S244166

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JASON AARON ARREDONDO,

Defendant and Appellant.

On review from the decision of the Court of Appeal,
Fourth Appellate District, Division Two, Case No. E064206,
on appeal from the judgment of the Riverside County Superior Court,
Case Nos. RIF1310007/RIF1403693
The Honorable David A. Gunn, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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To the Honorable Chief Justice of the Supreme Court of the State of California:

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Respondent pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the defendant seeks a rule that his constitutional rights were violated when the trial court allowed a minor adjustment to the witness stand so that the emotionally distraught victim witness need not look at him while she testified. Such a rule is contrary to the interests CJLF was formed to protect.

Need for Further Argument

Amicus is familiar with the arguments presented on both sides of this issue and believe that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional authorities and argument relevant to the question presented.

December 10, 2018

Respectfully Submitted,

KYMBERLEE C. STAPLETON

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

In 2015, a jury found defendant guilty of 14 sex offenses against his three stepdaughters—F.R., A.J.R., and A.M.R.—and F.R.'s friend, M.C. (*People v. Arredondo* (2017) 13 Cal.App.5th 950, 953.) Defendant lived with his girlfriend and her children for a majority of her children's lives. He began molesting his stepdaughters when they were young, and it continued for many years. (*Id*. at pp. 955-957.) It finally came to an end when defendant inappropriately touched M.C. on three separate occasions as she was visiting F.R. at her house. M.C. asked the three sisters if defendant had ever hurt them. (*Id*. at pp. 954-955.) All three sisters disclosed to M.C. and to each other the details of their abuse. M.C. told a school counselor, which soon led to defendant's arrest. (*Id*. at p. 955.)

F.R. was eight years old (around 2005) when defendant began molesting her and sixteen years old (2013) when it stopped. (*Ibid*.) At trial, F.R. was 18 years old and in the 11th grade of high school. Soon after taking the stand to testify against defendant, the court took a recess because "she was unable to proceed" and needed time to compose herself. (*Id.* at p. 961). After a recess, F.R. returned to the witness stand with a victim witness advocate seated nearby. The court noted for the record that the witness box had been slightly modified to accommodate F.R. (*Ibid*.) Specifically, a small computer monitor that is normally located on the witness stand was slightly elevated so that it blocked F.R.'s view of defendant while she testified.

Defendant's counsel objected to the witness box modification on the ground that it violated defendant's Sixth Amendment right to confront witnesses against him. (*Id.* at pp. 961-962.) The trial court overruled the objection and the monitor remained elevated during the testimony of F.R., A.J.R., and A.M.R.[2] (*Id.* at p. 962.) Defendant was found guilty and was sentenced to 33 years plus 275 years to life in state prison.[3] (*Id.* at p. 953.)

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2. At the time of the trial, A.J.R. and A.M.R. were 14 and 13 years old, respectively. (*Id.* at pp. 956-957.) After their testimony, the computer monitor was returned to its normal position for the remaining witnesses. Defendant did not renew his objection to the elevated placement of the monitor during the testimony of A.J.R. and A.M.R. The Court of Appeal held that defendant forfeited his Sixth Amendment claim against A.J.R. and A.M.R., and he did not demonstrate that the failure to object constituted ineffective assistance of counsel. (*Id.* at pp. 979-980.) This brief will only address the claims relating to F.R.

3. Defendant was convicted of 11 counts of committing a lewd act on a child under age 14, one count of a lewd act on a child under age 16, one count of oral copulation with a child under age 14, and one count of sexual penetration with a child under age 14. The jury also found that defendant engaged in substantial sexual conduct against more than one victim. Defendant also admitted that he had a prior conviction for committing a lewd act on a child under age 14. (*Id*. at p. 953, fn. 1.)

Defendant appealed. In a 2-1 decision, the Court of Appeal for the Fourth District affirmed the conviction but remanded for resentencing on three counts. (*Ibid.*) On November 15, 2017, this court granted review and limited the issue on review to whether defendant's confrontation right was violated by the placement of the computer monitor so that he was unable to see the girls as they testified in his presence.

