IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD ROBERSON,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. **16, 2025**
	)	
STATE OF DELAWARE,	)	On Appeal from the
	)	Superior Court of the
Plaintiff Below,	)	State of Delaware
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Carolyn S. Hake (No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel Office Building
820 North French Street, 5th Floor
Wilmington, Delaware 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On February 1, 2023, police arrested Gerald Roberson ("Roberson") following allegations of sexual abuse made by his daughter N.R., who was 7 at the time.[1] (A1 at D.I. 2).[2] On February 13, 2023, a grand jury indicted Roberson for: (a) three counts of First-Degree Rape; (b) First-Degree Sexual Abuse of a Child by a Person in a Position of Trust; and (c) Continuous Sexual Abuse of a Child. (A1 at D.I. 1; A9-12).

Following his February 23, 2023 preliminary hearing, the Court of Common Pleas found that the State had established probable cause for Roberson to be bound over for trial in the Superior Court. (A1 at D.I. 2).

On November 6, 2023, the State moved to permit N.R., who was now 10, to testify from an adjoining courtroom from the one containing Roberson for trial pursuant to 11 *Del. C.* § 3514. (A3 at D.I. 15; A13-18). Following Roberson's opposition (A19-27), the State introduced testimony by N.R.'s counselor, Colleen O'Connor, MS, NCC ("O'Connor") at a hearing. (A28-38). O'Connor testified that N.R. is quite fearful of her father, would "shut down" if required to communicate in front of him, and would suffer serious emotional distress from being in the same

[1] Because the complaining witness was a minor at the time of the offenses, the State refers to her by her initials.

[2] "D.I." refers to the Superior Court docket items in *State v. Roberson*, ID No. 2301011545 (A1-8).

room with him. (A29-35). Following additional briefing (A39-47; A48-50), the Superior Court granted the State's motion on January 25, 2024.[3] (A51-53).

The Superior Court held a three-day jury trial from May 13 to 15, 2024. (A5 at D.I. 31). Before jury selection, the State moved to amend the indictment to change the beginning date of all the charges from August 24, 2020 to August 24, 2019, which Roberson did not oppose. (A5 at D.I. 26; A57-58). Before resting, the State moved to further amend one count of the indictment (Count III – Rape First-Degree), to change the end date of the charge from June 9, 2021 to April 9, 2022, which was consistent with the end date of the other charges. (A200-03). Roberson objected. (A200-03). The court subsequently granted the State's request. (A200-03). The jury found Roberson guilty of all charges. (A278-79). On December 13, 2024, the Superior Court sentenced Roberson to a total of 100 years of incarceration, which was the minimum-mandatory sentence. (B-1).

Roberson appealed and filed an opening brief on May 21, 2025. This is the State's answering brief.

[3] *State v. Roberson*, 2024 WL 302437 (Del. Super. Ct. Jan. 25, 2024).

SUMMARY OF THE ARGUMENT

I. Denied. Roberson has not established that 11 *Del. C.* § 3514, which provides for the taking of a child's testimony "outside the courtroom and shown in the courtroom by means of secured video connection," provided the court finds that the child of less than 11 would suffer "serious emotional distress such that [she] cannot reasonably communicate" in the live courtroom," violates the "face to face" clause in Article I, Section 7 of the Delaware Constitution. As the trial court found, Roberson's argument is foreclosed by this Court's ruling in *McGriff v. State*,[4] which held that the admission of hearsay testimony under 11 *Del. C.* § 3513, the Delaware tender years statute, wherein a "child victim's prior out-of-court statements pertaining to instances of physical or sexual abuse, are admitted even though the child does not testify and is not available for cross-examination," did not violate the defendant's constitutional rights under the Delaware Constitution.

II. Denied. The State did not engage in impermissible vouching during closing argument, but made a permissible argument logically flowing from the evidence presented at trial.

[4] *McGriff v. State*, 781 A.2d 534 (Del. 2001) ("*McGriff II*").

STATEMENT OF FACTS

Near the end of June 2022, Christina Hoskins ("Hoskins") called police and brought her 8-year-old daughter N.R. to Nemours Children's Hospital ("Nemours") for a sexual assault nurse exam after N.R. disclosed to her that her father, Roberson, had been sexually molesting her. (A109-12; A120-22; A146-47).

At Nemours, N.R. underwent a pediatric sexual assault examination. (A189-91). There were no physical findings, but the nurse noted that she would not expect to find any evidence of sexual abuse because two months had passed since the time that N.R. last reported being assaulted. (A189-93).

After the forensic examination was completed, Hoskins took N.R. to the Children Advocacy Center ("CAC") on July 1, 2022 to give a statement. (A111-12; A121; A152-53). In her interview, 8-year-old N.R. disclosed that Roberson touched her vagina and her buttocks, inserted his finger and penis into her vagina and anus, and put his penis in her mouth. (A159-60, A167-81, A218-21). N.R. said that this had happened more than once, and that the abuse would happen in her parents' bedroom and bathroom when her mother was not paying attention. (A159-60, A167-81, A218-21). N.R. said that abuse began when she was four or six years old, and that the last incident occurred in April 2022, when she was 8. (A159-60, A167-81, A218-21). N.R. also stated that she was afraid to tell anyone because Roberson had told her he would "whoop" her if she did. (A159-60, A180).

N.R.'s video recorded CAC interview was played for the jury at Roberson's trial. (A159-60). N.R. also testified that Roberson put his penis inside her vagina and butt, showed her his penis, and put his penis inside her mouth. (A146-48, A154-58, A166, A169-75, A181-82). She also remembered feeling Roberson's fingers go inside her butt and private. (A181). Trial counsel cross-examined N.R. about the alleged abuse and inconsistencies in her CAC statement. (A167-83).

The defense argued in closing that the State had not satisfied its burden to prove the charges beyond a reasonable doubt. (A237-44). The defense noted that there was no corroboration for N.R.'s allegations and argued that the circumstances surrounding N.R.'s statements, including her lack of recollection at trial, was not reasonable. (*Id.*). The defense also emphasized that Roberson "[c]learly was [no]t a particularly popular person in the house [and] … [p]erhaps somebody wanted him out of the house." (*Id.*).

ARGUMENT

I. 11 *DEL. C.* § 3514 IS NOT UNCONSTITUTIONAL AND ITS APPLICATION IN THIS CASE DID NOT VIOLATE ROBERSON'S RIGHT TO CONFRONTATION UNDER ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION.

Question Presented

Whether the State's use of closed-circuit video testimony of the complainant under 11 *Del. C.* § 3514 violated the "face to face" provision of the Confrontation Clause in Article I, Section 7 of the Delaware Constitution.

Whether the trial court violated Roberson's right to confrontation under Section 7 when it permitted the complainant to testify in a separate courtroom under 11 *Del. C.* § 3514.

