IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JASON AARON ARREDONDO, Defendant and Appellant.	)	NO. S244166 APPEAL No. E064206 (Riverside County No. RIF1310007/ RIF1403693)

Appeal from the Superior Court of Riverside County
Honorable DAVID A GUNN

APPELLANT'S OPENING BRIEF ON THE MERITS

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Under appointment of the Court of Appeal under the Appellate Defenders, Inc. assisted case system

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ISSUE ON REVIEW

Was defendant's right to confrontation violated when he was unable to see witnesses as they testified because the trial court allowed a computer monitor on the witness stand to be raised several inches to allow them to testify without seeing him when they testified in his presence?

INTRODUCTION

This case presents an issue of first impression in California, a gray area left unanswered by U.S. Supreme Court precedent on Sixth Amendment

rights of confrontation. In essence, the trial court allowed an entire screen (a computer monitor) to be placed between appellant and three witnesses accusing him of sexual molestations. While *Maryland v. Craig* (1990) 497 U.S. 836 (*Craig*), upheld allowing a minor victim of sexual assault to testify via CCTV, the screen in this case wholly blocked appellant's view of the witness. Appellant objected to its use for the first witness, an 18 year old adult, which the court overruled after a brief hearing. As to the two other witnesses, both minors, counsel did not object and the court did not have a hearing as to them. The main Opinion found *Craig* applied to adults, that there was no 6th Amendment violation, and appellant forfeited his claims as to the other witnesses. The dissenting Opinion, while agreeing that *Craig* could apply to an adult, found the prosecutor had not met its burden that accommodations were required and that in any event the chosen method was too restrictive.

Appellant makes the following arguments:

a) A motion was required by the prosecution in line with Penal Code section 1347 regarding the use of CCTV for minors. Further, expert testimony should be required as under Evidence Code section 240 (as required under Penal Code section 1346), or at least the witness herself should have been required to testify as outlined in section 1347.

b) The use of any accommodation must be shown by the prosecution under a clear and convincing standard, as set forth in section 1347.

c) The accommodations should not apply to adults or at least, if it does apply, should be severely curtailed to those such as set forth in *People v. Williams* (2002) 102 Cal.App.4th 995.

d) Even if it does apply in this case, the standard for necessity was not met.

e) Even if the standard for necessity was met, the accommodation in this case, a full screen preventing appellant and the witness from seeing each other, should never have been allowed. Either the court should have merely rearranged the courtroom so the witness could look away from appellant or the parties should have utilized CCTV as set forth in section 1347.

f) Finally, if an objection was necessary as to the latter two witnesses (no objection was made by defense counsel), appellant received ineffective assistance of counsel.

PROCEDURAL HISTORY

A third amended information alleged that appellant, Jason Arredondo, committed 11 counts of lewd acts upon a child under the age or 14, in violation of Penal Code section 288, subdivision (a), one count of lewd acts upon a child under the age or 16, in violation of Penal Code section 288, subdivision (c)(1), one count of oral copulation of a person under the age of 14, in violation of Penal Code section 288a, subdivision (c)(1), one count of sexual penetration of a person under 14, in violation of Penal Code section

289, subdivision (j), and two counts of dissuading a witness, in violation of Penal Code section 136.1, subdivision (a)(1). (1CT 215-222.)

As to each of the counts of violating section 288, subdivision (a), the information also alleged that appellant had engaged in substantial sexual conduct, within the meaning of Penal Code subdivision 1203.066, subdivision (a)(8).[1] The information also alleged, as to all counts, that the crimes were committed against more than one victim, within the meaning of Penal Code section 667.61, subdivision (e)(4). Finally, the information alleged that appellant had suffered a prior serious offense, within the meaning of Penal Code section 667, subdivision (a), a prior prison term, within the meaning of Penal Code section 667.5, subdivision (b), a prior strike conviction, within the meaning of Penal Code sections 667, subdivision (c) and (e)(1), and 1170.12, subdivision (c)(1), and that he had suffered a prior sexual offense, within the meaning of Penal Code section 667.61, subdivision (d)(1). (1CT 215-222.)

On June 9, 2015, on the second day of trial, the prosecution dismissed the two counts of dissuading a witness. On that same date, the court granted appellant's motion to bifurcate the issue of the truth of his prior conviction. (1CT 250-251.)

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[1] The information was amended by interlineation to include this allegation as to Counts 10 and 11. (1CT 270; 4RT 717.)

On June 22, 2015, appellant waived his right to a jury trial as to his prior conviction. (1CT 267-268.)

On June 1, 2015, the jury found appellant guilty of all charged crimes and the enhancements true. (1CT 273-275.)[2]

On August 4, 2015, appellant admitted the truth of his prior convictions and the court denied appellant's motion to strike his strike related prior conviction. On that same date, the court sentenced appellant as follows: pursuant to Penal Code section 667.61, subdivision (a), 25 years to life for each of the 11 counts of violating section 288, subdivision (a), consecutive to each other, for a total of 275 years to life. In addition, the court sentenced appellant to the midterm of 6 years doubled pursuant to the Three Strikes law to 12 years for Count 14 (sexual penetration in violation of Penal Code section 289, subdivision (j)); a consecutive term of 6 years doubled to 12 years for Count 12 (oral copulation in violation of Penal Code section 288a, subdivision (c)(1)); a consecutive term of 2 years doubled to 4 years for Count 1 (lewd and lascivious conduct on person under 16, in violation of Penal Code section 288, subdivision (c)(1)); and a consecutive term of 5 years for the prior serious conviction (Pen. Code, § 667, subd. (a)), for a total

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[2] The Minute Order states that the jury found true the enhancements as to Count 9. (1CT 274.) In fact, the jury found not true the enhancement under Penal Code section 1203.066, subdivision (a)(8), regarding substantial sexual conduct as to this count. (4RT 865.)

determinate term of 33 years. Appellant was therefore sentenced to an aggregate term of 33 years followed by 275 years to life. The trial court also imposed the requisite fines and fees and calculated presentence credits. (2CT 468-471, 510.)

On August 2, 2012, appellant timely filed his notice of appeal from the judgment and sentence. (2CT 508.)

On July 27, 2017, the Court of Appeal, Fourth Appellate District, Division Two, affirmed with directions the judgment and sentence. (Opinion, p. 1.)

This court granted review on November 15, 2017.

STATEMENT OF FACTS

Alina G. had three girls, F.R., A.J.R., and A.M.R.. (1RT 83, 86.) F.R.'s best friend was M.C. (1RT 83.) Appellant was Alina's boyfriend and first came into the girls' lives in about 2004. (2RT 230.) At the time they testified, F.R. was 18 (birthdate May 5, 1997), M.C. was 16 (birthdate March 18, 1999), A.J.R. was 14 (birthdate September 9, 2000), and A.M.R. was 13 (birthdate February 27, 2002.) (1RT 83; 2RT 229, 330; 3RT 459.) Appellant was born on December 4, 1974. (3RT 588.)

F.R.

F.R. was about 7 when she first met appellant. (2RT 230.) They all started living together when F.R. was in the 5th grade. (*Ibid.*) Appellant played a parenting role in the family, telling her to do chores and her homework. (2RT 231.)

In general, F.R. recalled appellant touching her chest at four separate houses she lived at with appellant: at his mother's house in Corona; at F.R.'s grandmother's house in Canyon Lake; and at houses on Eugene and Olive Street. (2RT 234.)

One specific incident she recalled was when she was 8 years old. (2RT 235.) She was sleeping in the living room along with other people. (2RT 236.) She was on the floor. (*Ibid.*) Appellant used her hand to rub his penis. (2RT 241.) He did not ejaculate before stopping. (2RT 242.)

In another incident, the family was staying at F.R.'s grandmother's house. (2RT 242-244.) They were there during the time F.R. was in 3rd to 5th grade. (*Ibid.*) Appellant was not living with them. (*Ibid.*) It was in the morning and she was in bed asleep. (*Ibid.*) Appellant touched her again with his penis. (2RT 245.) She could not recall where or in what manner he touched her. (2RT 247.)

