In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

JASON AARON ARREDONDO,

Defendant & Appellant.

Case No. S244166

Fourth Appellate District Division Two, Case No. E064206
Riverside County Superior Court, Case Nos. RIF1310007 / RIF1403693
The Honorable DAVID A. GUNN, Judge

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ISSUE PRESENTED

Was defendant's right of 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 by several inches to allow them to testify without seeing him when they testified in his presence?

INTRODUCTION

Appellant molested his live-in girlfriend's three daughters, Fayth, Ariana and Anna, and Fayth's best friend, Megan. Megan testified first without incident. Next, Fayth was called as a witness, but before she could take the oath, she became emotional and started crying. The court took a break, determined Fayth was "unable to proceed," and after the prosecutor conferred with Fayth, the court placed some law books under a computer monitor that was on the witness stand so that it blocked appellant's view of Fayth, and Fayth's view of appellant. With this modification in place, Fayth was able to testify. The court permitted the same arrangement when Ariana and Anna testified.

Appellant contends the repositioning of the computer monitor violated his Sixth Amendment right to confront all three witnesses. Initially, appellant only objected to the placement of the computer monitor during Fayth's testimony, and so, as the Court of Appeal concluded, he has forfeited the issue with respect to Ariana and Anna.

As to his claim regarding Fayth, it is well established that the Confrontation Clause includes a *preference* for face-to-face confrontation, but it is not an absolute right, and it can give way where necessary to further important public policies, such as obtaining accurate testimony and protecting child molestation victims from further trauma, as long as the reliability of the testimony is otherwise assured. Here, the Court of Appeal correctly determined that the trial court satisfied the test enunciated in

Maryland v. Craig (1990) 497 U.S. 836 (*Craig*), that (1) the express and implied case-specific findings were supported by the record that the arrangement was necessary to protect the victim from suffering serious emotional trauma and to obtain her complete and accurate testimony, and (2) the reliability of the testimony was assured because the victim was under oath, subject to cross-examination, and the jury and defense counsel had unobstructed views of her. Therefore, this Court should affirm the judgment.

STATEMENT OF THE CASE AND FACTS

A. Appellant Repeatedly Molested Four Young Girls, and Had a History of Sexually Abusing Children

From about 2004 to 2013, appellant lived with his girlfriend, Alina Greggerson, and her children. Over the course of several of those years, appellant molested Greggerson's three daughters and a family friend. (1 RT 107; 2 RT 230, 235.) Fayth,[1] the eldest daughter, was molested from the time she was eight years old, until she was 16. (1 RT 107; 2 RT 235.) Appellant repeatedly touched Fayth inappropriately, and forced her to engage in sexual intercourse and sodomy. (2 RT 233-235, 239-243, 245-246, 248, 250-251, 253, 265-267, 283.)

Appellant also molested Ariana, Greggerson's middle daughter, beginning when she was eight years old. (2 RT 360.) He had vaginal and anal intercourse with her twice a week, and orally copulated her. The abuse continued until Ariana was 11 or 12 years old. (2 RT 330, 332, 335-338, 340-344, 347, 349-355, 360, 379-380; 3 RT 36.)

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[1] Consistent with the record at trial, respondent refers to the victims by their first names.

Anna, the youngest sister, was also molested by appellant when she was 11 years old. Appellant touched her inappropriately and digitally penetrated her. (3 RT 459, 461-465.)

Appellant also molested Fayth's best friend, Megan. (1 RT 83; 2 RT 232-233.) Appellant first molested Megan when she was 13 years old, by touching her on her vagina, buttocks, and breasts. (1 RT 91-93, 95-96, 98-99, 103, 106; 2 RT 223.)

Appellant had a history of sexually assaulting young girls. He forcibly raped his younger brother's girlfriend when appellant was 21 and the victim was 13 years old. (3 RT 512-514, 516-520.) He also molested her on other occasions; grabbing her breasts, vagina, buttocks, and attempting to rape her a second time. (3 RT 520-523, 525-528, 530.) Appellant was convicted of these crimes in 1999 and was sentenced to prison. (1 RT 48-49; 3 RT 546.) Lastly, appellant molested his cousin, who was five years his junior and in elementary school, by grabbing her buttocks over her clothes, and having her sit on his lap while he had an erection. (3 RT 548-553.)

B. Facts Related to Appellant's Alleged Violation of His Right to Face-to-Face Confrontation

At the time they testified in this case, Fayth was 18, Ariana was 14, and Anna was 13. (2 RT 229, 330; 3 RT 459.)

When Fayth was called to testify and first entered the courtroom, the court asked her to step up into the witness box, and follow the bailiff's instructions. (2 RT 226.) The bailiff told Fayth to "watch your step as you take the stand. Stay standing, raise your right hand, and the clerk will swear you in." (2 RT 226.) At that point, Fayth broke down crying, and the court asked her if she "needed a moment" to gather her emotions. (2 RT 226, 257.) She said, "I think so," and the court recessed. (2 RT 226.)

Outside the presence of the jury, the court asked the prosecutor to have the victim-witness advocate spend some time with Fayth, and then let the court know if Fayth was able or ready to proceed. (2 RT 226.) The prosecutor told the court she would ask Fayth if she would prefer testifying with the victim advocate behind her. (2 RT 226.) And the court responded, "Oh, yes. Right. If there's something like that that you can do that would make her more comfortable, I'm fine with that." (2 RT 226.)

The court recessed at 10:30 a.m. "to allow for witness composure," and resumed 30 minutes later. (1 CT 258-259.) When court resumed, the computer monitor had been raised to "accommodate the witness," and the victim advocate sat near Fayth. (2 RT 227-228, 256.) Fayth stood to take the oath, and then sat down in the witness box to testify. (2 RT 227.) Early on during her direct testimony, Fayth identified appellant in court. She described where he was sitting, and that he was wearing a blue shirt. (2 RT 230.) The court noted for the record that she had correctly identified appellant. (2 RT 230.)

At the next break, after a portion of Fayth's direct examination, the court described the reason for the accommodation for the record: "It's not a big change, but the monitor was placed kind of to the witness's right, apparently blocking at least some of her view of possibly Mr. Arredondo. And I think that was the only change that's been made." (2 RT 256.) Defense counsel objected noting that the monitor "does block Mr. Arredondo's entire view of the witness."

The court found, "Well, he is present in court. He can hear the witness, hear her answers. I think it's appropriate given her initial reaction. Again, just for the record, 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 her emotions back in order." (2 RT 257.)

The prosecutor added the accommodation was made because, "the witness had indicated that the defendant looked at her the first time she came in." (2 RT 258-259.) The court also clarified the monitor was repositioned "so that the witness doesn't have to look at Mr. Arredondo." (2 RT 258.)

Defense counsel had also objected several times during Fayth's direct examination because the prosecutor asked leading questions. (2 RT 257.) The court explained that it was allowing some leeway with the questioning of Fayth because although she was 18 years old, she was "fairly immature." (2 RT 257.) Fayth had turned 18 six weeks before she testified. (1 RT 107; 1 CT 1-4; 2 RT 229 [Fayth's date of birth was May 5, 1997].) She was a junior in high school and her best friend, Megan, was two years younger than she. (2 RT 229; 1 RT 83.)

The court and prosecutor provided additional details about the accommodation on the record. (2 RT 258-259.) Essentially, there was a "fairly small" computer monitor next to the witness box which was typically used so witnesses could see photographs and exhibits while they testified. (2 RT 258.) That monitor was "repositioned" by placing two books underneath it – a copy of the Penal Code and a volume of CALCRIM instructions. (2 RT 258.)

Defense counsel objected because appellant was unable to view the witness as she was testifying and appellant's knowledge of the witness "would be able to assist counsel in her demeanor and looks ... as a quasi-parent. He is aware of how the witness looks when the witness is maybe not telling the truth or when the witness is feigning something. I don't have that knowledge. I have never seen this witness before. And Mr. Arredondo is unable to assist me in that regard because he is unable to see the witness." (2 RT 258.) When the prosecutor indicated Fayth told her appellant looked at her when she entered the courtroom, defense counsel

responded that Fayth "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." (2 RT 259.) The court stated, "I understand. I'm not casting any aspersions at this point. But it clearly affected her and I think it's appropriate for the court to take whatever small efforts the Court can make to make the witness more comfortable without infringing on any of Mr. Arredondo's constitutional rights, and I don't believe that his rights have been infringed on at this point." (2 RT 259.)

During her testimony, it appears that Fayth was still somewhat emotional because at one point the court told her that there was water and Kleenex available for her. (2 RT 230.) At another point, when the prosecutor asked specific questions of how appellant had touched her, the court asked Fayth whether she needed a moment. (2 RT 238.)

After the prosecution rested, defense counsel sought permission to recall Fayth, Ariana, and Anna, for a limited line of questioning in his defense case. (3 RT 640.) While discussing the issue with the parties, the court noted that, "These were witnesses who were very difficult to pry information out of, and it was difficult for them to talk about the incidents." (3 RT 640.) When the trial court ultimately ruled that defense counsel could recall Fayth and Ariana, it added, "Again, when we talk about emotional trauma to the victims, I can't think of a worse emotional trauma than if Mr. Arredondo were to be convicted in this matter and a court with more authority than I have decided that I prevented Mr. Jones [appellant's trial counsel] from putting on a part of his defense. In fact, it would have to be litigated again at that point, and it would be a much more significant trauma than the brief questions that were talked about yesterday." (3 RT 646-647.) The prosecutor asked the court for clarification on what she was permitted to tell the girls about their being called to testify a second time,

"[b]ecause I know it's going to cause extreme emotional distress for these girls." (3 RT 650.)

At the end of the case, just prior to closing argument, the prosecutor put on the record that the computer monitor had been elevated in the manner described during Fayth's testimony, and remained elevated during Ariana and Anna's testimony. (4 RT 781.) As Fayth had done, Ariana and Anna both stood to take the oath, and then sat in the witness chair to testify. (2 RT 329; 3 RT 458.) Both girls also identified appellant during their testimony, and described the shirt he was wearing. (2 RT 331; 3 RT 460.) The fourth victim, Megan, was the first to testify, and was able to do so without the raised monitor. After Ariana and Anna's testimony, the computer monitor was lowered for the remainder of the People's case-in-chief, including the Evidence Code section 1108 witnesses, but was elevated again when Ariana and Fayth testified in the defense case (although the record does not indicate specifically when it was re-raised), and it stayed raised until the end of testimony that day, including during the testimony of other defense witnesses. (4 RT 781.) Thus, as the Court of Appeal noted, "[t]he record ... shows that raising the computer monitor by several inches was the *only* modification the court made to the witness box and to the entire courtroom" while Fayth, Ariana and Anna testified. (*People v. Arredondo* (2017) 13 Cal.App.5th 950, 962, emphasis original (*Arredondo*).)

C. Verdicts and Sentence

For his acts of molestation against Fayth, the jury convicted appellant of three counts (counts 3, 4, and, 5) of committing lewd and lascivious acts on a child under 14 (Pen. Code,[2] § 288, subd. (a). For his acts of

[2] Future unlabeled statutory references are to the Penal Code.

molestation against Ariana, the jury convicted appellant of four counts (counts 2, 10, 11, and 13) of committing a lewd and lascivious act on a child (§ 288, subd. (a)), one count (count 12) of oral copulation with a child under 14 (§ 288a, subd. (c)), and one count (count 14) of sexual penetration with a child under 14 (§ 289, subd. (j). For his acts of molestation against Anna, the jury convicted appellant of three counts (counts 6, 7, and 8) of committing a lewd and lascivious act on a child (§ 288, subd. (a)). Finally, for his acts of molestation against Megan, the jury convicted appellant of two counts (counts 1 and 9) of committing a lewd and lascivious act against a child (§288, subds. (a) and (c)). (1 CT 215; 2 CT 419-420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440-441, 443; 4 RT 859-868.)

