No. 11-____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD CARL ROSE,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Confrontation and Due Process Clauses allow a child to testify against an accused from behind a screen that prevents her from seeing the accused?

2. Given that its underpinnings have been removed by this Court's subsequent Sixth Amendment jurisprudence, should *Maryland v. Craig*, 497 U.S. 836 (1990), be overruled?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Carl Rose respectfully petitions for a writ of *certiorari* to the Court of Appeals of Michigan to review the judgment against him in *People v. Rose*, Docket No. 290936 (2010).

OPINIONS BELOW

The relevant trial proceedings are unpublished; excerpts are appended in the Appendix, at 30A to 43A. The decision of the Court of Appeals of Michigan is published at 289 Mich. App. 499 (2010); it is reproduced in the Appendix at 1A to 18A. The decision of the Supreme Court of Michigan granting leave to appeal, No. 141659, is published at 488 Mich. 1034, 793 N.W.2d 235 (2011); it is reproduced in the Appendix at 19A. The decision of that court vacating the order granting leave to appeal, together with a dissenting opinion by Justice Marilyn J. Kelly, is published at 490 Mich. 929, 805 N.W.2d 827 (2011); ; it is reproduced in the Appendix at 20A to 26A.

JURISDICTION

The Supreme Court of Michigan issued its decision vacating its prior order granting leave to appeal on December 9, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

The Fourteenth Amendment to the United States Constitution provides in relevant part: : "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Relevant portions of Michigan Comp. L. 600.2163a are reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioner was charged with four counts of first-degree criminal sexual conduct[1] and two counts of distributing obscene material to minors[2] based on allegations made by two children, referred to as JB and RB. Petitioner is the brother-in-law of the children; JB, a girl, was eight years old at the time of trial, and RB, her brother, was ten.

At the preliminary examination, in the 57th District Court for Allegan County, the court, over objection by the defense, allowed use of a screen, blocking JB's view of the Petitioner, during her testimony. At the opening of trial, in Allegan County Circuit Court, the State again moved for permission to use a screen during JB's testimony. The screen would allow the judge and jury and most of the courtroom audience to see JB and her to see them. It also allowed Petitioner to see JB

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[1] Mich. Comp. L. § 750.520b.

[2] Mich. Comp. L. § 722.675. Petitioner was initially also charged with one count of second-degree criminal sexual conduct and one count of accosting a child for immoral purposes. The state dropped these charges at the close of its case, for lack of proof.

as she testified, though it considerably dimmed his image of her. But the screen completely blocked JB's view of the Petitioner, and its placement made apparent to the jury that it had that effect.[3]

In support of its motion, the State presented the testimony of Jill VanderBent, a clinical social worker who had counseled JB. According to Ms. VanderBent, JB had expressed fear that she would not be able to" testify face-to-face with Petitioner. App. 37A. Ms. VanderBent testified that if JB could see Petitioner "it would be – could be traumatic for her,"App. 38A, causing "numbing, shutting down, not being able to speak even." App. 37A. *See also* App. 44A ("possibly not even being able to speak"), 51A ("potential to regress in her therapy"). Given the opportunity, however, she did *not* suggest that JB would "suffer any permanent emotional damage." App. 44A (answering "hard to say"). In explaining why she believed JB required unusual arrangements, Ms. VandeBent relied on JB's own expression of fear, App. 45A, but she acknowledged that there was no way of knowing whether JB would in fact be able to testify face-to-face with the accused without actually trying. App. 46-47A. Ms. VanderBent was not aware of any scientific basis for her contention that a screen would prevent regressive effects. App. 48A.

The trial court granted the State's motion, App. 52-53, placing emphasis on JB's expression of fear and the "high likelihood" that seeing the Petitioner "could cause her to regress in her therapy."

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[3] The court of appeals said that there was no information in the record concerning the nature of the screen. App. 12A. None is needed for the issue presented here: The only essential fact was that the screen was meant to, and did, block the witness's view of the accused. But in any event, at the request of the Michigan Supreme Court and pursuant to a stipulation of the parties, the record was supplemented by a set of photographs and video clips indicating the appearance of the screen in the courtroom. One of those photos is reproduced in the Appendix to this petition, at 54A. It shows clearly that the screen created a focused visual barrier, blocking the witness's view of the accused.

JB thereupon testified with a screen in front of her. RB testified in the ordinary manner.

Petitioner contended that he had been wrongfully accused; he presented testimony of JB's two older sisters suggesting that their mother had caused JB and RB to fabricate their allegations. Nevertheless, the jury found Petitioner guilty on each of the six counts presented to it. He was sentenced to 25 to 50 years in prison for each of the criminal sexual conduct counts, and 16 to 24 months in prison for each of the distribution counts, the sentences to run concurrently.

