

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VITA DUNCAN,

Defendant-Appellee.

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Supreme Court  
No. 146296

Court of Appeals  
No. 312638

Macomb Circuit Court  
No. 2011-004401-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

STANLEY DUNCAN,

Defendant-Appellee.

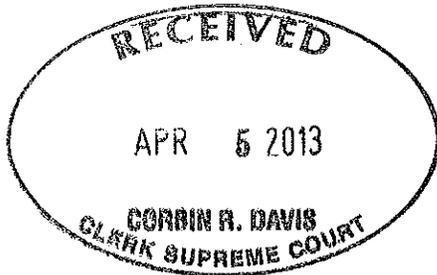
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Supreme Court  
No. 146295

Court of Appeals  
No. 312637

Macomb Circuit Court  
Nos. 2011-004304-FC  
2011-003839-FC

**REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN**



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## INTRODUCTION

The four- and one-half year-old child sexual assault victim is incompetent to testify. Under MRE 804(a), she is an unavailable witness because she cannot testify. The lower courts erred in concluding that she was not unavailable.

## ARGUMENT

### I. MRE 804(a)'s plain language is inclusive, not exclusive.

MRE 804(a)'s language is inclusive. It begins by defining unavailability to “include[]” and, then, describes five situations. MRE 804(a). It adds a sixth situation in MRE 804(b)(5)(A). Like this Court in *Meredith*, other courts have described their equivalent of 804(a) as being inclusive rather than exclusive. *State v Jefferson*, 287 Kan 28, 37; 194 P3d 557 (2008) (By using the word “includes”, the “plain language means that the classification ‘unavailable as a witness’ encompasses the situations listed but could also encompass others.”); *People v Caffey*, 205 Ill 2d 52; 792 NE2d 116; 275 Ill Dec 390 (2002) (“[T]his court has not adopted Rule 804(a) as an exhaustive definition of ‘unavailability’ under Illinois law[.]”); *Wildermuth v Michelin North America*, 187 F3d 639 (CA 6, 1999) (“Rule 804(a) lists a total of five such situations, but the list does not purport to be exhaustive.”)<sup>1</sup>

This interpretation is consistent with the ordinary meaning of the word “includes.” “Include” is defined as “[t]o take in as a part, an element, or a member”

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<sup>1</sup> The People agree with the Attorney General's analysis in his amicus brief, citing three additional cases for this same proposition. (Amicus Brief, 18.)

or “[t]o contain as a secondary or subordinate element” or “[t]o consider with or place into a group, class, or total.” *The American-Heritage College Dictionary* (1997), p 687. “[T]he word *include* does not ordinarily introduce an exhaustive list[.]” Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, (Minn: Thomson/West, 1<sup>st</sup> ed, 2012), p 132. (emphasis in original.) Instead, if an exhaustive list is intended, the word “comprise” is used. *Id.*; *The American-Heritage College Dictionary*, pp 286, 687.

Accordingly, Stanley Duncan’s arguments that the People have “failed to demonstrate that MRE 804(a) does not provide an exhaustive list of when a witness can be declared unavailable” and that this Court must strictly construe MRE 804(a) are wrong. So too is Vita Duncan’s contention that the People are asking this Court to “rewrite’ MRE 804(a) ... [to] include a definition of ‘unavailable’ that is not contained within the rule.” Instead, the People are asking this Court to follow MRE 804(a)’s plain language – just as it did in *Meredith*. If its plain language is applied as written, 4½-year-old RS is unavailable both legally and factually because she is incompetent. For this reason alone, this Court should reverse the decision of the Court of Appeals.

Indeed, defendants’ contention that the rule is limited to the six categories listed defeats one of the express purposes of this state’s evidentiary rules – to promote the “growth and development of the law of evidence to the end that the truth may be ascertained and the proceedings justly determined.” MRE 102. Rather than ascertaining the truth and justly determining the charges against

defendants, the jury will not hear RS's earlier sworn testimony given when she was competent and fully cross-examined. And, it will be required to disregard her father's compelling testimony about RS's innocent disclosure of Stanley's Duncan's sexual assaults because MRE 803(A) requires RS to testify before her statements to him are admissible.

Defendants, however, argue that there are jurisdictions that hold incompetence is not unavailability under MRE 804(a). But, the cases they rely on readily distinguishable. For example, the Washington case was one where the prosecutor failed to subpoena the 4½- and 5-year-old victims, concluding they were incompetent – contrary to that state's competency statute and without any determination by the court. *State v Ryan*, 103 Wash2d 165, 167, 171; 691 P2d 197 (1984). As the state did not even attempt to produce the children, the court correctly ruled the admission of the children's hearsay statements under Washington's statute violated the defendant's confrontation clause rights under *Ohio v Roberts*, 488 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980) – the rule then in effect. *Id.* at 171-172. Later, the Washington Supreme Court recognized that while competency and availability did not overlap entirely, an available witness was one "who can be confronted and cross-examined." *State v Doe*, 105 Wash2d 889, 895; 719 P2d 554 (1986). Therefore, "[a] child unable to take the stand obviously cannot respond to opposing counsel's questions." *Id.* The Court then remanded for a competency determination. *Id.* at 896.

