No. 11-9259

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The lengthy recitation of trial evidence in the Brief in Opposition (BIO) should not obscure two basic facts: (1) There is a sharp conflict among the states as to whether the Constitution allows a child to testify against an accused from behind a screen that prevents her from seeing the accused. (2) Only this Court can decide whether, given that the underpinnings of *Maryland v. Craig*, 497 U.S. 836 (1990), have been removed by this Court's subsequent Sixth Amendment jurisprudence, that case should now be overruled.¹

I. THERE IS A FULLY DEVELOPED CONFLICT AS TO THE CONSTITUTIONALITY OF WITNESS SCREENS.

The Respondent states, rather mystifyingly, that Petitioner "implicitly conced[es] that his chances in this case rely entirely on the Court overruling [Maryland v.] Craig." BIO at 23. That is simply not true. In discussing the first Question Presented, the Petition assumed "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." Petition at 6. The question remains, even given that assumption, whether the Constitution "allow[s] a child to testify against an accused from behind a screen that prevents her from seeing the accused." Question Presented 1. Thus, the issue under this Question is not whether

¹ The question of Petitioner's guilt, of course, is not before the Court at this time. In light of the Respondent's recitation of the evidence, Petitioner affirms that he continues to maintain his innocence, Pet. at 4, and hopes to prevail on a retrial.

a state may in some circumstances allow a child witness to provide trial testimony without physically confronting the accused; *Craig* says that it may. Rather, the issue is whether the state may accomplish that objective by using a screen in the courtroom, in such a way that the jury will inevitably know that the state is protecting the child from seeing the accused.

Despite Respondent's attempt to characterize the split of the lower courts on that issue as not "mature," BIO at 29-31, it is in fact very crisp. Most clearly, the decision in this case is in conflict with that in *State v. Parker*, 757 N.W.2d 7 (Neb. 2008), *modified*, 767 N.W. 68 (Neb. 2009). Indeed, the Michigan Court of Appeals explicitly noted the conflict. It stated accurately that *Parker* "held that the use of a screen is inherently prejudicial," and after quoting and summarizing *Parker* declared, in agreement with Justice Blackmun's dissent in *Coy v. Iowa*, 487 U.S. 1012 (1988), "We do not agree that the use of a screen is inherently prejudicial." App. 11A. ² Furthermore, the court's express disagreement with *Parker* applied to underlying reasons as well as to the result. *Parker* held that "there were no other innocuous inferences the jury would have been likely to derive from the screen." 757 N.W.2d at 17. The Michigan court explicitly disagreed, App. 11A, and listed alternative inferences that it believed the jury could draw. App. 11-12A.³

² Compare Coy, 487 U.S. at 1020 (majority opinion, recognizing use of screen to block child witness's view of accused as an extremely "damaging" violation of defendant's rights).

³ As already noted in the Petition, at 3-14, Justice Marilyn Kelly, dissenting from the order of the Michigan Supreme Court in this case, persuasively disposed of each of these alternative inferences. Respondent endorses the recitation of the court of appeals, BIO at 30,

Respondent's attempt to minimize the conflict is based on differences in the screen used in *Parker* and in this case. In *Parker*, the screen was larger and blocked the accused's view of the witness as well as her view of him; in this case, the accused was able to see the witness, though the screen considerably dimmed the image he perceived. Petition at 3. But the difference is inconsequential so far as the question of prejudice is concerned. Respondent acknowledges at the very outset the critical fact that demonstrates that prejudice: "The screen's *only* effect was to block J.B.'s view of Rose." BIO at 3 (emphasis added).

Indeed, given that the screen was large enough to block the witness's view of Petitioner, and was plainly designed to do so, the relatively small size of the screen could only have augmented the prejudice; this made it clear that the purpose of the screen was not to provide general comfort for the witness, but *only* to protect her from the accused.

Nor does the fact that Petitioner could see the witness through a tinted one-way window in the screen distinguish the cases. *Parker* spoke of "the inherent prejudice resulting from the jury's awareness of an officially sanctioned protection from the defendant." 757 N.W.2d at 17. Thus, *Parker* indicated that use of a screen, like allowing a witness to testify in disguise, "improperly communicated to the jury that the defendant was dangerous or culpable." *Id.* And it elaborated:

without offering further reasons in support of it or attempting to refute Justice Kelly's demonstration.