Standard and Scope of Review

This Court reviews *de novo* claims of violations of the United States or Delaware constitutions.[5] Evidentiary rulings of a trial judge are reviewed on appeal for an abuse of discretion.[6]

Argument

Prior to trial, the State moved to permit the complaining witness, N.R., who was then 10-years-old, to testify outside the courtroom containing Roberson by

[5] *Warren v. State*, 774 A.2d 246, 251 (Del. 2001).

[6] *Thomas v. State*, 725 A.2d 424, 427 (Del. 1999).

means of secured video connection pursuant to 11 *Del. C.* § 3514. (A13-18). In its motion, the State explained that it "has been in constant contact with [N.R.] and her mother and throughout these meetings and discussions it has become clear that [N.R.] is terrified of [Roberson]." (A15). The State stated that it "discussed the prospect of having [N.R.] testify in the courtroom in the presence of [Roberson] with [N.R.'s] counselor, Coleen O'Connor, MS, NCC, … [and O'Connor believed that] it would be detrimental to [N.R.] and she would suffer serious emotional distress if she were required to testify in front of [Roberson] and would 'shut down' and be unable to communicate." (A15). As a result, the State requested that the court permit N.R. to testify outside the courtroom through a secured video connection and permit "to be present a person whose presence will contribute to the well-being of [N.R.]." (A15-16).

Roberson opposed the State's motion, arguing that the use of closed-circuit video testimony in which Roberson is not in the same room as N.R. violates Roberson's "right to meet witnesses 'face to face'" under Article I, Section 7 of the Delaware Constitution. (A19-27). Roberson further contended that even if the court found the closed-circuit procedure to be constitutionally permissible, the court could not grant the State's motion under *Maryland v. Craig*,[7] without first holding a

[7] 497 U.S. 836 (1990). In *Maryland v. Craig*, the United States Supreme Court considered the constitutionality of a Maryland statute that permitted a child victim of sexual abuse to testify in a room separated from the defendant with only the

hearing and requiring the State to produce N.R.'s therapist to testify with "more specifics" to determine if there "may be ways to provide comfort for the child in the courtroom that would still preserve [Roberson's] right to confrontation." (A23-24).

Subsequently, the Superior Court held a hearing regarding whether to permit N.R.'s testimony pursuant to 11 *Del. C.* § 3514. (A29-38). At that hearing, N.R.'s counselor, O'Connor, testified that she had been treating N.R. since January 2023 and had had approximately 20 trauma therapy sessions with her. (A30). In the sessions, N.R. discussed having night terrors, separation anxiety from her mother, still sleeping with her mother, and being unable to sleep at night. (A30). N.R. also told O'Connor about a recurring, "very vivid" dream where she is getting ready to take a shower, leaves the bathroom to get soap from her mom, and "when she comes

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prosecutor and defense counsel present with the child. *Id.* During trial, the defendant, along with the judge and jury, remained in the courtroom where the child's testimony was viewed through closed-circuit television. *Id.* During the examination of the child, the defendant was able to electronically communicate with defense counsel. *Id.* Prior to trial, the trial judge determined, as demanded by the statute, that requiring the child to testify in court will cause "serious emotional distress such that the child cannot reasonably communicate." *Id.* The defendant contended on appeal that the statute impermissibly violated her confrontation rights. *Id.* The United States Supreme Court disagreed, concluding that the right to "face to face" confrontation is not absolute and must yield where it is necessary to further an important public policy and where the reliability of the testimony is otherwise assured. *Id.* The Supreme Court reasoned that the preference for "face to face" confrontation at trial "'must occasionally give way to considerations of public policy and the necessities of the case.'" *Id.* at 848-49 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

out of the door, she sees her dad standing there with a knife and he's going to kill her and her mom and her brother." (A30). O'Connor explained that N.R. is "extremely anxious" and "really suffers from trauma." (A30). O'Connor testified that she believed that N.R. would suffer serious emotional stress, such that she may have an issue testifying, if she were to have to testify in front of her father. (A30). O'Connor further explained that she was concerned that N.R. would "just shut down and not be able to testify at all" if required to testify in front of her father. (A30). O'Connor also testified that she believed that N.R. would be able to testify via closed-circuit television with the extra support there. (A30).

On cross-examination, O'Connor testified that N.R. was fearful of her father. (A31-34). O'Connor explained that N.R. reported that her father used to beat her if she didn't take care of her brother … who is … on the autism spectrum" and that Roberson also "threatened her not to tell" anyone about the abuse. (A31). O'Connor also explained that she had diagnosed N.R. with posttraumatic stress disorder and acute and generalized anxiety disorder. (A31).

O'Connor also stated that N.R. had not discussed the specific allegations against her father with her and had only disclosed that "her father would touch her in a way that she felt uncomfortable" and "he would do it when mom was home even, and mom would be doing the laundry, and then when mom came into the room, dad would put a blanket over her." (A31). O'Connor testified that N.R. was "not

disclosing right now, because … she's trying to hold herself together, so she's blocking out a lot of things." (A31).

O'Connor testified that she and N.R. had discussed testifying in court and that N.R. was "extremely frightened" and "gets that trauma response that you get when you think you're going to be re-traumatized." (A31). O'Connor stated that she believed that "testifying in this courtroom and … having to see her dad would re-traumatize her." (A31). O'Connor explained that N.R. had reported on "more than one occasion" that "she's very afraid to see [Roberson] [a]nd she's afraid that he's going to break out of jail and come find them and kill them." (A32). O'Connor also stated that she had discussed with N.R. "having support at the time of testifying, but she … just goes into the state of fear, anxiety" and she did not "think that having [her] next to [N.R.] [in the same courtroom with Roberson] would make any difference." (A32). However, O'Connor stated that she believed "if [N.R.] testified remotely, she would appreciate having [her] present." (A32).

O'Connor also explained that N.R. was "afraid that she couldn't keep her eyes away" if she was in the same courtroom as Roberson. (A32). When talking about being in the same room as Roberson, O'Connor stated that N.R. "becomes rigid, stiff, her eyes get really big, and she says, she's really scared, and her body language indicates that she is scared." (A32). When asked whether N.R. could just be apprehensive about generally testifying in court on a big case, O'Connor stated that

"I think either way, she's extremely, extremely stressed and, you know, my concern is a grave concern that she would have the inability to testify in the courtroom. And I am concerned about if she does have to testify in the courtroom, what her mental health status would be after the testimony." (A32). O'Connor further stated that N.R. had told her about testifying, "I'm afraid. Do I have to do it?" (A33).

