryland Legislature" It Evaded the Court's Duty To Say What the Law Is, and Uphold the Constitution as the Supreme Law of the Nation

"It is emphatically the province and duty of the judicial department to say what the law is…If two laws conflict..the courts must decide on the operation of each". *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed.60 (1803). When a law runs afoul of the Constitution, it is the very essence of judicial duty to reject the noncompliant law. *Id.*

Writing for the Court in *Craig*, Justice O'Connor explicitly rejected this duty saying, "we will not second-guess the considered judgement of the Maryland legislature …in protecting child abuse victims from the emotional trauma of testifying.[2] *Craig*, at 855. Justice O'Connor placed great weight in the significant majority of States enacting statutes to protect child witnesses from the trauma of courtroom testimony. *Id.* at 853. This is undoubtable a desirable policy. However, a law's desirability does not remove it from the scope of judicial review;

[2] Again, this puts the proverbial cart before the horse. Criminal defendants are presumed innocent until proven guilty. *Supra.* The purpose of a trial is to determine if a crime was committed and if the defendant committed it. To declare someone a victim prior to the determination of whether a crime has actually been committed is a radical notion which is unfortunately sweeping the nation.

the Constitution is meant to protect against, rather than conform to current widespread beliefs. *Id.* at 861 (Scalia, J., Dissenting).

Craig rests on a presumption of guilt and a refusal to uphold the supreme law of the land, in order to negate the common-law tradition of live testimony in court subject to adversarial testimony. The abrogation of two of our bedrock principle to eviscerate a third, is nothing short of alarming. The vigorous dissent of four justices in *Craig* sounded these alarm bells:

> 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.
>
> …
>
> It is not within our charge to speculate 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. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. *Craig,* at 870, (Scalia, J., Dissenting).

2. When the Supreme Court Overturned *Ohio v. Roberts*, in *Crawford v. Washington*, It Implicitly Overturned *Craig*

At the time *Craig* was decided, *Ohio v. Roberts* was the leading case on the confrontation clause. *Roberts* held the focus of the confrontation clause was reliability, and an unavailable declarants testimony may be admitted along as there are sufficient indica of reliability; all the Sixth Amendment demands is "substantial compliance with the purposes behind the

confrontation requirement". *Ohio v. Roberts*, 448 U.S. 56, 69, 100 S.Ct. 2531 (1980).

Craig's logical underpinnings rely entirely on the *Roberts* standard of reliability.

- "In sum our precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial" *Craig* at 849, *quoting Roberts* at 63.[3]
- "[O]ur precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and *only where the reliability of the testimony is otherwise assured*. *Craig*, at 850, *citing Roberts* at 64 (emphasis added).
- "[T]he presence of these other elements of confrontation… adequately ensures that the testimony is both *reliable* and subject to rigorous adversarial testing…These safeguards of *reliability* and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause". *Craig* at 851 (Emphasis added).
- "[T]hese assurances of reliability and adversaries are far greater than those required for admission of hearsay testimony under the Confrontation Clause. *Id*. *quoting Roberts* at 66
- "[T]he Confrontation Clause does not prohibit use of a procedure that, ensures the *reliability* of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Craig* at 857 (Emphasis added).

Fourteen years after *Craig*, the Supreme Court explicitly overturned *Roberts*. The Court reasoned:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To

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[3] *but see*, *Coy v. Iowa* at 1016 (we have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witness appearing before the trier of fact).

> be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it s a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.
>
> …
>
> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It this replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. *Crawford* at 61-62.

With the *Roberts* reliability test no longer applicable, the underpinnings of *Craig's* logic fail. *Craig* based its reasoning on the premise the alternative method of taking testimony would prove more reliable.[4] Case law prior to *Roberts*, and after *Crawford*, make it clear; it does not matter if the out-of-court testimony would be more reliable, the Confrontation Clause contains a procedural guarantee with only three exceptions. The Court lacked the authority to create additional exceptions, only an amendment to the Constitution can do so.