As in *Ryan*, the North Carolina Supreme Court refused to hold that a 4½-year-old child was unavailable in order to admit her hearsay statements under its residual hearsay exceptions without the trial court having personally examined her. *State v Fearing*, 315 NC 167, 170, 174; 337 SE2d 551 (1985). However, when later confronted with a case involving a 4-year-old girl who was unable to respond to questions, “utterly terrified” and “frozen” in fear, the Court ruled she was unavailable under 804(a)(4) and that the state had satisfied its burden under the Confrontation Clause by producing her and attempting to elicit her testimony. *State v Chandler*, 324 NC 172, 177-178, 180-181; 376 SE2d 728 (1989). This is exactly what the People did here.

Defendants’ reliance on *State v Dwyer*, 143 Wis2d 448; 422 NW2d 121 (1988), is likewise misplaced. When *Dwyer* was appealed to the Wisconsin Supreme Court, it found that the trial court had never explored the child’s willingness to testify truthfully because it asked age-inappropriate questions. *State v Dwyer*, 149 Wis2d 850, 854; 440 NW2d 344 (1989). As the record showed the “child was able to tell what happened to her” there was “no legal justification for not allowing her to testify.” *Id.* at 856. That is not the case here as the trial court twice attempted to elicit testimony from RS.

Finally, contrary to Stanley Duncan’s suggestion, this case did not involve RS’s mere unwillingness to testify. *People v Johnson*, 118 Ill2d 501; 517 NE2d 1070; 115 Ill Dec 384 (1987). Instead, the court found RS incompetent and, therefore, she could not testify. Moreover, Stanley Duncan recognizes that Johnson

was limited in *People v Rocha*, 191 Ill App 3d 529, 536-537; 138 Ill Dec 715; 547 NE2d 1335 (1989). There, the Illinois Supreme Court ruled that a child, who was incompetent, was unavailable under its statutory hearsay exception. *Id.*

Thus, the cases decided after the ones cited by defendants actually support the People's position. And, given MRE 804(a)'s plain inclusive language, this Court has no reason to retreat from *Meredith*.

**II. The four-year-old child was also unavailable because of a then-existing mental illness or infirmity.**

As an independent second basis on which to reverse the Court of Appeals, the child was also unavailable under MRE 804(a)(4). In an earlier case, the Court of Appeals specifically held that an incompetent unavailability under MRE 804(a)(4). *People v Edgar*, 113 Mich App 528, 536 n 1; 317 NW2d 675 (1982). Numerous other jurisdictions have also held that the testimony of an incompetent child-witness is unavailable under 804(a)(4). *State v Townsend*, 635 So2d 949, 955 (Fla, 1994) (“[A]n incompetent witness is an unavailable witness within the meaning of section 90.804(1)(d)’s existing mental infirmity requirement”, meeting the unavailability requirement set forth in the hearsay exception for a child’s statement of sexual abuse); *Gov’t of the Virgin Islands v Riley*, 754 F Supp 61, 64 (D VI, 1991) (“The child’s incompetence to testify in open court is due to the weakness of the emotional state of a child of his age as compared to an ordinary adult, and thus can be said to be the result of a ‘mental infirmity.’”); *In the Matter of ADB*, 778 P2d 945, 946-948 (Okla Civ App, 1989) (incompetency of 4-year-old girl “is an ‘infirmity’ which would render her unavailable as a witness” and, therefore, her statement was admissible under a statutory hearsay exception for minor children in sexual abuse cases).

As noted by defendants, the trial court found RS did not meet the definition of “unavailability” under MRE 804(a)(4) because she did not suffer from a then-existing mental illness or infirmity. (62a.) But that finding was clearly erroneous in light of the case just cited. Moreover, the court described RS as engaging in

“post-traumatic stress hand [w]ringing” “the whole time” and as having tears in her eyes before they began streaming down her face. (59a, 103a.) Posttraumatic stress disorder is a recognized condition. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4<sup>th</sup> ed 1994), § 309.81, pp 424-429. See also *State v Contreras*, 979 So2d 896, 906-907 (Fla, 2008) (“a child witness can be ‘unavailable’ under *Crawford [v Washington]*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004)] due to mental or emotional harm that testifying can cause”); *State v Beadle*, 173 Wash2d 97, 118; 265 P3d 863 (2011) (4-year-old girl who was diagnosed with sexual abuse and PTSD was unavailable to testify under both the Confrontation Clause and 804(a)(4)). Accordingly, RS is unavailable under MRE 804(a)(4).

**CONCLUSION AND RELIEF REQUESTED**

When a child is unable to testify because she is incompetent, she is legally and factually unavailable. Applying the ordinary meaning of the rule, the child here was unavailable under MRE 804(a). Moreover, she also was unavailable under MRE 804(a)(4).

This Court should reverse the legally erroneous decisions of the Court of Appeals and the trial court and remand for further proceedings.

Respectfully submitted,

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