No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY COX,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER *MARYLAND V. CRAIG* REMAINS GOOD LAW IN THE FACE OF *CRAWFORD V. WASHINGTON*.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Cox requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on September 14, 2017, affirming the judgment of the United States District Court for the Western District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is recommended for full-text publication and appears at *United States v. Cox*, 871 F.3d 479 (6th Cir. 2017). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, is unpublished and is attached at **Appendix B**. The district court's findings on this matter, also unpublished, appear in the records attached at **Appendices C-E**.

JURISDICTION

The United States Court of Appeals decided this case on September 14, 2017. Mr. Cox did not seek rehearing or rehearing en banc in the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Mr. Cox has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Sixth Amendment to the United States Constitution, providing that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It also implicates the Due Process Clause of the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

Mr. Cox faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on October 3, 2016. RE. 200: Judgment, PageID 2215. Mr. Cox filed a timely notice of appeal on October 5, 2016. RE. 202: Notice of Appeal, PageID 2225. The Sixth Circuit exercised jurisdiction over Mr. Cox's appeal under and 28 U.S.C. § 1291, which authorizes

review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

Mr. Cox now presents a critical question of federal law that only this Honorable Court can resolve: whether this Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990), can survive in the wake of the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *See* S. Ct. R. 10(c).

B. Factual Background and Procedural History in the District Court.

Before his arrest in this matter, Mr. Cox lived a difficult and then arguably unorthodox lifestyle. He suffered an abusive and traumatic childhood, one that included physical and sexual abuse and neglect. RE. 197: Motion for Variance, PageID 2209. He faced beatings, a mother who would not protect him, and a complete lack of a safe haven. RE. 197: Motion for Variance, PageID 2209. When he was seven years old, Mr. Cox endured a year of sexual abuse at the hands of his maternal uncle. RE. 197: Motion for Variance, PageID 2209.

As an adult, Mr. Cox became romantically involved with Mike Henry and Brandon Russell. RE. 178: Motion for New Trial, PageID 787. The men moved in together, and ultimately, Brandon Russell began sexually exploiting minors. RE. 79: Gov. Sentencing Memo Against Russell, PageID 241. Eventually, Mr. Russell faced prosecution in federal court, and the district court, on October 28, 2015, imposed on Mr. Russell a sentence of fifteen years. RE. 85: Minutes of Russell Sentencing, PageID 270.

Mr. Cox found himself swept up in the of prosecution of Mr. Russell. In April and August 2014, police executed search warrants at the men's residence. RE. 195: Presentence Investigation Report (PSIR), PageID 2165-66, ¶¶ 25, 30. The government filed its first indictment against Mr. Cox on October 30, 2014. RE. 4: Indictment, PageID 9. This initial indictment charged Mr. Cox with one count of sexual exploitation of a child (a violation of 18 U.S.C. § 2251(a)) and a forfeiture allegation. RE. 4: Indictment, PageID 9-10, 12. It also charged Brandon Alexander Russell with one count of sexual exploitation of a child. RE. 4: Indictment, PageID 11. Superseding indictments followed, with the government filing its final superseding indictment against Mr. Cox (the third superseding indictment) on March 26, 2015. RE. 48: Third Superseding Indictment, PageID 109. This third superseding indictment charged Mr. Cox with four counts of sexual exploitation of a child and three counts of sexual exploitation of a child and attempted sexual exploitation of a child (violations of 18 U.S.C. § 2251(a)), two counts of possession of child pornography (violations of 18 U.S.C. § 2252A(a)(5)(B)), and a forfeiture allegation. RE. 48: Third Superseding Indictment, PageID 109-20.

Mr. Russell pleaded guilty to the charges against him on March 2, 2015. RE. 36: Minutes of Russell Plea, PageID 89. He did so in accordance with a written plea agreement. RE. 36: Minutes of Russell Plea, PageID 89; RE. 35: Russell Plea Agreement, PageID 76-88. As discussed above, Mr. Russell received his fifteen-year sentence on October 28, 2015. RE. 85: Minutes of Russell Sentencing, PageID 270.

In the case against Mr. Cox, trial preparations proceeded, in the course of which the government moved pre-trial to allow two minor witnesses—identified as Child Witnesses 1 and 7—to testify through the use of closed-circuit television, in accordance with 18 U.S.C. § 3509. RE. 95: Motion for Presentation of Testimony Under § 3509, PageID 334-47.