O'Connor explained that she had not performed any mock practice courtroom sessions with N.R. with mock questions because she was "not skilled in that area." (A33). When asked if she had seen any improvements from N.R. over the 20 sessions, O'Connor stated that N.R. "has built a bond with [her], which is really important, so that's an improvement." (A33). O'Connor stated that N.R. is "in a heightened state of trauma," and her role is to reduce some of that trauma or to help her cope with it. (A33). O'Connor stated that she had not seen "a lot" of improvements with regards to her symptoms of trauma "because this is hanging over her head." (A33). When asked if it was "at all possible that with a combination of steps, perhaps [her] sitting next to [N.R.] in court, counseling sessions before and after court, and other things to provide [N.R.] with support that she could testify with support," O'Connor stated that "[m]y professional opinion is that she could not." (A33). O'Connor explained that she thought N.R. "would shut down and be unable to testify [and] [i]t would cause her serious distress." (A33). She explained that she had seen N.R. shut down, for example, after she told her about the dream about

Roberson having the knife, and "doesn't talk for a little bit." (A33). O'Connor also stated that N.R. "gets a sense of panic" and "shuts down" when they discussed testifying in court. (A34). According to O'Connor, when N.R. shuts down, "[h]er eyes get big as saucers, her body gets very rigid, and she stops talking." (A34). O'Connor testified that it was her opinion that N.R. would not have responded to questions if she had continued questioning N.R. after she stopped talking. (A34).

After cross-examination, the trial judge asked O'Connor "what can you tell me about [N.R.] that you think … fits her in this subcategory" of "traumatized children that should not be in the courtroom to make these accusations against their … victimizers." (A35). O'Connor responded that "[s]he fits that," explaining that "[h]er fear of seeing her dad is extreme" and she has all the characteristics of someone "who's completely traumatized." (A35).

After the hearing, the court requested additional briefing from the State regarding whether 11 *Del. C.* § 3514 is constitutional and whether it would be possible to attempt N.R.'s in-person testimony with the option to pivot to the secured video connection if it became evident that N.R. would not be able to testify in Roberson's presence. (A36). Thereafter, the State submitted its response, asserting that section 3514 is presumed constitutional; the demand that the testimony be physically "face to face" is not supported by Delaware case law or statute; this Court has acknowledged that while literal "face to face" testimony may be preferred, when

there is a child witness, the defendant's preference for a "face to face" confrontation may need to yield to the demands of the case; and Roberson's right to confrontation is preserved so long as there is an opportunity to cross-examine N.R. via the secured video. (A40-44). The State also advised the court that it had concerns about first attempting to have N.R. testify in the courtroom and then switching to closed-circuit testimony depending on N.R.'s ability to testify in Roberson's presence. (A43-44). First, the State expressed its concern that N.R. would shut down and be unwilling to testify at all upon seeing Roberson, citing O'Connor's testimony that she had serious concerns that N.R. would totally shut down and be unable to testify. (A43-44). The State also noted that "[i]f the witness shut down at that point, switching to closed circuit television may not matter. It could require significant time and delay to bring the witness back to a mental state where she can testify. The State cannot be certain the witness would be able to quickly recover and meaningfully participate at trial." (A43). The State also expressed its concern that "upon seeing her father in the confines of the courtroom[,] [N.R.] might react in an unpredictable manner [and] [m]ake some statement or outburst that could causes a mistrial if it were witnessed by the jury." (A44). The State further noted that Roberson "has a documented domestic violence history with the witness and her mother which, if disclosed, could improperly bias the jury." (A44). The State concluded that "based on the facts presented at the hearing, the plain terms of 11 *Del. C.* [§] 3514, the case law, and the

efficiency of the trial process[,] the State should be permitted to present [N.R.] via secured remote television." (A44).

Roberson subsequently submitted his reply, distinguishing the State's reliance on *McGriff*. (A48-49). Roberson argued that "[t]he Defense in this case is not making a challenge to 3513 nor is the Defense challenging the use of reliable hearsay or statements found by a court to possess particularized guarantees of trustworthiness involving an unavailable witness." (A48). Rather, "[t]he Defense challenges 11 *Del. C.* [§] 3514 under the Delaware Constitution and the use of closed circuit video involving an available child witness – given the 'face to face' language in the Delaware Constitution." (A48). Citing the United States Supreme Court's decision in *Maryland v. Craig*, Roberson claimed that the dissenting opinion in that case "drew a distinction between hearsay where a witness is unavailable and a case where a witness is available as follows: 'When two versions of the same evidence are available, long standing principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.'" (A48-49). Roberson further noted that "[t]he dissenting Opinion also discussed the importance of an accused father having an opportunity to sit in the presence of the child in these types of cases." (A49). Roberson also cited case law, which he claimed "has held that Delaware contemplates a greater right to confrontation than does the federal constitution." (A49). In addition, Roberson took the position that Roberson's "very

important right to confrontation should override any concerns about the time it might take to then have the child testify by video if in-court testimony does not work" and noted that "any concerns about mistrial could be alleviated by first having the child in the same room as the defendant without the jury and before questioning begins to see how the child responds." (A49).

After briefing was complete, the Superior Court granted the State's motion to take N.R.'s testimony in a remote courtroom pursuant to 11 *Del. C.* § 3514 after finding that "requiring the witness to testify in the physical presence of the defendant would cause the child to suffer serious emotional distress such that she will not be able to reasonably communicate."[8] (A51-52). In so ruling, the court found Roberson's argument "that the separate courtroom presentation, although authorized by the General Assembly pursuant to 11 *Del. C.* § 3514, would violate the 'face to face' provision under the Confrontation Clause of the Delaware Constitution," was foreclosed by this Court's decision in *McGriff*.[9] The court explained:

> There are two statutes at play here. 11 *Del. C.* § 3513 provides that prior, out of court statements by a child victim under 11 years of age may be admitted at trial, and without the opportunity for cross examination, provided at least one of 8 conditions are met. These include the child's death, disability, total failure of memory or absence from the jurisdiction. For our purposes, the "child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason" may supply the basis for

[8] *Roberson*, 2024 WL 302437, at *1-2.

[9] *Id.*

admissibility. Similarly, upon a showing of a "substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television" provided this "unavailability" is supported by expert testimony. A finding of "unavailability" under any of these criteria would then require the court to find that the statement possesses "particularized guarantees of trustworthiness" but, upon so finding, the statement is admissible despite the defendant's inability to confront or cross examine the accuser. Notably, this statute has withstood a rigorous review of its constitutionality by the Delaware Supreme Court, under both the U.S. Constitution and the Delaware State "face to face" clause. In *McGriff v. State*, the Court found the "face to face" mandate of the Delaware Constitution satisfied by the requirement that the trial court find "particularized guarantees of trustworthiness."

Thus, there is little question but that, if the child were found to be "unavailable" under section 3513 and the Court made the required finding, her prior statements would be admissible at trial whether she came to the courthouse or not.