One time, appellant put his penis inside either her vagina or her anus when she was eight. (2RT 250-253.) She could not remember which one. (2RT 253.) This happened in the Corona house. (2RT 254.)

Appellant would often touch her breasts. (2RT 248.) He would slide his hand over them and say he was sorry. (*Ibid.*) She would tell him to stop or move away from him. (*Ibid.*) It would happen when no one else was around. (2RT 249.) The touchings would be both over and under clothes. (2RT 248.)

A.J.R.

A.J.R. lived in the Olive Street house when she was 11 or 12 years old. (2RT 333.) She testified that one to two times per week during this period appellant would abuse her. (2RT 336.) Although he most often did so in the garage, he also touched her in her room, her brother's room, and in appellant's room. (2RT 336, 344.)

Appellant would call her to the garage. (2RT 335.) He would go towards the tools, not do anything with them, then come touch her. (2RT 337.) It was often on the couch. (*Ibid.*) Appellant would touch her chest and vagina. (2RT 338.) He would touch her vagina over and under her clothes. (*Ibid.*) He would put his finger inside her vagina. (2RT 340.) A.J.R. remembered him doing that on three occasions. (*Ibid.*)

Appellant also penetrated her vagina with his penis. (2RT 342.) She could not remember if his penis was hard of soft. (2RT 343.) He would be in her for about 5 seconds. (*Ibid.*) She did not know if he ejaculated. (2RT 344.) He would ask her if it hurt. (*Ibid.*) Sometimes it did and other times

it did not. (*Ibid.*) He penetrated her every time they were in the garage. (2RT 355.)

Appellant called her into his room once every few weeks. (2RT 345.) His door had a lock on it. (*Ibid.*) Appellant would tell her to take off her pants and underwear. (2RT 346.) He would do the same things to her there that he did in the garage. (2RT 344.)

Sometimes appellant would go in the bathroom where she was taking a shower. (2RT 348.) He would get in the shower with her and wash her whole body. (2RT 349-350.) He would tell her to grab his penis and he would move her hand. (*Ibid.*) Again, she does not know if he ejaculated. (2RT 351.)

It happened with less frequency in her brother's room, maybe once a month. (2RT 352.) It would occur less than that in her room. (2RT 353.) Again, the same things occurred in those rooms as in the others. (2RT 352-353.)

Appellant also put his penis in her anus. (2RT 356.) He would do so even though she told him that it hurt. (*Ibid.*) He also orally copulated her two times. (3RT 379-380.) That was on the couch in the garage. (*Ibid.*)

Appellant also touched her in the house prior to the one on Olive. (2RT 360.) Again, it was the same things as happened in the later house. (*Ibid.*) She lived in that house when she was 8 years old, which was when the touchings started. (2RT 360; 3RT 368.)

When she was in the 6th or 7th grade, she put a note in her mother's purse about the fact appellant was molesting her. (2RT 362.) She did not think her mother ever saw the note. (*Ibid.*) Regardless, appellant promised never to touch her again. (2RT 361.) She thought he made this promise about 10 different times. (3RT 456.) He would say it when he had finished penetrating her. (*Ibid.*)

She wrote and drew pictures in a couple of her textbooks when she was in 7th grade that appellant has penetrated her with his penis. (3RT 370-378.)

A.M.R.

When she was 11, appellant would come into her room, which she shared with her other two sisters, and touch her. (3RT 460, 463.) He would do so when she was asleep, but the touching would wake her up. (3RT 463.) He would touch her vagina, under her clothes. (3RT 464.) He would move his hand up and down under her clothes. (*Ibid.*) Sometimes, he would put his fingers inside her vagina. (3RT 465.) She thinks it happened about 10 times. (*Ibid.*)

Sometimes, she would wear thick clothes to sleep in or pajamas that had feet on them. (3RT 466.) When she did so, he would touch her on the outside of her clothes. (*Ibid.*) She thinks he did that 5 times. (*Ibid.*)

A few times when she was in the pool, appellant would move aside her bathing suit bottom and put his finger inside her vagina. (3RT 469-470.) He would do that while he was throwing them around the pool. (3RT 471.) She estimated that happened 5 times. (3RT 472.)

M.C.

When she was 13, she was sleeping at appellant's house in F.R., A.J.R., and A.M.R.'s room. (1RT 88-89, 91.) She was on the bottom bunk of the bunk bed. (1RT 91.) About 5:00 a.m., she woke up with appellant rubbing her leg. (*Ibid.*) When he saw that she was awake, he left. (*Ibid.*) She called her parents and they came picked her up. (*Ibid.*)

In another incident, she was in bed with F.R. and coughing a lot. (1RT 92.) Appellant came into the room, put his hand in her shirt and grabbed her breast, squeezing it. (1RT 92-93.) When appellant left, M.C. asked F.R. if appellant had ever done that to her. (1RT 94.) F.R. changed the subject. (1RT 95.)

In a third incident, M.C. was trying on biking gear in the garage. (1RT 97.) Appellant was helping her adjust it and he went inside her shirt and grabbed her breasts. (*Ibid.*) She looked at him strangely and he apologized. (*Ibid.*) He had used both hands. (*Ibid.*)

In a fourth incident, she was in the pool and appellant was throwing them around. (1RT 103.) She felt appellant touch her on her breasts, butt, and her vagina. (*Ibid.*)

Finally, in a fifth incident, appellant was massaging her and F.R.'s back. (1RT 98.) He went lower and started touching their butts. (*Ibid.*) F.R. yelled at him and he walked away. (1RT 99.) F.R. then told her things that had happened to her. (*Ibid.*) F.R. and M.C. questioned A.J.R. and A.M.R. as well about if anything happened to them. (1RT 102-103.) Both said it had. (*Ibid.*)

1108 Evidence

C.B., who was 32 when she testified, dated appellant's brother Jeremy when she was in middle school. (3RT 512-513.) Appellant was about 8 to 9 years older. (3RT 513.)

One day, Jeremy and his stepsister Janelle were putting various braids in C.B.'s hair, leading to it getting tangled. (3RT 514-515.) C.B. decided, in order to help get out the knots, to take a shower. (*Ibid.*) When she got out, appellant knocked on the door. (*Ibid.*) When she opened it, appellant came in, and pushed her towards the counter. (3RT 516.) He took the towel off of her. (*Ibid.*) She was naked. (*Ibid.*)

Appellant started rubbing her breasts and vagina area. (3RT 518.) He pulled out his penis tried to insert it into her vagina. (*Ibid.*) C.B. started to

scream and bang on a window. (3RT 519.) Appellant covered her mouth. (*Ibid.*) He forced himself into her and continued until he pulled out and ejaculated on the sink. (3RT 520.) He told her to get dressed. (*Ibid.*) She took a shower again because she had scraped her back on the sink and had blood on her back. (*Ibid.*) She eventually got dressed and ran out of the apartment. (3RT 521.)

In another incident, she was having a sleepover at the apartment with Janelle. (3RT 522.) She was sleeping on the living room couch and Janelle was asleep on the floor. (*Ibid.*) Appellant came home and went into the bedroom with his girlfriend, Sarah. (*Ibid.*) She woke up and appellant was rubbing her below the waist. (*Ibid.*) She could not remember if it was underneath her clothing. (*Ibid.*) She told him to stop, getting louder. (3RT 523.) He told her to be quiet, but he eventually stopped and left the room. (*Ibid.*)

Another time, appellant picked her up in his truck to take her to a family barbeque. (3RT 524.) He parked behind some stores, got out of the truck and went around, opening her door. (3RT 525.) He turned her body so that her legs were out of the truck. (*Ibid.*) He pulled down her pants, pulled out his penis and tried getting on top of her. (3RT 526.) She was crying and telling him to stop. (3RT 527.) He did, telling her to get dressed. (*Ibid.*)

Once, C.B. was sleeping in a bed with appellant's girlfriend Sarah. (3RT 528.) Appellant got in the bed and tried to have sex with her. (*Ibid.*) He woke her up and touched her vagina. (*Ibid.*)

She testified that in addition to those specific events there were numerous times when he would grab her butt, breasts and vagina. (3RT 527.) She could not count the number of times it happened. (3RT 529.)