Multiple times in the course of proceedings, Mr. Cox objected to such testimony. *See, e.g.*, RE. 178: Motion for New Trial, PageID 781 (detailing earlier objections); *see also* RE. 193: Trans. of Hearing on Motions in Limine, PageID 2087; RE. 187: Trans. of Trial, Vol. II, PageID 1161 (renewing objection). The district court conducted a hearing on the matter of the proposed closed-circuit testimony on April 20, 2016. RE. 193: Trans. of Hearing on Motions in Limine, PageID 2084. Ultimately, at trial, the district court allowed use of a closed-circuit television system for the testimony of Child Witnesses 1 and 7. RE. 187: Trans. of Trial, Vol. II, PageID 1158-59.

Mr. Cox stood trial and testified in his defense. RE. 190: Trans. of Trial, Vol. V, PageID 1825. A jury convicted him on all counts on June 15, 2016. RE. 176: Verdict Form, PageID 769-72. The district court sentenced Mr. Cox to 2,880 months of imprisonment at a sentencing hearing on September 30, 2016. RE. 199: Minutes of Sentencing, PageID 2214. The Court also ordered lifetime supervised release, a fine of $4,500.00, restitution of $4,916.00, and a special assessment of $900.00. RE. 199: Minutes of Sentencing, PageID 2214. The district court entered judgment on October 3, 2016. RE. 200: Judgment, PageID 2215. Mr. Cox filed a timely notice of appeal on October 5, 2016. RE. 202: Notice of Appeal, PageID 2225.

C. Sixth Circuit's Consideration of the Matter.

In his appeal to the Sixth Circuit Court of Appeals, Mr. Cox raised seven issues. The issue he now raises before this Honorable Court appeared as Issue I in the Sixth Circuit and revolved around the use of the closed-circuit television system for the testimony of Child Witnesses 1 and 7. *See United States v. Cox*, 871 F.3d 479, 484 (6th Cir. 2017). In its treatment of the issue, the majority of the appellate panel considered the district court's decision to conduct a motion hearing and the court's consideration of "whether there was an adequate and case-specific showing of necessity for the use of closed circuit television for Children 1 and 7." *Id.* at 484. After reviewing the record, the majority found itself "persuaded that the district court did not err in concluding that the government made an adequate showing of necessity." *Id.* at 485. The district court had heard evidence from a licensed counselor who testified that he had a history of treating children suffering from sexual abuse, and that he had received specific training in the field of trauma. *Id.* This counselor had been treating Child Witnesses 1 and 7 and testified, as the majority framed it, "that forcing the children to testify in the presence of open court would further add to their trauma." *Id.*

The majority also found that the counselor had "stated that given Child 1's history, his emotional unrest and bad behaviors that resulted from the abuse endured at the hands of Defendant would resurface should he be required to testify in the presence of Defendant" and that "Child 7 has a tendency to shut down and not communicate and experiences difficulty discussing the sexual abuse inflicted on him

by Defendant." *Id.* In pointing out these findings, the appellate court found that the counselor had testified that "Child 7's communication issues, his trouble sleeping, and past failures with interventions were symptoms of trauma from the sexual abuse he suffered and that Child 7 would regress back into avoidance behavior and possibly 'shut down on the stand' should he be forced to testify in the presence of Defendant." *Id.*

Regarding particularization, the majority concluded that the counselor had stated "that the children displayed unique personality characteristics, and have 'uniqueness in their support structures,' leading him to question their ability to testify in the presence of Defendant." *Id.* The district court questioned the minors, and, according to the majority of the appellate panel, both "stated that it would be difficult to testify in Defendant's presence." *Id.* Based on these points, the majority found that "the district court made a case-specific finding that the child witnesses would suffer substantial fear and be unable to testify or communicate because of Defendant's presence." *Id.*

The district court, the majority said, had "determined that there was a factual basis to support the use of closed-circuit testimony" and had concluded that the counselor's "findings as to the children were particularized." *Id.* The panel relied on the district court's interview and observation of the minors, and found that this interaction "reinforced the court's understanding of the expert's conclusion that the risk of trauma is substantially more likely in the presence of Defendant than it would be outside of his presence." The majority concluded that "the district court was

persuaded by [the counselor's] testimony that the children would be traumatized by the presence of Defendant, that the emotional stress that would be endured was more than *de minimis*, and that the closed-circuit television procedure was also necessary to protect the welfare of children." *Id.* Thus, the appellate panel said, "[t]he district court made an adequate case-specific showing of necessity for the use of closed-circuit television." *Id.*