The screen remained a constant presence during S.M.'s testimony. The screen stood there protecting S.M. as she told the jury how fearful she was of Parker. The screen was, in effect, a judicially sanctioned prop that lent credence to the witness' claims. * * *

It would have been a matter of common sense for the jurors to conclude that the court had placed the screen for S.M.'s protection because the court believed her accusations were true. We find it hard to imagine a practice more damaging to the presumption of innocence than one from which the jury may infer the court's official sanction of the truth of the accuser's testimony.

Id. None of this analysis depended on the inability of the accused to see the child.⁴ The prejudice to which *Parker* referred arises, of course, from the fact that the jury sees that the *child*'s view of the accused is blocked; if this is true, it does not matter how that blocking is accomplished, or whether the *accused* can see the child.⁵

If the court of appeals had thought it could reconcile its analysis with *Parker* in a plausible way, presumably it would have said so, distinguishing *Parker* rather than

⁴ The *Parker* court did say later in the opinion, in discussing whether innocuous inferences could be drawn from use of the screen.

The scene presented of the jurors watching Parker as he was forced to look onto a large panel instead of his accuser makes palpable the marks of shame and guilt caused by this looming presence in the courtroom.

⁷⁵⁷ N.W.2d at 18. The passages quoted above, however, make clear that *Parker* did not regard the accused's in ability to see the witness as essential to its conclusion that the screen was inherently prejudicial. Moreover, in this case the jurors only saw the opaque side of the screen; so far as they could tell, the accused could *not* see the child, so "the marks of shame and guilt" are the same here as in *Parker*. And even if somehow the jurors did realize that Petitioner could see the witness through the screen, it would still be true that Petitioner was forced to look on his accuser through a tinted screen, rather than directly – which still "makes palpable the marks of shame and guilt caused by this looming presence in the courtroom."

⁵ If the child *were* able to see the accused, preventing the accused from seeing her might provide some protection to the witness, and therefore some prejudice to the accused; if the accused knew that the child could see him, then it would be far easier for him to intimidate her if he was able to see her and gauge her reactions to his conduct. But in the actual case, as in *Parker*, the child could not see the accused, and so she was immune from intimidation by him whether he could see her or not.

creating a conflict with the decision of a sister state's supreme court. But it squarely rejected *Parker* and never suggested the cases were compatible. In the supreme court, Respondent attempted to distinguish the cases. Brief of Appellee, *People v. Rose*, No. 141659 (Mich. Sup. Ct. 2011), at 17. Only Justice Kelly wrote on the merits – and she quoted *Parker* approvingly without needing to demonstrate that there was no material factual difference between the two. App. 24A.

The point is confirmed by *McLaughlin v. State*, 79 So.3d 226 (Fl. 4th Dist. Ct. App. 2012). That decision held that the use of a screen was inherently prejudicial, and therefore violative of the presumption of innocence,⁶ in circumstances that it characterized as "strikingly similar" to those of *Parker*, *id.* at 228 – even though in *McLaughlin* the accused was able to observe the witness, on a television monitor, as she testified. *Id.* at 227. The *McLaughlin* court quoted *Parker* at length, and closely followed its analysis, *id.* at 228 (describing *Parker* as holding "that placing a screen between the victim and the defendant while the victim testified was inherently prejudicial"), without feeling any need to discuss this fact.

Parker and McLaughlin held use of a witness screen to be incompatible with the presumption of innocence, and therefore in violation of the Due Process Clause. (This was Justice Kelly's conclusion as well.) As discussed in the Petition, at 11-12, other courts have held that the Confrontation Clause is violated by arrangements in the courtroom that impede eye-to-eye contact between the accused and witnesses,

⁶ The court also held that use of the screen "was not authorized by the applicable [state] statute." 79 So.3d at 227.

including child witnesses. So long as *Craig* is good law, of course, the possibility remains of allowing a child, on a sufficient showing of probable trauma, to testify without being in the presence of the accused. But that does not mean that such a showing wipes the confrontation right out altogether, justifying any procedure at all. *Craig* allows an alternative procedure only when it is "necessary to further an important public policy." 497 U.S. at 850. Given the availability of less prejudicial alternatives, Petition at 15-16, including the use of closed circuit television, the highly prejudicial screen procedure is never necessary.