On appeal, Petitioner contended, among other points, that use of the witness screen violated his rights under the Sixth and Fourteenth Amendments to the Constitution. The Michigan Court of Appeals affirmed the judgment of conviction. That court recognized that there was no statutory basis for the screen procedure used by the trial court,[4] but it held that such a procedure could fall within courts' "inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated." App. 6A. The court further concluded that, under *Maryland v. Craig*, 497 U.S. 836 (1990), the trial court's "findings were sufficient to warrant limiting [Petitioner's] ability to confront JB face to face," and so did not violate the Confrontation Clause." App. 10A. And the court noted that, "aside from J.B.'s inability to see Rose, the use of the

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[4] The trial court relied on Mich. Comp. L. 600.2163a, but the court of appeals correctly indicated that that provision did not apply. App. 6A. Sections 15 and 16 of that statute provide for "special arrangements" if "the court finds on the record that [they] are necessary to protect the welfare" of a child witness. The specified arrangements are (1) excluding from the courtroom "persons not necessary to the proceeding," (2) rearranging the courtroom so that the accused is seated as far as is reasonable from all witnesses "and not directly in front of the witness stand," and (3) using a podium, located in front of the witness stand, for the questioning of all witnesses. If "the court finds on the record that the witness is or will be psychologically or emotionally unable to testify" even given such special arrangements, then § 17 provides for use of a video-recorded deposition; § 18 provides that "the court shall order that the witness, during his or her testimony, shall not be confronted by the defendant but shall permit the defendant to hear the testimony of the witness and to consult with his or her attorney."

witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process." *Id.*

The court of appeals next rejected Petitioner's argument that use of the screen was inherently prejudicial and violated his right to due process by impinging on the presumption of innocence. It recognized that this holding was in direct conflict with that of the Supreme Court of Nebraska in *State v. Parker*, 757 N.W.2d 7 (Neb. 2008), *modified on other grounds*, 767 N.W.2d 68 (Neb. 2009). The court expressed flat disagreement with *Parker* and instead endorsed Justice Blackmun's dissenting opinion in *Coy v. Iowa*, 487 U.S. 1012 (1988). App. 11A. It quoted approvingly his statement to the effect that because "[a] screen is not the sort of trapping that generally is associated with those who have been convicted," it is "unlikely" that it would have "a subconscious effect on the jury's attitude" toward the accused. *Id.* It acknowledged that "a juror might conclude that the witness fears the defendant because the defendant actually harmed the witness," *id.*, but it raised several other inferences that it thought a reasonable juror might draw. It also contended that "there are a variety of different screens and screening techniques that may be employed to shield a victim from having to see the defendant and, for that reason, the potential for prejudice will vary depending on the particular screen or screening technique employed." App. 12A.

The court of appeals also disagreed with the Nebraska Supreme Court's holding that the availability of other means – taking the child's testimony in another room and recording or transmitting a video representation of it – rendered the use of a screen improper. It recognized that the trial court was obliged to take steps to "minimiz[e] the prejudice" to the accused, but it believed that, as compared to use of the screen, evidence taken remotely posed equal or greater danger of prejudice. App. 13A.

Petitioner applied to the Michigan Supreme Court for leave to appeal the judgment of the court of appeals. The supreme court granted the application on February 2, 2011, instructing the parties to "address whether the use of a screen to shield a child complainant from the defendant during testimony violates the Confrontation Clause or prejudices the defendant because it impinges on the presumption of innocence." App 19A. Recognizing the importance of the issues presented by the case, the court suggested that persons or groups interested in their determination move for leave to file briefs amicus curiae, and it specifically invited the Prosecuting Attorneys Association of Michigan (PAAM) and the Criminal Defense Attorneys of Michigan to file such briefs.

The parties briefed the case, and three briefs amicus curiae, all in support of the state, were submitted – one by PAAM, one by the state's attorney-general, and one by the University of Michigan Family Assessment Clinic, Dr. James Henry, and the Michigan Court Appointed Special Advocates. The court heard oral argument on October 5, 2011. On December 9, 2011, the court issued an order vacating the order of February 2 and denying leave to appeal the judgment of the court of appeals. Invoking a formula that it has used in numerous recent cases, the court said simply that it was "no longer persuaded that the questions presented should be reviewed by this Court." App. 20A.

