THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Was-25-276

STATE OF MAINE
Appellee

v.

NAKOMA V. POLCHES
Appellant

ON APPEAL from the Washington County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

[redacted] never appeared in a courthouse to level her Class-A allegations against defendant. The State, rather, obtained leave to present her Children's Advocacy Center ("CAC') interview via the pathway of 16 M.R.S. § 358. And, over defendant's objection, the court further excused [redacted] from needing to appear in person for her cross-examination, permitting her to do so remotely, in the presence of her victim's witness advocate,[1] from the nearby CAC.[2] *See* 15 M.R.S. § 1321. The result was allegations pock-marked with iterations of "I don't know," contradictions, and even [redacted] turning to her VWA for guidance about how to answer questions. The entire evidentiary presentation – 20 transcript pages and the 80-minute CAC video – was wrapped up in less than two and a half hours.[3] Defendant will now spend two decades in prison and serve a lifetime of supervised release.

All of this was premised on two significant errors of law, one based on state statute and the other on the Sixth Amendment:

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[1] A VWA is statutorily charged with "assist[ing] the victims and witnesses of criminal offenses in the prosecution of those offenses." 30-A M.R.S. § 460; 16-A M.R.S. 53-C(1)(C) ("to advise, counsel or assist victims or witnesses of crimes"). They work for the prosecution, *id.*, and their communications with anyone they determine to be a "victim" are privileged. 16-A M.R.S. § 53-C(2); 22 M.R.S. § 4019.

[2] CAC team-members "work together" to achieve the successful "prosecution of child sexual abuse cases." Maine Network of Children's Advocacy Center, *What is a CAC?*, available at: https://www.cacmaine.org/how-it-works.html

[3] *See* Tr. 35, 86.

(I) [redacted] was not duly authorized to testify remotely. 15 M.R.S. § 1321(3) prohibits such whenever "the positive identification of the defendant is required." Here, it certainly was, as is demonstrated by this Court's case-law, commonsense and the circumstances of the case. [redacted]'s confused and uneven testimony, coupled with the lack of any stipulation about identity or an affirmative defense, left wide-open the question of identity and proof beyond a reasonable doubt.

(II) The trial court erred in determining that *Maryland v. Craig*, 497 U.S. 836 (1990) controls. Our case goes beyond the circumstances of *Craig*. *Craig* involved detailed questioning of several children witnesses in the presiding judge's chambers, in the presence of attorneys, where identification was not at issue. Here, [redacted] said almost nothing, other than in the CAC video. She testified from a "child-centered" location, in the presence of a VWA to whom she looked for guidance. Identification was at issue. *Craig* was the Sixth Amendment's bottom-line; this case falls below it.

STATEMENT OF THE CASE

After a few-hours-long jury-trial, defendant was convicted of gross sexual assault, 17-A M.R.S. § 253(1)(C) (Class A). Eight days later, at sentencing, the Washington County Unified Criminal Docket (Stewart, J.) imposed a twenty-year carceral sentence and a lifetime of supervised release. This timely appeal follows.[4]

I. Pretrial motions

The State sought – and the court granted, without objection – leave to introduce the CAC video by way of 16 M.R.S. § 358. Tr. 3-4.

However, defendant objected to the State's *Motion to Permit Remote Testimony by Juvenile*, made pursuant to 15 M.R.S. § 1321. A51. After defense counsel noted, "We are objecting to her appearing remotely," the court proceeded directly to the analysis it determined was applicable. Tr. 4-5. Such focused on whether "the requirements" of § 1321(2)[5] were satisfied,

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[4] The Sentence Review Panel denied defendant leave to pursue an M.R. App. P. 20 appeal. *Order Denying Leave to Appeal Sentence*, SRP-25-277 (Aug. 28, 2025).

[5] They include:

> A. The testimony must be conducted by way of 2-way closed-circuit television or other audiovisual electronic means;
>
> B. The testimony must occur at a recognized children's advocacy center with only a victim or witness advocate present in the room in which the child is testifying;
>
> C. The opportunity for real-time cross-examination of the child must be provided to the defendant's attorney after the child's direct testimony; and
>
> D. The defendant must be able to observe the testimony of the child while the child is testifying and must be able to

and whether the Confrontation Clause would be offended. Tr. 5-7. It then permitted the State to put on evidence to satisfy § 1321(2).