Pursuant to the One-Strike law, the jury also found true an allegation that appellant engaged in substantial sexual conduct with a child under 11 and that he committed the offenses against multiple victims. (2 CT 418, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 442; 4 RT 860-868.) The trial court sentenced appellant to an indeterminate sentence of 275 years to life, plus a determinate sentence of 33 years. (4 RT 896-899; 2 CT 468-471.)

D. The Court of Appeal Affirmed Appellant's Convictions

With the exception of a limited remand for a sentencing error, the Court of Appeal affirmed appellant's convictions. The court, in a 2-1 published decision, rejected appellant's argument that his constitutional rights were violated because of the computer screen's placement during Fayth's testimony. All three justices agreed appellant had forfeited his claims as to Ariana and Anna by failing to object, and because trial counsel's failure to object could have been tactical, appellant had failed to show his counsel was ineffective. (*Arredondo*, *supra*, at pp. 960-961.)

ARGUMENT

I. BECAUSE THE ACCOMMODATION PERMITTED HERE WAS NECESSARY TO FURTHER AN IMPORTANT PUBLIC POLICY, AND OTHER PROCEDURAL SAFEGUARDS ENSURED THE RELIABILITY OF THE TESTIMONY, APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS NOT VIOLATED

The Confrontation Clause includes a *preference* for face-to-face confrontation between defendants and their accusers. But that preference is subject to exceptions. Here, Fayth[3] was unable to proceed without the accommodation. Therefore, the court properly determined appellant's right to face-to-face confrontation was outweighed by "considerations of public policy and the necessities of the case," and the reliability of the testimony was "otherwise assured." (*Craig*, *supra*, at pp. 849-850.)

A. The Confrontation Clause Does Not Grant Defendants an Absolute Right to Face-to-Face Confrontation

The Sixth Amendment to the federal Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before a trier of fact." (*Craig*, *supra*, 497 U.S. at p. 845.) The right of confrontation includes four essential elements—"physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." (*Id.* at p. 846.) The "combined effect" of these four elements "serves the purposes of the Confrontation Clause by ensuring that

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[3] As explained in Section IV, *post*, appellant has forfeited his claims as to Ariana's and Anna's testimony. Accordingly, respondent's discussion focuses solely on the claim related to Fayth's testimony.

evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." (*Ibid.*) But, importantly, none of the elements is an absolute guaranteed right in every case: The high court in *Craig* clarified that the Confrontation Clause must be interpreted "in a manner sensitive to its purpose and sensitive to the necessities of trial and the adversary process." (*Id.* at p. 849.)

In *Coy v. Iowa* (1988) 487 U.S. 1012 (*Coy*), the trial court, pursuant to an Iowa statute, allowed child molestation victims to testify behind a large screen that blocked them from the defendant's sight. (*Id.* at p. 1014.) After lighting adjustments, the screen allowed the defendant to dimly perceive the witnesses, but they could not see him. The defendant argued that the arrangement violated his rights to confrontation and due process. (*Id.* at p. 1015.) The court explained that the "Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Id.* at p. 1016.) The right to confront witnesses was described as "forming 'the core values furthered by the Confrontation Clause.'" (*Id.* at p. 1017, quoting *California v. Green* (1970) 399 U.S. 149, 157.) The court explained that face-to-face confrontation was an important aspect of ensuring the reliability of the testimony: "It is always more difficult to tell a lie about a person 'to his face' than 'behind the back.'" (*Id.* at p. 1019.) However, "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." (*Ibid.*)

The court left "for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." (*Ibid.*) However, since there were "no individualized findings that these particular witnesses needed special protection," and the procedure instead was based

on a legislative presumption of trauma, the judgment in that case "could not be sustained by any conceivable exception." (*Id.* at p. 1021.)

Two years later, in *Craig*, the court answered the open question, and found that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." (*Craig*, *supra*, 497 U.S. at p. 855.)

In *Craig*, the child abuse witnesses testified outside the courtroom while the judge, jury, and defendant remained in the courtroom. A video monitor recorded and played the testimony in the courtroom, but the witnesses could not see the defendant. (*Id.* at p. 841-842, 843.) The defendant was in electronic communication with defense counsel, who, along with the prosecutor, was in the room with the witness. (*Id.* at pp. 840-842.) The defendant argued the procedure violated his confrontation rights. (*Id.* at p. 842.) Prior to allowing the victims to testify via closed-circuit television, the trial court heard expert testimony that the victims would suffer "serious emotional distress such that [they could not] reasonably communicate" if forced to testify in the courtroom. (*Id.* at p. 842.) The trial court credited the expert testimony, and found the victims would suffer serious emotional distress if forced to testify in the defendant's presence, but never personally observed the victims or their emotional reactions to the defendant's presence. (*Id.* at pp. 842-843.)

In rejecting the defendant's contention that the procedure violated his right to face-to-face confrontation, the high court explained that it had "never held ... that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." (*Id.* at pp. 844, emphasis original, 849-850 ["[W]e cannot say that

[face-to-face] confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."].) Instead, the court clarified that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that 'must occasionally give way to considerations of public policy and the necessities of the case." (*Id.* at p. 849, emphasis original, internal citations omitted.) Albeit not an absolute right, the court confirmed it should not be lightly disregarded. (*Id.* at p. 850.) Instead, "a defendant's right to confront accusatory witnesses may be satisfied absent 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.)

As "'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one," it may outweigh, "at least in some cases, a defendant's right to face his or her accusers in court." (*Craig*, *supra*, 497 U.S. at pp. 852-853.) The finding of necessity must be case-specific, and the witness must be traumatized by the presence of the defendant, not just the courtroom generally. (*Id.* at pp. 855-856.) The court must also find that the emotional distress is "more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" (*Id.* at p. 856, quoting *Wildermuth v. State* (1987) 310 Md. 496, 524.) Importantly, in *Craig*, the Court of Appeals based its conclusion that the CCTV procedure violated the defendant's confrontation rights, in part, on the "trial court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the use of the one-way closed circuit television procedure." (*Craig*, *supra*, 497 U.S. at p. 860.) In overruling the lower court, the Supreme Court recognized that "such evidentiary requirements could strengthen the grounds for use of protective measures," but the court expressly "decline[d]

to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." (*Ibid.*) Instead, the high court confirmed that the Constitution only required trial courts to make "a case-specific finding of necessity," to permit use of the CCTV procedure. (*Ibid.*)

In 2004, the Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. 36. Returning to the historical roots of the Confrontation Clause, the *Crawford* court overruled *Ohio v. Roberts* (1980) 448 U.S. 56, and held the admission of out-of-court testimonial hearsay statements violated a defendant's right to confrontation. (*Id.* at p. 68.) Importantly, *Crawford* does not undermine the high court's opinion in *Craig*. This Court has already concluded as much in *People v. Gonzales* (2012) 54 Cal.4th 1234, finding "*Crawford* and its progeny are limited to 'testimonial' hearsay statements, and say nothing about whether a witness who testifies in person must face the defendant. [Citations.] *Craig* remains good law." (*Id.* at p. 1266.) Other jurisdictions are uniformly in agreement. (See *United States v. Pack* (C.A.A.F. 2007) 65 M.J. 381, 384 [collecting cases]; *State v. Jackson* (N.C. Ct. App. 2011) 216 N.C.App. 238, 243 [same]; and see *Roadcap v. Commonwealth* (2007) 50 Va.App. 732, 743 ["As nearly all courts and commentators have agreed, *Crawford* did not overrule *Craig*."].)

By its own terms, *Crawford* is limited to testimonial hearsay. (*Crawford, supra*, 541 U.S. at pp. 68-69.) The *Crawford* court noted its focus on the "principal evil" the Sixth Amendment sought to address, which was the use of ex parte examinations as evidence against the accused." (*Id.* at p. 50; see also *id.* at p. 53.) Further, the *Crawford* court's emphasis on the *manner* by which the reliability of evidence is tested is consistent with the test announced in *Craig*. In *Crawford*, the court reiterated that the "ultimate goal" of the Confrontation Clause is to ensure reliability of evidence," but as the court explained, the guarantee is

"procedural rather than [] substantive." (*Id.* at p. 61.) "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." (*Ibid.*) Consistent with that finding, the test announced in *Craig* permits an infringement on the defendant's right to face-to-face confrontation only where necessary and only where the reliability of the evidence is ensured "by subjecting it to rigorous adversarial testing and thereby preserv[ing] the essence of the effective confrontation." (*Craig*, *supra*, 497 U.S. at p. 857.) Thus, both *Crawford* and *Craig* rest the determination of a Confrontation Clause violation on whether the particular practice at issue subjects the evidence to the "constitutionally prescribed method of assessing reliability," which *Crawford* described as "the crucible of cross-examination," (*Crawford*, at p. 61), and *Craig* described as the combination of cross-examination, competency, testimony under oath, and observation of demeanor. (*Craig*, *supra*, 497 U.S. at p. 851.)

B. The Accommodation Was Necessary to Further Important Public Policies

In *Craig*, the Supreme Court held that the state's "transcendent interest in protecting the welfare of children" was "sufficiently important to justify the use of a special procedure." (*Craig*, *supra*, 497 U.S. at p. 855.) But, nothing in *Craig* indicates that the interest in protecting the welfare of children is the only interest that could be considered sufficiently important so as to justify an accommodation that may impact a defendant's traditional right to face-to-face confrontation. Indeed, in the wake of *Craig*, federal and state courts have applied its framework in cases involving other

important state interests. (See, e.g., *United States v. Abu Ali* (4th Cir. 2008) 528 F.3d 210, 240 (*Abu Ali*) [finding government's interest in combatting international terrorism sufficiently important]; *Rivera v. State* (Tex. App. 2012) 381 S.W.3d 710, 711-713 [finding state interest in obtaining testimony sufficiently important]; *People v. Wrotten* (2009) 14 N.Y.3d 33, 39 (*Wrotten*) [finding state's interest in prosecuting criminal cases and protecting the well-being of witnesses sufficiently important]; and *United States v. Rosenau* (W.D. Wash. 2012) 870 F.Supp.2d 1109, 1113 ["A wide variety of public policy objectives may satisfy this test, but the Government must make some showing of necessity."]; but see *United States v. Yates* (11th Cir. 2006) 438 F.3d 1307, 1316 (*Yates*) [requiring an interest more significant than mere convenience].) As New York's highest court concluded, "Nowhere does *Craig* suggest that it is limited to child witnesses or that a 'public policy' basis for finding necessity must be codified." (*Wrotten*, *supra*, 14 N.Y.3d at p. 39.)

Here, the trial court's repositioning of the computer screen was necessary to further the state's dual interests in obtaining accurate live testimony and protecting victims in child abuse cases from further trauma.

This Court has already recognized that the state's interest in obtaining accurate testimony can justify the use of an accommodation that impacts the defendant's right to a traditional face-to-face confrontation. In *Gonzales*, the defendant's eight-year-old son testified against his father using an alternative seating arrangement—the child's chair was placed at an angle so he was not directly facing his father. (*People v. Gonzales*, *supra*, 54 Cal.4th at pp. 1265-1268.) Relying on a lower court's holding in a similar scenario, this Court held the minimal intrusion on the defendant's right to confront his accuser was justified by the state's interest in protecting the child witness "and obtaining accurate testimony." (*Gonzales*, *supra*, at p. 1265, citing *People v. Sharp* (1994) 29 Cal.App.4th

1772, 1783-1784 (*Sharp*); see also *Yates*, *supra*, 438 F.3d at p. 1316 ["The Government's interest in presenting the fact-finder with crucial evidence is, of course, an important public policy."].) More generally, the United States Supreme Court has recognized that "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." (*United States v. Scheffer* (1998) 523 U.S. 303, 309.) And this Court has expressly said the same with respect to California: "California has an interest 'in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 270, quoting *Scheffer*, *supra*, 523 U.S. at p. 309.)