Judge Sutton concurred in the majority's decision, but wrote separately to bring to light several critical points related to the right of confrontation. *See id.* at 492 (Sutton, J., concurring). These points can be distilled as a concern that the conclusions in *Maryland v. Craig*, 497 U.S. 836 (1990), cannot live comfortably beside those in *Crawford v. Washington*, 541 U.S. 36 (2004). In Judge Sutton's summation, individuals "accused of sexually abusing children, it's fair to say, are not sympathetic defendants," but, as explained in *Crawford*, "the Framers drafted the Confrontation Clause to ensure that those accused of the worst crimes have the opportunity to prove their innocence through a specific, time-tested procedure." *Id.* at 495 (Sutton, J., concurring). The *Craig* decision stands "in tension with, if not in opposition to," *Crawford*'s holding. *Id.* Yet, both decisions remain. *Id.* Americans "often take great pride in talking about the constitutional protections we accord individuals suspected of the most offensive crimes," but Judge Sutton wonders "if we mean it." *Id.* Judge Sutton's observations on the tension between *Craig* and *Crawford* provide a succinct background for this petition.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI IN MR. COX'S CASE TO DETERMINE WHETHER *MARYLAND V. CRAIG* REMAINS GOOD LAW IN THE FACE OF *CRAWFORD V. WASHINGTON*, AND TO CONCLUDE THAT *CRAIG* CANNOT SURVIVE *CRAWFORD*.

As Judge Sutton did in the Sixth Circuit, Mr. Cox will start at the beginning: The Sixth Amendment. *See United States v. Cox*, 871 F.3d 479, 492 (6th Cir. 2017) (Sutton, J., concurring). Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI. Over time, this Honorable Court has interpreted the meaning of that guarantee.

In the course of this interpretation, over twenty-five years ago, the Court decided *Maryland v. Craig*, 497 U.S. 836 (1990). In that case, this Court considered "whether the Confrontation Clause of the Sixth Amendment 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." *Craig*, 497 U.S. at 840. The Court concluded that its "precedents establish 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 849 (citations omitted).

A. As the law currently stands, under Craig, minors may testify through the use of closed-circuit television in certain circumstances, in violation of a defendant's confrontation rights.

Specifically, the *Craig* Court considered the use of closed-circuit television technology to facilitate the testimony of minors in child-abuse cases. *Id.* at 840. The

Court cited the "State's traditional and "'transcendent interest in protecting the welfare of children,'"" and the buttressing of "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court." *Id.* at 855 (citations omitted). The Court stated it would "not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying" and held "that, if the State makes an adequate showing of necessity," the state's interest in protecting minor 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." *Id.* The requisite finding of necessity is case-specific and a trial court must hear evidence and determine whether use of the closed-circuit television procedure is necessary to protect the welfare of the minor witness. *Id.*

The Court recognized subtle issues with this proposed testimonial procedure, remaining "mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding." *Id.* at 851. It posited, however, that protections of oath, cross-examination, and observation of witness demeanor could adequately ensure that testimony would be "both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.*

Following this "door opening" in *Craig*, Congress enacted 18 U.S.C. § 3509(b) allowing for "alternatives" to in-court testimony for minors. Under § 3509(b), the statute, and its application, Mr. Cox challenged in the lower courts, codified *Craig*'s now-eroded and suspect balancing framework. *See* Document: Appellant Br., PageID 20 (Sixth Circuit) (detailing Mr. Cox's objections to the closed-circuit-television testimony). Section 3509 allows the use of closed-circuit television for child witnesses in trials for alleged offenses against children if: the potential child witness "is unable to testify because of fear"; a substantial likelihood, as established by expert testimony, exists "that the child would suffer emotional trauma from testifying"; "[t]he child suffers a mental or other infirmity"; or "[c]onduct by defendant or defense counsel causes the child to be unable to continue testifying." 18 U.S.C. § 3509(b)(1)(A) & (B).