Justice Marilyn J. Kelly filed an extensive dissent. Without reaching the Confrontation clause issue, she concluded that "the witness screen violated [Petitioner's] right to due process by impinging on the presumption of innocence." App. 23A. Methodically responding to the alternative inferences suggested by the court of appeals, the prosecutor, and supporting amici, she said, "The only inference that a reasonable juror could draw from the use of the witness screen is that JB was afraid of defendant because he abused her." *Id.* And she also rejected the court of appeals'

conclusion that the State's interest in protecting the child justified use of the screen. Invoking the decision of the Nebraska Supreme Court in *Parker*, she asserted that the trial court had "numerous alternative ways of presenting child witness testimony" that "would allow reasonable jurors to draw innocuous inferences rather than brand the defendant as guilty." App. 24A-25A.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. INTERVENTION BY THIS COURT IS NECESSARY TO RESOLVE A CONFLICT AMONG THE STATES AS TO WHETHER A CHILD WITNESS MAY TESTIFY FROM BEHIND A BARRIER THAT PREVENTS HER FROM SEEING THE ACCUSED.

A. The States are in Conflict on the Constitutionality of this Procedure.

Coy v. Iowa, 487 U.S. 1012 (1988), like this case, concerned the use of a screen that blocked a child witness's view of the accused but that let the accused see the witness, albeit with some impairment. This Court held that the right to "a face-to-face meeting" with adverse witnesses was an integral part of the Sixth Amendment' guarantee of confrontation, *id.* at 1016, and that it was "difficult to imagine a more obvious or damaging violation" of that right than the procedure used there. *Id.* at 1020. The Court did, however, leave open the possibility that there might be exceptions to the right, supported by "individualized findings" of a need for protecting the witness. *Id.* at 1021. *Maryland v. Craig*, 497 U.S. 836 (1990), took advantage of the opening and ruled that the Sixth Amendment does not treat the right to face-to-face confrontation as "indispensable." *Id.* at 849. The Court held that, upon an adequate, case-specific showing of necessity, "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case" justifies the use of a special

procedure – there, closed circuit television(CCTV) – that wold permit the child to testify without a face-to-face confrontation with the accused. *Id.* at 855.

This part of the petition assumes that *Craig* remains good law and that, given an appropriate showing of necessity, a child may constitutionally testify against an accused without confronting the accused face to face. Thus, it assumes that the child may give testimony in some manner outside the presence of the defendant and other than in the courtroom at trial, either by a video-recorded pre-trial deposition or (as in *Craig* itself) by CCTV.

In this case, however, the court did something much different: As in *Coy*, it placed a screen in the courtroom to obstruct the witness's view of the accused. Petitioner contends, as discussed below, that this procedure creates an intolerable risk of prejudice, making it clear to the jury that the court was protecting the witness against the accused, and that it therefore violates both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The decision of the Michigan courts in this case deepens a conflict among the states – a conflict that only this Court can resolve – concerning the constitutionality of such a procedure.

Michigan joins a small group of states that, given a showing of necessity, allow such a procedure, deeming it to be consistent with the United States Constitution. Relying, as did the Michigan Court of Appeals in this case, on *Maryland v. Craig*, the Montana Supreme Court upheld the use of a screen against constitutional attack in *State v. Davis*, 830 P.2d 1309 (Mont. 1992); indeed the court allowed the screen in that case even though, as three dissenting justices pointed out, the placement of the screen prevented the accused from observing the children as they gave their testimony. The Montana Supreme Court has recently cited *Davis* approvingly. *State v. Stock*, 361 256 P.3d 899, 904 (2011).

Alaska goes even further: In some circumstances, it authorizes the use of one-way mirrors, which "shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors." Alaska St. § 12.45.946(e). The Alaska courts have assumed the constitutionality of this measure, given appropriate findings. *See, e.g., Humphrey v. State*, 1999 WL 46541, at n.1 (Alaska App. 1999).

A decision of the Wisconsin Supreme Court issued one day before this Court's decision in *Coy* upheld against constitutional attack a procedure in which a child testified from behind a screen at a video-recorded deposition. *State v. Thomas*, 425 N.W.2d 641 (Wis. 1988) (*Thomas I*). The court reconsidered the case after *Coy* and confirmed its holding. *State v. Thomas*, 442 N.W.2d 10, *cert. denied*, 493 U.S. 867 (1989) (*Thomas II*).[5] The *Thomas* decisions remain the law of the state, and have been applied to uphold against constitutional challenge testimony given live at trial from behind a screen. *State v. Vogelsberg*, 724 N.W.2d 649 (Wis. App. 2006), *cert. denied*, 550 U.S. 936 (2007).[6]

The vast majority of states, however, do not allow children to testify from behind a screen or other obstruction in the courtroom. Most states have statutes authorizing special arrangements