In contrast, *Coy* focused on the single state interest of protecting victims of child abuse from the trauma of testifying. Due to the procedural posture of that case—namely, one that involved a legislative presumption without individualized findings of fact—the question presented did not raise the specter of being wholly unable to obtain the victim's testimony. But here, that issue was directly before the trial court because it had already made a factual finding that Fayth was unable to proceed. (2 RT 257.) Had the court not made the accommodation it did, Fayth would not have been able to testify. The state has an interest in not only protecting child abuse victims from further trauma, but also in enabling a witness to testify who would otherwise be unable to give testimony.

The alternatives where a witness is unable to proceed are either to dismiss charges or to admit hearsay evidence. Dismissal of the charges would necessarily undermine the state's interest in protecting the public. Resorting to use of hearsay evidence, on the other hand, requires reliance on inferior evidence with fewer assurances of reliability (most importantly, the absence of an opportunity to cross-examine the witness). (See generally *Ohio v. Clark* (2015) __ U.S. __ [135 S.Ct. 2173, 2179-2183] (*Clark*)

[abuse victim's statements to preschool teachers admissible under the Confrontation Clause even though witness was incompetent to testify].) Notably, in California, unavailability of a witness can be established by showing the witness is "persistent in refusing to testify" or that testifying will cause the witness "substantial trauma," including physical or mental trauma. (Evid. Code, § 240, subds. (a)(3) & (c).) Once the court finds the victim unavailable, her prior out-of-court statements may be admissible under certain circumstances. (See, e.g., Evid. Code, §§ 1291 [former testimony], 1228 [spontaneous statements], 1360 [certain statements by child abuse victims], and 1380 [statements of unavailable witness where defendant's conduct contributed to unavailability].) Because they are often non-testimonial, such statements may satisfy the Confrontation Clause. (*Clark*, *supra*, 135 S.Ct. at p. 2182 ["Statements by very young children will rarely, if ever, implicate the Confrontation Clause."].) But, reliance on out-of-court hearsay statements is inherently inferior to reliance on live in-court testimony. (See *Crawford*, *supra*, 541 U.S. at p. 61.)

In addition to the state's interest in obtaining accurate testimony, the state has a compelling and important interest in protecting victims of crime, and in reducing the trauma those victims experience when they participate in the criminal justice system. California has recognized this important public policy, and codified it in the most significant manner possible—by adding it to the California Constitution. In 2008, Article I, section 28 ("Marsy's Law"), was added to the Constitution because, as the People of the State of California declared, "The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." (Cal. Const., art. I, § 28(1).) The constitutional provision identified several specific rights of victims, including the right "[t]o be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile

justice process." (Cal. Const., art. I, § 28, subd. (b)(1), emphasis added.) The constitutional rights of victims are enforceable "in any trial or appellate court with jurisdiction over the case as a matter of right." (Cal. Const., art. I, § 28, subd. (c)(1).) Other states have recognized a similar interest. In *Wrotten*, for instance, the highest state court in New York confirmed that a minimal intrusion on the defendant's right to face-to-face confrontation could be justified by "the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness." (*Wrotten*, *supra*, 14 N.Y.3d at pp. 39-40 [allowing for use of two-way video testimony where key witness could not physically travel to court].)

The state's interests in obtaining accurate testimony and in protecting victims from further trauma are particularly heightened with child abuse victims because those interests bear directly on the state's ability to prosecute these difficult cases. The Supreme Court has recognized that, "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60.) In the concurring opinion in *Coy*, Justice O'Conner noted that "[c]hild abuse is a problem of disturbing proportions in today's society. (*Coy*, *supra*, at p. 1022, conc. opn of Justice O'Connor.) Where the abuser is a parent, victims are often reluctant to come forward, making it that much harder for the state to effectively protect these children from abuse. Furthering these state interests is necessary to ensure these crimes are prosecuted at all.

Appellant claims *Craig* is inapplicable because Fayth had recently turned 18 years old, thus, she was an adult, and not entitled to any accommodations. (ABOM 39-44.) Even though Fayth turned 18 years old six weeks before testifying, she was a "fairly immature" 18-year-old (2 RT 257), and the policy and state interest in protecting victims of child abuse still applied. To allow accommodations only for victims who happen to

testify before they turn 18 would suggest that the state's interest in protecting victims of child abuse is arbitrarily severed on every victim's 18th birthday. The courts have recognized that the state continues to have an interest in protecting victims even after they become adults. As the Court of Appeal observed, Fayth at age 18 and 6 weeks, was "no less vulnerable than a minor to the emotional trauma of face-to-face confrontation." (*Arredondo*, *supra*, at p. 973.) Further, to define the state's interest in terms of hard age limits would "commit the very sin the Supreme Court condemned in *Coy*—that is, making a 'generalized finding' about the level of trauma certain groups of witnesses experience when confronting defendants." (*Ibid.*) Additionally, as the Court of Appeal noted, *Craig* did not "'mark[] the outer boundary of when alternative procedures to face-to-face confrontation are constitutionally permissible." (*Ibid.*; *People v. Lujan* (2012) 211 Cal.App.4th 1499, 1505 (*Lujan*).)

Fayth was molested when she was a child, subjected to having intercourse with appellant, beginning when she was eight years old, and continuing at four separate residences over the course of six years. (2 RT 223-235, 250-251, 253, 265-267.) The molestations were disclosed, and charges were filed, in September 2013, when Fayth was 16 years old. (1 RT 107; 1 CT 1-4; 2 RT 229 [Fayth's date of birth was May 5, 1997].) The trial commenced June 9, 2017, a little over a month after Fayth turned 18. (1 CT 250.) Fayth testified on June 16, 2015, approximately six weeks after turning 18. (2 RT 185, 228.)

Even though Fayth had turned 18, she was still as vulnerable as a child. She was only a junior in high school. (2 RT 229.) The trial court noted that she was "fairly immature." (2 RT 257.) Her long-time best friend, Megan, was two years younger. (1 RT 83; 2 RT 232-233.) Fayth was testifying about being repeatedly molested from the time she was eight years old by her father figure, who was also present in the room while she

explained what he had done to her. (1 RT 85; 2 RT 235.) She had to take a break to get her emotions "back in order." (2 RT 257.) The record shows Fayth was still in need of special protections, even though she had turned 18. While *Craig* found an accommodation constitutionally permissible for child witnesses, it did so because that was the issue before it. *Craig* did not hold that protection of child witnesses was the sole and exclusive policy interest that might justify an accommodation. Here, even though Fayth was barely 18, the state's interest in protecting her as a victim of child abuse was still important and compelling.

The continuing nature of the state's interest in protecting victims of child abuse is further reflected in several states' CCTV statutes which allow for accommodations based on the victim's age when the abuse occurred, not their age when testifying. For example, Colorado allows videotaped testimony if the victim was under 15 years old at the time of the offense (Colo. Rev. Stats. Ann. § 18-3-413), New Hampshire allows videotaped testimony if the victim or witness was under 16 at the time of the offense (N.H. Rev. Stat. § 517:13-a), and Tennessee allows CCTV for victims 13 or younger at the time of the offense (Tenn. Code. Ann. § 24-7-120).

Nevada's statute allows for videotaping of a sexual abuse victim's testimony who is 18, or if in school, until graduation from high school. (Nev. Rev. Stats. § 174.227 [provides for videotaping of a victim of sexual abuse] § 432B.100 [provides sexual abuse includes certain acts committed upon a child] § 432B.040 [defines "child" as a person under 18 or, if in school, until graduation from high school].) Other states do not specify an age. (N.J. Stats. Ann. § 2A:84A-32.4; 11 Del. Code §§ 3511, 3514 [Delaware allows CCTV for *victims* of certain offenses regardless of age; but a *witness* must be under 11 years old.].)

All these statutes would allow accommodations for someone like Fayth even though she was 18 at the time she testified. The *per se* rule that

appellant requests would invalidate the above statutes as unconstitutional. These statutes demonstrate the important public policy and state interest in accommodating victims of child molestation.

In keeping with the policy concerns underlying these statutes, at least one Court of Appeal has already held that the state's interest in protecting victims does not stop when the victim turns 18. In *People v. Williams* (2002) 102 Cal.App.4th 995, 997-998 (*Williams*), the court upheld the use of videotape for an adult witness of domestic violence against a claim the defendant was denied his right to confront witnesses, to be present at trial, and to due process. Expert testimony established the victim would be unable to testify in front of the defendant, her ex-boyfriend, due to her medical and psychological conditions. (*Id.* at pp. 1004-1006.) The court explained that the principles in *Craig* applied, even though the witness was an adult. (*Id.* at pp. 1007-1008, citing *Craig*, *supra*, at p. 851.)

As he did below, appellant relies on *People v. Murphy* (2003) 107 Cal.App.4th 1150 (*Murphy*), for the proposition that any special arrangement of the courtroom was unconstitutional because Fayth was an adult, not a child. (ABOM 40-41.) In that case, the victim of a sexual assault was 31 years old, and testified behind a one-way glass that prevented her from seeing the defendant, even though the defendant could see her. (*Murphy*, at p. 1152.) The victim was nervous, severely emotionally distraught, and even passed out during cross-examination. (*Id.* at pp. 1152-1152.) The Court of Appeal held the defendant's confrontation rights were violated. In *dicta*, the court noted that the case did not "involve the State's traditional and transcendent interest in protecting the welfare of children, ... nor [had] the People ... 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." (*Id.* at

p. 1157.) As explained above, the state does have an important interest in protecting victims, and the interest has been codified as a constitutional provision. The *Murphy* court also dismissed the trial court's reliance on the state's interest in ascertaining the truth (*ibid.*), but this Court relied on that very interest to justify the alternate seating arrangement in *Gonzales*. (*Gonzales*, *supra*, 54 Cal.4th at p. 1265.) In the end, the holding in *Murphy* was that the defendant's confrontation rights were violated because the trial court had not made the necessary case-specific factual findings *Craig* required. (*Murphy*, *supra*, 107 Cal.App.4th at pp. 1157-1158.)

Here, as explained in more detail below, the trial court made all the necessary factual findings. Moreover, as explained above, the state's interest in protecting child abuse victims from further trauma does not evaporate on the child's 18th birthday. As the Court of Appeal explained, "*Craig* specifically recognized that the state's "'compelling'" 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. But *Craig* did not suggest the state no longer has an interest in protecting a child abuse victim from the emotional trauma of face-to-face confrontation *if* that victim happens to have turned age 18 by the time he or she is called upon to testify." (*Arredondo*, *supra*, 13 Cal.App.5th at p. 973, citation omitted, italics original.) Thus, *Murphy* is either distinguishable or wrongly decided.

In a different context, the Legislature has demonstrated its belief that the state's interests with respect to its treatment of children do necessarily end abruptly at age 18. The state's interest in protecting juvenile offenders from sentences that are too lengthy in light of developmental distinctions with youthful offenders has given rise to legislation guaranteeing parole eligibility hearings after 25 years of incarceration. (*People v. Contreras* (2018) 4 Cal.5th 349, 381-382.) And while the initial statute applied solely

to juvenile offenders who committed their crimes before they turned 18, more recently, the Legislature has extended this protection to offenders who were 23 years old or younger when they committed the offense. (*Ibid.*) This demonstrates what is already a commonsense principle: while the legal demarcation between child and adult is often drawn at age 18, the developmental demarcation does not necessarily fall in lock step, and it differs for every individual. The state's interest in protecting Fayth, a "fairly immature" 18-year-old junior in high school, and a victim of six years of horrific sexual abuse at the hands of her quasi step-father, did not cease to exist on her 18th birthday, six weeks before the trial began.