After the State completed its brief presentation, the court walked the attorneys through the prongs of § 1321(2). Tr. 19-26. Defense counsel noted that, though the statute contemplated remote testimony in the presence of a VWA, "we would prefer if it was somebody not directly associated with the DA's office." A31-A32; Tr. 21-22. Nonetheless, the court found that all of the statutory requirements were satisfied. A43; Tr. 30.

Then the court conducted a confrontation analysis, first remarking, "I'll be frank, I'm not particularly comfortable with the way in which recently our legislature has nibbled away at the [C]onfrontation [C]lause and is continuing to do that with the proposed legislation even this year." Tr. 26. The court, however, believed that *Maryland v. Craig*, 497 U.S. 836 (1990) controlled the Sixth-Amendment analysis. A19, A39, A42; Tr. 6, 26, 42.

Undertaking the *Craig* analysis, the court found that, should she testify in person in the courtroom, [redacted] would experience "an increase in her anxiety" that would "negatively impact her mental health and negatively impact her wellbeing." A40; Tr. 27. Such was both general – *i.e.*, a normal anxiety faced by witnesses – and something "related to the defendant." A41; Tr. 28. It further found that, were she to testify in the courtroom, the "most likely result" was "that she would freeze up and not be able to testify." A42;

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communicate with the defendant's attorney while the child is testifying.

Tr. 29. It therefore concluded that there was no Confrontation Clause violation. A42; Tr. 29.

Defense counsel renewed the objection just as the complainant's remote testimony began. Tr. 52-53.

II. The CAC video

Without any foundation or even a witness on the stand, the evidence began with the court itself introducing the CAC video, State's Exhibit A (SX A): "So it's our understanding that … in this recorded interview of [redacted] being now heard as – being introduced to you as Exhibit A." Tr. 47. "You may play the video," the court instructed the prosecutor. Tr. 49. Skipping over a seven-minute interlude during which the CAC interviewer solicited the instructions of her law enforcement team-members and the help of [redacted]'s mother, the prosecution displayed the roughly 80-minute video. Tr. 49-50; SX A ca. 35:45 to 42:00.

For roughly the first 15 minutes of the substantive portion of the interview, [redacted], who was nine at the time, repeatedly answered, "I don't know," when asked questions clearly pointed towards the investigation. Tr. 9, 14; SX A ca. 19:30 to 35:45. As the interviewer steadfastly redirected [redacted] to answer questions about defendant, [redacted] continued, "I don't know." *Id.* She even wrote, "I don't know," when asked to write on paper about her dealings with defendant. SX A ca. 28:00 to 29:15.[6] Running out

[6] Were this quasi-testimony to be elicited at trial, any reasonable judge would have sustained an asked-and-answered or "badgering" objection. CAC interviewers have been granted ways around the rules of evidence that no one else enjoys.

of options to coax information from [redacted], this is when the interviewer decided they ought to take a short break and obtain some assistance from [redacted]'s mother. SX A ca. 35:45 to 42:00.

Returning to the room, the interviewer prodded, "[redacted], tell me what happened with Uncle Nokomis [sic] for you not to go back to Uncle Nokomis' [sic]." SX A ca. 43:30. "He did weird stuff to me," [redacted] finally ventured. *Id.* Asked what that meant, [redacted] wrote that he had kissed her with his tongue. SX A ca. 45:00.

Seeking more, the interviewer directed, "Tell me about other things that happened with Uncle Nokomis [sic] that make it so you can't go back to Uncle Nokomis' [sic]." SX A ca. 48:00. "Nothing else," [redacted] answered. SX A ca. 48:15. Convinced that there was more to the story, the interviewer told [redacted] it was "really important" for [redacted] to repeat the allegations she had "told Mum." SX A ca. 48:40.[7] [redacted] kept responding, "I don't know." *Id.* The interviewer again asked [redacted] to repeat what she had "told Mum." *Id.* ca. 49:15. A short time later, [redacted] informed the interviewer, "My uncle is not my uncle." *Id.* ca. 51:00.