The district court must support its ruling with findings on the record. 18 U.S.C. § 3509(b)(1)(C). Section 3509 does allow for the presence of defense counsel in the room with the minor and for cross-examination. 18 U.S.C. § 3509(b)(1)(D). The testimony then appears in the courtroom for the jury, the defendant, the presiding judge, and the public through closed-circuit television technology. *Id.* The statute provides for allowing the defendant the means for contemporaneous, private communication with his or her attorney, and for the projection (through closed-circuit television) of an image of the courtroom and defendant into the room where the minor sits. *Id.*

B. In Crawford, this Court rejected the idea of an "amorphous" concept of reliability to govern testimonial evidence.

A decade and a half after *Craig*, the Court tacked the boat of cross-examination in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court returned to an understanding of confrontation as a "bedrock guarantee." *Crawford*, 541 U.S. at 42. In considering whether use of a tape-recorded statement at trial violated the Sixth Amendment, the *Crawford* Court reviewed the history behind the right of confrontation. *Id.* at 38, 43. The historical record supported the proposition that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54.

The text of the Sixth Amendment does not suggest open-ended exceptions from the confrontation requirement for courts to develop. *Id.* at 54. Rather, the *Crawford* Court said, the right to be confronted with the witnesses against a defendant "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* And "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Id.* The Sixth Amendment incorporates these limitations. *Id.*

In considering *Ohio v. Roberts*, 448 U.S. 56 (1980), and that opinion's firmly rooted hearsay exceptions and ideas about particularized guarantees of trustworthiness, the *Crawford* Court rejected malleable standards that can fail "to protect against paradigmatic confrontation violations." *Id.* at 60. The Court made

clear that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. The Court noted that none of the authorities it had discussed acknowledged "any general reliability exception to the common-law rule": "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.*

The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* The Clause "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." *Id.* In questioning the *Roberts* test, the *Crawford* Court pointed out that *Roberts* "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Id.* at 62. That test "replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one" and "[i]n this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability." *Id.* As an example of such an exception to confrontation, the Court looked to "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Id.*

C. Craig stands in irreconcilable conflict with Crawford.

The *Craig* rule does exactly what the Court condemned in *Crawford*: it offers an alternative means for assessing reliability—it supplants confrontation as the crucible and substitutes a judicial determination that something less than confrontation will suffice. Judge Sutton pointed out this problem in his concurrence in Mr. Cox's case in the Sixth Circuit. *See Cox*, 871 F.3d at 492-93 (Sutton, J., concurring). In condemning *Roberts*, the *Crawford* Court pointed out the subjectivity of the concept of "reliability" and the unpredictable nature of the *Roberts* test. *Crawford*, 541 U.S. at 63. Then the Court stated: "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.*

Where the issue involves testimonial statements, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. The allowances in *Craig* can't survive such a resurrection of confrontation rights—*Crawford* undermined the judicial weighing undergirding *Craig*. As Judge Sutton pointed out in his concurrence in Mr. Cox's case, he is not the first person to point out this tension. *See Cox*, 871 F.3d at 493 (Sutton, J., concurring). Scholars have suggested that "[r]ecent developments . . . cast doubt on whether *Craig*'s analytical framework would pass unscathed through today's Court." Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's*

Confrontation Jurisprudence, 58 Drake L. Rev. 481, 483 (2010). They have posited that it is worth inquiring "into the fate of pre-*Crawford* cases, most importantly *Maryland v. Craig*." Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 Ind. L.J. 909, 910 (2007).

To some scholars, *Crawford* "soundly denounced a reliability-based confrontation analysis similar to that of *Craig*, [which] suggests the stage has been set for *Craig*'s demise." Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. at 483. In the analogous context of "disguised" witnesses, scholars have described "the entire *Craig* framework" as "suspect, particularly in its adoption of a reliability-based framework similar to that struck down in *Crawford* and in its tendency to promote cost-benefit analysis of an explicit constitutional guarantee." *Id.* at 485. And "[a]t an even deeper level, the shifting foundations of the confrontation right itself create uncertainty as to its precise nature, which then obscures the proper method for analyzing the disguised witness issue." *Id.* at 485-86. As these commentators have put it, "recent developments raise several fundamental questions, including whether *Craig* and *Crawford* can legitimately coexist; whether the face-to-face-confrontation requirement retains independent significance in a post-*Crawford* world; and to what extent a literal face-to-face confrontation may be compromised before a defendant's confrontation right is violated." *Id.* at 488.