The accommodation here was necessary to further the important state interests. Without such an accommodation Fayth would have been unable to participate in the proceedings, which would have directly undermined the state's interest in obtaining her testimony. Further, the record shows Fayth was emotionally traumatized by having to testify in appellant's presence, and the state has a compelling interest in protecting victims from suffering additional trauma by participating in the criminal justice system. These twin interests are particularly pronounced in child abuse cases because of the inherent importance of the only available witness's testimony and the understandable trauma caused to child victims when they are called to testify about the abuse in front of the abuser, who is most often a parent, family member, authority figure or otherwise well-known adult.

C. The Record Supports the Trial Court's Finding That the Accommodation Was Necessary

In order to show necessity for the accommodation, *Craig* requires trial courts to (1) make a case-specific finding that the accommodation is necessary to further an important public policy; (2) find that the trauma is caused by the defendant's presence, and not by the courtroom generally,

and (3) find that the emotional distress is more than de minimis. (*Craig*, *supra*, at pp. 850, 855-856.) Importantly, this Court has recognized that the detail required of the trial court's findings is directly proportional to the degree of intrusion on the defendant's rights, i.e., the smaller the intrusion on a defendant's Sixth Amendment rights, the less detail required of a trial court's findings. (*Gonzales*, *supra*, 54 Cal.4th at p. 1267.)

The record supports the trial court's determination on all three questions. The court made a case-specific finding that blocking Fayth's view of appellant by putting books under the computer monitor was necessary to allow her to proceed with her testimony and to protect her from suffering serious emotional trauma from facing appellant in court. In fact, perhaps an even stronger showing was made here than in *Craig*. In *Craig*, an expert witness testified about various victims, and the difficultly they would have testifying in Craig's presence. (*Craig*, *supra*, at p. 842.) The expert described various child witnesses as having the following limitations: one child would have "the most anxiety" if the child testified in front of the defendant, another would not be "able to communicate effectively," another "would probably stop talking" and would "withdraw and curl up," one would "become highly agitated" and "may refuse to talk," or if he did, he "would choose his subject regardless of the questions," and one "would become extremely timid and unwilling to talk." (*Ibid.*) The expert's testimony that a child "may" refuse to talk, or have anxiety, or "probably" stop talking is a much weaker showing than the one in this case, where Fayth actually did come to the courtroom, faced appellant, and had an emotional breakdown that rendered her unable to proceed.

Initially, Fayth entered the courtroom, approached the witness box, and prepared to take the oath. (2 RT 226.) At that point, she broke down crying and the court asked if she needed a moment to get her emotions in

order. (2 RT 226, 257.) The trial court was already aware that Fayth had particular difficulty disclosing the abuse. Her best friend of six years, Megan, had already testified that when she confronted Fayth about appellant's abuse, Fayth initially refused to disclose the abuse to her despite the girls' very close relationship. (1 RT 94-95.) After Fayth left the courtroom, the court asked the prosecutor to have the advocate spend some time with Fayth, and let the court know if she was able to proceed. (2 RT 226.) When the prosecutor suggested allowing the advocate to sit behind Fayth, the court agreed it would allow that accommodation, or "something like that." (2 RT 226.) The prosecutor's subsequent comment shows that during the break Fayth indicated her inability to proceed was caused by appellant looking at her (2 RT 258-259), and that an accommodation that would help her avoid looking at him would allow her to proceed (see 2 RT 258 [trial court explained that the monitor was repositioned "so that the witness doesn't have to look at Mr. Arredondo."]). Consistent with its earlier indication, the court allowed the accommodation so Fayth would be able to testify. (2 RT 226.) With the computer monitor repositioned to block Fayth's view of appellant while testifying, Fayth stood to take the oath, and then sat down in the witness box to testify. (2 RT 227.) The record also shows that the accommodation served its purpose. Fayth remained emotional throughout her testimony, but she was able to testify. (2 RT 230, 238.) Thus, contrary to appellant's argument that Fayth's emotional trauma was insufficient because it did not render her "unable to reasonably communicate" (AOB 44-45), the record establishes that Fayth's emotional distress rendered her "unable to proceed," which is functionally equivalent. Accordingly, the record supports the trial court's finding that the accommodation was necessary in order to secure Fayth's testimony, because without it she was so emotionally upset that she was "unable to proceed." (2 RT 257.)

In addition, as the Court of Appeal observed, "the record affirmatively shows—and defendant did not dispute—that [Fayth] was too emotionally upset to testify *because* she had to face defendant." (*Arredondo*, *supra*, 13 Cal.App.5th at p. 971, emphasis original.) Fayth broke down just before taking the oath, suggesting this occurred at or near the witness box which would also have been the first time she had to turn and face appellant. (2 RT 226.) She told the prosecutor the break-down was because appellant looked at her (2 RT 258-259), which is corroborated by the timing of the events. The court found that facing appellant "clearly affected" her, and that an accommodation that helped her avoid looking at him would solve the problem. (2 RT 257-258.) Unlike in *Murphy*, *supra*, where there was not a sufficient and particularized finding, the determination was not based solely on the prosecutor's unsworn representation; rather, it was based on the court's own observations of Fayth and her emotional breakdown when faced with having to testify in front of appellant. Further, the fact that the accommodation worked supports the trial court's finding that it was facing *appellant* that rendered Fayth unable to proceed.

For purposes of justifying the accommodation pursuant to the state's interest in protecting witnesses from the trauma of testifying, the court in *Craig* required a finding that the anticipated emotional distress was "more than *de minimis*." That standard was met here because the record shows that Fayth broke down, was crying, and was experiencing emotional trauma severe enough that she could not take the stand and testify. (2 RT 226, 257-258.) Fayth had to leave the courtroom, and it took 30 minutes to regain her composure. (2 RT 257; 1 CT 257-259.) The trial court's comments when discussing defense counsel's request to recall Fayth in the defense case provide further support for its initial finding that Fayth would experience emotional trauma by being forced to testify. When the trial court ultimately ruled that defense counsel could recall Fayth, it did so in

part to guard against a possible reversal and retrial, which the court noted would necessitate Fayth testifying again, and which would cause the worst possible emotional trauma to her. (3 RT 646.) This satisfies the test in *Craig* that Fayth's emotional trauma was more than de minimis.

Craig requires trial courts to make findings based on evidence or personal observation regarding "the particular child witness who seeks to testify" rather than generalized notions of potential harm to child abuse victims as a class. (*Craig*, *supra*, 497 U.S. at p. 855.) The trial court's use of the repositioned monitor for some, but not all of the child abuse victims, supports the inference that its findings were specific and particular as to each witness. This inference is further supported by the trial court's use of the accommodation for one adult child abuse victim (Fayth), but not all of the adult child abuse victims (i.e., the Evidence Code section 1108 victims), and its use of the monitor for some of the child witnesses (Ariana and Anna), but not all of the child witnesses (Megan). Thus, the trial court appropriately refrained from making a generalized finding of potential harm to a class of victims or witnesses.

Moreover, a separate evidentiary hearing was not required. As the Court of Appeal explained, neither *Gonzales* nor *Sharp* involved an evidentiary hearing. "Yet the courts in each case upheld the alternative seating arrangements despite the absence of evidentiary hearings in the trial courts, given that the records in each case supported the trial courts' findings of case-specific necessity for the alternative procedure used." (*Arredondo*, *supra*, 13 Cal.App.5th at p. 972.) And *Craig* "declined to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use" of a special procedure. (*Craig*, *supra*, at p. 860.) The evidence here occurred in the trial court's presence; nothing more was required.

Appellant claims the trial court's findings are insufficient under *Craig* because the trial court simply wanted to make Fayth "more comfortable" (ABOM 47). However, taken in context, the court did not make the accommodation based on the witness's comfort; rather, it was because she was "unable to proceed." As the Court of Appeal explained, "[t]he record shows [Fayth] was not merely crying or 'uncomfortable' when she first stepped to the witness stand, but was so emotionally upset that she was unable to proceed and 'participate effectively in the proceedings.'" (*Arredondo*, *supra*, at p. 969.) The trial court said it made the accommodation to make Fayth "more comfortable" without infringing on any of appellant's rights in "reference to its earlier finding that it was necessary to raise the monitor to protect [Fayth] from the emotional trauma of facing defendant while testifying. The record shows that making [Fayth] 'more comfortable' was not the basis of the court's finding of a case-specific necessity to raise the computer monitor for [Fayth]. Rather, the need to protect [Fayth] from serious emotional trauma and to render her able to testify were the reasons for raising the monitor." (*Id.* at p. 970, emphasis original.) Thus, as the Court of Appeal's analysis is sound and comports with the record, appellant's arguments fail. The trial court made all the findings required by *Craig*, and the record shows the accommodation was necessary.

D. Because the Reliability of the Evidence Was Assured Through Other Procedural Mechanisms, Blocking Appellant's View of Fayth Did Not Violate His Right to Confrontation

As the court explained in *Craig*, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Craig*, *supra*, 497 U.S. at

p. 845.) All of the elements of confrontation seek to accomplish this same purpose—the reliability of the evidence presented against the accused. (*Id.* at p. 846.) The right to a face-to-face confrontation is no different, and the Supreme Court has explained that it is included in the confrontation right to do what the other elements do as well – to ensure the reliability of the testimony by forcing the accused and his accusers to confront each other. (See *Coy*, *supra*, 487 U.S. at pp. 1017-1019.) Thus, the two-part test announced in *Craig* recognizes that if there is a sufficient showing of necessity, an infringement on the defendant's right to face-to-face confrontation will not violate his constitutional right to confrontation so long as the "reliability of the testimony is otherwise assured." (*Id.* at p. 850.)

In *Craig*, the case-specific showing of necessity permitted a specific intrusion on the defendant's right to face-to-face confrontation—namely, it permitted the use of CCTV which meant the witness could testify without seeing the defendant or being physically present in the same room with him. (*Id.* at p. 855.) This intrusion did not create a constitutional violation because the reliability of the testimony was assured by other means. In particular, the court relied on the Maryland statute's preservation of "all of the other elements of the confrontation right," including the requirements that the witness be competent to testify, testify under oath, be subject to contemporaneous cross-examination, and that her demeanor be observable by the judge, jury and defendant as she testified. (*Id.* at p. 851.)

Nearly all of the other assurances relied on in *Craig* are also present here. Fayth was competent to testify, she testified under oath (2 RT 227), the judge, jury and attorneys could observe her demeanor, and she was subject to vigorous contemporaneous cross-examination (see 2 RT 269-324). The oath facilitates reliability by "encouraging truth through solemnity." (*Abu Ali*, *supra*, 528 F.3d at p. 241.) Observation of demeanor

facilitates reliability of the evidence because it permits the trier of fact to more wholly assess the witness's credibility. (See *People v. Garton* (2018) 4 Cal.5th 485, 501.) Lastly, courts have long recognized the important contribution of contemporaneous cross-examination to the reliability of the evidence, calling it the "'greatest legal engine ever invented for the discovery of truth,'" and the "'principal means by which the believability of a witness and the truth of his testimony are tested.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 736, quoting *California v. Green*, *supra*, 399 U.S. at p. 158, and *Davis v. Alaska* (1974) 415 U.S. 308, 316.) *Craig* itself recognized that, "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight the witness' testimony." (*Craig*, *supra*, at p. 847, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 22, brackets original.) And Crawford referred to cross-examination as the "particular manner" and "constitutionally prescribed method of assessing reliability." (*Crawford*, *supra*, 541 U.S. at pp. 68-69.)