11 *Del. C.* § 3514 provides for the taking of a child's testimony "outside the courtroom and shown in the courtroom by means of secured video connection," provided the court finds that the child of less than 11 would suffer "serious emotional distress such that [she] cannot reasonably communicate" in the live courtroom. Under such proceedings, only the prosecutor, defense counsel, camera technicians and support for the child are permitted. The judge and the Defendant stay in the "live" courtroom. This means of procuring the witness' testimony does not allow direct, "face to face" confrontation between the child and the defendant but, some might argue, it at least permits a modicum of cross examination of the witness by counsel for the accused – a right that is non-existent when the testimony is offered under section 3513.

While Defendant has urged that the State's proposed utilization of section 3514 to bring the child to the courthouse, put her in a courtroom and make her available for cross examination by defense counsel denies the Defendant his right to "face to face" confrontation under the Delaware Constitution, the Court believes that argument is foreclosed by the Supreme Court's ruling in *McGriff* discussed above.

> Surely, if the child's statements can be admitted against the accused with no cross examination at all as permitted under *McGriff* and section 3513, then the accusations can be admitted against the accused from a closed monitor from an adjoining courtroom from which defense counsel is able to cross examine the accuser on behalf of his client.[10]

On appeal, Roberson argues that the use of closed-circuit video testimony under 11 *Del. C.* § 3514, in which the defendant is not in the room, violates the "face to face" provision of Delaware's confrontation clause in Article I, Section 7 of the Delaware Constitution. (Opening Br. 6-12). He contends that reversal is required because the Superior Court violated his right to confrontation when it permitted N.R. to testify in a separate courtroom via closed-circuit video pursuant to section 3514 because he "was unable to confront his accuser 'face to face' as guaranteed by [Section 7 of] the Delaware Constitution." (*Id.* 7). Roberson's claims are unavailing.

11 *Del. C.* § 3514, which was enacted in 1992,[11] provides:

> (a)(1) In any prosecution involving any offense set forth in § 3513(a) of this title, domestic violence as defined in § 1041 of Title 10, and §§ 768 thru 778 and 1312 of this title a court may order that the testimony of a witness less than 11 years of age or any victim of the offenses described herein be taken outside the courtroom and shown in the courtroom by means of secured video connection if:
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> a. The testimony is taken during the proceeding; and

[10] *Id.*

[11] 68 Del. Laws ch. 407 (1992).

b. The judge determines that testimony by the witness less than 11 years of age or any victim of the offenses described herein in the courtroom will result in the witness less than 11 years of age or any victim of the offenses described herein suffering serious emotional distress such that the witness less than 11 years of age or any victim of the offenses described herein cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child victim or witness.

(3) The operators of the secured video connection shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room when the witness less than 11 years of age or any victim of the offenses described herein testifies by closed circuit television:

a. The prosecuting attorney;

b. The attorney for the defendant;

c. The operators of the closed circuit television equipment; and

d. Any person whose presence, in the opinion of the court, contributes to the well-being of the witness less than 11 years of age or any victim of the offenses described herein, including a person who has dealt with the witness less than 11 years of age or any victim of the offenses described herein in a therapeutic setting concerning the abuse.

(2) During the witness or victim's testimony by secured video connection, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the witness less than 11 years of age or any victim of the offenses described herein is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

> (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.
>
> (e) The proponent of the witness's or victim's testimony must inform the adverse party of the proponent's intention to offer the testimony and the content of the testimony sufficiently in advance of the proceeding to provide the adverse party with fair opportunity to prepare a response to the testimony before the proceeding at which it is offered.[12]

A legislative enactment, such as 11 *Del. C.* § 3514, is presumed to be constitutional.[13] Roberson, as the party seeking to invalidate section 3514, has the burden of rebutting this presumption of validity and constitutionality which accompanies every statute.[14] "All reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation."[15] If a constitutional construction of a statute is possible, it should be followed.[16] In determining the

[12] 11 *Del. C.* § 3514.

[13] *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008); *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997); *State v. Blount*, 472 A.2d 1340, 1346 (Del. Super. Ct. 1984), *aff'd*, 511 A.2d 1030 (Del. 1986).

[14] *McDade*, 693 A.2d at 1065; *Wilm. Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978); *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974).

[15] *McDade*, 693 A.2d at 1065; *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 714 (Del. 1979).

[16] *Id.*

constitutionality of a legislative enactment, "[t]he wisdom of legislative policy is not a matter of judicial review."[17]

Roberson makes no claim under the Confrontation Clause in the Sixth Amendment, ostensibly recognizing that such argument would not be cognizable under the United States Supreme Court's decision in *Maryland v. Craig*, which upheld, as constitutional under the Federal Constitution, a Maryland statute that establishes a closed-circuit procedure virtually identical to that provided for in section 3514.[18] Instead, he only contends that section 3514 violates the "face to face" provision of Delaware's Confrontation Clause in Article I, Section 7. (Opening Br. 6-12). In support of his claim, Roberson repeats this Court's conclusion in *Van Arsdall v. State*,[19] as cited in the Superior Court's decision in *State v. Xendis*,[20] that Section 7 offers "a greater right to confrontation than does the [Sixth Amendment of the] federal constitution."[21] (*Id.*). But *Van Arsdall* concerned limitations on cross-

[17] *Kreisher v. State*, 303 A.2d 651, 652 (Del. 1973).

[18] *See Craig*, 497 U.S. at 840-60.

[19] 524 A.2d 3 (Del. 1987).

[20] 212 A.3d 292 (Del. Super. Ct. 2019).

[21] Roberson mistakenly refers to the Superior Court's decision in *Xendis* as a decision by this Court. (Opening Br. 7). Although this Court affirmed the Superior Court's decision on appeal, this Court did not address Xendis's constitutional claims on appeal because they were not essential to the disposition of the case. *See Xendis v. State*, 2020 WL 1274624, at *2 & n.24 (Del. Mar. 17, 2020) (citation omitted).

examination, not the right to literally "examine witnesses face to face."[22] Although the Delaware Constitution may provide broader protections than the United States Constitution,[23] Roberson does not cite a case on point that identifies greater and relevant protections of literally examining witnesses face-to-face. Furthermore, to the extent that he engages in the type of analysis required under *Jones v. State*[24] to identify them for the first time now, his argument that the Delaware Constitution should be interpreted differently than the Federal Constitution is unpersuasive.

First, Roberson's claim that the Delaware Constitution provides broader rights because the "face to face" language in Section 7 is not included in the Federal Constitution (*see* Opening Br. 8), is without basis. Both the Delaware and United States Constitutions protect the right of a criminal defendant to confront the witnesses against him.[25] The Sixth Amendment to the United States Constitution specifically mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."[26] The analogous portion of Article I, Section 7 of the Delaware Constitution provides that "[i]n all criminal prosecutions, the accused hath a right ... to meet the witnesses in their

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[22] *Van Arsdall*, 524 A.2d at 5-6.