When she was 15, her mother found out what appellant had done to her. (3RT 529.) She called the police. (*Ibid.*) C.B. testified she did not tell the police everything that appellant had done to her. (3RT 529.) Several years prior to testifying in court, C.B. saw appellant in Arizona. (*Ibid.*) He apologized for the past and said he was willing to accept responsibility for what he had done. (3RT 531.)

R.G. was 34 when she testified. (3RT 548.) Appellant is her cousin. (*Ibid.*) Appellant's father and her mother are brother and sister. (*Ibid.*) She was close with appellant and his family when they all lived together in San Diego. (3RT 549.) At that time, She was in "mid-elementary" school. (*Ibid.*) Appellant would grab her butt over clothes. (3RT 550.) He would also pick her up and put her on his lap when his penis was erect. (3RT 551.) He told her not to say anything because then her family would get kicked out of the house. (3RT 552.)

Police Investigation

Various police officers testified to getting appellant's phone and examining the contents of it, looking for child pornography. (3RT 559-560, 589-590, 596, 605, 610, 616.) There were essentially 11,000 photos on the phone, most dealing with travel. (3RT 607.) A few were introduced including one from a website called teenku. (3RT 612-613.)

DEFENSE

An investigator examined appellant's penis. (4RT 662-664.) It had a noticeable discoloration. (*Ibid.*) A.J.R. was recalled and could not remember anything abnormal about appellant's penis. (4RT 656.)

Casmer Harmon knew appellant for 35 years. (4RT 670.) He saw appellant with the girls and did not see anything out of the ordinary. (4RT 672.) Further he saw them playing in the pool area, having fun. (*Ibid.*) He never heard anyone complain when thrown around the pool, playing. (4RT 673.) He noted that appellant was often gone working, sometimes 2-3 weeks at a time. (4RT 675.) He testified that he would have no hesitation about having appellant around his children. (*Ibid.*)

Harmon was also familiar with the garage door. (4RT 726.) It was a roll up one that was very loud. (4RT 727-728.) He never saw it shut because it was difficult to do so and because it had to be shut from the outside using a chain. (4RT 728-730.) He also could not remember a couch in the garage. (4RT 732.)

Appellant's mother also testified. (4RT 685.) Appellant was away about 85-90% of the time travelling for his company. (4RT 687.) Appellant had a good relationship with Alina's children. (4RT 688.) He was a father figure to them. (*Ibid.*) She never saw any inappropriate interaction between appellant and the girls. (4RT 689.)

ARGUMENT

I.

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT BLOCKED APPELLANT'S ABILITY TO VIEW THREE OF THE FOUR ACCUSERS.

A. Introduction.

During the first break after F.R. started testifying, appellant objected that he was unable to view that witness and assist trial counsel regarding whether or not she was telling the truth. As trial counsel noted, "It does block Mr. Arredondo's entire view of the witness." (2RT 257.) Apparently, a computer monitor was repositioned so that "the witness doesn't have to look at Mr. Arredondo." (2RT 258.) The court noted that appellant "is present in court. He can hear the witness, hear her answers." (2RT 257.) As such, the court found that it was "a small infringement on his confrontation rights . . . an allowable infringement on his right to confrontation." (2RT 258.) Later, just prior to closing arguments, the prosecutor noted that the same repositioning of the computer monitor, to block appellant's view of the witness, was done for two of the other victims. (4RT 781.)

The appellate court opinion, in upholding the screen, veered sharply away from established precedent and radically alters Sixth Amendment jurisprudence regarding confrontation.

B. U.S. Supreme Court Precedent: *Coy*, *Craig*, and *Crawford*.

The Confrontation Clause of the Sixth Amendment to the United States provides, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." It applies to the states via the Fourteenth Amendment's Due Process Clause. (*Pointer v. Texas* (1965) 380 U.S. 400, 403.)

The United States Supreme Court first addressed whether the use of a screen to shield a witness from viewing the defendant while testifying violated a defendant's constitutional right to confront the witnesses against him or her in *Coy v. Iowa* (1988) 487 U.S. 1012 (*Coy*). In *Coy*, the defendant was arrested and charged with sexually assaulting two 13-year-old girls while they were camping in their backyard. (*Id.* at p. 1014.) On the prosecutor's motion, the trial court permitted the complaining witnesses to testify from behind a screen. With adjustments to the lighting in the courtroom, the defendant could dimly see the witnesses, but the witnesses could not see the defendant. (*Id.* at pp. 1014-1015.) On appeal in the United States Supreme Court, the defendant argued that the trial court violated his constitutional rights by permitting the screen because the Confrontation Clause gave him the right to face-to-face confrontation and because the screen eroded the presumption of innocence. (*Id.* at p. 1015.)

Justice Scalia, writing the majority opinion, noted that the Supreme Court has "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy, supra,* 487 U.S. at p. 1016.) He explained that the perception that confrontation is essential to fairness "has persisted over the centuries" because it "is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" (*Id.* at p. 1019.) Moreover, Justice Scalia opined that the benefits of face-to-face confrontation outweighed the potential harms to the witness:

> "Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both ensur[e] the integrity of the factfinding process. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential trauma that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."

(*Id.* at 1019-1020 (citation omitted).)

Turning to the facts in the case before the Court, Justice Scalia stated that it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." (*Id.* at p. 1020.) Although he acknowledged that the Court had in the past stated that the right to confront

witnesses was not absolute, Justice Scalia differentiated those prior holdings on the ground that they did not involve the literal meaning of the Confrontation Clause:

> "To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: a right to meet face to face all those who appear and give evidence at trial."

(*Coy, supra,* 487 U.S. at pp. 1020-1021.)

Justice Scalia did leave open the possibility that there might be exceptions to the right to face-to-face confrontation. (*Id.* at 1021.) Such an exception, he opined, would "surely be allowed only when necessary to further an important public policy." (*Ibid.*) However, such an exception was not established through a "legislatively imposed presumption of trauma." (*Ibid.*) Rather, because there had been no "individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." (*Ibid.*) For these reasons, the Court reversed the judgment of the Iowa Supreme Court and remanded the case for a harmless-error review. (*Id.* at p. 1022.)

Although Justice O'Connor was one of the six justices who signed Justice Scalia's opinion, she wrote a concurrence to clarify that the use of procedures "designed to shield a child witness from the trauma of courtroom testimony" might be permissible under facts different from those present in

the case before the Court. (*Coy, supra,* 487 U.S. at p. 1022.) Justice O'Connor acknowledged that the Confrontation Clause generally required that a witness face the defendant. However, she explained that this requirement was not absolute:

> "But it is also not novel to recognize that a defendant's right physically to face those who testify against him, even if located at the core of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. Rather, the Court has time and again stated that the Clause reflects a preference for face-to-face confrontation at trial, and expressly recognized that this preference may be overcome in a particular case if close examination of competing interests so warrants."

(*Id.* at p. 1024 (citations omitted).)

Justice O'Connor went on to state that she would permit the use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure were necessary to further "an important public policy." (*Id.* at 1025.) Moreover, although a mere generalized legislative finding of necessity is insufficient to establish such a necessity, when a court "makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." (*Ibid.* (citations omitted).)

Almost two years to the day after the decision in *Coy*, the United States Supreme Court clarified whether and to what extent there were exceptions to a defendant's right to confront witnesses face to face. In *Craig*,

supra, 497 U.S. 836, the defendant was charged with physically and sexually abusing a six-year-old girl who attended a kindergarten and prekindergarten center owned and operated by the defendant. (*Id.* at p. 840.) Before trial, the prosecution moved to permit the child to testify by means of one-way closed-circuit television. (*Id.*) The trial court permitted the use of this procedure after first taking evidence and finding, as required under the relevant state statute, that the child witness and other child witnesses would suffer serious emotional distress to the extent that the children would not be able to reasonably communicate. (*Id.* at pp. 842-843.) The Maryland Court of Appeals reversed the defendant's convictions because the prosecution's showing of necessity was insufficient under the decision in *Coy*. (*Id.* at p. 843.)