The two distinctions between this case and *Craig* concern the opportunity for the defendant and the witness to view each other, and their physical presence in the same room. First, in *Craig*, the victims could not see the defendant at all, and never testified in his physical presence, whereas here Fayth saw appellant as she entered the courtroom, took the oath, and identified him, and her testimony was entirely in his physical presence. Second, in *Craig*, the defendant could see the victims testify, whereas here, appellant's view of Fayth was blocked while she testified. When assessed in light of each factors' contribution to the evidence's overall reliability, it is clear that the repositioning of the computer monitor did not work a violation of appellant's constitutional right to confrontation.

Coy recognized that the right to face-to-face confrontation includes several components, all of which play a different role in assuring reliability. The first and most important aspect of the face-to-face confrontation is its impact on the witness. (See *Coy*, *supra*, 487 U.S. at p. 1020 ["It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter," than one which "enable[s] the complaining witnesses to avoid viewing appellant as they gave their testimony..."].) As the Supreme Court explained, "[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.'" (*Coy*, *supra*, 487 U.S. at p. 1019 (quoting Chafee, The Blessings Of Liberty 35 (1956) (other citation omitted)).) The court noted, "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" (*Id.* at p. 1019.) Importantly, the court in *Coy* clarified that the requirement of a "face-to-face" confrontation does not mean a literal face-to-face confrontation: "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." (*Id.* at p. 1019.) Face-to-face confrontation is important because the physical presence of the defendant and his accuser in the same room communicates to the accuser the gravity of her testimony, and the impact her statements will have on the defendant. It forces the accuser to recognize and take account of the consequences of her testimony, thereby making it much more difficult to lie. (See *Ohio v. Roberts*, *supra*, 448 U.S. 56, 63 fn. 6 ["[T]he requirement of personal presence ... undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial."].) As the Texas high court explained, "The physical presence element entails an accountability of the witness to the defendant." (*Romero v. State* (Tex. Crim. App. 2005) 173 S.W.3d 502,

505.) In *Craig*, the court added that "face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person." (*Craig*, *supra*, 497 U.S. at p. 846.)

Here, Fayth entered the courtroom and saw appellant sitting at counsel table. (2 RT 226, 257.) After the monitor had been repositioned and the court resumed her testimony, Fayth entered the courtroom again and stood while she took the oath. (2 RT 227.) From a standing position, the computer monitor necessarily could not have blocked her view of appellant while she took the oath. Further, Fayth identified appellant during her testimony, demonstrating that her view of him was not entirely obstructed, nor his of her. (2 RT 230.) Fayth's opportunities to see appellant in the courtroom (coupled with the fact that appellant was well known to her), and her positive identification of him, alleviated any risk Fayth would wrongfully implicate an innocent person, thus satisfying that component of reliability included in the right to face-to-face confrontation. (See *Craig*, *supra*, at p. 846.) In addition, Fayth's opportunities to see appellant sitting in the courtroom would have had the same effect that the court in *Coy* found so important. (See also *Coy*, *supra*, at p. 1023, conc. opn. of O'Connor, J. [noting that protective procedures that "involve testimony in the presence of the defendant" may "raise no substantial Confrontation Clause problem"].) She necessarily understood that appellant was being tried for crimes she was accusing him of, and that he would suffer harm if she distorted facts. It made Fayth accountable to appellant while giving accusatory testimony. Having the two in the same room together with the jury there to view their respective demeanors did much of the work of ensuring reliability in the manner sought by a traditional face-to-face confrontation. The computer screen's minimal obstruction of her view of appellant during her testimony could not, in any manner, have reduced her

awareness of and appreciation for the gravity of the circumstances, and the importance of her testimony. Thus, Fayth's physical presence in the courtroom and her awareness of appellant add assurances of reliability to her testimony that were not present in *Craig*.

Further, obstructing *appellant's view of Fayth* did not so undermine the reliability of the evidence such that it amounts to a violation of his right to confrontation. While a defendant's ability to view the witness is undoubtedly a component of the right to face-to-face confrontation, courts have provided significantly less detail about the precise contribution this element makes to the reliability of the evidence. In *Coy*, the court noted this was part of the right, stating: "'[A] fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial, *upon whom he can look while being tried*, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.'" (*Coy*, *supra*, 487 U.S. at p. 1017 (emphasis added), quoting citing *Kirby v. United States* (1899) 174 U.S. 47, 55.) But *Coy* provides no additional detail about the role this element plays in assuring reliability. In addition, in resolving a similar issue where a witness was permitted to wear sunglasses while testifying, the Second Circuit identified the defendant's ability to view the witness as a component of the right to face-to-face confrontation, but ultimately rested its conclusion on the sunglasses' interference with the *jury's* ability to see the witness and thus assess demeanor—the third component of face-to-face confrontation which assures reliability. (*Morales v. Artuz* (2d Cir. 2002) 281 F.3d 55, 60; see also *United States v. Kaufman* (2008) 546 F.3d 1242, 1253-1254.) In *People v. Lofton* (2000) 194 Ill.2d 40, 60, the Illinois Supreme Court addressed the constitutionality of placing lecterns between the witness stand and the defense table,

blocking the witness's view of the defendant and the defendant's view of the witness. (*Id.* at pp. 46-51.) The court found that 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." (*Id.* at p. 60; see also *Smith v. State* (1995) 111 Nev. 499, 503 [blocking a defendant's view of the witness interferes with his ability to effectively cross-examine].) Ultimately, however, the court in *Lofton* found a Confrontation Clause violation because the trial court had made no particularized findings of necessity. (*Id.* at pp. 60-61.) The *Lofton* court's observation regarding appellant's ability to identify lines of cross-examination is consistent with trial counsel's objection in this case—he argued appellant's familiarity with Fayth, as her "quasi parent," would enable him to suggest areas of cross-examination based on her visual demeanor while testifying. (2 RT 258.)

To the extent a defendant's right to see the witness is important because it enables him to effectively participate in cross-examination, it must be remembered that the lines of cross-examination potentially impacted by a defendant's obstructed view of a witness are, at best, limited. The defendant can still hear the witness testify, and can still fully participate in the cross-examination as it is occurring. He can still suggest areas to explore on cross-examination based on the substance of the witness's answers, the tone in her voice, and his personal knowledge of the facts to which she is testifying. And, in a situation where the defendant does not have any intimate or familial knowledge of the witness, it is unlikely that he will be able to offer any unique suggestions about potential areas of cross-examination based on his ability to view the witness, where his attorney can also see and hear that witness. The only lines of questioning left are those potential areas of cross-examination that a

defendant, like appellant here, may be able to suggest given his familiarity with the mannerisms, facial expressions, and demeanor, of the witness. Every other assurance of reliability guaranteed by the Confrontation Clause was fully preserved. Interfering with this very narrow component of the overall reliability of the evidence did not amount to a violation of appellant's constitutional right to confrontation. Thus, while the defendant's right to view the witness is undoubtedly a component of his right to a face-to-face confrontation, its contribution to the overall assurance of reliability is far less significant than that of the other components of the confrontation right.

Appellant also complains that the accommodation here impacted another aspect of the reliability assured through face-to-face confrontation—the jury's observation of demeanor. He argues that the repositioned monitor limited the ability of the jury to assess Fayth because she did not have to look at appellant while testifying, and in support, appellant cites the following quote from *Coy*: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" (ABOM 54, quoting *Coy*, *supra*, at p. 1019.) But *Coy* itself held that, "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*, at p. 1019.) Even without the repositioned monitor, Fayth could have averted her eyes and steadfastly refused to look at appellant or even in his direction, and *Coy* confirms that would pose no confrontation problem. Moreover, the case law allowing exceptions to the right to face-to-face confrontation upholds testimony where the witness was not looking at the defendant. In *Craig*, for instance, the court upheld one-way CCTV where the witness could not see the defendant. (*Craig*, *supra*, at pp. 841-842; see also *Gonzales*, *supra*, 54 Cal.4th at pp. 1265, 1267 [witness facing away from defendant]; *Sharp*,

supra, 29 Cal.App.4th at pp. 1780, 1783 [prosecutor stood so witness faced away from defendant].)

Additionally, in the unique context of child abuse victims, the Supreme Court has recognized that an accommodation such as that used here can actually increase the reliability of the testimony. Justice Blackmun was among the first jurists to recognize this in his dissent in *Coy*: "[T]he fear and trauma associated with a child's testimony in front of the defendant ... may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself." (*Coy*, *supra*, 487 U.S. at p. 1032, dis. opn. Blackmun, J.) In support, Justice Blackmun noted, "some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective procedures." (*Ibid.* at p. 1032, fn. 5, citing *State v. Sheppard* (1984) 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332; note, Parent–Child Incest: Proof at Trial Without Testimony in Court by the Victim, 15 U.Mich.J. L. Ref. 131 (1981).) The majority opinion in *Craig* reiterated this finding, and cited Justice Blackmun's observation as additional support for its holding that the other procedural assurances of reliability were sufficient to protect the defendant's constitutional right to confrontation. (*Craig*, *supra*, 497 U.S. at p. 857.)

Finally, appellant cites seven cases from other states that found a violation of the defendant's confrontation right where something was placed between the defendant and the testifying witness to block their view of each other. (ABOM 53.) But the cases are not helpful here. First, in five of the seven cases, the courts' decisions relied on the absence of case-specific findings of necessity, which under *Craig*, are clearly required. (*Lofton*, *supra*, 194 Ill.2d at pp. 60-61; *Sparkman v. Com.* (Ky. 2008) 250 S.W.3d 667, 669 ["There was no finding of 'compelling need' to justify impairing Appellant's ability to confront the witnesses against

him."]; *Smith v. State*, *supra*, 111 Nev. at p. 510, fn. 2 ["The prosecution made no offer of proof that the child-victim would be traumatized or otherwise effected by having an unobstructed view of Smith during direct examination and the district court made no specific finding regarding this issue."]; *State v. Welch* (La. 2000) 760 So.2d 317, 321 ["[T]he State presented no case-specific evidence to prove the necessity of protecting this child from the trauma of testifying against the defendant."]; *State v. Lipka* (2002) 174 Vt. 377, 383 [defendant's confrontation right violated by alternate seating arrangement where trial court failed to make adequate findings of necessity].)

In two of those five cases, and in an additional case appellant cites out of Colorado, the courts found that the particular state's adoption of a CCTV statute constituted a legislative pronouncement that CCTV was the sole and exclusive permissible accommodation trial courts could employ. (*Lofton*, *supra*, 194 Ill.2d at pp. 60-61; *Sparkman v. Com.*, *supra*, 250 S.W.3d at p. 669; *People v. Mosley* (Colo. App. 2007) 167 P.3d 157, 161 [holding that because the state statute had been adopted, it "need not resolve [] whether a defendant's view of a witness's demeanor is an indispensable ingredient of the limited right of confrontation recognized in *Maryland v. Craig*"].) For the reasons explained below, California trial courts have inherent authority to craft procedures to fill gaps in legislation so long as such procedures are otherwise lawful and constitutional.

The seventh and last case, *State v. Parker* (2008) 276 Neb. 661, addressed a different constitutional question altogether. There, the Nebraska Supreme Court found that the placement of "a large opaque screen jutt[ing] curiously into the room with one edge touching the wall and the other edge approaching the corner of [the defendant's] table," was inherently prejudicial as it interfered with the presumption of innocence and thus with the defendant's right to a fair trial. (*Id.* at pp. 671-673.) The

Parker court did not address whether the screen constituted a violation of the defendant's confrontation right.