SUMMARY OF ARGUMENT

The traumatic lifelong effects that victims of childhood sexual abuse experience can be profound. Facing their abuser in court can trigger an overwhelming emotional response. A defendant's constitutional right to physically confront his or her accuser in the courtroom face-to-face is not absolute. Alternate procedures may be utilized if necessary to further an important public policy if the testimony given by the victim is also reliable.

The state has a compelling interest in protecting crime victims of all ages. The emotional trauma experienced by minor victims of sexual molestation can continue well into adulthood. These victims are particularly vulnerable to further traumatization by their assailant's presence in the courtroom. Easing a physically present victim witness's anxiety with a minor modification to the witness box has little impact on a defendant's confrontation rights.

ARGUMENT

I. The Sixth Amendment right to confront witnesses face-to-face is not absolute.

"Childhood sexual abuse infringes on the basic rights of human beings. . . . The nature and dynamics of sexual abuse . . . are often traumatic." (Hall & Hall, The Long-Term Effects of Childhood Sexual Abuse: Counseling Implications (2011) p. 2.)[4] The long-term effects of childhood sexual

4. https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf.

molestation can include debilitating anxiety long after the abuse stops. (*Id*. at p. 3.) F.R.'s emotional state while testifying against defendant in this case illustrates the profound emotional trauma that victims of childhood sexual abuse continue to suffer into adulthood.

When F.R. took the stand to testify, she immediately began to cry. (Answer Brief on the Merits 14). During a brief recess, a small computer monitor, normally affixed to the witness stand for the purpose of allowing witnesses to view pictures and other digital evidence, had two books placed beneath it so as to elevate it slightly. The slight elevation was done for the purpose of blocking F.R.'s view of defendant. (*Id.* at p. 15.) With the computer monitor raised, F.R. was able to testify without further incident.

Defendant contends that the placement of the computer monitor deprived him of his Sixth Amendment right to confront F.R. The constitutional right to confront adverse witnesses is a trial right afforded to the accused in all criminal prosecutions. (*Dutton v. Evans* (1970) 400 U.S. 74, 79; see also *Pointer v. Texas* (1965) 380 U.S. 400, 403; *People v. Brock* (1985) 38 Cal.3d 180, 188-189.). The Confrontation Clause has been interpreted to encompass issues falling within three broad categories: (1) the admissibility of out of court statements (see, e.g., *Crawford v. Washington* (2004) 541 U.S. 36); (2) the right of a defendant to conduct cross-examination (see, e.g., *Kentucky v. Stincer* (1987) 482 U.S. 730, 736; *Davis v. Alaska* (1974) 415 U.S. 308); and (3) the right of a defendant to physically face adverse witnesses. (See, e.g., *Coy v. Iowa* (1988) 487 U.S. 1012; *Maryland v. Craig* (1990) 497 U.S. 836; cf. *Delaware v. Fensterer* (1985) 474 U.S. 15, 18-19 (*per curiam*) [witness's inability to recall].)

A. Face-to-Face Confrontation.

The Confrontation Clause was added to our nation's Bill of Rights "to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of cross-examination." (*Dowdell v. United States*

(1911) 221 U.S. 325, 330; see also *Mattox v. United States* (1895) 156 U.S. 237, 242-243.) The Clause has a long and well-litigated history in the United States Supreme Court. California added its own Confrontation Clause to the California Constitution in 1974. (*People v. Contreras* (1976) 57 Cal.App.3d 816, 819.) Article I, section 15 is on equal footing with its federal counterpart and provides no greater confrontation protections to a defendant. (*Id.* at p. 820 [the state and federal confrontation rights are "identical"].)[5]

The first and second categories of cases have received the most appellate attention. (See *Fensterer*, 474 U.S. at p. 18.) The third category, "face-to-face" confrontation, was brought to the forefront in *Coy v. Iowa* (1988) 487 U.S. 1012 and *Maryland v. Craig* (1990) 497 U.S. 836. Both cases discuss the relationship between procedures designed to protect a sexually abused child witness and the Confrontation Clause.