Writing for the majority, Justice O'Connor noted that the right guaranteed by the Confrontation Clause ensures not only a personal examination of the witness, but also that the witness will testify under oath, that the witness will be subject to cross-examination, and that the jury will have the opportunity to observe the witness's demeanor. (*Id.* at pp. 845-846.) She explained that the benefits conferred by this right could not be reduced to any one element of confrontation:

> "The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous

> adversarial testing that is the norm of Anglo-American criminal proceedings."

(*Craig*, *supra*, 497 U.S. at p. 846.]

This was even true of the core value of the Confrontation Clause—the right to face-to-face confrontation. (*Id.* at p. 847 "[W]e have nevertheless recognized that [face-to-face confrontation] is not the sine qua non of the confrontation right."]). "For this reason, we have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant." (*Ibid.*) Rather, as suggested in *Coy*, "our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." (*Id.* at p. 850.)

Turning to Maryland's statutory procedure, Justice O'Connor noted that it did prevent a child witness from seeing the defendant as he or she testified. However, she found it significant that the remaining elements of the confrontation right were preserved: "The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." (*Id.* at p. 851.) The presence of these

elements "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." (*Craig*, *supra*, 497 U.S. at p. 851.) Because the procedure leaves sufficient safeguards in place, when the use of the procedure is necessary to further an important state interest, its use will "not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." (*Id.* at p. 852.) Therefore, Justice O'Connor stated, the critical inquiry is whether use of the procedure is necessary to further an important state interest. (*Ibid.*)

Justice O'Connor reiterated that the Court had already recognized that the states have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment. (*Ibid.*) And, on a similar basis, she concluded that a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." (*Id.* at p. 853.) But the state may not limit face-to-face confrontation unless the state makes an adequate showing of necessity. (*Id.* at p. 855.)

The requisite finding is case-specific; the trial court must hear evidence and determine whether the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify." (*Ibid.*) In order to warrant dispensing with face-to-face confrontation, the trial court must find after an evidentiary hearing, that: (1) the "procedure is necessary to

protect the welfare of the particular child witness who seeks to testify"; (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis." (*Craig, supra*, 497 U.S. at p. 855-856.) Applying these standards to the Maryland procedure, Justice O'Connor determined that the statute's requirement that the trial court find that the child would suffer serious emotional distress to the extent that the child would not reasonably be able to communicate met the necessity requirements and, for that reason, was consonant with the Confrontation Clause. (*Id.* at pp. 856-857.)[3]

Finally, in *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court was called to decide if introduction of Sylvia Crawford's prior statement to the police at the murder trial of her husband, Michael Crawford, violated the defendant's Sixth Amendment right to

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[3] Since deciding *Craig* twenty-four years ago, the Supreme Court has not further examined the constitutionality of remote video testimony. Justice Scalia twice dissented from the Court's denials of certiorari in cases involving the remote testimony of child abuse witnesses because he believed the lower courts had inappropriately expanded the exception to face-to-face confrontation. (*Marx v. Texas* (1999) 528 U.S. 1034, 1034-35 (mem.) (Scalia, J., dissenting from denial of certiorari) (criticizing the expansion of the exception to face-to-face confrontation where the trial court allowed a witness who had been abused by the defendant in a prior incident to testify remotely upon a finding that there might be emotional trauma); *Danner v. Kentucky* (1998) 525 U.S. 1010, 1011 (mem.) (Scalia, J., dissenting from denial of certiorari) (disagreeing that a fifteen-year-old witness who expressed only some apprehension at testifying in front of her alleged abuser should be permitted to testify through video).

confrontation and cross examination. Sylvia did not testify at trial due to martial privilege, and Michael did not have an opportunity to cross examine her. (*Id.* at p. 38.) *Crawford* explained that Sylvia was a "witness" against the defendant within the meaning of the Confrontation Clause because witnesses are those who "bear testimony" against the accused. (*Id.* at p. 51.) "Testimony" is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Ibid.*, citation omitted.) Tracing the development of the Sixth Amendment through English common law, the opinion explained that it sought to protect against introduction of "lesser" forms of evidence instead of live witness testimony in court, where the accused may confront the witness face-to-face and subject the witness to cross examination. (*Id.* at pp. 43-56; *Michigan v. Bryant* (2011) 562 U.S. 344, 385-386 (Scalia, J., dissenting).) *Crawford* held that a testimonial out-of-court statement "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 657-658.) Finding that admission of Sylvia's police statement did not meet this standard, *Crawford* reversed. (*Crawford v. Washington, supra,* 541 U.S. at pp. 52, 68-69.) In so doing, it overruled the United States Supreme Court's earlier decision in *Ohio v. Roberts* (1980) 448 U.S. 56, which held that the Sixth Amendment does not bar admission of an

unavailable witness's out-of-court statement as long as it was reliable. (*Crawford v. Washington, supra,* 541 U.S. at pp. 60-69.)

While *Crawford* rested on the Sixth Amendment's literal language that a defendant has the right to be "confronted" with adverse witnesses (*id.* at pp. 36, 42) and declared that "the only indicium of reliability . . . the Constitution actually prescribes: confrontation" (*id.* at p. 69), it more frequently emphasized the right to cross examination implicit in the Confrontation Clause. (See e.g., *id.* at p. 68 ["[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination"], 53-54, 55, 59.) Cross examination, however, is not all that the Confrontation Clause requires. It also requires that an accused be afforded a face-to-face confrontation with the witnesses against him. As the United States Supreme Court stated in *Mattox v. United States* (1895) 156 U.S. 237, "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face-to-face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . ." (*Mattox v. United States, supra*, 156 U.S. at p. 244.)

C. A Motion Should Have Been Required.

The Opinion below found that no evidentiary hearing was required before finding an accommodation necessary. (Opinion, pp. 30-33.) Appellant believes that, if this court is going to grant such an assault on a defendant's Sixth Amendment rights, a prosecutor should, at the very least, meet the requirements of section 1347.

Without belaboring the point, that section concerned a less onerous assault on appellant's confrontation rights, fully seeing the witness on CCTV vs. not seeing her at all, and concerns an older witness, an adult vs. a child under 13. Given that, the prosecutor should have been required to give notice at least three days prior to the witness's testimony. (See Pen. Code, § 1347, subd. (b).) Here, no such motion was ever made as to any of the witnesses.

In *People v. Murphy* (2003) 107 Cal.App.4th 1150 (*Murphy*), the appellate court reversed the use of one-way glass because the trial court failed to hold an evidentiary hearing to determine the extent to which the victim's anxiety was due to defendant as opposed to the trauma of testifying in court. "[A] court may not, as the court did in this case, dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem. In our view, the court's ruling was not based upon an adequate 'case-specific finding of necessity.' [Citation.]" (*Murphy, supra,* 107 Cal.App.4th at pp. 1157-1158.)