In applying these concepts to *Crawford*'s application to the issue of closed-circuit-television testimony, one must note these commentators' warnings that "the same amorphous notions of reliability that plagued the *Roberts* test may also be present in *Craig*." *Id.* at 510. Even scholars who favor *Craig* admit that it has washed up on the rocks in the wake of *Crawford*. Some have tried to argue in favor of "the continued vitality of *Maryland v. Craig*, despite its conflict in tone and constitutional theory with the Court's jurisprudence in *Crawford*." Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 Ind. L.J. at 913. Such commentators have noted that, "with the new approach to confrontation, more children will have to testify and courts will have to find ways of making that happen." *Id.* at 914.

The seeds of the controversy at hand "were planted in *Craig*." Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. at 510. While the *Craig* Court "held that the Confrontation Clause is not offended so long as reliability of the evidence is ensured, Justice Scalia's dissent denounced this view." *Id.* According to Justice Scalia, the Sixth Amendment does not guarantee reliable evidence. *See id.* 510-11. Rather, it guarantees specific trial procedures thought to assure reliable evidence, including "face-to-face" confrontation. *Id.* at 511. A "nearly identical" argument received seven votes in *Crawford*, and while the composition of this Honorable Court has changed since both *Craig* and *Crawford*, the *Crawford* majority declared that the Confrontation Clause commands not the

reliability of evidence, but that reliability be assessed in a particular manner, namely by testing in the "crucible of cross-examination." *Id.* Under *Crawford*, "dispensing with confrontation because testimony is obviously reliable mischaracterizes the confrontation right as a substantive rather than a procedural guarantee, thus threatening to undermine the right." *Id.*

In suggesting that it *may* be possible to save *Craig* despite *Crawford*, scholars and jurists have pointed out that, of course, *Crawford* governs the admissibility of out-of-court statements and *Craig* governs the presentation of in-court testimony. *See id.* at 512-13; *see also United States v. Yates*, 438 F.3d 1307, 1329-30 (11th Cir. 2006) (decision en banc) (Marcus, J., dissenting). Scholars have noted the differences in the *Craig* and *Roberts* "reliability standards." *See* Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. at 514. These attempts to distinguish *Craig*, however, fail in the face of *Crawford*'s unequivocal statement that the Framers of the Constitution did not intend to leave Sixth Amendment protections to the "vagaries" of "amorphous notions of 'reliability.'" *See Crawford*, 541 U.S. at 61. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* This Court did not limit or qualify that statement when it made it. *See id.*

Scholars recognize this limit to trying to "save" or distinguish *Craig*. As they recognize, "the fact remains that *Crawford* condemned the same type of judicial reliability assessment authorized by *Craig* on the grounds that such an inquiry is

overly subjective and threatens to undermine the confrontation right's procedural nature." Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. at 514. In various places, "the *Crawford* opinion suggest that any underlying differences between the *Roberts* and *Craig* methods of assessing reliability are constitutionally irrelevant and that any reliability-based assessment of the confrontation right fails to comport with constitutional demands." *Id.* at 514-15.

Nor is a right to cross-exam the answer to saving *Craig*: some put forth the idea that the opportunity to cross-examine a witness will obviate a challenge based on the inability to actually face the witness; cross-examination, however, does not equate with confrontation. *See id.* at 519. In *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), which does predate *Craig*, as Mr. Cox recognizes, this Court nonetheless said quite clearly: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." The Court stressed witnesses meeting the accused face-to-face. *Coy*, 487 U.S. at 1017. As this Court has emphasized, "[t]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1018 (citation omitted). It bears repeating the simple phrase the Court cited in *Coy*: "Look me in the eye and say that." *Id.* This Court has not underestimated the value of such confrontation. Our culture perceives "confrontation [a]s essential to fairness" and

this perception "has persisted over the centuries because there is much truth to it." *Id.* at 1019. A witness may feel differently when he or she must repeat their story while looking at the person whom they "will harm greatly by distorting or mistaking the facts." *Id.*

The *Coy* Court admonished "[t]hat face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 1020. "It is a truism that constitutional protections have costs." *Id.* Such language seems to coalesce better with that of *Crawford* than *Craig*, with *Crawford* affirming that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62.