In *Coy*, the defendant was on trial for sexually assaulting two 13-year-old girls while they were camping in their backyard. (487 U.S. at p. 1014.) Iowa law permitted the use of a large screen in the courtroom to be placed between the witness stand and the defendant so that the teen girls did not have to look at the defendant while testifying. The screen totally blocked the girls' view of the defendant but allowed him to see them dimly. (*Id.* at pp. 1014-1015.) The defendant objected to its use, claiming that the Confrontation Clause guaranteed him the right to confront them face to face. (*Id.* at p. 1015.) The trial court rejected the defendant's argument, permitted its use, and instructed

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5. Article I, section 15 of the California Constitution provides: "The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law."

the jury to draw no inference of guilt from the screen. (*Ibid*.) The defendant was subsequently convicted of two counts of lascivious acts with a child. (*Id.* at p. 1014.)

The *Coy* Court reversed the defendant's conviction and held that the Confrontation Clause guarantees to a defendant the right to "a face-to-face meeting with witnesses appearing before the trier of fact." (*Id.* at p. 1016.) Because the screen blocked the defendant's face-to-face encounter with the teen girls, and because the trial court did not make any specific findings that the girls needed such protection, the Confrontation Clause was violated. (*Id.* at pp. 1021-1022.)

The five-justice majority held that a face-to-face encounter between the accused and accuser is " 'essential to a fair trial' " in that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " (*Id.* at pp. 1017, 1019, quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404.) Face-to-face confrontation does not, however, "compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere . . . ." (*Id.* at p. 1019.)

The *Coy* Court emphasized that the primary concern behind the Confrontation Clause was to preserve the integrity of the fact-finding process and to prevent unjust convictions. (*Id.* at pp. 1019-1020.) However, the majority also recognized that the rights conferred by the Confrontation Clause were not absolute and explicitly reserved for another case whether "individualized findings" would support an exception to literal face-to-face confrontation during the testimony of sexually abused victims. (*Id.* at p. 2021.)

Justice O'Connor wrote a separate concurrence, joined by Justice White, in which she expanded upon the majority's acknowledgment that a criminal defendant's confrontation rights were "not absolute." (*Id.* at p. 1024). She noted that " 'the right to confront . . . may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " (*Ibid*., quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) In her opinion, a "case-specific finding of necessity" might provide a "compelling state

interest" that would cause "the strictures of the Confrontation Clause [to] give way." (*Id.* at p. 1025.)

Two years later, in *Maryland v. Craig*, the Court was faced with the issue of whether the Confrontation Clause "categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television." (497 U.S. at p. 840.) The defendant was charged with sex offenses, assault, and battery on a six-year-old child who attended a school owned and operated by the defendant. Maryland law permitted testimony from child abuse victims to be accomplished by one-way closed circuit television. (*Ibid.*)

The Maryland statutory procedure allowed the accusing witness to testify against the defendant without ever having to appear in the courtroom after case-specific findings that emotional distress would otherwise render the witness unable to communicate. (*Id.* at pp. 840-841, fn. 1.) The judge, jury, and defendant remained in the courtroom, while the prosecutor and defense attorney examined and cross-examined the child witness in a separate room. The defendant, judge, and jury were able to watch the testimony, and thus view the child's demeanor on a video monitor in the courtroom, but the child witness was not able to see the defendant. (*Id.* at pp. 841-842.)

The *Craig* Court upheld the constitutionality of the televised procedure. (*Id.* at p. 860.) Justice O'Connor, this time writing for the majority, expanded upon her *Coy* concurrence by finding that although the literal "face-to-face confrontation with witnesses" is important, it is not an "indispensable element . . . of the right to confront one's accusers." (*Id*. at pp. 849-850.) "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." (*Id.* at p. 850.)