The test as articulated by the U.S. Supreme Court is whether the child would suffer emotional trauma if forced to testify in appellant's presence. (*Craig, supra*, 497 U.S. at pp. 857-858; *Coy, supra,* 487 U.S. at p. 1021.) In order to make that determination, expert testimony should generally be required.[4]

Few reported cases discuss section 1347. In the ones that do, and the issue of the propriety of the use of remote testimony, some expert testimony was presented by the prosecution. (See *People v. Lujan* (2012) 211 Cal.App.4th 1499, 1503-1504 [testimony from family therapist and detective]; *People v. Powell* (2011) 194 Cal.App.4th 1268, 1284 [testimony from social worker and mother].) For instance, Penal Code section 1346 allows the videotaped presentation of testimony if the prosecution can show that testimony would cause the "victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of Section 240 of the Evidence Code . . ." (Pen. Code, § 1346, subd. (d).) Section 240 in turn, for a finding of unavailability, requires expert testimony:

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[4] For instance, Missouri courts have generally required that the emotional or psychological trauma be established by expert testimony. (*State v. Sanders* (Mo.App.2003) 126 S.W.3d 5, 15.) The expert testimony does not have to come from a psychiatrist, psychologist, or physician, but may come from an experienced social worker or other person who has sufficient knowledge about such issues to provide an opinion. (*State v. Naucke* (Mo. banc 1992) 829 S.W.2d 445, 449-50.) Trauma may not be established merely by "'knowledge of the child's age and the sensitive nature of the subject involved.'" (*State v. Sanders, supra*, 126 S.W.3d at p. 16.) Louisiana holds similarly. (See *State v. Welch* (Louisiana Sup.Ct. 2000) 760 So.2d 317.)

> "(c) Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010."

(See *Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777, 793-794 [reversing use of closed-circuit television when no psychiatric evidence offered regarding the victim's mental health].)

This court should find that a motion was required in line with section 1347, subdivision (b). Further, at that hearing, expert testimony should be required.

D. The Proper Standard For Granting Such A Motion Must Be At Least The Same As Set Forth In Penal Code Section 1347, Namely Clear And Convincing Evidence Of Trauma.

The Opinion makes no mention of the proper standard for determining whether sufficient evidence has been presented by the prosecution for determining whether an accommodation needs to be utilized and the extent of that accommodation. The dissent suggests it should be at least that set forth in Penal Code section 1347: clear and convincing evidence of trauma so great as to render the witness unavailable. (Dissent, pp. 18-19.) As the dissent points out it makes little sense to have a lesser standard for a younger

witness with less invasive accommodations than for an adult witness and a full screen such as this case. Certainly the dissent has it right.

Penal Code section 1347 was enacted to make CCTV testimony "available to child witnesses under circumstances that, in the lawmakers' view, would preserve a defendant's Sixth Amendment confrontation rights as outlined in *Craig*." (*People v. Powell, supra,* 194 Cal.App.4th at p. 1282.) The statute provides in relevant part:

> "(b) Notwithstanding any other law, the court in any criminal proceeding ... may order that the testimony of a minor 13 years of age or younger ... be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings: [¶] (1) The minor's testimony will involve a recitation of the facts of any of the following: [¶] (A) An alleged sexual offense committed on or with the minor. [¶] ... [¶] (2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (E), inclusive, is shown by *clear and convincing evidence* to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used."

(Pen. Code, § 1347, subd. (b) [emphasis added].)

When the law was originally enacted in 1985, the legislature's stated purpose was to "protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process." (Pen. Code, § 1347, subd. (a); Stats. 1985 ch. 43 § 1, effective May 20, 1985.) Interestingly, when originally enacted, the cut-off for the use of CCTV was age 10. (Pen. Code, § 1347, subd. (b); Stats. 1985 ch. 43 § 1, effective May 20, 1985.) It was not

until 1998 that the age was increased to 13. (Stats. 1998 ch 669 § 1 (AB 1077), ch 670 § 1.5 (AB 1692).)

The clear and convincing standard requires evidence """sufficiently strong to command the unhesitating assent of every reasonable mind."""" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) As the legislature found, that standard properly balances the needs of the child witness with the defendant's right of confrontation.

It would seem then that the proper standard should the court allow a complete screen would at least be clear and convincing. Section 1347, when originally enacted, was only applicable to 10 year olds. Here, the Opinion allows it to be used on any adult, no matter their age. (Opinion, pp. 35-38.) While appellant obviously disagrees, this court should at least find that the legislature has already done the weighing, and give its decision due deference.[5]

E. *Craig* In This Context Should Not Be Applied To Adults.

Appellant's position below, as noted in the Opinion, was that *Coy* and *Craig* have no application to adults whatsoever, at least in this context. (See

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[5] Other states have reached a similar conclusion that the standard should be clear and convincing evidence. (See, e.g. *People v. Arroyo* (2007) 935 A.2d 975 (Connecticut); *State v. Baeza* (2016) 383 P.3d 1208 (Idaho); *State v. Chisholm* (1992) 825 P.2d 147 (Kansas); and *State v. Stock* (2011) 256 P.3d 899 (Montana).)

Opinion, p. 37.) Because F.R. was 18 when she testified, *Craig* did not apply to her, which should have been the end of the analysis.

Appellant reviewed hundreds of cases across the majority of states and did not find one with similar facts: an adult, with no testimony that she had special needs or other disabilities, was allowed to testify behind a full screen. No reviewing court upheld such facts.

First, as set forth above, section 1347 makes the delicate balance regarding the reach of the statute. The legislature could have applied it to all witnesses who had a similar need based upon being too traumatized to testify but chose not to do so. Rather the statute was enacted to protect child witnesses while preserving the defendant's confrontation rights. (*People v. Powell, supra,* 194 Cal.App.4th at p. 1282.)

In *Murphy*, the defendant was found guilty of forced oral copulation and false imprisonment. The victim, Sydney Doe, a 31-year old adult, was allowed to testify behind a one-way glass. (*Murphy, supra*, 107 Cal.App.4th at p. 1152.) The *Murphy* court examined the rulings in *Coy* and *Craig*, among others, noting that "a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. [Citations.]' (*Craig, supra*, 497 U.S. at p. 852.) It concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at

least in some cases, a defendant's right to face his or her accusers in court.' (*Id.* at p. 853.)" (*Murphy, supra*, 107 Cal.App.4th at p. 1155.)

Turning to the case before it, the *Murphy* case noted that the state has no compelling interest in protecting a testifying adult from doing so face-to-face with the defendant. Said the *Murphy* court:

> "However, the present case, unlike *Maryland v. Craig* and *People v. Sharp, supra*, 29 Cal.App.4th 1772, does not involve the 'State's traditional and' 'transcendent interest in protecting the welfare of children.' (*Maryland v. Craig, supra*, 497 U.S. at p. 855.) Neither the court in *People v. Williams, supra*, [2002] 102 Cal.App.4th 995 nor the People in this case have identified any authority recognizing or establishing that the state has 'transcendent' or 'compelling' interest in protecting adult victims of sex crimes from further psychological trauma that might result from testifying face-to-face with a defendant. Moreover, the trial court in this case was not relying upon the state's interest in protecting adult victims but, instead, predicated its ruling on the state's interest in ascertaining the truth. (See § 1044; see also Evid. Code, § 765, subd. (a).) As articulated in *Coy*, the governmental interest in discovering the truth historically and traditionally cuts the other way."

(*Murphy, supra*, 107 Cal.App.4th at p. 1157 [footnote omitted].)

Murphy found no "transcendent" state interest in protecting adult witnesses as exists for child witnesses. (*Murphy, supra*, 107 Cal.App.4th at p. 1157.) *Murphy* did not agree with *People v. Williams* (2002) 102 Cal.App.4th 995, the case relied upon in the Opinion, finding that the latter case had failed to establish the state's compelling interest in applying *Craig* to adult witnesses.

The Opinion relies on *People v. Lujan* (2012) 211 Cal.App.4th 1499, 1505-1506, a case which extended *Craig* to child witnesses who were not victims. (Opinion, pp. 35-36.) The Opinion neglects to mention that Vanessa, the protected witness, was 7 and the focus was once again on child witnesses. (*Id.* at pp. 1503, 1505-1506.) Nowhere does it suggest that adults should likewise be included.

Although the Opinion finds it difficult to accept that adults and children would be treated differently, Penal Code section 1347, for instance, does just that. (Opinion, pp. 35-38.) It limits the close-circuit television option, where the defendant can actually see the victim, to those under the age of 13. The same question can be asked—why 13 and not someone who just turned 14? Because a balance must be made with appellant's Sixth Amendment rights. The obvious place to strike it would be right where the Legislate did, at age 13. Regardless, certainly adulthood would not be too much.