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[7] These questions, and others during the course of the interview, *e.g.*, SX A ca. 51:10, seemingly violate 16 M.R.S. § 358(3)(B)'s prohibition against "suggestive or leading questions." The interviewer is plainly trying to get [redacted] to repeat the allegations she "told Mum" so that they would be recorded on the CAC video and then admissible at trial – indeed, one of the interviewer's statutory "duties." 22 M.R.S. § 4019(6).

Though trial counsel conceded that the CAC video satisfied § 358's requirements, Tr. 3, 36, the leading, suggestive questions are relevant to establish the frailty of the State's case.

"Tell me the things that you told Mum that happened with Nokomis [sic]," the interviewer persisted. *Id.* ca. 51:10. "Inappropriate stuff," [redacted] later offered – "weird stuff." *Id.* ca. 52:00. She finally reported that "he put his thing in me" – his "D-I-C," she spelled out. *Id.* ca. 52:20.

Yet, [redacted] continued to respond, "I don't know" to many of the interviewer's questions. *E.g.*, *Id.* ca 54:50. But she did reference an occasion when she went to defendant's home, and defendant's dad was also present at the home – he lived there. *Id.* ca. 23:30 & 57:30. In the bedroom, defendant displayed his "thing" to [redacted]. *Id.* ca. 57:45. Then, defendant put his thing into her. *Id.* ca. 59:15. The bedroom door was left open to the rest of the house. *Id.* ca. 1:08:00. She tried to run away. *Id.* ca. 1:19:15. When it was over, [redacted] returned to the kitchen, observing defendant's father, who was still in the living room. *Id.* ca. 1:21:45.

Wanting to hear more, the interviewer prodded [redacted], "Tell me about another time that Nokomis [sic] put his thing inside you." *Id.* ca. 1:23:00. "I don't know," she again answered when asked for details. *Id.* ca. 1:23:25, 1:23:40.[8] Later, she remembered that she was 8 when this occurred. *Id.* ca. 1:24:20. That time, again in defendant's bedroom, he "put his thing in" her. *Id.* ca. 1:24:15.

[8] At what point, after a witness/informant/victim such as [redacted] repeatedly says, "I don't know," does a CAC interviewer who persists in attempting to procure a different answer commit tampering? *See* 17-A M.R.S. § 454. Are other law enforcement "team members" free of a conflict of interest in so evaluating?

[redacted] seemingly nodded when asked whether "this" had happened on other than the two occasions she described specifically. *Id*. ca. 1:29:15. When the interviewer asked, "[redacted], did this happen every time you went to Nokomis' [sic]," she responded, "Yes." *Id*. ca. 1:38:30. Yet, there were no follow-up questions about those occasions – cynically, in the eyes of a defense lawyer, because [redacted] had not previously "told Mum" about such other incidents.

III. [redacted]'s testimony

As a mental health counselor aptly described, [redacted]'s speech was "very soft tone" – "much lower" than what the counselor usually saw from other nine- to ten-year-olds. Tr. 9-10.

Appearing by Zoom, [redacted] was sworn as a witness. Tr. 55. The prosecutor asked [redacted] three questions: her name, her birthday, and who else was in the room with her. Tr. 55-56. It was up to defense counsel, alone, to elicit substantive evidence without "appearing to attack" the child. *See* Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42. ME. L. REV. 283, 284 (1990).

As counsel asked one such question, an "unidentified speaker" blurted out, "She doesn't understand your question, [counsel]." Tr. 58. When defense counsel asked [redacted] another question, the court had to intervene: "[Y]ou can't ask the person that's sitting with you – you can't ask her how to respond to the questions, how to answer the questions." Tr. 58. The court

restated this admonition: "The questions that are being asked of you, do not ask the person sitting beside you how to respond." Tr. 58.