This Court was initially asked to answer the question of whether *Crawford* overturned *Craig* in *State v. Vogelsberg*. *Vogelsberg* reached the correct conclusion, the use of a screen to shield the child witness did not violate the Confrontation Clause, but for the wrong reasons. In *Vogelsberg*, the court took testimony on the motion from the child's guardian, and his counselor, but most importantly considered a police report

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[4] *See*, *e.g. United States v. Carter*, 907 F.3d 1199, 1207-1208 (9th Cir. 2018) ("Craig provides the standard for assessing the constitutionality of two-way video testimony…a defendants right to physical, face-to-face confrontation at trial may be compromised by the use of a remote video procedure only upon a case-specific finding that (1) the denial of physical confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured" *quoting State v. Rogerson,* 855 N.W.2d 495, 502-03 (Iowa 2014)). *See also*, *Unites States v. Yates*, 438 F.3d 1307, 1313-15 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005).

indicating Vogelsberg had threatened to harm the child if the child ever told anyone about the abuse. *State v. Vogelsberg*, 2006 WI App 228 ¶2. *Vogelsberg* could have easily been disposed of under the forfeiture by wrongdoing doctrine. *Crawford* at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds").

Rather than deciding *Vogelsberg* on narrow, but well supported grounds, this court determined it was necessary to save *Craig*. The Court did this with three increasingly odd statements.

First the Court stated if the Supreme Court intended to overturn *Craig* it would have done so explicitly. This is a strange argument to make as the facts of *Crawford* are utterly unrelated to those of *Craig*, and the question was not before the Court. While a laundry list of cases implicitly overturned by the *Crawford* decision would indeed be useful for practitioners, it would have been highly unusual, particularly when *Crawford's* author, Justice Scalia, was a noted advocate of judicial restraint. The argument the Supreme Court only overturns a case when it expressly states so, is unpersuasive.[5]

Next, the *Vogelsberg* court reasoned *Crawford* and *Craig* addressed different questions. According to the court, "[t]he fundamental issue in *Crawford* was the reliability of testimony*",* whereas the issue in *Craig* was "whether the demands of the Confrontation Clause are met when, for public policy reasons and following a case-specific determination of necessity, a barrier is

[5] For an overview of the Supreme Court's longstanding practice of overruling by implication *see* Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U.L. Rev. 151 (2009).

placed between the witness and the accused."[6] *Vogelsberg*, ¶15. This reading of *Crawford* and *Craig* is unsupported by the plain language of the cases. *Craig* rests on the determination the out-of-court testimony is inherently more reliable than in court testimony for child witnesses. Because the *Craig* court determined the inherent reliability satisfied the Confrontation Clause's goal of reliable evidence, it was unconcerned with the lack of in person confrontation. *Crawford* is concerned with the how determination of reliability is made. The Court wrote "[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* at 61. The *Vogelsberg* court's understanding of these two cases is alarmingly incorrect.

Lastly, the *Vogelsberg* court wrote *Crawford* and *Craig* can coexist peacefully, as *Crawford* addresses the question of when confrontation is required and *Craig* addresses the question of what procedure is required. "[The Confrontation Clause] is a procedural…guarantee." *Crawford* at 61. *Crawford* is explicit, unless one of the historical exception applies, witness testimony must be taken in the common law tradition of live, in court testimony subject to adversarial testing. As demonstrated above, the *Vogelsberg* court's belief these two cases can exist in harmony is wrong.

There is no permissible exception to the Confrontation Clause's guarantee of a face-to-face meeting in this case. As such, this court must overturn the circuit court's ruling allowing G.B.

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[6] A barrier was not used in *Craig*. *Craig* concerns the Maryland statute authorizing the use of one way closed circuit audio video devices as a means of receiving the child testimony.

to testify from an alternate location using closed circuit audiovisual devices and remand for a new trial.

II. When the Courthouse Locked its Doors Prior to the Reading of the Verdict, Mr. Bessert's Right to a Public Trial Was Violated. The Only Effective Remedy Is To Grant Mr. Bessert a New Trial.

A. Standard of Review

The Sixth Amendment to the United State Constitution provides the right to an open trial. U.S. Const. Amend. VI. The roots of an open trial reach to before the Norman Conquest of England. *Press-Enterprise Co. Superior Court of California*, 464 U.S. 501, 505, 104 S. Ct. 819 (1984). The right to a public trial is a basic tenant of our judicial system and amongst the most effectual safeguards of justice; indeed it is the "soul of justice". *State v. Vanness*, 2007 WI App 195, ¶8, 304 Wis. 2d 692, 738 N.W.2d 154 (Wis. Ct. App 2007)(Internal citations omitted). Closed proceedings must be rare, and only for cause which is shown to outweigh the value of openness. *Press-Enterprise*, 464 U.S. at 509.