This court should find *Murphy* makes the better argument. With the passage of the one-strike law, among others, these crimes can have a lifetime statute of limitations. (See e.g., *People v. Perez* (2010) 182 Cal.App.4th 231, 239–240 (lifetime limitations period if "One-Strike" enhancement is charged].) While *Craig* noted the state's interest in protecting child witnesses, that interest needed to be balanced against appellant Sixth Amendment right to face-to-face confrontation. The Opinion does not even

bother mentioning defendant's right in that regard, focusing solely on the victim.

At best, *Williams*, should be limited to its facts. It was a unique case involving a physically and mentally disabled adult. As the dissent noted:

> "*Williams* is the only California decision to uphold an accommodation eliminating a defendant's ability to see an adult witness as she testified. (*Williams, supra*, 102 Cal.App.4th 995.) However, the facts of that case are extraordinary and, for that reason, I do not think it provides a sound basis for approving the accommodation used here. The witness in *Williams* was a physically and mentally disabled adult who had been called to testify against her abusive boyfriend. (*Id.* at pp. 998–999.) At the hearing on whether she needed accommodation, her psychotherapist and physician testified she would become suicidal and incommunicative if forced to face the defendant in court. (*Id.* at pp. 998, 1004–1006.) To avoid this likelihood of 'grave harm,' the trial court permitted the witness to testify in another room while the defendant listened from a detention cell and was able to confer with his counsel during cross-examination, though he could not see her. (*Id.* at pp. 1006, 1008.) The Second District approved the extension of *Craig's* narrow exception to the disabled adult witness but only because of the compelling evidence of necessity to protect a vulnerable witness. (*Williams*, at p. 1008.)
>
> Our Sixth Amendment case law is founded on the widely recognized principle that children are especially vulnerable and the state has a compelling interest in assuring they are protected when called upon to testify against their abusers. As a general matter, the law does not find it necessary to protect adult witnesses to the same degree. *Williams* provides an example of when it may be proper to consider an adult witness vulnerable, but the vulnerability in that case was both extreme and extremely developed."

(Dissent, pp. 13-14.)

This court should either find *Craig* does not apply to adults, that section 1347 defines the extent of accommodations in California, and/or that *Williams* is limited to its unique facts.

F. The Prosecution Presented Insufficient Evidence Warranting The Accommodation.

Needless to say, the Opinion found that sufficient evidence was presented to the court, apparently most of it implied, to uphold the evisceration of appellant's Sixth Amendment rights. The dissent found it was not even close.

One of the problems in this case stems from issue D above. There was no motion for the use of a screen, and thus no formal hearing for F.R. and nothing whatsoever for the other two girls. The record is therefore slim, lacking any testimony, expert or the witness, and was ultimately left to the appellate court's speculation as to the severity of F.R.'s mental state. Further, the majority Opinion fails to articulate the proper standard for review. It is tough therefore to know how the Opinion even knows F.R. crossed the proper hurdle.

If the proper standard is the one for children in Penal Code 1347, there is simply no way that was met. *Craig* defines an accommodation as necessary when the witness would be so "traumatized" as to be unable to reasonably communicate if made to confront the defendant face to face.

(*Craig, supra*, 497 U.S. at pp. 841-842, 855-856.) That standard is reasonably codified in section 1347, defining necessity as "suffering serious emotional distress so [as to be] . . . unavailable as a witness." (Pen. Code, § 1347, subd. (b)(2)(A).)

In *Murphy*, the victim testified for a day without the one-way glass. The next morning the prosecutor informed the court that the victim was disturbed by seeing the defendant. The trial court allowed the one-way glass, finding:

> "To say that the victim in this case while testifying is severely emotionally distraught is like saying the ocean is rather damp. She has been engaging in a hyperventilation that we have heard described in other contexts by her cousin. She has been making marked spasmodic motions of her head and neck relating to her breathing abilities, I suspect. She has been crying and sobbing. She has been making "keening: type noises that at times make it difficult to hear her testimony. [P] As the record will reflect, we took one or more breaks yesterday just in an effort to try to allow her to feel more comfortable. Again, that's sort of an understatement as well. [P] A reading of the preliminary hearing transcript would suggest that during that hearing paramedics were required to treat her on the same sort of issues that she has."

(*Murphy, supra*, 107 Cal.App.4th at p. 1152.)

Even in the face of that description of the testifying witness, the *Murphy* court reversed finding it inadequate to overcome defendant's constitutional rights. It found that the court had consented to the prosecutor's request for the one-way glass without holding an evidentiary hearing to determine the extent to which the victim's anxiety was due to defendant as

opposed to the trauma of testifying in court. "[A] court may not, as the court did in this case, dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem. In our view, the court's ruling was not based upon an adequate 'case-specific finding of necessity.' [Citation.]" (*Murphy*, *supra*, 107 Cal.App.4th at pp. 1157-1158.)

Here, the court granted the screen for F.R. similarly without making a case-specific finding. The court stated the block was put up because "when she first came in to take the oath, she was unable to proceed at that time. We took about a 15-minute break before she could get emotions back in order." (2RT 257.) The prosecutor stated that blocking appellant's view of F.R. was necessary, apparently, "[g]iven that the witness had indicated that the defendant had looked at her the first time she came in." (2RT 258-259.) Defense counsel though stated, "For the record—for the record, Your Honor, when the witness first came in, she began crying before she was even able to see Mr. Arredondo's face. So Mr. Arredondo made no effort to look at her, intimidate her, or make any kind of eye contact or suggestive contact with her." (2RT 259.)

As the dissent notes, *Murphy* reversed because the trial court did not determine the extent to which the witness's distress was due to the defendant as opposed to "'general emotional fragility'" and the appellate court refused to infer necessity from the record. (Dissent, p. 20, citing *Murphy, supra*, 107

Cal.App.4th at pp. 1157-1158.) So too in this case. This does not even meet the threshold facts of *Murphy*. The court there reversed because there was no evidentiary hearing as to the cause of the witness's distress. So too in this case. As defense counsel stated, appellant did not turn around and look at F.R. It may have simply been because of the stress of testifying in court as opposed to anything dealing with appellant. The trial court did not bother to hold the necessary hearing to make that determination. Further, as even the court noted, F.R. was able to regain her composure after the 15 minute break. That is simply too wide from the mark of being "traumatized" as required by *Craig*.

The trial court failed to make a particularized determination regarding F.R. As pointed out throughout the briefing, the court utilized the accommodation as a "small effort . . . to make the witness more comfortable." (Dissent, p. 20.) She apparently was already more comfortable when she came back in the room and got "her emotions back in order." (*Ibid.*) Nothing more was required at that point.

G. A Complete Screen Between Appellant And The Witness Should Not Have Been Allowed.

The court had numerous options available to it that would have adequately protected the witness's mental state and the defendant's constitutional rights.

The most obvious is simply having the victim face away from the defendant, such as by moving the podium.

In *People v. Gonzales* (2012) 54 Cal.4th 1234, 1265-1266, for instance, the two boys were seated facing away from the defendant. This court noted that "the witnesses were free to look around the courtroom and make eye contact with defendants, if they desired." (*Id.* at p. 1265.) The trial court found that "it was guarding against the intimidation of children 'of tender age,' and noted that the defendants would be able to see and hear the witnesses, and would be 'within eye contact' if the witnesses wished to look at them." (*Id.* at p. 1266.) Ivan, one of the minor witnesses, was 8 when he testified. (*Id.* at p. 1247.)

The *Gonzales* court cited with approval *People v. Sharp* (1994) 29 Cal.App.4th 1772, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452, which had similar seating arrangements to *Gonzales*. In *Sharp*, the prosecutor stood or sat next to the witness stand so the child witness did not have to look at defendant. Defendant could see the side and back of the witness's head while she testified; even if he could not see all her facial expressions, he could see her general demeanor and reactions to questioning. The witness could, but chose not to, see defendant and the jury could see both the witness and defendant. (*People v. Sharp, supra*, 29 Cal.App.4th at pp. 1781-1782.) The Court of Appeal found the situation "not materially different from one in which a witness might stare at the floor, or

turn her head away from the defendant while testifying." (*People v. Sharp, supra*, 29 Cal.App.4th at p 1782.)