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[5] The *Thomas II* court said there was no possibility of prejudice because the jury did not see the screen, 442 N.W.2d at 17 – an assertion that appears to be not quite accurate, *see Thomas I*, 425 N.W.2d at 648 ("We have carefully viewed the entire videotaped testimony that was shown to the jury. The videotaped deposition showed the screen at the start of the tape for a few seconds . . ."). In any event, the significance of what the jury may not have seen is essentially nullified by what the trial judge *told* the jury – that the accused "was present, but outside the view of the witness." *Thomas II*, 442 N.W.2d at 17. *See also Thomas I*, 425 N.W.2d at 648 (a juror aware of the barrier "would likely conclude, given the nature of the assaults, that the measure was designed to reduce the trauma attending to the child's testimony").

[6] Although the prosecution in *Vogelsberg* had originally asked for the child's testimony to be given by closed circuit television, 724 N.W.2d at 650, it was in fact given in the courtroom from behind an opaque screen. Petition for Certiorari, *Vogelsberg v. Wisconsin*, No. 06-1253, at 7.

for the testimony of children on a showing of necessity. Virtually none of these cases authorize courtroom obstructions; they rely instead on methods with less prejudicial potential, such as CCTV. *State v. Parker*, *supra*, 757 N.W.2d at 16-17 ("in contrast to the use of closed-circuit or videotaped testimony, screens are rarely used as an accommodation of child witnesses"). For example, the statute involved in *Coy,* which explicitly authorized testimony from behind a screen, Iowa Code § 910.14A, was repealed in 1998; its replacement, Iowa Code § 915.38, authorizes various electronic means of presenting the child's testimony, but not use of any kind of barrier. Some state constitutions have been held to bar obstructions. *E.g., Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997).[7] But at least three state supreme courts have recognized that the United States Constitution is violated when a witness testifies against the accused with a visible obstruction between the two.

The Michigan Court of Appeals took explicit note in this case of its disagreement with the Nebraska Supreme Court's decision in *State v. Parker*. In *Parker*, as here, there was evidence that a child making an accusation of sexual molestation could suffer serious psychological harm if forced

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[7] *Amirault* dealt with seating arrangements under which the witness did not see the accused. Its language was very broad:

> The witness must give his testimony to the accused's face, and that did not happen here. Moreover, it is a non sequitur to argue from the proposition that, because the witness cannot be forced to look at the accused during his face-to-face testimony, that therefore this aspect of the [state] confrontation right is dispensable. The witness who faces the accused and yet does not look him in the eye when he accuses him may thereby cast doubt on the truth of the accusation. See *Coy v. Iowa* . . . . The child witnesses in these cases did not testify to the face of the accused. Though they were aware of the presence of the accused, the arrangement was such – and deliberately so – that they could testify quite comfortably and naturally without ever having the accused in their field of vision.

424 Mass. at 632, 677 N.E.2d at 662.

to view the accused face to face and that she might be unable to testify fully under that condition; there, as here, the child testified at trial from behind a screen that blocked her from seeing the accused.[8] The Nebraska Supreme Court held that this practice violated the Due Process Clause of the 14th Amendment by impinging on the presumption of innocence. That court concluded that placement of a screen between the child witness and the accused was "inherently prejudicial," 757 N.W.2d at 18, likely to lead jurors to infer "that the court had placed the screen for [the witness's] protection because the court believed her accusations were true." *Id.* at 17. Recognizing that protection of the child was a compelling state interest, *Parker* nevertheless held that use of the screen could not pass close scrutiny, because the trial court "had available another equally effective method" of protecting the child that was *not* inherently prejudicial: a state statute specifically authorized "pretrial videotaping or closed-circuit video from another room." *Id.* at 18. In a recent case a Florida appellate court, closely followed *Parker* in ruling that use of a screen between a child witness and the accused was "inherently prejudicial."[9]

In *Richardson v. State*, 581 S.E.2d 528, 530 (Ga. 2003), the Georgia Supreme Court held that the confrontation right entitles the accused to "a face-to-face meeting with witnesses appearing before the trier of fact," *quoting Coy*, 487 U.S. at 1016, including "an unobstructed view of them

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[8] The screen in *Parker* apparently also prevented the accused from seeing the witness, but the *Parker* court did not rely on that fact, and the Michigan Court of Appeals did not attempt to distinguish the cases on that basis. *Compare People v. Lofton*, 740 N.E.2d 782, 794 (Ill. 2000) (holding use of podium as a barrier between witness and accused violated confrontation right, where accused had "no view of the testifying victim whatsoever").