If the undersigned has counted correctly, [redacted] said a total of 125 words during the cross-examination, including five instances of "I don't know" or something indicating that she did not understand counsel's questions. Tr. 57-62. Twenty-one of her answers were one-word responses. Tr. 57-62. In terms of words-spoken, her most fulsome response to any question was: "I don't know. It was – so he – I don't understand the question." Tr. 61.

In its brief redirect, the State elicited that [redacted] had not sooner reported the incidents because she was afraid of "what was going to happen." Tr. 63.

IV. Other pertinent evidence and argument

When the law enforcement officer who took the complaint testified at trial, the State asked the officer whether she was "familiar with" defendant and whether he was present in the courtroom. Tr. 66. Receiving affirmative responses, the prosecutor asked the court, "Your Honor, let the record reflect that the witness has identified the defendant." Tr. 66. The court agreed: "Yeah. Record reflect [sic] that the witness has identified the defendant." Tr. 66.

Defendant did not put on a case. Tr. 82. The defense, rather, was merely that of a failure of proof. *See* Tr. 46. In closing, defense counsel noted [redacted]'s repeated statement, "I don't know." Tr. 104. He noted inconsistencies in [redacted]'s testimony. Tr. 105. [redacted], he argued, "ha[d] a

very hard time keeping a story straight." Tr. 105. After reminding jurors of the presumption of innocence and the beyond-a-reasonable-doubt standard, he urged that the State had offered insufficient proof. Tr. 105.

ISSUES PRESENTED FOR REVIEW

I. Did the court commit obvious error by permitting the complainant to testify remotely, even though the statute permitting such remote testimony was inapplicable because the positive identification of defendant was required?

II. Did the trial court err by concluding that *Maryland v. Craig*, 497 U.S. 836 (1990) permitted the complainant to testify remotely from a CAC, in the presence of a VWA, and when positive identification of defendant was required?

ARGUMENT

First Assignment of Error

I. The court committed obvious error by permitting the complainant to testify remotely, even though the statute permitting such remote testimony was inapplicable because the positive identification of defendant was required.

A. Preservation and standard of review

Though defense counsel objected to the State's reliance on 15 M.R.S. § 1321, he did so on grounds other than those presented in this assignment of error. Therefore, the issue is not preserved. *See* M.R. U. Crim. P. 51, 52(b). For that reason, the Court will review for obvious error: an error that is plain, affects substantial rights, and which this Court should remedy so as to forestall injury to the fairness, integrity or public reputation of the court system. *See State v. Clisham*, 614 A.2d 1297, 1299 (Me. 1992) ("The court's application of the wrong statutory provision constituted obvious error and therefore may be noticed despite the fact that it was not brought to the attention of this Court."); *State v. Pabon*, 2011 ME 100, ¶¶ 26-29, 28 A.3d 1147 (obvious-error elements).

A. Analysis.

Defendant hews to the obvious-error rubric.

1. The court erred.

That portion of § 1321(3) applicable to our case is simple: "This section does not apply if … the positive identification of the defendant is required." Nor is there any ambiguity about the meaning of "the positive identification of the defendant is required." Absent a stipulation that the defendant is the

person whom the complainant has accused of the crime, or the presentation of an affirmative offense, "'identity is always an issue in a criminal trial.'" *State v. Donovan*, 2004 ME 81, ¶ 20, 853 A.2d 772, quoting *Anderson v. State*, 831 A.2d 858, 865 (Del. 2003); *see Ferguson v. State*, 168 P.3d 476, 481 (Wyo. 2007) ("Identity is always an element of the crime charged, and must be proven by the prosecution. Identity is, therefore, always a material issue.").

As this Court has concluded, proof of identity is required "even when the alleged victim identifies only the defendant as the perpetrator of a crime but the defendant claims no crime was committed." *Donovan*, 2004 ME 81, ¶ 19. So has it held that positive identification is required in sex cases "in spite of the fact that the victim knew and identified the defendant, because the defendant denied engaging in a sexual act with the victim[.]" *Ibid.* This is no complex legal principle. Nothing is more fundamental than ensuring the person accused is the defendant and vice versa.