D. Allowing Craig and § 3509 to stand would cast an unconstitutional pall over the presumption of innocence.

This Court has emphasized the potential trial procedures present for tainting the presumption of innocence. In the lower courts, Mr. Cox protested this erosion of the presumption. Document: Appellant Br., PageID 20 (Sixth Circuit) (citing *United States v. Partin*, 990 F. Supp. 2d 1219, 1225 (M.D. Ala. 2013), to be discussed below). In *Estelle v. Williams*, 425 U.S. 501, 502 (1976), this Court considered whether forcing a defendant to wear prison garb to stand trial before a jury violated due-process and equal-protection rights. In finding a violation, the Court stood on the presumption of innocence as axiomatic. *Id.* at 503. In the administration of criminal justice, courts must guard against any "dilution of the principle that guilt is to be established by

probative evidence and beyond a reasonable doubt." *Id.* And courts must remember that the true "impact of a particular practice on the judgment of jurors cannot always be fully determined." *Id.* at 504. Speaking of itself, the Court said that it had "left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny," and lower courts "must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Id.*

In the case of eliminating face-to-face confrontation, more than a negligible risk exists that the jury will attribute some guilt to the defendant through the procedure, even if subconsciously. *See, e.g.*, *United States v. Partin*, 990 F. Supp. 2d 1219, 1225 (M.D. Ala. 2013) (considering application of § 3509(b)(1)). As one jurist put it, "it seems apparent that, if the court orders out-of-court video testimony, in no event should the jury be told the basis for the court's ruling, that is, that the minor is afraid of the defendant or will be traumatized if made to testify in front of him." *Id.* Allowing a jury to infer a "judge is convinced of the alleged abuse may cause irreparable unfair prejudice to the defendant's case." *Id.* Jurists have expressed concern that "the jury may infer that the court is affording the minor special treatment as a victim, and thus that the court believes the defendant to be guilty." *Id.*

E. States, no less than federal courts, have struggled with these issues.

Many state constitutions explicitly recognize the critical need for the accused to be able to meet an accuser "face to face." *See, e.g.*, Marc C. McAllister, *The*

Disguised Witness and Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. at 520-21 & 520 n.239 (listing state provisions). In 2010, some seventeen states called for "face-to-face" confrontation—using the words "face to face." *Id.* at 520 n.239. Another eleven states had "similar" provisions. *Id.*

State trial courts struggle with these confrontation issues and reconciling *Craig* and *Crawford*. In *People v. Gonzales*, 281 P.3d 834 (Cal. 2012), for example, defense counsel argued that *Craig* was no longer good law in the face of *Crawford*. *Gonzales*, 281 P.3d at 863. The California Supreme Court tried to make the dichotomy scholars and jurists elsewhere have explored, namely that *Craig* governs in-person testimony and *Crawford* governs testimonial hearsay. *See id.*; *see also id.* at 866 (returning to *Crawford* in a different context and hanging the case on the testimonial-hearsay hook). On the issue of the specific findings to justify the use of videotaped testimony at trial, the state supreme court pointed out the testimony had arisen from the preliminary hearing and found that confrontation rights are not in full flower at such hearings, that they are trial rights. *See id.* at 863.

An interesting twist in that case warrants noting here. Defense counsel raised the issue of potential harm to the testifying minor. *Id.* at 860. The defense argued that the trial court had erred by admitting the minor's videotaped preliminary-hearing testimony at trial in the face of evidence that such admission would be "damaging" to the minor. *Id.* The California Supreme Court stated that the defense had presented no authority on the matter or on the defense's standing to raise the

issue. *Id.* The court found that "there was some risk of damage" to the minor, but the value of the evidence to the prosecution "far outweighed" that risk. *Id.* at 860-61.

Under § 3509, the government's attorney, the minor's attorney, or a guardian may apply to the district court for application of the closed-circuit-television procedures. 18 U.S.C. § 3509(b)(1)(A). The defense does not appear on this list of potential applicants. *See id.* The facts of and ruling in *Gonzales*, however, raise the issue of exactly how much stock is put in trauma to the minor witness and how much is placed on value of the testimony (secured by whatever means most valuable or efficacious to the prosecution) against the defense. *Cf. Gonzales*, 281 P.3d at 860-61 (discussing the trauma to the minor if he were to testify at the trial, but later minimizing that trauma in the context of the videotaped testimony). Mr. Cox does not wish to sound cynical here, but potential trauma to the minor in *Gonzales*, whose video-taped testimony helped secure the death penalty for his father, hardly seemed at the forefront of the state courts' and prosecution's minds.