The simple fact remains: Michigan is one of a small number of states (Alaska, Montana, and Wisconsin are the others of which Petitioner is aware) that have concluded that the Confrontation and Due Process Clauses both tolerate use of a barrier between the accused and the child as she testifies. Other states have concluded that one or the other of these Clauses does not tolerate such a procedure.⁷ The conflict is fully developed. Only this Court can resolve it.

⁷ As discussed in the Petition, at 9-10, most states, while providing for some special arrangements for child witnesses, reject the use of a screen without needing to reach the question of the validity of the procedure under the United States Constitution. Note in particular *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997), relying on the state constitution, but on grounds that could equally well have been applied under the United States Constitution.

II. ONLY THIS COURT CAN DECIDE WHETHER *CRAIG* REMAINS GOOD LAW DESPITE SUBSEQUENT DECISIONS OF THIS COURT.

As the Petition pointed out, at 17-19, Crawford v. Washington, 541 U.S. 36 (2004), cut the theoretical legs from under Craig, and United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), confirms that point: Craig is based on a discarded way of thinking about the Confrontation Clause, as an open-ended balancing test that countenances the absence of confrontation if there is sufficient need in the particular case and the evidence seems sufficiently reliable. Rather, the Confrontation Clause provides a categorical rule as to the manner in which witnesses must give their testimony – face to face with the accused, subject to cross-examination.

Respondent, perhaps recognizing the starkness of the incompatibility, makes no attempt to reconcile this difference. Rather, Respondent makes two points. First, it says that this Court is "not prone" to recognize overruling by implication. BIO at 24. In support of this proposition, it quotes a passage from this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). That passage so clearly *supports* the grant of the Petition that it is worth quoting again, with some emphases added:

We do not acknowledge, and we do not hold, that *other courts* should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, *leaving to this Court the prerogative of overruling its own decisions*."

Id. at 237, quoting in part Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Exactly. No matter how much a decision of this Court may be incompatible with the underlying logic of subsequent decisions, if this Court does not overrule the earlier case lower courts must continue to follow it; no split can properly arise in the lower courts on the matter. Until this Court intervenes, therefore, the incompatibility is bound to fester. Only this Court can confirm that the earlier case is no longer good law.

Second, Respondent reports that, shortly after this Court decided *Crawford*, Petitioner's counsel wrote that *Crawford* and *Craig* could "coexist peacefully." BIO at 23-24. The "gotcha" quality of this find is rather diminished by the fact that the Petition had already reported it. Petition at 19.8 More importantly, Respondent ignores what Petitioner's counsel said immediately afterwards. "And yet," he wrote (with considerable understatement), "the categorical nature" of Justice Scalia's majority opinion in *Crawford* "squares better with his categorical *Craig* dissent than with the looser majority opinion in *Craig* written by Justice O'Connor." Richard D. Friedman, *Adjusting to* Crawford: *High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 8 (2004).9 He then speculated on the chance that the Court would overrule *Craig*.

⁸ The Petition and the Brief in Opposition quoted different articles, but the passages were very similar, and both included the "coexist peacefully" language. Petitioner's counsel sometimes has a habit of repeating himself.

⁹ Justice O'Connor was one of the two members of the Court not to have joined the majority opinion in *Crawford*.

Thus, what Petitioner's counsel said in 2004 is perfectly consistent with the position that Petitioner asserts now. There is no doubt that *Craig* and *Crawford* address different questions, and that has allowed them to "coexist peacefully" for eight years. But that fact does not alter the deeper underlying reality: The two cases proceed from fundamentally different conceptions of the Confrontation Clause. *Crawford* rejected the discredited framework on which *Craig* rested. This disjuncture must remain until this Court steps in.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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