In contrast to those cases, the Supreme Court of Montana upheld a physical screen between a witness and a defendant in *State v. Davis* (Mont. 1992) 830 P.2d 1309. There, the trial court placed a free-standing, six and one-half foot by ten-foot screen, normally used as a temporary room divider, between the defendant and two child witnesses in a child molestation case, blocking the defendant from seeing them. (*Id.* at p. 1312.) The court noted that although the defendant could not see the witnesses, it did not find that fact dispositive. (*Id.* at p. 1314.) It explained that the elements of confrontation in *Craig* that ensured the evidence was reliable and subjected to the rigorous adversarial testing were present—"physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." (*Ibid.*, quoting *Craig*, *supra*, at p. 846.) Thus, even though the defendant could not personally observe the witnesses, "the basic elements relied upon by the Supreme Court in *Craig* were satisfied. The child witnesses were physically present in the court, an oath was administered, the children were cross-examined, and the jury was able to observe the demeanor of the child witnesses." (*Id.* at p. 1315.) The same analysis applies here.

In *State v. Naucke*, the Supreme Court of Missouri upheld the admission of videotaped testimony, taken without the defendant present, based on a finding that the young child and victim of sexual abuse was unavailable due to the emotional and psychological trauma the child witness would sustain if the defendant were present. (*State v. Naucke* (Mo. 1992) 829 S.W.2d 445, 448-449; see also *People v. Rose* (Mich. Ct. App. 2010) 289 Mich.App. 499, 517 [upholding use of screen similar to the one used in *Coy*].) It is also noteworthy that several courts upholding alternative seating arrangements which partially or completely obstructed

the defendant's view of the witness have done so even where the trial court made no case-specific findings, indicating courts do not place the same weight on a defendant's ability to see the witness as they do on the witness's ability to see the defendant, and that where the victim is physically present when testifying, the defendant's right to confrontation is not infringed. (*Gonzales*, at p. 1268; *Smith v. State* (2000) 340 Ark. 116, 122; *State v. Brockel* (La.Ct.App. 1999) 733 So.2d 640, 645-646.)

Because of the other procedural protections in place, the central concern of the Confrontation Clause, i.e., reliability, was served here, as the testimony was subjected to rigorous testing in the context of an adversary proceeding before the trier of fact. (*Craig*, *supra*, at pp. 845, 851.) Fayth saw appellant in the courtroom and knew she was testifying in his presence. She testified under oath, in full view of the judge, jury and attorneys, and she was subject to contemporaneous cross-examination. As the procedure employed here maintained the other vital assurances of reliability, use of the repositioned computer monitor, "where necessary to further an important state interest, [did] not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." (*Id.* at p. 852.)

E. The Actual Accommodation—Two Books Placed Under a Computer Monitor to Position the Monitor Between Fayth and Appellant—Was Reasonable

The accommodation here was reasonable. Contrary to appellant's claims, it was not necessary for the trial court to explore possible less obstructive alternatives in order to pass constitutional muster—especially where appellant himself never suggested alternatives below. In any event, the placement of the computer monitor as a means of obtaining Fayth's testimony was the most viable of the solutions available to the trial court.

At the outset, the trial court's actions show it carefully weighed appellant's rights and the competing interests at stake. After balancing

those interests, the court reached a reasonable accommodation. The computer screen was already present on the witness stand, and was unlike the screen barrier in *Coy*, which was not only larger but also an unusual addition to the courtroom and an obvious cue to the jury. The victim was present in the same room, and testified live, in view of the judge, defense counsel, and the jury. The only change to the courtroom was to place two books—a copy of a Penal Code and a CALCRIM volume—underneath the computer monitor, raising it, so as to block the visual path between the witness and appellant. The trial court noted the computer monitor was "simply repositioned," and was at most a "small infringement on his confrontation right," with a "limited blockage." (2 RT 258.)

Importantly, the court in *Coy* clarified that the requirement of a "face-to-face" confrontation does not mean a literal face-to-face confrontation: "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." (*Id.* at p. 1019.) Raising the computer monitor by a few inches accomplished nearly the same thing Fayth herself could have done. The monitor made it easier for her to avoid looking at appellant, although the record reflects it did not block her view of him entirely. As the court noted, "the monitor was placed kind of to the witness's right, *apparently blocking at least some of her view of possibly Mr. Arredondo*." (2 RT 256, emphasis added.) And, Fayth positively identified appellant and an article of his clothing during her direct testimony. (2 RT 230.) In *Sharp*, where the prosecutor placed herself between the defendant and the victim during the victim's testimony, the court noted *Coy*'s comment that the victim is not required to "'fix [her] eyes upon the defendant while testifying,'" and then held that in light of the fact that the victim is not required to look at the defendant, "the mere fact that the prosecutor facilitated [the victim's] decision to look away from

appellant does not transform this innocuous act into a violation of the confrontation clause." (*Sharp*, *supra*, 29 Cal.App.4th at p. 1782.)

Appellant argues a complete obstruction should not have been allowed, and that the trial court's use of the repositioned monitor was error because it had other, less restrictive options available to it. (ABOM 47-48.) But the Supreme Court in *Craig* expressly declined to adopt a standard requiring trial courts to explore less restrictive alternatives. (*Craig*, *supra*, 497 U.S. at pp. 859-860.) In *Craig*, the court noted that, in part, the Court of Appeals rested its conclusion that the trial court had erred in allowing the use of CCTV on the fact that the trial court failed to explore less restrictive alternatives. (*Ibid.*) The court noted that such considerations can "strengthen the grounds for use of protective measures," but specifically declined to hold that the Constitution requires any such categorical prerequisite. (*Ibid.*) Commensurate with this conclusion, neither the high court nor the trial court in *Craig* undertook such an analysis. Instead, *Craig* held the confrontation clause does not "prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." (*Craig*, *supra*, at p. 857.)

As long as the procedure satisfies *Craig*, there is no requirement that it be by the least restrictive means available. For example, in a case involving the introduction of videotaped deposition testimony of foreign witnesses, the Fourth Circuit explained, "There was no clear roadmap here, and *Craig* anticipates that a *reasonable balance* must be struck. Given the limitation that face-to-face confrontation between the defendant and the Saudi officers was not feasible, the trial judge fashioned confrontation procedures that preserved the defendant's constitutional right to the maximum extent possible. The trial court's conscientious effort infringed no Sixth Amendment right." (*Abu Ali*, *supra*, 528 F.3d at p. 243, emphasis

added.) The same is true here. There was no clear roadmap and the trial court had to strike a reasonable balance. The record confirms the trial court weighed the competing interests and fashioned a procedure that "preserved [appellant's] constitutional right to the maximum extent possible." (*Ibid.*)

In any event, appellant does not show there were any viable less restrictive means available. On appeal, appellant suggests the trial court could have moved the lectern or rearranged the seating arrangements to have the victim face away from the defendant, as in *Gonzales* and *Sharp*. (ABOM 47-49.) But appellant did not request or suggest these or any other accommodations below. Nor would such arrangements have been sufficient given that Fayth broke down upon entering the courtroom and seeing appellant, before even being sworn in.

Moreover, it is not apparent that an alternative seating arrangement would have afforded appellant any meaningful additional protection of his confrontation right. In both *Gonzales* and *Sharp*, the alternative seating arrangements obstructed the defendant's frontal view of the victim, and as the Court of Appeal noted, "the defendant's view of the witness's face and demeanor [were] largely, if not entirely, blocked, as defendant's view of [Fayth] was here." (*Arredondo*, *supra*, at p. 977.) Several of the out-of-state cases on which appellant relies demonstrate that an alternative seating arrangement would not necessarily have made a meaningful difference with respect to his right to confront Fayth. (*Smith v. State* (Ark.Sup.Ct. 2000) 8 S.W.3d 534, 537 [witness testified from a chair that faced outside the defendant's line of sight]; *State v. Brockel*, *supra*, 733 So.2d at p. 644 [witness's back was towards defendant]; *State v. Hoyt* (Utah Ct.App. 1991) 806 P.2d 204, 209-210 [victim seated out of direct line of sight of defendant but physically present]; see also *Price v. State* (Ga. Ct. App. 1996) 223 Ga.App. 185, 187-188 [defense table was positioned in such a manner that defendant was unable to see witnesses as they testified].) In

addition, a different seating arrangement may be more noticeable to the jury than the repositioned monitor was here. The accommodation employed here, like the seating arrangements in *Gonzales*, *Sharp*, and the out-of-state cases, was a minor change in the courtroom setting (unlike the barrier in *Coy*), and as the Court of Appeal observed it was "far less intrusive than any other alternate procedure would have been." (*Arredondo*, *supra*, 13 Cal.App.5th at pp. 977-978.)

Appellant also argues the least restrictive alternative and the only one the trial court had the authority to employ was the one codified by the Legislature in section 1347, i.e., CCTV. (ABOM 50-55.) Once again, appellant did not suggest this option in the trial court, and the record does not indicate whether this omission was because the courtroom was not equipped with the technology or because trial counsel did not believe it was a preferable alternative. As explained more fully below, the trial court was not restricted to the procedures set forth in section 1347, and it is not clear that the use of CCTV is in fact a *less* restrictive alternative.

In the CCTV context, the defendant and the witness are never in the same room, and the witness cannot see the defendant at all. Given the importance of the witness's appreciation for the gravity and consequences of his or her testimony (see *Coy*, *supra*, 487 U.S. at 1019), courts have recognized that CCTV (even two-way CCTV) is not a perfect substitute for live testimony. "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation ... the two are not constitutionally equivalent." (See *Yates*, *supra*, 438 F.3d at p. 1315; see also *United States v. Bordeaux* (8th Cir. 2005) 400 F.3d 548, 554-555. The Second Circuit recognized that video testimony should not be considered a commonplace substitute for live testimony because, "[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony." (*United States v.*

Gigante (2d Cir. 1999) 166 F.3d 75, 81; see also *Wrotten, supra*, 14 N.Y.3d at p. 40 ["Live televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully."]; *White v. State* (Md. Ct. Spec. App. 2015) 223 Md.App. 353, 392-393 ["Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony—no matter how clearly depicted and crisply heard—is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion."].)

Justice O'Connor seemed to recognize this same principle in her concurring opinion in *Coy*. There, discussing state legislatures' attempts to shield child witnesses from the trauma of testifying by codifying certain protective procedures, she explained that "many such procedures [to protect child witnesses] may raise no substantial Confrontation Clause problem since they involve testimony *in the presence of the defendant*." (*Coy, supra*, at p. 1023, conc. opn. of O'Connor, J., emphasis added.) In contrast, Justice O'Connor explained that CCTV procedures that did not involve live testimony may still pass constitutional muster if they fall within an exception to the face-to-face confrontation requirement (*ibid.*), as the Maryland statute in *Craig* did two years later.

Lastly, appellant contends that the more subtle use of a computer screen was not the least restrictive alternative because it was not helpful to the defense, precisely because it was *less* obvious than a full screen: its subtlety meant defense counsel could not make the argument that the witness did not want to face appellant because she was lying, or it could have given the witness a false aura of having composure. (ABOM 54-55.) Initially, the use of an obvious or intrusive screen may have other constitutional implications. As discussed above, in *State v. Parker, supra*,

276 Neb. 661, 672-673, the Nebraska Supreme Court held that the use of "a large opaque screen jut[ing] curiously into the room" was particularly damaging to the presumption of innocence because it constituted a practice "from which the jury may infer the court's official sanction of the truth of the accuser's testimony." (*Id.* at pp. 672-673; see also *Coy*, *supra*, 487 U.S. at p. 1022 [declining to reach the due process claim]; but see *People v. Rose*, *supra*, 289 Mich.App. at p. 509 [finding use of screen not a due process violation].) In contrast, the court in *Parker* sanctioned the use of CCTV, at least in part, because "the jury would not usually be specifically aware that the child was being shielded from the defendant." (*Id.* at p. 675.) Under the *Parker* court's analysis, the least restrictive accommodation is one, like the repositioned monitor at issue in this case, that is subtle, not obvious to the jury, and does not invite an inference of official sanction of the truth of the witness's testimony.