[23] *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017).

[24] 745 A.2d 856, 863-65 (Del. 1999).

[25] U.S. Const. amend. VI; Del. Const. art. I, § 7.

[26] U.S. Const. amend. VI.

examinations face to face."[27] Although the "face to face" language found in Section 7 is not expressly included in the Sixth Amendment's Confrontation Clause, the United States Supreme Court has noted that both a literal interpretation of the language in the federal constitutional provision and reference to its historical origins yields the conclusion that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[28] Moreover, this Court has recognized that, despite the absence of the specific words, "face to face", in the Sixth Amendment's Confrontation Clause, "[t]he concept of a physical or 'face to face' meeting between the declarant and the defendant is not unique to Delaware law."[29] Roberson's attempt to latch upon this stylistic difference in the two provisions as a basis to support his contention that Section 7 provides a broader, absolute right of in-person confrontation thus fails.

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[27] Del. Const. art. I, § 7.

[28] *McGriff v. State*, 672 A.2d 1027, 1030 (Del. 1996) ("*McGriff I*") (quoting *Craig*, 497 U.S. at 844 (noting that "[t]his interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots") (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988))). Notably, in holding that the right to face-to-face confrontation is not absolute, and the right to "face to face" confrontation will in some circumstances give way to more imperative ends, the United States Supreme Court did not abandon this interpretation. *See Craig*, 497 U.S. at 844.

[29] *McGriff II*, 781 A.2d at 539.

Citing *Commonwealth v. Ludwig*[30] and *Commonwealth v. Johnson*,[31] Roberson also notes that the Pennsylvania Supreme Court and the Massachusetts Supreme Court both have held that the use of closed-circuit video testimony by an alleged child victim violated their state's constitutional confrontation provisions requiring "face to face" confrontation. To the extent that Roberson contends that this Court should likewise interpret Section 7 to require a "face to face" confrontation, he is wrong. Delaware courts, unless compelled to do otherwise, have expressed a preference to interpret our state constitution in a manner consistent with the Federal Constitution.[32]

Moreover, Roberson ignores that this Court has repeatedly rejected the argument that the Delaware Constitution provides for greater confrontation rights than the Sixth Amendment based on the "face to face" language in Section 7 and has

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[30] *Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991). In *Ludwig*, the complainant "was totally unaware of the existence of the trial itself." *Id.* at 479-80.

[31] *Commonwealth v. Johnson*, 631 N.E.2d 1002 (Mass. 1994).

[32] *See In re 1982 Honda, Del. Registration No. 83466*, 681 A.2d 1035, 1038 (Del. 1996) (noting that "the language of the Delaware Constitution parallels the federal provision" and electing to interpret the two consistently "[s]ince the two clauses contain substantially identical language"); *Johnson v. Delaware Dept. of Correction*, 1983 WL 473278, at *2 (Del. Super. Ct. July 25, 1983) ("[I]t has been the practice of the Delaware courts to interpret the Constitution of Delaware consistently with the federal courts' interpretation of the United States Constitution.").

declined to impose a literal, in-person requirement for "face to face" confrontation.[33] In declining to find greater protection, this Court has recognized that, like the right to confrontation under the Sixth Amendment, the right to "face to face" confrontation of witnesses under Section 7 is not absolute and must yield where it is necessary to further an important public policy and where the reliability of the testimony is otherwise assured.[34]

For example, in *McGriff v. State*, this Court held that the Superior Court's admission of the hearsay testimony of State witnesses regarding the child victim's accounts of sexual abuse under 11 *Del. C.* § 3513, the Delaware tender years statute, wherein a "child victim's prior out-of-court statements pertaining to instances of physical or sexual abuse may be admitted even though the child does not testify and is not available for cross-examination," did not violate the defendant's

[33] *See Ayers v. State*, 97 A.3d 1037, 1040 (Del. 2014); *McGriff II*, 781 A.2d at 540-42.

[34] *See Ayers*, 97 A.3d at 1040; *McGriff II*, 781 A.2d at 540-42. There are at least eight other states where statutory language allowing closed-circuit or videotaped testimony from child sexual abuse victims has been deemed constitutional under those states' "face to face" confrontation clauses. *See People v. Phillips*, 315 P.3d 136, 152 (Colo. App. 2012) (citing *Compan v. People*, 121 P.3d 876, 885-86 (Colo. 2005)); *State v. Chisholm*, 825 P.2d 147 (Kan. 1992); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986); *State v. Naucke*, 829 S.W.2d 445 (Mo. 1992); *State v. Warford*, 389 N.W.2d 575 (Neb. 1986); *State v. Self*, 564 N.E.2d 446 (Ohio 1990); *State v. Foster*, 957 P.2d 712 (Wash. 1998); *Matter of Stradford*, 460 S.E.2d 173 (N.C. App. 1995).

constitutional rights under the United States and Delaware Constitutions.[35] Relying on the United States Supreme Court's decision in *Craig* that the use of the one-way closed-circuit procedure, where necessary to further an important state interest, did not impinge upon the purposes of the Confrontation Clause, this Court held that "the sections of Delaware's tender years statute at issue in McGriff's case satisfy the 'face to face' confrontation requirement of Article I, § 7 of the Delaware Constitution," because section 3513 affords the right of "face to face" cross-examination at the hearing conducted by the trial court pursuant to section 3513.[36] This Court also rejected the defendant's request to interpret the confrontation clause in Section 7 "to provide more protection than its federal counterpart," based on the inclusion in the state clause of the phrase "face to face," explaining:

> It would be incongruent to interpret this provision as an absolute requirement of in court, physical "face to face" confrontation in all circumstances. A strict reading of the phrase "face to face" would virtually foreclose the State's ability to admit hearsay testimony against a criminal defendant, including those statements determined to be particularly trustworthy, substantially eliminating many exceptions to the rule prohibiting hearsay testimony. As with the Federal Confrontation Clause, a literal reading of the Delaware Confrontation Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme. The right to meet witnesses "face to face" is not mandatory in all circumstances; rather, Article I, § 7 expresses a preference for "face to face" confrontation in Section 7. In all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel, to be plainly and fully

[35] *McGriff II*, 781 A.2d at 537-42 (citing 11 *Del. C.* § 3513).

[36] *Id.* at 540-41.