Surely, the drafters of § 1321 were cognizant of this Court's case-law about the requirement of proof of identity. "'The Legislature is presumed to be aware of the state of the law and decisions of this Court when it passes an act.'" *Bowler v. State*, 2014 ME 157, ¶ 8, 108 A.3d 1257, quoting *Stockly v. Doil*, 2005 ME 47, ¶ 14, 870 A.2d 1208. And the Legislature's plain language controls. *Cf. State v. Pinkham*, 2016 ME 59, ¶ 14, 137 A.3d 203. There is no ambiguity here.

Even were there, legislative intent, naturally enough, buttresses the same conclusion. At the legislative work session from which § 1321 derived,

then-Representative Moriarty described what it meant, his interpretation yielding no push-back from other members of the Judiciary Committee:

> I understand that a positive identification is required, that a child needs to come into the courtroom, and the D.A. needs to say, you know, 'Is the person you've been speaking of present in the courtroom, can you point him out?'

An Act to Facilitate Children's Testimony in Certain Sex Crime Cases: Work Session on LD 1612, HP 1201 Before the J. Standing Comm. on the Judiciary, 130th Legis. (May 28, 2021) (remarks of Rep. Stephen W. Moriarty) at ca. 9:12 available at https://legislature.maine.gov/audio/#438?event=84617&startDate=2021-05-28T09:00:00-04:00 Indeed, this is a fundamental component of *any* accusatorial process: making sure you're pointing the finger at the right person.

The Legislature's choice, moreover, is an intentional departure from iterations of the child-remote-testimony statute enacted elsewhere. For example, Illinois' such statute provides:

> This section may not be interpreted to prevent a child victim and a defendant or child respondent from being in the courtroom at the same time when the child victim is asked to identify the defendant or child respondent.

725 ILCS 5/106B-5(h); Md. Criminal Procedure Code Ann. § 11-303 (same); Rev. Code Wash. § 9A.44.150 ("This section may not preclude the presence of both the child witness and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant

when identification is a legitimate issue in the proceeding."). The Legislature's choice to eschew such language, to instead preclude the use of any remote testimony pursuant to § 1321 whenever identification is required, is indicative of the meaning of Subsection 3. Had it wanted to preserve the possibility of remote testimony even when identification was required – *i.e.*, whenever it was neither stipulated to nor established via an affirmative defense – the Legislature could have easily done so. Its choice not to do so indicates its understanding of the importance of positive identification . *Cf. Pinkham*, 2016 ME 59, ¶ 21 (construing statute in light of the fact that, as evidenced by other statutes, the Legislature "knows how to accomplish that result"). No court is at liberty to disregard this plain meaning.

Neither of the exceptions – stipulation or affirmative defense – was applicable at trial. Surely, that is why the State felt compelled to elicit the law enforcement officer's identification of defendant. It knew, as any good prosecutor would, that identification was certainly required.

2. The error was plain.

The error was as plain as the clear language of Subsection 3. All the court and the parties had to do to catch it was read the entire statute. *Cf. People v. Kadell*, 411 P.3d 281 (Colo. Ct. App. 2017) ("When we rely only on the plain language of the statute, an error is more likely to be obvious.").

It is clear from defendant's opposition to [redacted]'s remote testimony that defense counsel merely overlooked Subsection 3.[9] In other words, his strategy was to seek to force [redacted] to testify in court. He simply missed the winning argument. It was an omission, though, not a knowing choice.

The court, with all due respect, simply missed it, too. It seemed primed to rule on the Confrontation Clause issue, making available to the parties an order in that vein from another justice, analyzing *Maryland v. Craig*, 497 U.S. 836 (1990), and stating its (quite appropriate) concerns about the Legislature's eager encroachment on the confrontation right. *See* Tr. 5-6, 26, 29. Given the court's understandable focus on the Sixth Amendment and the prongs of Subsection 2, Subsection 3 must simply have gotten lost in the mix.

Nevertheless, "It is a fundamental American principle that we are governed by the rule of law, and that all are presumed to know what the law is." *State v. Austin*, 2016 ME 14, ¶ 11, 131 A.3d 377. If to anyone, this certainly applies to the officers charged with applying those laws in cases bearing Class-A charges.