Numerous courts have held that, as long as the defendant and witness are present in the courtroom and their view of each other is not physically obstructed, as by a screen or two-way mirror, the Confrontation Clause is not violated by allowing the witness to testify while facing away from the defendant. (See, e.g., *Brandon v. State* (Alaska Ct.App.1992) 839 P.2d 400, 409-410; *Smith v. State* (Arkansas Sup.Ct. 2000) 8 S.W.3d 534, 537-538; *Ortiz v. State* (Georgia Ct.App. 1988) 374 S.E.2d 92, 95-96; *Stanger v. State* (Ind.Ct.App. 1989) 545 N.E.2d 1105, 1112-13; *State v. Brockel* (La.Ct.App.1999) 733 So.2d 640, 644-46; *People v. Tuck* (1989) 147 A.D.2d 899, 537 N.Y.S.2d 355, 356 (1989); *State v. Hoyt* (Utah Ct.App. 1991), 806 P.2d 204, 209-10; see also Bruce E. Bohlman, The High Cost of Constitutional Rights in Child Abuse Cases—Is the Price Worth Paying?, 66 N.D.L.Rev. 579, 589 (1990) (suggesting this "technique of directional deviation" is the least restrictive means available to protect both the witness and the defendant's right to a fair trial).)

If this method will not work, and face-to face confrontation will result in the witness "suffering serious emotional distress so that the child would be unavailable as a witness" (Pen. Code, § 1347, subd. (b)(2)(A)), the authorized method would be that set forth in section 1347.

In *State v. Nutter* (New Jersey App.Ct. 1992) 609 A.2d 65, 74, the court observed:

> "[W]e agree that theoretically a policy interest sufficient to outweigh the right to physical confrontation may exist without the formality of statutory codification. However, when the Legislature has considered the issue of the protection of child witnesses and has delineated with precision those limited circumstances which, upon appropriate findings, will prevail over a defendant's right to face-to-face confrontation, that is the expression of the public policy of this state. We are not free to engraft onto it our own vision of what our public policy is, or should be."

This court should likewise conclude that section 1347 represented the legislature's judgment as to how best, and under what circumstances, to accommodate the public's interest in protecting child sex assault victims consistent with a defendant's right to face-to-face confrontation of adverse witnesses. (See *Price v. Commonwealth*, (Kentucky Sup.Ct. 2000) 31 S.W.3d 885, 894 ("the statute creates a narrow exception to a constitutional right, [and] thus, its provisions should be scrupulously followed"); see also *People v. Lofton* (Illinois Sup.Ct. 2000) 740 N.E.2d 782, 790, 794 (where the legislature authorized the use of closed-circuit television, the trial court's use of podiums to block the defendant's view of the child witness was "unauthorized").

As in *Craig*, the closed-circuit television procedure authorized by section 1347 gave appellant a right of great significance, namely, the right to observe and assess the victim's demeanor while testifying. Demeanor

evidence is relevant on the issue of credibility (see *California v. Green* (1970) 399 U.S. 149, 160), and jurors are to be so instructed. (Pen. Code, § 1127; Evid. Code, § 780, subd. (a); CALCRIM No. 226.)

As explained by Judge Learned Hand, a witness's "'demeanor'—is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale." (*Dyer v. MacDougall* (2d Cir. 1952) 201 F.2d 265, 269, fn. omitted.)

Demeanor evidence is of considerable legal consequence. It can have a dispositive effect in the outcome of a case "in which the existence or nonexistence of a determinative fact depends upon the credibility to be given to testimonial evidence." (*Harding v. Purtle* (1969) 275 Cal.App.2d 396, 400.) Although demeanor evidence does not appear on the record, and for that reason has led to the rule that the fact-finder is the exclusive judge of credibility (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140), many is the case which is affirmed on appeal because the reviewing court

necessarily deferred to the finding of the trier of fact on issues of credibility. (See *People v. Thornton* (1974) 11 Cal.3d 738, 754.)

The U.S. Supreme Court noted that the elements of an oath, cross-examination, and observation of the witness's demeanor "adequately ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." (*Craig, supra*, 497 U.S. at p. 851.) In discussing the last of those elements, the Court at one point indicated that a witness's demeanor need only be observed by the jury or trier of fact. (*Craig, supra*, 497 U.S. at p. 846.) However, in upholding the use of closed-circuit television to present the testimony of a child witness, the Court found it significant that "the judge, jury, *and defendant* are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." (*Craig, supra*, 497 U.S. at p. 851 (emphasis added).)

The trial court here did not explore either method and instead allowed a complete screen between appellant and the witness. That should not have been found acceptable. As *Coy* and *Craig* make clear, it is the defendant's view of the witness, and vice-versa that is most crucial, not just the jury's. (*Coy, supra*, 487 U.S. at pp. 1015-1020; *Craig, supra*, 497 U.S. at pp. 844, 846-847, 851.) "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that

man is. It is always more difficult to tell a lie about a person to his face than behind his back." (*Coy, supra*, 487 U.S. at p. 1019 (citations omitted) (quoting Z. Chafee, The Blessings of Liberty 35 (1956)).

As the Opinion notes, various state courts have found the complete screen a violation of defendant's Sixth Amendment rights. (Opinion, pp. 43-44, fn. 8, citing *People v. Lofton* (Illinois Sup.Ct. 2000) 740 N.E.2d 782 [blocking view with podiums]; and *People v. Mosley* (Colorado Ct.App. 2007) 167 P.3d 157 [blocking view with easel]; see also, *Sparkman v. Commonwealth* (Kentucky Sup.Ct. 2008) 250 S.W.2d 667, 669-670 [violation where prosecutor standing between child witnesses and defendant completely blocking view of each other]; *Smith v. State* (Nevada Sup.Ct. 1995) 894 P.2d 974, 975-977 [same]; *State v. Welch* (Louisiana Sup.Ct. 2000) 760 So.2d 317, 320-321 [violation where used total screen]; *State v. Parker* (Nebraska Sup.Ct. 2008) 757 N.W.2d 7 [same].)

Appellant's inability to assess the witness's disposition and credibility worked a Sixth Amendment violation. As *Lofton* noted, "[T]he right to confront witnesses includes . . . the ability to be of aid in counsel's cross-examination. Here the defendant's inability to observe the manner of the witness while testifying could have prejudiced him by limiting his ability to suggest lines of examination to his attorney that might have been indispensable to effective cross-examination." (*People v. Lofton, supra,* 740 N.E.2d at p. 794 (citations omitted); cf. *State v. Lipka* (Vermont Sup.Ct.

2002) 817 A.2d 27, 33 ("The seating arrangement devised by the trial court in this case indisputably deprived defendant of the opportunity to observe the witness's demeanor during her testimony, contrary to this [Confrontation Clause] requirement."). As the dissent noted, appellant was her stepfather, and thus knew her personality and mannerisms and would be able to tell if she was being untruthful. (Dissent, p. 22.)

Further, as the dissent notes, "At any rate, even with its clear view of F.R., the jury's ability to assess her demeanor was limited because she did not have to look at Arredondo while testifying. (*Craig, supra*, 497 U.S. at p. 851.) As the Supreme Court observed in *Coy*: 'It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.' (*Coy, supra*, 487 U.S. at p. 1019.) The accommodation used here removed that factor from the jury's consideration because it allowed F.R. to look straight ahead while testifying without having to face Arredondo." (Dissent, p. 23.)

While a barrier would obviously be noticeable to the jury, the computer screen remains an open question. As the prosecutor noted, the screen was lifted and lowered. Although the Opinion speculates that the jury

may not have noticed it, certainly no one knows that for certain. A sharp eyed juror may have noted it was raised while the girls were testifying.