> informed of the nature and cause of the accusation against him or her, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself or herself, his or her friends or counsel, for obtaining witnesses in his or her favor, and a speedy and public trial by an impartial jury; he or she shall not be compelled to give evidence against himself or herself, nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land—due process. That preference must yield in those hearsay situations that are consistent with due process: firmly rooted exceptions and hearsay statements that have particularized guarantees of trustworthiness.[37]

Similarly, in *Ayers v. State*, this Court rejected the defendant's argument that the admission of wiretap hearsay recordings violated his confrontation rights under the "face to face" clause in Section 7 of the Delaware Constitution.[38] In rejecting the defendant's argument, this Court reiterated its holding in *McGriff* that "Article I, § 7 expresses a preference for 'face to face' confrontation in accordance with the law of the land—due process. That preference must yield in those hearsay situations that are consistent with due process: firmly rooted exceptions and hearsay statements that have particularized guarantees of trustworthiness."[39]

While recognizing the Delaware Constitution's preference for face-to-face confrontation, this Court's reasoning in *McGriff* and *Ayers* makes it clear that Section 7 does not impose an absolute or literal mandatory, in-person, face to face

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[37] *McGriff II*, 781 A.2d at 541-42 (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Gannon v. State*, 704 A.2d 272 (Del. 1998)) (internal quotations omitted).

[38] *Ayers*, 97 A.3d at 1040.

[39] *Id.*

confrontation requirement for all testimony and evidence. As the Superior Court found, although *McGriff* and *Ayers* addressed the admission of hearsay statements where the witness was "unavailable" to testify and be cross-examined, this Court's holdings in those cases forecloses Roberson's argument that the separate courtroom presentation of N.R.'s testimony in this case pursuant to section 3514 violated his right to "face to face" confrontation under Section 7. As the Superior Court recognized, a one-way video set-up certainly affords a defendant far greater procedural protection, including the ability to cross-examine the witness, than does the admission under a hearsay exception of an unavailable child victim's or co-conspirator's hearsay statements, which have not been tested through the adversarial process.[40]

Nor did the application of section 3514 violate Roberson's confrontation rights under Section 7. Although *McGriff* preceded the United States Supreme Court's decision in *Crawford v. Washington*, which held that the Confrontation Clause requires that the defendant be provided an opportunity to cross-examine the witness when there are witness statements of a "testimonial" nature, *Crawford* does not specifically address remote or video testimony or overrule *Craig*, but rather

[40] *See Roberson*, 2024 WL 302437, at *2; *see also Craig*, 497 U.S. at 851-52 (recognizing that the "assurances of reliability and adversariness [provided when a child testifies by one-way closed-circuit video] are far greater than those required for admission of hearsay testimony under the Confrontation Clause").

focuses on whether the accused had the opportunity to meaningfully challenge the witness's testimony.[41] Here, Roberson's right to confrontation was preserved because he had an opportunity to fully cross-examine N.R. and the jury had the opportunity to observe the demeanor of the witness.

Furthermore, the use of video testimony in this case satisfies the test set forth in *Craig* for satisfying a defendant's right to confront accusatory witnesses absent a physical, face-to-face confrontation at trial, and thus does not impinge on Roberson's confrontation rights. Under *Craig*, the State must show that (1) the denial of face-to-face confrontation is necessary to further an important public policy; (2) the reliability of the testimony is otherwise assured; and (3) there is a case-specific showing of necessity for the accommodation.[42] Each of these prongs is satisfied here.

First, Delaware has recognized the important public policy in making accommodations for young children, such as N.R., who are the complainants in sexual abuse cases in Delaware courts. Specifically, this Court has recognized that "[t]he State has an interest in protecting young children from testifying …. [and] an interest in prosecuting individuals in cases of sexual and physical abuse involving

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[41] *See Crawford v. Washington*, 541 U.S. 36 (2004). *Ayers* was decided over ten years after *Crawford*.

[42] *Craig*, 497 U.S. at 850, 855.

children, cases that can be very difficult to prosecute."[43] In addition, this Court has noted that "[o]ften, children are reluctant to testify in court[, which] … may be due to a fear of the defendant or even the child's belief that he or she was somehow at fault."[44] This Court further explained that "[i]n other cases, … the child … may refuse to [recall what occurred] in the presence of the offender."[45]

Second, the *Craig* Court held that the reliability portion of the test is met by a "combined effect of these elements of confrontation – physical presence, oath, cross-examination and observation of demeanor by the trier of fact."[46] According to *Craig*, the combination of oath, cross-examination, and observation of a witness's demeanor "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."[47] Here, the record reflects that N.R. provided an affirmation before she testified (A141), was subject to extensive cross-examination, was in view of the jury, and Roberson was able to see and hear N.R. while she testified. Thus, this prong of the *Craig* test was also satisfied.

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[43] *McGriff II*, 781 A.2d at 542; *see also Craig*, 497 U.S. at 852-53.

[44] *Id.*

[45] *Id.*

[46] *Craig*, 497 U.S. at 846.

[47] *Id.* at 851.

Finally, the State made a proper showing of necessity for the accommodation. The State produced N.R.'s counselor, O'Connor, who opined that testifying in the courtroom as Roberson would cause N.R. to suffer serious emotional distress and that N.R. would "shut down" if required to communicate in front of him. (A30-35). Citing O'Connor's testimony, the trial court found that requiring N.R. to testify in the physical presence of Roberson would cause her to suffer serious emotional distress such that she would not be able to reasonably communicate.[48]

Roberson nevertheless argues that "[w]hat transpired in this case breathes life into precisely what Justice Scalia warned against in his impassioned dissent in *Maryland v. Craig*." (Opening Br. 9-10). Roberson's reliance on Justice Scalia's dissent, which argued that the "categorical guarantee" of a face-to-face confrontation could not be overcome by the policy judgments of the Maryland legislature relating to the commission and prosecution of child abuse crimes,[49] is misplaced. As the United States Supreme Court recently reminded, "[i]t is the Court's ruling, not the one set forth by the dissents, that binds the lower courts."[50] Notably, the United

[48] *Roberson*, 2024 WL 302437, at *2.

[49] *See Craig*, 497 U.S. at 860-70 (Justice Scalia, dissenting).

[50] *See Bondi v. VanDerStok*, 604 U.S. --, 145 S. Ct. 857, 877 (2025) (Justice Sotomayor, concurring).

States Supreme Court has not overruled *Craig*, and Justice Scalia, who authored the majority opinion in *Crawford*, did not mention *Craig* therein.[51]

Furthermore, even assuming that the fundamental purpose of the "face to face" language of Section 7 is that the defendant be in the physical presence of adverse witnesses, this objective is met under the statute at issue here because it provides that the defendant's counsel may be in the same room with the witness.[52] Defense counsel is in constant contact with the defendant both electronically and physically.[53] If the defendant is acting as his own attorney closed-circuit testimony will not be allowed.[54] This is consistent with "the main and essential purpose of confrontation[, which] is *to secure for the opponent the opportunity of cross-examination.*"[55] Because the right to cross-examine is in no way impaired by closed-circuit testimony, Roberson's defense was not compromised by admission of this testimony. Indeed, a setting that facilitates candor

[51] *See Crawford*, 541 U.S. at 38-69.