B. Important Public Policy.

"The impact of childhood sexual abuse varies from person to person and from case to case." (Hall & Hall, *supra*, at p. 2.) F.R. was only 8 years old when defendant—her stepfather—began to sexually molest her and then it continued for another eight years. The abuse finally stopped when defendant was arrested for molesting her, her younger sisters, and her best friend.[6] Most of F.R.'s young life had been spent being repeatedly sexually assaulted by a trusted adult living with her in her home.

The state has a compelling interest in protecting all crime victims, regardless of age.

> "Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a *matter of high public importance*." (Cal. Const., art. I, § 28, subd. (a)(2), italics added.)

Furthermore, "the state has a strong interest in ensuring that sex offenses are duly and promptly reported." (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 53.) Yet, it is no secret that the great majority of sexual assaults are unreported. (*Id*. at p. 56; U.S. Bureau of Justice Statistics, Criminal Victimization, 2016: Revised (2018) p. 7.) Among the cases of child sexual abuse that are reported, 93% of the perpetrators are known to the victim. (See U.S. Bureau of Justice Statistics, Sexual Assault of Young Children as Reported to Law Enforcement (2000) p. 10.) This case is no exception. In California, all crime victims are "[t]o be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse,

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6. At trial, the prosecution also introduced evidence of defendant's prior repeated sexual assaults on his younger brother's girlfriend when she was a 13-year-old middle school student, and also on his younger cousin when she was in elementary school. (*Arredondo*, 13 Cal.App.5th at pp. 957-959.)

throughout the criminal or juvenile justice process." (Cal. Const., art. I, § 28, subd. (b)(1).)

California law recognizes the impact trauma has on crime victims and authorizes certain exceptions to live in-court testimony for young victims of sexual assault. Victims who are 15 years old or younger have the option to video record their preliminary testimony and admit it as "former testimony" at trial if the court finds "that further testimony would cause the victim emotional trauma" so that he or she is considered unavailable to testify in person at trial. (Pen. Code, § 1346.) Furthermore, *regardless of the age of the victim*, this same type of alternate procedure further extends to victims of spousal rape, victims of traumatic injury caused by a spouse, former spouse, cohabitant or former cohabitant, current or former significant other, or a victim who is the parent of the assailant's child. (Pen. Code, § 1346.1.)

However, there is currently no alternate statutory procedure for sexual assault victims over the age of 15 who are not currently or formerly in a romantic relationship with their assailant. In this case, the Court of Appeal found that even though F.R. was 18 years old, she was only a junior in high school and was quite "immature." (*Arredondo*, 13 Cal.App.5th at p. 961, fn. 3.) She was physically present in the courtroom, but had a hard time controlling her emotions with defendant seated nearby. (*Id.* at pp. 961-962.) For some victims, "the courtroom experience . . . is almost as traumatic as the crime itself . . . ." (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 619 (dis. opn. of Burger, J.)

People v. Sharp (1994) 29 Cal.App.4th 1772[7] addressed the constitutionality of an analogous situation in which the defendant's view of the physically present victim witness was slightly obstructed. In *Sharp*, the defendant was charged with multiple counts of sexual assault against three children under the

7. *Sharp* was disapproved on a ground unrelated to confrontation in *People v. Martinez* (1995) 11 Cal.4th 434, 452. This court cited *Sharp*'s confrontation analysis with approval in *People v. Gonzales* (2012) 54 Cal.4th 1234, 1267.

age of 14. At trial, when one of the young victims took the stand to testify, she stated that she was afraid of the defendant. (*Id.* at p. 1778.) After a recess, the prosecutor resumed her examination of the victim and in so doing stood in a position where the victim would not have to look at the defendant while testifying. (*Ibid*.) The young victim then testified without further incident. The prosecutor's position in the courtroom was a minor accommodation that drew little or no attention by the jury.

On appeal, the defendant argued that the lack of face-to-face confrontation with his accuser violated his constitutional rights. (*Id.* at p. 1780.) The Court of Appeal disagreed and held that his confrontation rights were not violated. (*Id.* at pp. 1781-1782.) Because a witness is not required "to fix his eyes upon the defendant," the court held that "[t]he 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." (*Id.* at p. 1782.) The court further stated that the courtroom arrangement during the victim's testimony "resulted in only the most minimal inference with appellant's right to confront his accuser" and that "[a] contrary holding would border on the absurd." (*Id*. at pp. 1782, 1783.)