Further, appellant did not raise his concerns regarding the subtlety of the accommodation below, and did not make use of his options in the trial court for highlighting the impact the monitor had on Fayth's credibility. Had appellant held these concerns, he still could have cross-examined the witness on whether she could see him; he could have asked for an instruction that the witness had an obstructed view of appellant; and counsel could have argued that the witness did not want to face appellant because she was lying. Because the subtlety of the accommodation does not demonstrate that it was an unreasonable accommodation, and because appellant could have, but failed to, invite the jury to draw inferences regarding Fayth's credibility because of the monitor's placement, this argument should be rejected.

Here, all of the "intangible elements" of testifying live in court were present because Fayth testified in appellant's presence, and those elements would have been absent had Fayth testified via CCTV. Being physically

present, whether facing away from the defendant, or as here, with the computer monitor raised, is, as the court in *Sharp* described and which this Court quoted in *Gonzales*, "the most minimal interference with appellant's right to confrontation." (*Gonzales*, *supra*, at p. 1267, quoting *Sharp*, *supra*, at p. 1783.) Even had appellant made a request for CCTV below, and even if the trial court were constitutionally required to employ the least restrictive alternative, it is not apparent that the use of CCTV is actually a less restrictive alternative than the repositioned computer monitor used here. Because the accommodation used here struck a reasonable balance between the competing interests, it was appropriate and met the standard announced in *Craig*.

II. BECAUSE THE TRIAL COURT'S MODIFICATION WAS PURSUANT TO ITS INHERENT AUTHORITY, PENAL CODE SECTION 1347 IS NOT APPLICABLE IN THIS CASE

Throughout his brief, appellant argues that Penal Code section 1347 establishes minimum procedures necessary before a trial court can infringe on a defendant's right to face-to-face confrontation. (ABOM 35-39.) Section 1347 is California's statute (similar to the one at issue in *Craig*), which establishes a procedure for courts to use CCTV in certain cases. (§ 1347, subd. (b).) Appellant argues the specific procedural protections codified in section 1347 should have been applied here. Specifically, he contends the trial court's use of the repositioned computer monitor was erroneous because it (1) failed to require the filing of a written motion by the prosecution, (2) never heard expert testimony regarding the trauma that Fayth would experience, and (3) failed to use a "clear and convincing" standard of proof for the showing of necessity. (ABOM 35-39.) First, appellant has forfeited his statutory claims because he did raise any of these arguments below. Second, even if preserved, the statute is plainly inapplicable in this case as the witness was 18 (not under 13 as section

1347 requires), and the alternative procedure at issue was not the use of CCTV. The trial court's order was not erroneous under this statute because the court did not proceed under this or any other statute; rather, it used its inherent authority to control its courtroom. Finally, to the extent appellant argues the procedural protections in section 1347 establish a constitutional minimum in this area, he is wrong.

A. Appellant's Statutory Claim Has Been Forfeited

As appellant did not object at trial on these specific statutory grounds, he has forfeited his claims. (*People v. Riggs* (2008) 44 Cal.4th 248, 324; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 113.) An objection is necessary to give the People an opportunity to correct any defects at trial. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Here, an objection on these grounds would have given the People an opportunity to file a written motion (if one was required), and to present additional evidence to satisfy the statute's burden. Further, an objection would have allowed the trial court an opportunity to cure any error in the first instance. Because appellant failed to object on these grounds below, he has forfeited his claims that the procedural protections included in section 1347 should have been applied to him.

B. The Trial Court Had the Inherent Authority to Accommodate the Witness in the Manner It Did so Long as the Accommodation Was Not Unconstitutional

On its face, section 1347 does not apply to this case. It establishes a procedure whereby a trial court can allow a victim under the age of 13 to testify via CCTV. (§ 1347.) Fayth was 18, not under 13, and she testified with the use of a repositioned monitor to block her view of appellant, not via CCTV. The statute, and its procedures, simply have no application in this case.

The trial court instituted the alternative procedure in this case via its inherent authority, and it did not rely on section 1347. The trial court's inherent authority is codified in the Code of Civil procedure: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (Code Civ. Proc., § 187.) Additional authority is granted to trial courts in Penal Code section 1044, which dictates that, "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Pen. Code, § 1044.) Further, with respect to the examination of witnesses, Evidence Code section 765 demands that trial courts "shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a).)

In a similar situation, the court in *People v. Lujan* (2012) 211 Cal.App.4th 1499, recognized the trial court's inherent authority to craft alternative procedures to fill the gaps left by legislation. There, a child witness who was not a victim testified by closed-circuit television, but not pursuant to section 1347. The defendant argued that the court was required to comply with section 1347, which only allows for such accommodations for crime victims, not witnesses. The court rejected that argument, because "[t]rial courts also possess a constitutionally conferred, inherent authority to 'create new forms of procedures' in the gaps left unaddressed by statutes

and the rules of court." (*Id.* at p. 1507; see also *In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264-1265 [rejecting argument that trial court did not have authority to use CCTV in dependency hearing because "trial court has the inherent authority to create a new form of procedure in a particular case, where justice demands it."].) So long as a trial court exercises its authority in a manner that is consistent with the constitution and does not contravene the Legislature's intent, it has the authority to fashion procedures that allow it to carry out its duties of pursuing justice, and keeping control and order in its courtroom. (*Id.* at p. 1508, and cases cited therein.)

Here, placing two books under a computer monitor on the witness stand was certainly within the trial court's inherent authority, and did not violate appellant's right to confrontation, or result in any statutory violation. (See also *United States v. Gigante*, *supra*, 166 F.3d at p. 80 [finding federal courts have "inherent power" to structure a criminal trial in a just manner]; *People v. Wrotten*, *supra*, 14 N.Y.3d at p. 38 [holding trial courts maintain inherent authority to "fashion necessary procedures consistent with constitutional, statutory, and decisional law"]; *State v. Hoyt*, *supra*, 806 P.2d at pp. 209-210 [upholding seating of witness to face away from defendant even though not the method the Legislature prescribed, and noting the "great discretion" a trial judge has in management of a trial]; *People v. Rose*, *supra*, 289 Mich.App. at p. 509 [existence of statute did not preclude trial court from using alternative procedures permitted by law to protect witnesses, and trial court could do so pursuant to its inherent authority to control courtroom and mode of witness interrogation].) Thus, there is no question the trial court has the inherent authority to order an alternative seating arrangement, or as here, to raise the height of a computer monitor, to run its courtroom, and in this case, to balance the rights of the defendant with the public policies of obtaining accurate testimony and protecting child abuse victims from further trauma. The question before

this Court is not whether the accommodation was justified under section 1347, but whether the accommodation violated appellant's rights to confrontation under the Confrontation Clause of the Sixth Amendment.

C. Section 1347 Does Not Reflect the Constitutional Minimum With Respect to Procedures Allowing for an Exception to the Right to Face-to-Face Confrontation

As mentioned above, section 1347 does not apply by its terms because Fayth was over the age of 13 at the time of trial, and the accommodation made did not involve the use of CCTV. Appellant nonetheless claims that the prosecutor should have been required to file a written motion giving at least three days' notice prior to the testimony, consistent with the statute. (ABOM 35-37.) Appellant further contends the trial court was required to hear expert testimony regarding the emotional trauma Fayth would experience. (ABOM 36-37.) Finally, relying again on section 1347 and the *Arredondo* dissent, appellant argues the standard for determining whether an accommodation for a witness needs to be utilized, and the extent of the accommodation, should be by "clear and convincing evidence of trauma so great as to render the witness unavailable," as when accommodations are made pursuant to section 1347. (ABOM 37-39.)

To the extent appellant's arguments can be construed as claims that these procedural protections are constitutionally required, they should be rejected. First, in *Craig*, the Supreme Court recognized that such evidentiary requirements "could strengthen the grounds for use of protective measures," but expressly "decline[d] to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." (*Craig*, *supra*, 497 U.S. at p. 860.) Instead, as the *Craig* court reiterated, all that is required is that "a trial court make[] ... a case-specific finding of necessity," which the trial court in this case made. (*Ibid.*)

Second, as explained above, the balancing at issue in the CCTV context is, at a minimum, fundamentally different than the balancing at issue in cases like this one, where the witness testifies live in court. Appellant's arguments assume the accommodation here is more of an intrusion on a defendant's right to confrontation than to have the witness or victim's examination "out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television." (Pen. Code, § 1347, subd. (b).) (ABOM 39; and see *Arredondo*, *supra*, at p. 991 (dis. opn. of Slough, J.) [arguing that where witness is 18 years old and accommodation is a physical barrier, standard of proof should be "at least as stringent as the standard in Penal Code section 1347."].) But, as explained above, live testimony with the physical presence of both the defendant and the witness is arguably less of an intrusion on the right to confront witnesses. (See, e.g., *Arredondo*, *supra*, at p. 976 [testimony by CCTV is a drastic alternative to face-to-face confrontation]; 977 [the arrangement of putting two books under the computer monitor was "the most minimal intrusion possible on defendant's confrontation rights."].)

Because the two inquiries are fundamentally different, the Legislature's adoption of the procedures in section 1347 to guide trial courts' use of CCTV is not a helpful indicator of the Legislature's view (assuming it has one) regarding the procedures that should be used in the related, but distinct context of using a physical barrier during live in-court testimony. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think." (*Williamson v. Lee Optical of Oklahoma Inc.* (1955) 348 U.S. 483, 489.) Further, a legislature often implements reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citation.) The legislature may select one phase of one

field and apply a remedy there, neglecting the others." (*Ibid.*; see also *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 371 ["Countless constitutional precedents establish, however, that the equal protection clause does not prohibit a Legislature from implementing a reform measure 'one step at a time,' or prevent it 'from striking the evil where it is felt most.'" (Internal citations omitted.)].)

Nor should the Legislature's adoption of section 1347 be construed as an announcement that its procedures establish the constitutional minimum in this context. (See, e.g., *People v. Freeman* (2010) 47 Cal.4th 993, 1005 [holding that the due process clause establishes the "constitutional floor" for judicial disqualification issues, but statutes may provide broader protection].) This Court's recent opinion in *People v. Contreras*, *supra*, 4 Cal.5th 349, is instructive. There, several decisions of the United States Supreme Court indicated life sentences for juvenile offenders may be unconstitutional where the sentence did not include a meaningful opportunity for release within the offender's lifetime. (*Id.* at p. 360.) The Legislature had acted to solve the problem for some offenders by guaranteeing them a parole hearing after 25 years in prison, but the legislative remedy did not apply to the defendants in *Contreras*. (*Id.* at pp. 381-382.) This Court found the defendants' sentences unconstitutional, but did not impose the legislative remedy that applied to other offenders. (*Id.* at pp. 368-370.) Instead it remanded the case to the trial court with instructions to craft a constitutional sentence – one that guaranteed a meaningful opportunity for release, but not necessarily one that included a parole hearing as early as the one the Legislature granted to other offenders. (*Id.* at pp. 379-380.) The Legislature's act to address a constitutionally sensitive issue does not necessarily establish a constitutional minimum with respect to that issue because it is the duty of the judiciary to decide the outer bounds of constitutional rights. (See, generally, *Youngstown Sheet &*

Tube Co. v. Sawyer (1952) 343 U.S. 579, 595 [noting the "nature of the judicial process as the ultimate authority in interpreting the Constitution"]; and see *I.N.S. v. Chadha* (1983) 462 U.S. 919, 941 ["Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, (citation), so long as the exercise of that authority does not offend some other constitutional restriction."].)