F. The actions and statements of this Court in the wake of Craig have eroded that decision and dovetail with the principles of Crawford, and the government's statements in Crawford recognize the irreconcilability of Craig and Crawford, and overruling Craig would not wreak havoc in the lower courts.

The lower courts recognize that video testimony does not equate to confrontation. "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (decision en banc). Multiple circuits recognize that the two forms "are not constitutionally equivalent." *Id.* In *Yates*, the entire Eleventh

Circuit recognized that "[t]he Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." *Id.* As the *Yates* court noted, "[i]ndeed, no court that has considered the question has found otherwise." *Id.* That court cited other courts that have acknowledged that the use of closed-circuit-television testimony must be circumscribed carefully. *Id.* With such recognition in mind, one can see that a change—such as overruling *Craig*—would not wreak havoc on lower courts' jurisprudence. Those courts already know, intimately, the challenges and risks of such testimony.

Even before *Crawford*, this Court decided to halt further erosion of confrontation rights. In 2002, this Court addressed the Advisory Committee on the Criminal Rules' suggestions for a revision to Federal Rule of Criminal Procedure 26. *See Yates*, 438 F.3d at 1314. This revision "would have allowed testimony by means of two-way video conferencing." *Id.* The proposed amendments to the Federal Rules of Criminal Procedure that this Court transmitted to Congress did *not* include the proposed revision to Rule 26 that would have allowed testimony by two-way video-conference technology. *Id.* Justice Scalia filed a statement in which he stated that he shared the majority's doubts regarding the constitutionality of the Judicial Conference's proposed version of Rule 26(b). *Id.*

Justice Scalia's statement explained "that he shared the majority's view that the Judicial Conference's proposed version of Federal Rule of Criminal Procedure 26(b) was 'of dubious validity' under the Confrontation Clause." *Id.* In mentioning

Craig, Justice Scalia noted that the proposed amendments were contrary to the rule in *Craig* in that they would not limit the use of remote testimony to situations where there has been a case-specific finding of necessity to further an important public policy. *Id.* at 1315. Ultimately, Rule 26 was *not* revised to allow such procedures for taking testimony. *Id.* While this exchange, related to amendment of the rules, does not shed direct light on the issue at hand because it followed *Craig* and did not abrogate the rule in *Craig*, it still demonstrates this Court's reluctance to allow *Craig* to "spread."

A dissent in *Yates* suggested that Justice Scalia's statements and the fate of the Rule 26 amendments should not be read broadly to imply some message about the validity of video conferencing. *See id.* at 1324 (Tjoflat, J., dissenting). This opinion describes the statements as the "legal musings" of a justice. *Id.* This attempt to narrow their meaning, however, ignores the subsequent development of *Crawford* itself.

Even those jurists who have been open to allowing wider use of video technology to take testimony have suggested the use of such technology should be cabined to limited, compelling circumstances. For example, in *Yates*, Judge Marcus dissented from the majority opinion and suggested that video technology could be used to facilitate the testimony of otherwise unavailable witnesses. *Yates*, 438 F.3d at 1333 (Marcus, J., dissenting). As Judge Marcus put it: "When a witness is available for an in-person court appearance, the ideal is a face-to-face confrontation in open court: the Confrontation Clause not only demands that the defendant be

present as the witness testifies; it also demands that the trier of fact be present." *Id.* Even to those open to video testimony, the *ideal* is face-to-face confrontation.

The government recognizes that *Craig* and *Crawford* are "incompatible." In its amicus brief in *Crawford*, the Department of Justice wrote, "Petitioner's call for a categorical rule of inadmissibility under the Confrontation Clause is incompatible with the Court's approach when construing other procedural rights secured by the Sixth Amendment" and cited *Craig*. Brief for the United States as Amicus Curiae at 20-21, *Crawford v. Washington*, 541 U.S. 36 (2004); *available at* https://www.justice.gov/osg/brief/crawford-v-state-washington-amicus-merits; *see also Cox*, 871 F.3d at 493 (Sutton, J., concurring). The government described *Craig* as "reconciling interpretation of Confrontation Clause with decisions construing 'other Sixth Amendment rights.'" *Id.* This Court did, however, adopt the petitioner's position in *Crawford*, rejecting the government's positions, and bringing the incompatibility of *Craig* with its jurisprudence to the forefront for reevaluation now.