Whether Mr. Bessert's right to a pubic trial has been violated is a question of constitutional fact; appellate courts defer to a circuit courts finding of fact unless clearly erroneous, but the application of constitutional principles to those historical facts is a question of law reviewed without deference to the circuit court. *Vanness* 2007 WI ¶6. When there is an unjustified closure, the right to a public trial may not be implicated if the closure is trivial. *Id*. at ¶9. Triviality is determined by the duration of the closure, and which parts of the trial were closed. *Id*. at ¶12.

B. Caselaw Conclusively Demonstrates Mr. Bessert's Right a Public Trial Was Violated

The facts regarding the courthouse closure are undisputed. The courthouse inadvertently closed at 4:30, while Mr. Bessert was being tried. While the court was in session for a minuscule five minutes, this five minute period was the perhaps the most critical five minutes of the trial: the verdict.

In *United States v. Canady*, the Third Circuit found the announcement of the verdict is neither of little significance nor trivial, but it is the focal point of the entire proceeding. *United States v. Canady*, 126 F.3d 352, 364 (3rd Cir. 1997). Excluding the public affects the integrity and legitimacy of the entire judicial process. *Id*. This court has cited to this principle favorably in *Vanness*, and there is no legitimate reason for this court to depart from this sound logic.

The courthouse was closed to the public at the time the court deliberated, made, and announced its verdict. While the deliberation and reading of the verdict took very little time, the verdict is the central focus of the trial, so a closure of the courthouse while the verdict is being read cannot be trivial. When the historical facts are applied to these basic principals, there is only one possible conclusion: Mr. Bessert's constitutional right to a public trial were violated.

C. The Circuit Court's Remedy Reduces the Most Critical Moment of Trial to a *Pro Forma* Gesture; a New Trial Is the Proper Remedy

After determining the right to a public trial has been violated, this court must still determine what is the appropriate relief to remedy the constitutional violation. *Waller v. Ga.*, 467 U.S. 39, 49, 104 S.Ct. 2210 (1984). The United States Supreme

Court has instructed courts to seek a remedy which is appropriate to the violation. *Id*. at 41. When a suppression hearing is held closed to the public, the appropriate remedy is to hold a new suppression hearing; a new trial would only be appropriate if the results of the suppression hearing differed. *Id*.

Canady is factually similar to Mr. Bessert's case. In both cases, the defendant waived a jury trial, and the trial court acted was the finder of fact. *Canady*, 126 F.3d at 355. The circuit court in Canady mailed a written decision to the parties rather than announcing the decision in open court. *Id*. The court of appeals held the appropriate remedy was to vacate the conviction and remand for the circuit court to announce its decision in open court. *Id*. at 364.

The *Canady* Court's hollow remedy contrasts sharply with the lofty language the court used in describing the right to a public trial. The court stated

> The public trial is a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to *contemporaneous* review in the forum of public opinion is an effective restraint on possible abuse of judicial power. The accused is entitled to a public trial so that the public may see his is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to their responsibility and to the importance of their functions. The requirement that verdicts be announced in open court vindicates the judicial system's symbolic interest in maintaining the appearance of justice and its pragmatic interests in giving the finder of fact a final opportunity to change its decision….[T]he failure to announce in open court the verdict strikes at the fundamental values of our judicial system and our society as a whole. *Id*. at 362, (Internal citations omitted) (Emphasis added)

Remanding for the circuit court to say what it has already says seems to fall short. To say "Mr. Bessert, your fundamental constitutional right to a public trial was violated in a way which strikes at the fundamental values of our justice system, but your relief is no relief at all" is wrong. Conducting a new trial based on what amounts to a violation may certainly seem like a windfall for Mr. Bessert, but it is the minimum required to maintain faith in our system of justice. This court has previously recognized requiring public trials is an additional burden, but this is a burden our constitution demands. *Vanness*, 2007 WI App. at ¶18.

Conclusion

Constitutional protections have costs. The Confrontation Clause, like the right to a trial by jury and the privilege against self-incrimination, may make the prosecution of criminals more burdensome. Likewise, there is a burden to keeping courthouses open to ensure the right to a public trial. These are constitutional provisions which help form the bedrock of our justice system, we may not disregard them for our convenience. Mr. Bessert requests this court overturn the circuit court's rulings, and grant him a new trial where he may exercise his fundamental rights to confront the witness against him and enjoy his right to a public trial.

Dated: Friday, September 3, 2021
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)
I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5,610 words.
Electronically Signed By: Steven Roy

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (2)
I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.
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