[52] 11 *Del. C.* § 3514(b)(1).

[53] *Id.* § 3514(b)(3)

[54] *Id.* § 3514(c).

[55] *Van Arsdall*, 524 A.2d at 6 (quotation omitted) (emphasis in original); *see also McGriff II*, 781 A.2d at 542 ("The purpose of the Confrontation Clause is upheld if the testimony at issue is found to carry the indicia of reliability.").

by otherwise reluctant witnesses, such as children accusing adults of sex crimes, "may well aid a defendant in eliciting favorable testimony from the child witness."[56]

Roberson also contends for the first time on appeal that "the presentation of the complainant's testimony through the filter of closed-circuit television no doubt bolstered the complainant's credibility as a prosecution witness by the undeniable implication that she needed to be protected from her father." (Opening Br. 10). By not raising this claim below, Roberson's belated conclusory claim is waived and may now only be reviewed on appeal for plain error.[57] Roberson cites no case law supporting this argument and thus has not established plain error.

Roberson further argues that the court should have found less-restrictive means of taking N.R.'s testimony that would still preserve Roberson's right to confrontation. (Opening Br. 11). His claim is unavailing. Neither section 3514 nor Delaware law imposes this requirement. Rather, pursuant to section 3514, the trial court may order that a witness's testimony be taken through a secured video connection when the following criteria are met:

1. The witness is less than 11 years old.

2. The offenses are those codified in 11 *Del. C.* § 768-778.

3. Testifying in the courtroom will cause the witness to suffer "serious emotional distress such that the witness […] or victim

[56] *Craig*, 497 U.S. at 851.

[57] Supr. Ct. R. 8.

> of the offenses described herein cannot reasonably communicate."[58]

Here, the Superior Court did not abuse its discretion in finding that the State satisfied these criteria. N.R. was less than 11 years old (A143), the offenses at issue are codified in 11 *Del. C.* § 773, 776, and 778 (A9-12), and the State produced N.R.'s counselor, O'Connor, who opined that testifying in the courtroom as Roberson would cause N.R. to suffer serious emotional distress and that N.R. would "shut down" if required to communicate in front of him (A30-35).

Furthermore, the United States Supreme Court in *Craig* declined to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure, such as observing the child's behavior in the defendant's presence or exploring less restrictive alternatives.[59] The Court held that "[s]o long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case."[60] As discussed, the trial court here made such a case-specific finding of necessity.

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[58] 11 *Del. C.* § 3514(a)(1)(b).

[59] *Craig*, 497 U.S. at 859-61.

[60] *Id.* at 860.

Finally, Roberson contends that "[t]his case also underscores how easily a criminal defendant's right to face-to-face confrontation can be 'virtually' diminished where the opinion of a counselor that the child would suffer emotional trauma if required to testify in open court was enough to abridge the Defendant's right to face-to-face confrontation—even though the counselor had never previously assessed in her career to make a determination or opine about whether or not a child should be allowed in a court room to testify versus CCTV" and also "exemplifies how dramatically the Confrontation right can be circumscribed by remote testimony." (Opening Br. 12). Roberson's argument is unavailing. Similar to the right to confrontation under the Sixth Amendment, this Court has recognized that the right to "face to face" confrontation of witnesses under Section 7 is not absolute and must yield where it is necessary to further an important public policy and where, the reliability of the testimony is otherwise assured.[61] Here, section 3514 safeguards the defendant's right to cross-examination while accommodating the need to spare small children the emotional trauma sometimes associated with the trial process. Furthermore, as discussed above, the combination of oath, cross-examination, and observation of a witness's demeanor "adequately ensures that the testimony is both

[61] *See McGriff II*, 781 A.2d at 540-42; *Ayers*, 97 A.3d at 1040.

reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."[62]

Furthermore, any violation of the Confrontation Clause was harmless beyond a reasonable doubt. Under *Coy v. Iowa*, the harmlessness of a violation of a defendant's right to face-to-face confrontation is determined based on the remaining evidence.[63] In this case, N.R.'s live testimony at trial was cumulative of her CAC statement, which was played at trial. N.R.'s live testimony was also not the sole opportunity the jury had to observe N.R.'s demeanor while making her accusations against Roberson, as the jury was shown the audio and video recording of N.R.'s CAC interview. Thus, any error was harmless beyond a reasonable doubt.

[62] *Craig*, 497 U.S. at 851.

[63] *Coy*, 487 U.S. at 1021-22.

II. THE PROSECUTOR'S COMMENT DURING CLOSING ARGUMENT DID NOT CONSTITUTE MISCONDUCT THAT VIOLATED ROBERSON'S DUE PROCESS RIGHTS.

Question Presented

Whether Roberson has demonstrated that the prosecutor's comment during closing argument amounted to prosecutorial misconduct.

Standard and Scope of Review

If defense counsel raises a timely and pertinent objection to prosecutorial misconduct, or if the trial judge intervened and considered the issue *sua sponte*, this Court reviews for "harmless error."[64] Under this standard, this Court first reviews the record *de novo* to determine whether the prosecutor's actions were improper.[65] If the Court determines that no misconduct occurred, the analysis ends.[66] But if the Court determines the prosecutor engaged in misconduct, under the harmless error standard, the Court must then determine whether the misconduct prejudicially affected the defendant.[67] To make that determination, the Court applies the three factors identified in *Hughes v. State*,[68] which are: (1) the closeness of the case, (2)

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[64] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citing *Baker v. State*, 906 A.2d 139, 148 (Del. 2006)).

[65] *Baker*, 906 A.2d at 148-49.

[66] *Id.*

[67] *Id.*

[68] *Hughes v. State*, 437 A.2d 559 (Del. 1981).

the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.[69] Where the misconduct "fails" the *Hughes* test and otherwise would not warrant reversal, the Court applies *Hunter*[70] to determine whether the "prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[71]

Merits of the Argument

During her closing argument, the prosecutor stated:

> Defense counsel's probably going to get up and try to say this is made up, this didn't really happen. Why? Ask yourselves why an eight-year-old girl would want to deal with law enforcement, have an awkward conversation with her mom, go to the hospital, and do whatever that frog position is that [defense counsel] was cross-examining the FNE about, have her body exposed, be humiliated and then talk about it at length with a stranger in her room at the hospital and then two years later come in here and sit up there and testify. Did it look like she wanted to be here today?