The minor modification to the witness stand in this case not only furthers an important public policy, but F.R.'s testimony was sufficiently reliable. *Maryland v. Craig* recognized that reliability is assessed by examining whether the proceedings comply with four elements of confrontation: (1) physical presence; (2) oath; (3) cross-examination; and (4) observation of demeanor by the trier of fact. (497 U.S. at pp. 845-846; *United States v. De Jesus-Casteneda* (9th Cir. 2013) 705 F.3d 1117, 1120; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1268.) It is "the function of the jury to assess such demeanor evidence and 'draw its own conclusions' about the credibility of the witness and her testimony." (*Sharp*, 29 Cal.App.4th at p. 1782, quoting *Coy*, 487 U.S. at p. 1019.) The computer monitor was slightly raised so that it only prevented F.R. from seeing defendant. F.R. and the defendant were physically present

in the courtroom, and F.R. was examined under oath while in the direct view of the judge and jury.

The defendant further contends that "at least three days" advance notice by the prosecution, and a separate hearing with expert testimony, should have been held prior to any modification of the witness box. (Defendant's Opening Brief 35-37.) However, the anxiety felt by F.R. occurred while she was in the witness box on the day of trial. (*Arredondo*, 13 Cal.App.5th at p. 962.) The prosecution was not spontaneously asking for F.R. to testify outside of defendant's physical presence, nor was a request made for a large, obvious screen or mirror to be placed in the courtroom in between F.R. and defendant. The trial court was no doubt aware that such a situation would require significant evidence to support such a grand deviation from defendant's right to confront his accusers face-to-face. Rather, the trial court understood that simply raising a small computer monitor that was affixed to the witness stand by a couple of inches eased F.R.'s anxiety with minimal impact on defendant's confrontation rights. The trial court found that seeing defendant "clearly affected [F.R.], and I think it's appropriate for the court to take whatever small efforts it can . . . to make F.R. more comfortable without infringing on any of [defendant's] constitutional rights . . . ." (*Arredondo*, 13 Cal.App.5th at p. 962.)

The Court of Appeal agreed with the trial court and held that

> "[n]ot all cases will require testimony from a psychotherapist or other health care professional that the witness will suffer *extreme or debilitating* emotional trauma if required to testify facing the defendant. In some cases, like this one, the court may accurately assess the degree of the witness's emotional trauma without third party testimony or a pretrial hearing." (*Id.* at p. 977, original italics.)

All crime victims in California have the right "[t]o be reasonably protected from the defendant and persons acting on behalf of the defendant." (Cal. Const., art. I, § 28, subd. (b)(2).) Like *Sharp*, this minor modification to the witness box was necessary to further the state's compelling interest in

protecting a sexual assault victim from further trauma, and F.R.'s testimony satisfied all of the indicia of reliability. "Averting further harm is an important interest that justifies procedural adaptions that reduce risk [of retraumatization] while still permitting fair adjudication." (Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection* (2014) 55 B.C. L. Rev. 775, 782.) The slight elevation of the computer monitor was simply a minor deviation from full face-to-face confrontation in court, which balanced her rights as a victim with defendant's rights as an accused.

II. The trauma caused by long-term childhood sexual abuse by a trusted adult does not abruptly stop on a victim's eighteenth birthday.

The alternate procedure permitted by *Craig* was applicable to a very young child witness. The Court found that the state has as substantial interest in protecting the physical and psychological well-being of minor victims of sex crimes and noted that most states permit their televised testimony. (*Maryland v. Craig* (1990) 497 U.S. 836, 853-854.)[8] Here, defendant contends that because F.R. was 18 years old at the time of trial, she was entitled to no special protection or alternate procedures while testifying. (Appellant's Opening Brief 39-44.) Defendant's argument fails to acknowledge that the long-term emotional trauma that is experienced by victims of sexual molestation do not come to an end on the victim's 18th birthday. For some victims, the traumatic effects are life long.