Moreover, there is no evidence that a subtle screen was somehow helpful to the defense. The defense argument should the witness obviously face away from appellant would be that she was doing so because she was lying and could not do so face to face. "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'" (*Coy, supra,* 487 U.S. at p. 1019.) A subtle screen may have seemed like the witness was composed in her testimony and thus truthful. In fact, she could have even looked in appellant's direction during her testimony and the jury may have been unaware she could not see him. The Opinion does not bother "speculating" how that would be helpful to the defense.

This court should find that even if an accommodation was necessary, this one should never have been allowed, and it per se worked a Sixth Amendment violation.

H. If An Objection To The Screen For The Other Minor Girls Was Necessary, Trial Counsel Was Ineffective.

Counsel failed to object to the screen being lifted for either of the other girls, either when they initially testified or when they testified in the defense case.

Both the Opinion and Dissent find these issues forfeited and that trial counsel may have had a tactical reason for not objecting. (Opinion, pp. 45-47; Dissent, pp. 28-30.) Appellant disagrees.

First, a further objection should be excused as futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432 [party need not make futile objection to preserve claim of error].) If the court made the finding as to the F.R., it would undoubtedly have made the same ruling as to the younger witnesses.

Appellant possesses the federal and state constitutional rights to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 688; *People v. Pope* (1979) 23 Cal.3d 412.) These rights are guaranteed by the Sixth Amendment of the federal constitution (*Powell v. Alabama* (1932) 287 U.S. 45, 64), and apply to the states by virtue of the Fourteenth Amendment (*Cuyler v. Sullivan* (1980) 446 U.S. 335). The right to effective assistance of counsel is also guaranteed by article I, section 15 of the California Constitution. (*People v. Nation* (1980) 26 Cal.3d 169, 178.)

Both the main Opinion and Dissent find that it made tactical sense for appellant to object to the only witness who seemed upset, F.R., but not object to the other witnesses who showed no signs of discomfort. After all, the record shows, slim as it was, that F.R. was upset when she first made her way into the courtroom but the others were not. From this, the appellate court was able to glean that the two younger girls were somehow more upset and

it thus made sense to not object. This turns the entire tactical reason on its head.

If the reasonable tactical reason was that "defense counsel believed the monitor would prevent A.J.R. and A.M.R. from becoming emotional as they testified and thereby potentially elicit sympathy from the jury" (Dissent, p. 29), why did he object to it being in place for F.R.? She was actually upset as opposed to the others. If that had been his tactical reason, shouldn't he have sat on his hands for F.R. and allowed the monitor to be lifted without objection? Neither the Opinion nor the Dissent bother to answer that question.

The more likely answer to this was that it would have been futile. (*People v. Boyette, supra,* 29 Cal.4th at p. 432.) The trial court clearly set forth its standard, and found no confrontation issue because appellant could hear the witness and he was in the courtroom. (2RT 257.)

On top of that, if this court finds that the various arguments above prevail, such as the need for a prosecution motion with expert testimony, then that applies equally to the other two girls. The prosecution certainly did not carry its burden as to these two girls and the court did not make a particularized finding as to them.

If that is not the case, and further objection was necessary, appellant received ineffective assistance. The court should reverse as to them as well.

I. The Error Was Not Harmless Beyond a Reasonable Doubt.

The Sixth Amendment violation is subject to the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18. (*Coy, supra*, 487 U.S. at p. 1021.) Under normal *Chapman* analysis, reversal is required unless the government proves the error harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) However, where the defendant has been denied the ability to confront an adverse witness face-to-face, "[a]n 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 purse speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." (*Coy, supra*, 487 U.S. at pp. 1021-1022.)

The dissent uses this standard and finds that the counts related to F.R. must be reversed. If this court finds a Sixth Amendment violation as to the other two girls, the counts related to them should be reversed as well. Clearly, the state cannot meet its heavy burden. Without the girls' testimony, there is simply nothing left to prove the allegations involving those victims. There was no physical evidence. Appellant never admitted that he touched the girls. Although there were two witnesses regarding prior sexual acts, without the three victim's testimony, there is simply nothing to corroborate or support. Although M.C. stated that the girls told her something, it was not

enough to support each of the convictions and was hearsay in any event. In short, there is no means to support the convictions absent their testimony.

J. Conclusion

Craig opened a narrow gap in *Coy's* requirement for face-to-face confrontation. This case widens that gap beyond recognition. It fails to identify that "compelling" or "transcendent interest" that necessitates the screen for F.R., as required by *Craig, supra*, 497 U.S. at p. 855, or to require of the trial court a basic outline of its case-specific findings as to why this adult needs such protection. Rather, it uses guesswork and inferences, not supported by the four corners of the transcript, to come to a conclusion that this witness would be so traumatized as to be functionally unavailable to testify. It further places on appellant the burden of making continuing and specific objections to a wide range of findings (such as that F.R. was in fact not sufficiently traumatized), and places apparently no burden whatsoever on the moving party. It should be the exact opposite. If the prosecutor thinks it necessary to have some protection in place, he or she should move for it, put forth testimony (expert or otherwise) supporting it, and require a case-specific ruling that demonstrates trauma from facing the defendant.

The U.S. Supreme Court affirmed in *Crawford* the importance of face to face confrontation. While *Craig* bowed to the reality that certain situations will call for practical protections for young witnesses, that balance was struck

by the legislature with the passage, shortly after *Craig*, of section 1347. This court should, at the very least, use that as the template for any protections offered to traumatized witnesses. It protects to the extent possible a defendant's important confrontation rights while ensuring that witnesses that are so traumatized as to be unavailable, can give testimony. With CCTV, for instance, appellant can at least still see the witness. The same is certainly true with having the witness face away from the defendant while testifying. The jerry-rigged solution in this case was simply the worst of all worlds. It prevented face to face confrontation but did not allow the jury to even know that was occurring—thus painting the witness in a false light of being able to face her accuser.

This court can honor the choice of the legislature in its approach to this thorny issue, while staying true to the finding in the relevant Supreme Court precedent on this subject.

This court should reverse the appellate court opinion.

CONCLUSION

For the reasons set forth in Section I, this court should reverse all convictions or at least all those that do not involve M.C., based upon the violation of appellant's Sixth Amendment right to confrontation.

Dated: May 16, 2018

TORRES & TORRES

STEVEN A. TORRES
Attorneys for Defendant and
Appellant Jason Arredondo

WORD COUNT CERTIFICATE

I, Steven A. Torres, appointed counsel for appellant, Jason Arredondo, hereby certify, pursuant to rule 8.204, subdivision (c)(1) of the California Rules of Court, that I prepared the foregoing Brief on the Merits on behalf of my client, and that the word count is 12,488, which does not include the cover or the tables. I certify that I prepared this document in Microsoft Word 2013, and that this is the word count the program generated for this document.

Dated: May 16, 2018 **TORRES & TORRES**

STEVEN A. TORRES
Attorneys for Defendant and
Appellant Jason Arredondo

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50)

I, Steven A. Torres, declare that: I am over the age of 18 years and not a party to the case; I am employed in, or am a resident of, the County of Los Angeles, California, where the mailing occurs; and my business address is PMB 332, 3579 Foothill Boulevard, Pasadena, California 91107.

I further declare that I am readily familiar with the business practice for collection and processing for mailing with the United States Postal Service; and that the mailing shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served this day the following document: OPENING BRIEF ON THE MERITS by placing a true copy of each document in a separate envelope addressed as follows:

Jason Arredondo
[Address per inmate locator]

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)

Furthermore, I, Steven A. Torres, declare I electronically served from my electronic service address of Torres144381@gmail.com the same document on or before 5:00 p.m. on May 16, 2018 to the following entities:

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CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, via truefiling
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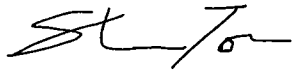
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 16, 2018



STEVEN A. TORRES