[9] *McLaughlin v. State*, 2012 WL 469830 (Fl. 4th Dist. Ct. App. Feb. 15, 2012).

while they were on the stand."[10] Similarly, the Kentucky Supreme Court, also basing its decision on the Confrontation Clause, has warned trial judges against "tolerating *any* kind of courtroom arrangement which impedes eye-to-eye contact between the defendant and witnesses." *Star v. Commonwealth*, 313 S.W.3d 30, 40 (Ky. 2010) (emphasis added).[11] *See also Fuson v. Tilton*, 2007 WL 2701201 (S.D. Cal. Sept. 10, 2007) (distinguishing child choosing to shield her face while testifying from use of a physical barrier, as in *Coy*, in which "the witness' view of the accused would be blocked without any action on the part of the witness that the jury could consider as part of her demeanor").

The conflict among the states is not only important, governing the conditions under which children who allegedly have been the victims of abuse shall give their testimony, but also a simple one, not bound to the facts of any particular case: Some states hold that the Confrontation and Due Process Clauses both tolerate use of a barrier between the accused and the child as she testifies, and some states do not. The conflict will not be resolved without intervention by this Court.

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[10] *Richardson* involved adult witnesses and seating arrangements rather than a physical barrier. But it was applied in *Harris v. State*, 604 S.E.2d 565 (Ga. App. 2004), to use of a physical barrier – a blackboard – placed between the accused and a child witness, allegedly the victim of sexual molestation. Harris contended that he could not see the child and she could not see him, and the appellate court clearly implied that if this were so there would have been a confrontation violation. But the court concluded that in fact Harris could see the child and that she could see him – "though not as easily as she might have without the blackboard," 604 S.E.2d at 568 – and so held that there was no confrontation violation.

[11] *Star* involved use of seating arrangements to shield adult witnesses. It relied on *Sparkman v. Commonwealth*, 250 S.W.3d 667 (Ky. 2008), which held that the prosecutor violated the Confrontation Clause, as well as the state constitution and a state statute authorizing special arrangements for children's testimony in some cases, by standing between the child witnesses and the accused. In both cases, the error was deemed harmless. These cases appear to be in conflict with an earlier, unreported decision of the same court, *Washington v. Commonwealth*, 2005 WL 924332 (Ky. 2005), which has not been cited by any reported decision.

B. Allowing a Witness to Testify Against an Accused from Behind a Screen Violates the Due Process and Confrontation Clauses.

This petition is supported not only by the existence of the conflict, but also by the merits of the case – even assuming the continued vitality of *Craig* – under both the Due Process and Confrontation Clauses.

1. Due Process

The analysis offered by Justice Kelly in this case, and by the Nebraska Supreme Court in *Parker*, is clearly correct: Placing a screen in the courtroom between witness and accused violates the Due Process Clause by impinging on the presumption of innocence. This Court has recognized repeatedly that the presumption of innocence is a basic component of a fair trial, and that it is undermined by a practice that is "inherently prejudicial"; the test for such a practice is whether "an unacceptable risk is presented of impermissible factors coming into play," and if so the practice can be allowed only if it survives close judicial scrutiny, which demands that it be "justified by an essential state interest specific to each trial." *E.g,, Deck v. Missouri*, 544 U.S. 622, 627-28 (2005); *Holbrook v. Flynn*, 475 U.S. 560, 567-70 (1986); *Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976).

In determining whether a practice is "inherently prejudicial," the key consideration is whether, as in *Holbrook*, a juror might reasonably draw a "wider range of inferences" than that the accused has been branded "with an unmistakable mark of guilt." *Holbrook*, 475 U.S. at 569, 571, *quoting in part Estelle*, 425 U.S. at 518. Here, as Justice Kelly observed, "[t]he only inference that a reasonable juror could draw from the use of the witness screen is that JB was afraid of defendant because he abused her." App. 23A.

Justice Kelly carefully disposed of the supposed alternative inferences raised by the Michigan Court of Appeals. First, a reasonable juror could not conclude that the witness was afraid to look on the accused because she was not testifying truthfully: "Courts are not in the habit of protecting people who proffer perjured testimony. . . . Permitting the screen sent the jury the message that the court deemed the witness to be worthy of protection *from the defendant*." App. 23A (emphasis added). Second, a juror could not reasonably conclude, as the Michigan Court of Appeals did, that the screen was "used to calm the witness's general anxiety about testifying rather than out of fear of the defendant in particular,"App. 12A; given that she could see the other participants in the trial, "[t]he screen's only function in this case was to block JB's view of the defendant." App. 23A. Third, the court of appeals said that "anytime a child victim testifies against a defendant who is accused of harming the child victim, the jury is going to reasonably infer that the child has some fear of the defendant." App. 12A. It hardly seems likely that the jury would infer that the judicial system thought it necessary to engage in he highly unusual step of placing a barrier between the child and the accused because of a fear that she feels in common with all children – irrespective of the accuracy of their accusations – in a similar situation. Besides, as Justice Kelly pointed out, any suggestion that the jury might infer that screening is standard practice is precluded by the fact that JB's older brother, RB, testified without the screen. App. 24A.