Finally, with respect to the specific procedural protections appellant wishes incorporated here, they were either complied with in this case or other courts have rejected the notion that they are constitutionally required. First, with respect to the motion and notice provision, the statute provides for notice three days prior to the testimony being given, or "during the course of the proceeding." (§ 1347, subd. (b).) Therefore, three days' notice was not statutorily required as the need for the accommodation became clear "during the course of the proceedings," i.e., only once Fayth appeared in court.

And while expert testimony may be helpful in some cases, it is not constitutionally required. (*Craig*, *supra*, 497 U.S. at p. 860 [declining to establish categorical evidentiary prerequisites]; see *State v. Crandall* (1990) 120 N.J. 649, 662-664 (*Crandall*) [noting several jurisdictions require expert testimony as a matter of state law, but "the vast majority of jurisdictions with child-witness-protection schemes similar to [the one at issue] have concluded that expert testimony is not necessarily required to justify use of the statutory procedure."]; *State v. Lewis* (S.C. Ct. App. 1996) 324 S.C. 539, 552, fn. 1 [finding that many states "apply *Craig* in a flexible manner, whereby a treating or examining expert's testimony is strongly suggested, though is not necessarily a minimum evidentiary requirement."].)

In addition, a number of states emphasize the importance of a trial court's personal observations, and recognize that where the trial court

personally observes the witness (as the trial court here did), expert testimony may be unnecessary. (See *Crandall*, *supra*, 120 N.J. at pp. 663-664; *Wildermuth v. State*, *supra*, 310 Md. at p. 524 ["expert testimony may not be essential;" testimony of parent, combined with the child's own testimony and judicial observation of the child, may suffice); *State v. Cooper* (1987) 291 S.C. 351 [finding videotape procedure appropriate after trial court conducted discussion with victim and victim's mother about victim's fear of defendant].) Reliance on the trial court's observations makes particular sense when the need for the accommodation only becomes evident during the trial, as it did in this case, when Fayth attempted to but was unable to proceed. (See *Craig*, *supra*, 497 U.S. at p. 849 [Confrontation Clause must be interpreted in manner "sensitive to the necessities of trial"].)

Similarly, while many state CCTV statutes require a showing by "clear and convincing evidence," several other states require only a showing by a "preponderance of the evidence" (see Ga. Code Ann., § 17-88-55, subd. (d); Mass. Gen. Laws Ann., § 16D, subd. (b)(1); Vernons Ann. Mo. Stats., § 491.725, subd. (4)(b); N.H. Rev. Stat., § 517:13(a))—demonstrating that the "clear and convincing" standard is not a constitutional requirement in the CCTV context, let alone a constitutional requirement in the context of live testimony with a partially obstructed view.

For the reasons set forth above, California's CCTV statute does not purport to establish the constitutional floor regarding procedural protections in this context. Section 1347 establishes only the statutory protections for the use of CCTV in this state, but it does not establish any constitutional prerequisites in this area generally, and it bears repeating that the Supreme Court in *Craig* expressly declined to adopt any such "categorical

evidentiary prerequisites" as a matter of federal constitutional law. (*Craig*, *supra*, 497 U.S. at p. 860.)

III. ANY ERROR WAS HARMLESS AS TO THE REMAINING COUNTS

Confrontation Clause violations are subject to the federal harmless-error analysis of *Chapman v. California* (1967) 386 U.S. 18, requiring reversal unless it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159.) As *Coy* explained, "[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 pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." (*Coy*, *supra*, at pp. 1021-1022.)

Even if this Court were to find the accommodation for Fayth infringed on appellant's constitutional rights, given the weight of the evidence, including the testimony of Ariana, Anna, Megan, and the other witnesses that appellant had a history of molesting children, any error did not affect the verdict on the remaining charges and counts under *Chapman*. Thus, his convictions on counts 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, and 14, should be affirmed, and the case remanded to allow the People an opportunity to retry appellant on counts 3, 4, and 5, or dismiss those counts and resentence him on the remaining counts.

IV. BECAUSE APPELLANT'S FAILURE TO OBJECT FORFEITED HIS CLAIM REGARDING THE OTHER TWO VICTIMS, THE ISSUE ON REVIEW IS LIMITED TO THE TESTIMONY OF FAYTH

Finally, appellant argues his confrontation rights were violated with respect to all three of the victims who testified behind the computer monitor —Fayth, Ariana, and Anna, not just Fayth. (AOB 24.) But, appellant did

not object to the alternate arrangement for Ariana or Anna, or request there be any findings regarding their ability to proceed. Thus, he has forfeited any claim of error as to their testimony. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 324; *People v. Coffman & Marlow*, *supra*, 34 Cal.4th at p. 113.)

In general, challenges to evidence or procedures are forfeited unless timely raised in the trial court. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4.) The rule of forfeiture applies with equal force to claims of constitutional violations. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [finding defendant's failure to raise confrontation clause violation in the trial court forfeited the claim].) The purpose of the forfeiture rule is to "encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881.) That purpose is borne out here. Had appellant objected to the procedure as to Ariana and Anna, the trial court would have had an opportunity to correct the error (by lowering the monitor), or to make additional findings on the record regarding the necessity of the accommodation as to Ariana and Anna. Appellant's failure to object prevented the trial court from curing any error in the first instance.

To the extent appellant argues the trial court erred by failing to make specific factual findings on the record, that claim has likewise been forfeited. (See *People v. Williams* (2010) 49 Cal.4th 405, 448 ["The court was not required to make any particular factual findings, and certainly cannot be faulted for failing to make findings addressing the claims raised by defendant for the first time on appeal."].) Trial courts are presumed to know and follow the law: "As an aspect of the presumption that judicial duty is properly performed, we presume, ... that the court knows and applies the correct statutory and case law." (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Further, on

review, an appellate court will infer the trial court made "all findings necessary to support the judgment." (*People v. Francis* (2002) 98 Cal.App.4th 873, 878.) "[I]t is settled that: 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Accordingly, the trial court's ruling is entitled to a presumption of correctness, all necessary factual findings are inferred, and any failure by the trial court to make additional factual findings on the record is attributable to appellant's failure to object. He cannot now use the record's silence to assert a claim he never raised below.

Appellant argues his forfeiture should not preclude review of these claims for two reasons: first, because an objection would have been futile, and second, if an objection was required, his trial counsel was ineffective for failing to object.

As to the futility of an objection, appellant contends the trial court would have "undoubtedly" made the same finding as to the younger witnesses, as it had with Fayth. (ABOM 56.) While true that a defendant may be "excused from the necessity of ... a timely objection" if the objection would have been futile, (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*)), that futility must be shown from the record and the surrounding circumstances. (*Id.* at pp. 820-821; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320, 1334.) The record here does not demonstrate that an objection would have been futile. The trial court was careful to make a record that the repositioning of the computer monitor was in response to Fayth's "initial reaction" when she entered the courtroom and was "unable to proceed." (2 RT 257.) Nothing indicates that the trial court would have

applied a different standard to Ariana and Anna. Presumably, had counsel objected to the position of the monitor when Ariana and Anna took the stand, the trial court would have applied the same standard and if the girls were able to proceed without the monitor, it would have removed the books from underneath it. As the Court of Appeal concluded, "Nothing in the record indicates that the trial court would have overruled separate and specific objections to raising the monitor for [Anna or Ariana], simply because it overruled the objection to raising the monitor" for Fayth. (*Arredondo*, *supra*, at pp. 979-980.) The court made a finding as to Fayth, and there is no reason to support appellant's contention it would not have made findings for Ariana and Anna. Notably, the books were taken down for the other witnesses, including the Evidence Code section 1108 victims. (4 RT 781.)

Appellant also argues his forfeiture should not preclude review of the claims as to Ariana and Anna because if an objection was required, his trial counsel was ineffective for failing to make one. (ABOM 55-57.) However, he cannot show his counsel was deficient or that he was prejudiced. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient, meaning the representation failed to meet an objective standard of professional reasonableness. A defendant must also show that he or she was prejudiced by counsel's deficient representation, i.e., the defendant must show absent counsel's deficiencies, there is a reasonable probability the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Frye* (1998) 18 Cal.4th 894, 979 (*Frye*).)

There is a strong presumption that counsel's conduct falls within the wide range of professional reasonableness, and great deference should be given to counsel's tactical decisions. (*Strickland*, at p. 688; *Frye*, *supra*, at

p. 979.) On appeal, a conviction should not be reversed for ineffective assistance of counsel unless the record discloses there was no rational tactical purpose for counsel's act or omission. (*Frye*, *supra*, at p. 979.) If a defendant fails to establish either of the two prongs, the conviction must be upheld. (*Strickland*, *supra*, at p. 687). A reviewing court need not and should not attempt to determine whether counsel's performance was deficient if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. (*Id.* at p. 697.)

Both the majority opinion and the dissent in the Court of Appeal agreed that counsel was not deficient. The majority noted defense counsel's decision not to object could have been a tactical choice to prevent additional emotional displays when the victims had to look at appellant, potentially garnering additional jury sympathy. (*Arredondo*, *supra*, at p. 980.) The dissent posited that another tactical purpose could have been that appellant would have elicited more helpful testimony if the victims were less emotionally charged, given the awkward and uncomfortable subject. In particular, to undermine the girls' direct testimony, defense counsel recalled Fayth and Ariana in the defense case so he could ask the girls to describe anything unusual about appellant's penis, which apparently had some noticeable discoloration. (*Id.* at p. 998 (dis. & conc. opn. of Slough, J.) The record supports both proffered tactical reasons. Because the victims were all able to testify, defense counsel was able to conduct vigorous cross-examination of all three witnesses, without interruption, and without any additional emotional outbursts that may have garnered sympathy for the victims. When the court and parties discussed whether he would be permitted to recall Fayth and Arianna in his defense case, defense counsel acknowledged the harm and disruption it may cause, but assured the court his questions would be brief to minimize the impact. (3 RT 640-641.) As there are tactical reasons that defense counsel could have had, and

there is not a contrary explanation on the record, appellant cannot show his counsel was deficient. (See *People v. Pope* (1979) 23 Cal.3d 412, 426.)

For these reasons, appellant has forfeited his claims as to Ariana and Anna. Even if preserved, as noted the trial court's ruling is entitled to a presumption of correctness and on appeal, reviewing courts will infer all necessary factual findings in support of the judgment. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) To the extent this Court finds the record inadequate to permit affirmance of the trial court's use of the computer-monitor accommodation during the testimony of Ariana and Anna, the appropriate remedy is remand as to the counts concerning those witnesses, not reversal. As this Court has observed, "when the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand." (*People v. Moore* (2006) 39 Cal.4th 168, 176-177; and *People v. Collins* (1986) 42 Cal.3d 378, 393 [cautioning against "unwarranted retrials in cases in which there was actually no prejudice"]; see also § 1260 [reviewing court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

CONCLUSION

For the reasons set forth above, respondent respectfully requests the Court to affirm the judgment.

Dated: July 16, 2018

Respectfully submitted,

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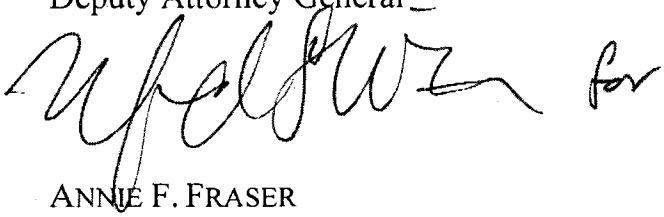

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 19,236 words.

Dated: July 16, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Arredondo*** No.: **S244166**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 17, 2018, I served the attached **ANSWER BRIEF ON THE MERITS**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 17, 2018, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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