"Stress and anxiety are often long-term effects of childhood sexual abuse. Childhood sexual abuse can be frightening and cause stress long after the experience or experiences have ended. Many times survivors experience chronic anxiety, tension, anxiety attacks, and phobias." (Hall & Hall, *supra*,

8. California law permits the use of alternative procedures for testifying at trial for certain victims. One such alternative is the use of live closed circuit television for witnesses who are 13 years old or younger if the court makes detailed findings of necessity. (Pen. Code, § 1347.) This same alternate procedure is allowed for victims of human trafficking who are 15 years old or younger. (Pen. Code, § 1347.1.)

at p. 3.) Childhood sexual assault victims are three to five times more likely to develop major depression. (Putnam, Ten-Year Research Update Review: Child Sexual Abuse (2003) 42 J. Am. Acad. Child Adolesc. Psychiatry 269, 271.) Similarly strong links have been found to post-traumatic stress disorder, a number of other psychological disorders, and suicide. (See *id*. at p. 273.)

Craig held that a witness's actual physical presence in the courtroom is not constitutionally mandated in all circumstances. Modern technology enables virtual confrontation in some instances.[9] In *Craig*, the witness was not physically present in the courtroom and was not face to face with the defendant. The use of one-way, closed-circuit television made it so the defendant could see the witness, but the witness could not see the defendant. Such a procedure is arguably consistent with *Coy* because a witness need not "fix his eyes upon the defendant[.]" (*Coy v. Iowa* (1988) 487 U.S. 1012, 1019.) Thus, from a witness's perspective, *Coy* and *Craig* instruct that he or she need not look at the defendant, need not be in the defendant's physical presence, and need not physically face the defendant in person. Virtual one-way confrontation is permissible.

Crime victims of all ages experience trauma and for some, being in the presence of their assailant is harrowing. The Court of Appeal aptly proclaimed that

> "*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 . . . . In our view, it would be absurd to allow alternative procedures to face-to-face confrontation for child abuse victims *only if* they are still under age 18 by the time of trial, but deny the same protections to a child abuse victim who, like F.R., have turned age 18 but are no less vulnerable than a minor to the emotional trauma of face-to-face confrontation." (*Arredondo*, 13 Cal.App.5th at p. 973, original italics.)

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9. In Hawaii, all victims and witnesses have the right to testify by two-way closed circuit television. (Haw. Rev. Stat. § 801D-7.)

The defendant's right to confront witnesses is to prevent unjust convictions and to preserve the integrity of the fact-finding process. (*Coy*, 487 U.S. at pp. 1019-1020.) The fact-finding process is not well served by a victim on the witness stand who is so overcome by emotion that he or she has great difficulty responding to questions about the endured abuse. Some victims may not be aware of the extent of their emotional state until they are in the courtroom and on the witness stand in direct proximity to the defendant. Whether the victim chooses to turn his or her body away from the defendant or a minor modification is made to the witness stand to put the victim at ease does little to interfere with the primary objective of the clause.

In *People v. Williams* (2002) 102 Cal.App.4th 995, the trial court permitted the testimony of an adult victim of domestic violence to be video recorded outside of the presence of the jury and the defendant because of her extreme fear of the defendant, and because "panic, anxiety, and fear would overwhelm her" if forced to face the defendant in the courtroom. (*Id.* at p. 1005.) The adult victim was videotaped while she testified in the courtroom without the jury present. The defendant was placed in a separate detention cell and was equipped with sound so that he could hear her testimony as she was examined and cross-examined by counsel. (*Id*. at pp. 1004-1006.) The videotaped testimony was later played for the jury in the presence of the defendant in the courtroom. (*Id.* at p. 1006.) The jury was not informed of the victim's reasons why she could not testify live in front of the defendant. (*Ibid*.)