In any event, the proper question should not be whether the *only* possible inference the jury could draw is a prejudicial one. The proper question is whether there is an "unacceptable risk." *Estelle v. Williams*, 425 U.S. at 505. It seems clear that the jury would at least *likely* infer from the screen "that JB was afraid to face the dangerous defendant because he had abused her." App. 24A.

That is especially so given that there is no countervailing consideration that would justify use of the screen given the prejudice that it creates. As Justice Kelly and *Parker* both pointed out, the trial court has other means of blocking the accused from the view of the witness that would not have entailed any prejudice. Most notably, the court could have ordered that the child's testimony be taken in a smaller room, before trial by a videotaped deposition or during trial by CCTV. As in *Craig*, the accused might have been placed outside that room but in electronic contact with his counsel. Better yet, the accused could have been kept behind a screen in that room, *see* Conn. Gen. Stat. § 54-86g(a), so long as it was not made apparent to the jury – either verbally or by the videotape itself – that there was a barrier between the witness and him. Such a method is superior to an in-court barrier because it is not focused on the accused: The court could explain to the jury, entirely accurately, that the procedure allowed the child to testify in greater comfort, in a smaller room and with fewer people present. And if the accused was behind an off-camera screen, the court could even state, also accurately, that the accused was present in the room when the child gave her testimony.[12]

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[12] The Michigan Court of Appeals, while recognizing that the trial court had a responsibility to "minimiz[e] the prejudice" to the accused, App. 13A, suggested that the procedure used in this case might not be more prejudicial than CCTV, with counsel in the same room as the witness, because in that case "it will be patently obvious to the jury that the parties' trial counsel left the courtroom to interrogate the witness rather than bring the witness into the courtroom." *Id.* This assertion simply shows that the court failed to recognize why the screen is prejudicial. Testifying in a smaller room, in the presence of fewer people – no gallery, no jury – is likely to be, and appear to the jury to be, more comfortable for the child even without taking the accused into account. The in-court screen procedure, by contrast, only shields out the accused, and that is obvious to the jury. Moreover, this argument says nothing about procedures, such as the one suggested in the text, in which it is *not* made apparent to the jury that the witness is not face-to-face with the accused when she gives her testimony.

The court also said that "use of video equipment deprives the jury of the ability to see the witness in person and judge his or her reactions without the distorting effects created by the use of videorecording devices." *Id.* Such distortions are likely to be minimal, given the quality of modern video equipment – but in any event they are not nearly as prejudicial to the accused as the message of guilt conveyed by the in-court screen. Moreover, it must be borne in mind that although the right

Given the ready availability of such alternatives, why would a trial court allow use of a prejudicial in-court barrier? An answer may be gleaned from advice given in a widely distributed manual in Canada; unburdened by constitutional constraint, the authors have no need to concoct reasons that might satisfy an "essential state interest" standard: "Relative to the CCTV option," they wrote,

> there are some advantages offered by the screen.
>
> • It is cheaper than the sophisticated equipment of the CCTV option.
> • You will not encounter technical glitches and delays.
> • It is easily moved from courtroom to courtroom and stored between uses.
> • It can be erected at the last minute or kept on standby as a backup.[13]

In other words, a screen is cheap and convenient, and requires little or no planning. Such considerations could not justify *any* substantial risk of prejudicing a constitutionally protected right.

2. Confrontation

Again assuming the continued vitality of *Craig*, the analysis is similar under the Confrontation Clause. *Coy*, like this case, considered the use of a screen placed between the accused and alleged victims of child molestation. The Court held, "It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." 487 U.S. at 1012. While asserting that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.," *id. at* 1016, the Court did leave open the possibility of

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to be face to face with the witness is, as *Coy* emphasized, an integral aspect of the confrontation right, the accused has no comparable right to have the witness give her testimony in the presence of the jury; it has long been established that if the witness is unavailable then prior testimony taken subject to confrontation may be introduced, even if only by transcript.