(A223). After the prosecutor concluded her summation, defense counsel requested a side-bar before making his closing argument. (A235). At side-bar, defense counsel stated:

> Your Honor, at one point during the closing there was a suggestion as to why would [N.R.] go through this, why would she go through this, why would she testify if – it sounded like it was approaching the possibility of credibility vouching. I would request an instruction to the

[69] *Baker*, 906 A.2d at 149 (citing *Hughes*, 437 A.2d at 571).

[70] *Hunter v. State*, 815 A.2d 730 (Del. 2002).

[71] *Justice v. State*, 947 A.2d 1097, 1101 (Del. 2008).

> jury that they not consider the idea that because … an investigation starts that it must have happened.

(A236). The trial judge denied Roberson's request for an instruction, stating:

> Wasn't that an argument? I'm not sure that the prosecutor was arguing it because an investigation started it must have happened. So I don't really think that an instruction like that would work.
>
> I think you have the space, if you choose, to argue that the complainant is not credible for another reason and maybe she had a motive to make stuff up or what have you, but I'm not going to – I'm not convinced that the prosecutor's argument needs a curative instruction, so your request is denied.

(A236).

On appeal, Roberson claims that the prosecutor's comment constituted prosecutorial misconduct and denied Roberson the right to a fair trial. (Opening Br. 13-16). Specifically, Roberson contends that the prosecutor improperly vouched for N.R.'s credibility by conveying a "clear message" to the jury that "the complainant would not have come forward and go[ne] through the investigation unless she was telling the truth." (*Id.*). Roberson argues that reversal is required because "[t]his was a pure credibility case where there was no physical evidence to support the allegations of misconduct." (*Id.*). Roberson's arguments are unavailing.

No prosecutorial misconduct occurred here. "In closing argument, a prosecutor is allowed and expected to explain all the legitimate inferences of the

[defendant's] guilt that flow from [the] evidence."[72] "[P]rosecutors generally cannot vouch for the credibility of a witness by stating or implying personal knowledge that the witness' testimony is correct or truthful."[73] "Improper vouching occurs when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness testified truthfully."[74] Repeatedly arguing that a witness is "right," or "correct" has been found to be "improper vouching."[75] On the other hand, a prosecutor may address witness bias or motive in argument without a personal endorsement of credibility.[76] Furthermore, an allegedly improper statement must be viewed in context of the trial.[77]

Here, the prosecutor's remark during closing was not improper when viewed in context of what is otherwise an unobjectionable argument concerning N.R.'s credibility.[78] During trial, Roberson focused on inconsistencies in N.R.'s story to

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[72] *Benson v. State*, 105 A.3d 979, 984 (Del. 2014).

[73] *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013).

[74] *Id.*

[75] *Id.* at 246.

[76] *Caldwell v. State*, 770 A.2d 522, 530 (Del. 2001).

[77] *Kurzmann v. State*, 903 A.2d 702, 710 (Del. 2006).

[78] *See Ward v. State*, 2020 WL 5785338, at *4 (Del. Sept. 28, 2020) ("The prosecutor's alleged vouching [for complaining witness's credibility in sexual abuse case when she commented in closing, "This case isn't definitely invented by [A.M.]," if it was vouching, does not satisfy the demanding plain error standard," noting [t]his is a single statement in the context of what is otherwise an unobjectionable argument concerning A.M.'s credibility."); *Cirwithian v. State*, 2021 WL 1820771, at *5-6 (Del. May 6, 2021) (finding no plain error where prosecutor

undermine N.R.'s credibility. (A167-83). During her summation, the prosecutor argued that the trier of fact, the jury, should ask themselves why N.R. would fabricate accusations that Roberson sexually abused her. (A223). The prosecutor's question properly addressed the potential motive or bias of N.R. to fabricate such accusations with an argument grounded in evidence from the trial.[79] The prosecutor's argument did not "cross the line," as it did not constitute a personal endorsement by the prosecutor of N.R.'s credibility beyond what could be inferred from the evidence or assert that N.R. was truthful.[80]

Finally, to the extent that Roberson argues for the first time on appeal that the prosecutor unfairly appealed to the emotions of the jury by invoking sympathy for N.R. (Opening Br. 13), he has failed to establish error, plain or otherwise. For the

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questioned during summation, "[w]hy would S.C. make this story up?," noting that "[i]t may perhaps have been better form if the prosecutor had argued that the trier of fact, the judge, should ask himself why S.C. would fabricate such an accusation, but the argument as made stops short of a personal endorsement by the prosecutor of S.C.'s credibility beyond what could be inferred from the evidence [and] [i]t also stops short of an assertion by the prosecutor that S.C. was truthful, correct, or right.").

[79] *See Cirwithian*, 2021 WL 1820771, at *5-6; *Burroughs v. State*, 988 A.2d 445, 451 (Del. 2010); *cf. Benson v. State*, 636 A.2d 907, 910 (Del. 1994); *see O'Neil v. State*, 691 A.2d 50, 56 (Del. 1997) ("As we have stated in the past, 'the prosecution may fairly attempt to neutralize strident defense arguments in the same manner as they were made.'" (quoting *Hooks v. State*, 416 A.2d 189, 205 (Del. 1980))); *Dailey v. State*, 956 A.2d 1191 (Del. 2008) ("During summation, a prosecutor may 'argue an inference which could be drawn from the evidence.'").

[80] *See Cirwithian*, 2021 WL 1820771, at *5-6 (citing *Whittle*, 77 A.3d at 243, 246).

reasons discussed above, the State's comment was not improper. Furthermore, the Superior Court specifically instructed the jury that their "deliberations must not be influenced by any sympathy you may feel for any person involved in this case. It's only natural and human to sympathize with people and their families who have been victims of crimes or accused of committing crimes, but you must not allow that sympathy to enter into the consideration of the case or to influence your verdict." (A270-71).

Because the prosecutor's statement was not improper, this Court need not consider the *Hughes* factors.[81] Finally, as no improper vouching occurred, the prosecutor's statement did not affect the reliability of the integrity of the outcome of the trial.

[81] *White v. State*, 816 A.2d 776, 779 (Del. 2003).

CONCLUSION

The State respectfully requests that this Court affirm the judgment below for the foregoing reasons.

/s/ Carolyn S. Hake
Carolyn S. Hake (Bar I.D. No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 North French Street, 5th Floor
Wilmington, Delaware 19801
(302) 577-8500

Dated: July 23, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD ROBERSON,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. **16, 2025**
	)	
STATE OF DELAWARE,	)	On Appeal from the
	)	Superior Court of the
Plaintiff Below,	)	State of Delaware
Appellee.	)	

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1. This answer brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

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/s/ Carolyn S. Hake
Carolyn S. Hake (Bar I.D. No. 3839)
Deputy Attorney General
Delaware Department of Justice

DATE: July 23, 2025