On appeal, the defendant argued that the manner in which the victim was permitted to testify violated his confrontation rights. The Court of Appeal disagreed and held that the Confrontation Clause's preference for face-to-face confrontation was overcome by the strong public policy of protecting abuse victims and because the "need to take measures to protect [the victim] was apparent." (*Id.* at p. 1008.) The court further reasoned that the videotaped testimony permitted the jury to see the victim's demeanor on the witness stand

as she faced defense counsel in the presence of the trial judge. (*Ibid*.) The principles of *Maryland v. Craig* applied even though this was not a child witness case, and the procedure was consistent with *Craig*'s requirements. (*Id*. at pp. 1007-1008.)

In *People v. Lujan* (2012) 211 Cal.App.4th 1499, the defendant was on trial for murder and child abuse, causing the death of a four-year-old boy. The victim's sister witnessed her younger brother being beaten by the defendant on multiple occasions, including the beating that resulted in his death. (*Id.* at p. 1503.) The trial court allowed the victim's sister (age 7) to testify remotely by two-way, closed-circuit television. The defendant argued that *Craig*'s authorization of remote testimony only applied to child victims. (*Id.* at p. 1505.) Because the witness was not a victim, permitting her to testify remotely violated his confrontation rights.

The Court of Appeal disagreed with the defendant and found that the *Craig* Court was not "staking out the perimeter of when the confrontation clause permits remote testimony. *Craig* simply applied *Coy*'s exception to the facts before it." (*Ibid*.) The *Lujan* court then found that the state has a compelling interest in protecting the welfare of minor witnesses, victim or not. (*Id.* at pp. 1505-1506.)

> "Lujan urges us to treat children who are not victims of a crime as *categorically* less traumatized and hence never excused from face-to-face confrontation. Doing so commits 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." (*Id.* at p. 1506.)

In *People v. Murphy* (2003) 107 Cal.App.4th 1150, one-way glass was used in the courtroom to obstruct an "emotionally distressed" adult victim's view of the defendant, who was on trial for sexually assaulting her. The victim was "severely emotionally distraught" by seeing the defendant in the courtroom and was having great difficulty testifying. (*Id.* at p. 1152.) The trial court overruled the defendant's objection to the use of the one-way glass on

the grounds that its use balanced the defendant's rights with the state's interest in "finding the truth." (*Id*. at p. 1153.)

The Court of Appeal reversed, focusing heavily on the fact that the distraught witness was an adult and therefore the case did not involve the state's traditional interest of protecting minor victims of sex crimes. (*Id.* at p. 1157.) "[T]he People in this case have [not] identified any authority recognizing or establishing that the state has a '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." (*Ibid*.)

Murphy was decided in 2003. Article I, section 28 of the California Constitution was substantially expanded by Proposition 9 in 2008. (2008 Cal. Stat. A-298.) Proposition 9, known as the "Victims' Bill of Rights Act of 2008: Marsy's Law," explicitly states that protecting all victims of crime is "a matter of high public importance." (Cal. Const., art. I, § 28, subd. (a)(2).) *Murphy* not only conflicts with *Williams* and *Lujan*, it conflicts with this subsequent amendment to the Constitution. The state has a compelling interest in protecting all victims, and *Murphy* should be disapproved.

The same reasoning employed in *Lujan* and *Williams* applies to this case. *Lujan* involved a non-victim child witness and *Williams* involved an adult victim of domestic violence. Both cases involved traumatized witnesses who did not fall neatly within the facts of *Craig*. Yet both witnesses were upset by seeing the defendant in the courtroom while attempting to testify against him. Modifying the witness box so that the sexually abused adult victim, who is physically present in court, feels more comfortable testifying live against her abuser furthers the state's compelling interest in protecting victims of crime. The elevated monitor on the witness stand was only a minor infringement of the defendant's right to confront F.R. and did not amount to a violation of his constitutional rights.

CONCLUSION

The judgment of the Court of Appeal for the Fourth Appellate District should be affirmed.

December 10, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached brief amicus curiae contains 5,305 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: December 10, 2018

Respectfully Submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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