G. Jurists, including this Court, have increasingly called for the affirmance of uncompromised constitutional rights for even the "untouchables," and recognition of the untenable compromises in Craig continues this trajectory.

Even the most reviled in society have rights. This Court continues to champion these rights—even for those from whom society may recoil. *See e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733, 1738 (2017) (finding a First Amendment right of sex offenders to use the internet and social media). And until proved guilty at trial, one of these rights is the presumption of innocence and the concomitant right to confront accusers—in order to have a jury acquit one of charges against that

innocence. As the *Crawford* Court said, confrontation constitutes a "bedrock" right and deserves more protection than simply an "unpredictable" framework, one which can easily fail "to provide meaningful protection from even core confrontation violations." *Crawford*, 541 U.S. at 42, 63.

While society should be sensitive to the plight of the crime victim, specifically the alleged child sex-assault victim in the context of the discussion at hand, one must also remain cognizant of the gravity of what stands at stake for the accused. As Judge Sutton noted in the Sixth Circuit in this case, these cases involve sentences like the one at hand: 2,880 months. *See Cox*, 871 F.3d at 493-94. So while it is easy to point to examples of heinous acts perpetrated against children, it is also easy to conceive of people being crushed and lives being ruined by false accusations. *Compare Packingham*, 137 S. Ct at 1740 n.3 (Alito, J., concurring) (citing various cases in which defendants used the internet to obtain access to minors to sexually abuse them) *with Craig*, 497 U.S. at 867-68 (Scalia, J., dissenting) (discussing risks of false testimony and cases of false accusations).

The presumption of innocence must not fall prey to good intentions—nor can the constitutional rights meant to protect it. *See Estelle*, 425 U.S. at 503. While it may be unfortunate that a child has to testify before the defendant in court, and may suffer some trauma from that experience, what trauma is involved in facing a false accusation and finding oneself unable to confront one's accuser? Judge Sutton spoke of "balancing" in his opinion in this case and the complexity of framing the stakes to

balance. *Cox*, 871 F.3d at 494 (Sutton, J., concurring). This Court in *Craig* likewise spoke of a sort of balancing, a pragmatic weighing. *See Craig*, 497 U.S. at 844-45.

The problem lies in figuring out what to weigh and how to do it, as Judge Sutton pointed out. When a child testifies truthfully, the testimonial experience itself can hardly equate to the actual abuse; the damage has been done, though the testimony many involve some additional trauma. When a person faces a false accusation and cannot face their accuser and receives essentially a life sentence, that "trauma" could have, perhaps, been obviated by the trial procedure—confrontation. Similarly, as Judge Sutton pointed out, perhaps the child could be spared the entire testimonial process by the prosecution's use of alternative evidence. *See Cox*, 871 F.3d at 494 (Sutton, J., concurring). The *Crawford* Court recognized the unwieldly and unreliable nature of subjective balancing inquiries and elevated the Sixth Amendment above them. This choice undermines the continuing validity of *Craig*.

Justice Scalia, in his dissent in *Craig*, and Judge Sutton, in his concurrence in Mr. Cox's case in the Sixth Circuit, both expressed sentiments similar to those of one another on the meaning of the Constitution, its protections, and the issue at hand. Judge Sutton mused on whether people truly mean it when they speak of honoring the rights of those accused of terrible crimes. *See Cox*, 871 F.3d at 495 (Sutton, J., concurring). Justice Scalia reminded readers that "the Constitution is meant to protect against, rather than conform to, current 'widespread belief.'" *See Craig*, 497 U.S. at 861 (Scalia, J., dissenting). Their statements present two sides of the same coin: we speak of protecting these rights, and if we mean it, we must do so in the face

of "widespread belief" in ideas contrary to those rights. Mr. Cox asks this Honorable Court to consider now whether *Craig* best serves the Sixth Amendment and whether it can survive in light of *Crawford*.

CONCLUSION

For these reasons, Mr. Cox asks this Honorable Court to grant this Petition for a Writ of Certiorari and reverse the Judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,
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