[13] ALISON CUNNINGHAM AND PAMELA HURLEY, USING SPECIAL ACCOMMODATIONS AND TESTIMONIAL AIDS TO FACILITATE THE TESTIMONY OF CHILDREN, BOOK 3: WITNESS SCREENS (2007), p. 3 (available at <http://www.lfcc.on.ca/3_WitnessScreens.pdf>).

exceptions, but "only when necessary to further an important public policy." *Id.* at 1021. *Craig* took up the invitation to delineate exceptions, but it did not challenge the core holding of *Coy* that denial of face-to-face confrontation is presumptively a violation of the Confrontation Clause. Rather, it held 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." 497 U.S. at 850. Here, the accused was clearly denied "a physical, face-to-face confrontation at trial." But given that the procedure used by the trial court posed a serious danger of prejudice, and that the same state interests could have been achieved without prejudice by other procedures, it cannot be said that the procedure used was "necessary to further an important public policy."

II. REVIEW BY THIS COURT IS NECESSARY TO DECIDE THE CONTINUING VITALITY OF *CRAIG*.

The discussion thus far has assumed that *Craig* remains good law. But this Court's subsequent decisions, especially *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), cast grave doubt on the continued vitality of *Craig*.

Craig was decided during the era when *Ohio v. Roberts*, 448 U.S. 56 (1980), governed the jurisprudence of the Confrontation Clause; the scope of the Clause with respect to out-of-court statements was deemed to be as broad as the traditional rule against hearsay, but application of the Clause could be defeated by judicial determination that a given statement was reliable. *Id.* at 66. This orientation – willingness to dispose of confrontation on a particularized showing of reliability rather than treating the Clause as a categorical protection – pervaded the Court's consideration in

Craig of the conditions under which a child could testify. Thus, the Court summarized its precedents as establishing that

> the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts*, . . . 448 U.S. at 63 (emphasis added [in *Craig*]; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox* [*v. United States,*]156 U.S. at 243.

497 U.S. at 849.

Crawford, in overruling *Roberts*, cut the theoretical legs from under *Craig*. First, *Crawford* strongly suggested, and subsequent cases confirmed, *Davis v. Washington*, 547 U.S. 813, 823-25 (2006); *Whorton v. Bockting,* 549 U.S. 406, 420 (2007), that, contrary to the indication in *Roberts*, not all hearsay falls within the ambit of the Confrontation Clause; rather, only statements testimonial in nature do. 541 U.S. at 51-52. This eviscerates a key point of the logic of *Craig*, 487 U.S. at 848-49, that the Confrontation Clause cannot impose a categorical requirement of face-to-face confrontation, because otherwise the Court would have had to hold that the Clause precluded hearsay in cases such as *Bourjaily v. United States*, 483 U. S. 171 (1987), and *United States v. Inadi*, 475 U. S. 387 (1986), *Crawford* makes clear, 541 U.S. at 56, that the reason the Clause did not require exclusion of the statements in those cases was that they were not testimonial; those cases say nothing whatsoever about a categorical requirement of face-to-face confrontation.

More fundamentally, *Crawford* indicates throughout that the Confrontation Clause *should* be read in categorical terms, rather than as a balance of a constitutional preference that can be overcome, if the evidence is deemed sufficiently reliable, by countervailing policy concerns. *See, e.g.*, 541 U.S .at 54 ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."), 61 ("Where testimonial

statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"), 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."), 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.").

To be sure, *Crawford* and *Craig* address different questions – *Crawford* deals with the circumstances in which an out-of-court declarant must be subjected to confrontation, and *Craig* deals with the nature of the confrontation.[14] But *Crawford* represents a conception of the Confrontation Clause that is utterly incompatible with the theoretical foundation on which *Craig* rests.

The Court subsequently recognized that fact in *Gonzalez-Lopez*, a case involving the right to counsel. The Court's opinion there referred to *Craig* disparagingly – and in the past tense:

> What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts*, 448 U.S. 56 (1980)) with regard to the Sixth Amendment's right of confrontation – a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. See *Roberts*, . . . at 65–66. We rejected that argument (and our prior cases that had accepted it) in *Crawford v. Washington*, 541 U.S. 36 (2004). . . .

Certainly it is at the very least plausible that *Craig* is no longer good law. Lower courts have repeatedly recognized the tension between *Crawford* and *Craig*. *E.g., United States v. Sandoval*,

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[14] Thus, shortly after *Crawford*, Petitioner's counsel wrote that the two cases could "coexist peacefully." Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO S. CT. REV. 439, 454. But he was just talking about the results of the two cases, given that the questions they addressed were different. He made clear at the same time that the theoretical basis of *Crawford* was in line with that of the dissent in *Craig* rather than that of the majority opinion.

2006 WL 1228953, at 9 (*Crawford* "may have called into question" the holding of *Craig*), 11 (D.N.M. 2006); *Vogelsberg, supra*, 724 N.W.2d at 654 (noting "language from *Crawford* that would appear to call into question the continued validity of Craig"). At the same time, they have properly recognized that this Court alone can determine whether *Craig* remains good law. *E.g., Horn v. Quarterman*, 508 F.3d 306, 319 (5th Cir.2007) ("[W]e are not at liberty to presume that Craig has been overruled sub silentio."); *see State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting that "it is this Court's prerogative alone to overrule one of its precedents").

Overruling *Craig* would not mean that every child making an allegation of molestation would have to testify subject to confrontation.[15] In many cases, a court could find that the accused forfeited the confrontation right. *See Giles v. California*, 554 U.S. 353, 380 (2008) (Souter, J., concurring) (concluding that "the element of intention [deemed necessary by *Giles* for a determination that the accused had forfeited the right] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help").[16] Furthermore, it may be that the Confrontation Clause is altogether inapplicable to very

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[15] It should also be noted that, as found by one review of the scientific research, symptoms of anxiety and distress from testifying "are short-lived for most children." Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. TRAUMATIC STRESS 149, 155 (2003); *see also id.* at 152 (noting another study involving 12-year follow-up interviews: "No significant long-term negative impact was observed among participants who had been court-involved for sexual abuse, even among those who testified."), 151 (noting that there *is* a "negative effect of having to endure multiple interviews during the course of the investigation and adjudication process."). *See also* JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 188 (5th ed. 2011) ("In the final analysis, although testifying is difficult, children weather the storm.").

[16] In this case, the State has made no contention that the accused forfeited the confrontation right.

young children who as yet are so undeveloped that they should not be deemed capable of being witnesses for purposes of the Clause.[17]

There is no need to determine these subsidiary issues now, and they are not presented by this petition. But it has been, as of the date of this petition, eight years since this Court decided *Crawford*. The *Craig* issue affects many prosecutions of child abuse every year. If *Craig* is no longer viable, then the rights of criminal defendants should be protected. And if *Craig* still is the law, then the cloud hanging over it should be removed.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR DETERMINATION OF THE QUESTIONS PRESENTED.

This case poses the questions presented in a clean, crisp manner. The case comes here on direct appeal, rather than on habeas.

The issues were properly preserved. There is no possibility that the errors claimed were harmless. *See Coy*, *supra*, 487 U.S. at 1021-22 ("An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence."). There was no other evidence for most of the key assertions to which JB testified from behind the screen.

There is no jurisdictional problem.

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[17] *See* Richard D. Friedman, *Child Witnesses on the Academic and Judicial Front,* <http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html> (suggesting that some very young children are "just not capable of engaging in the kind of activity – witnessing – covered by the confrontation right," but they are still sources of evidence, and so the accused should have a due process right to have a qualified child psychologist evaluate the child). In this case, JB was certainly cognitively capable of being a witness, and the State treated her as one.

The case also presents the Court with a choice. The Court can, if it wishes, simply resolve the conflict among the states regarding the use of in-court barriers between witness and accused, without reaching the broader issue of the continuing vitality of *Craig*. But if it wishes, it also can address that long-standing issue.

Moreover, the case is a particularly good vehicle for considering *Craig*, because it illustrates how vulnerable that decision makes the confrontation right. In this case, the accused was denied the right to face-to-face confrontation principally because the child expressed fear of testifying in the presence of the accused. There was no certainty that the child could not testify subject to confrontation. No attempt was made to determine whether in fact she could do so, and little or no effort was made – such as by visiting the courtroom, a standard preparatory technique[18] – to improve the chances that she would be able to do so. A social worker who professed no knowledge of the scientific literature on the subject testified briefly and in very general terms that the child *could* regress in her therapy if she testified while able to see the Petitioner, and she offered no opinion, and no reason to believe, that the child would likely suffer long-term trauma. This case, then, demonstrates how easy the *Craig* test is to satisfy, making the criminal defendant's right to be confronted face to face with adverse witnesses little more than a matter of the witness's desire and the discretion of the prosecutor.

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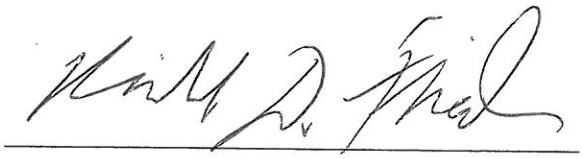
[18] *See, e.g.,* National Center for Missing & Exploited Children, *Just in case . . . Guidelines in case your child is testifying in court* (2005) (A visit to the courtroom when it is not in session can demystify the experience for your child. The victim/witness advocate or guardian ad litem can . . . show your child where he or she will be seated, point out where the defendant will be seated . . . .).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 8th day of March, 2012.



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