3. The error affected substantial rights.

[redacted]'s testimony was sparse and uneven. She told the CAC interviewer that the perpetrator wasn't her uncle. She acceded to the interviewer's continued references to "Nokomis," a native term for "my grandmother" and both a lake and a high school in Maine. She detailed her allegations only after the interviewer repeatedly redirected her to explain

[9] Indeed, the only player with an incentive to overlook Subsection 3 was the State – the party that sought leave to present remote testimony

what she had "told Mum" about "Nokomis" – suggestive reification or confabulation, jurors could justifiably believe (especially after a prolonged initial refusal to allege anything). She told the interviewer that defendant's dad lived in the house and was just a room away, through an open door, while the perpetrator assaulted her and she attempted to run away.

All of this is to say two things. First, on the facts of this case, the evidence was much less than overwhelming. Second, proof of identity – not so much in terms of whether defendant is Uncle Nakoma but as whether defendant *is the perpetrator* – was equally questionable.

It was plainly defendant's strategy to require [redacted] testify at trial. In-person testimony can reveal credibility deficits not readily apparent via a television screen. In-person testimony can cause complainants to change their stories. *See State v. Engroff*, 2025 ME 83, ¶ 57, ____ A.3d ____. Children have "'difficulty … testifying in court.'" *Id.* ¶ 57, quoting *An Act to Permit Recordings of a Protected Person To Be Admissible in Evidence: Hearing on L.D. 765 Before the J. Standing Comm. on Judiciary*, 131st Legis. 1 (2023) (testimony of Sen. Anne Carney, sponsor of L.D. 765).

Defendant urges this Court to watch the CAC video. Doing so reveals little doubt that, had Subsection 3 been properly applied, [redacted] would not have offered testimony as coherent as her allegations in the CAC interview. As the court itself found, and as [redacted]'s mother herself testified, were she to have testify in the courtroom, [redacted] would probably "freeze up and not likely be able to testify at all." Tr. 17-18, 29. That certainly qualifies as a reasonable probability of a different outcome.

4. This Court should vacate, in order to ensure fairness and uphold the integrity and public reputation of our courts.

We are in a new and, for those concerned about individual rights, scary era. It is remarkable how little it takes to prosecute a defendant and send him away to decades in prison. A lightning-quick proceeding, at which the complainant need not appear in person nor even put eyes on[10] the accused, now possible. The complainant's accusations need not be solemnized in a courtroom nor by oath. They may be presented via an interview video-recorded months or years prior, in a "child-friendly" environment, and prodded by a questioner who, as here, is aiming to memorialize a repeat telling of what the complainant previously "told Mum."

A limited few legal protections remain. Subsection 3 is one of them. There is nothing foreign about the logic behind it: An accuser should show up in court to ensure the person on trial is actually the one who did it. Without that guarantee, it is not possible to uphold the fairness and integrity of "justice."

[10] [redacted] appeared via Zoom, which, no citation is needed to establish, can be minimized or obscured so that others are not viewed. Tr. 17, 19, 21, 31.

Second Assignment of Error

II. The trial court erred by concluding that *Maryland v. Craig*, 497 U.S. 836 (1990) permitted the complainant to testify remotely from a CAC, in the presence of a VWA, and when positive identification of defendant was required.

A. Preservation and standard of review

The issue is preserved by defense counsel's objections and the trial court's ruling, excerpted at pages A15 through A48 of the appendix, and also discussed above, in the STATEMENT OF THE CASE. Therefore, this Court's review is plenary. *State v. Adams*, 2019 ME 132, ¶ 19, 214 A.3d 496.

B. Analysis

In *Coy v. Iowa*, 487 U.S. 1012 (1988), Justice Scalia wrote for the Court in a case about a screen placed between the child complainants and the defendant:

> The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

487 U.S. at 1020 (internal citation omitted). Just two terms later, and by the slimmest of margins, a 5-4 Court added a caveat: the preference for face-to-face confrontation recedes "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." *Craig*, 497 U.S. at 850.

Respectfully, that is where the lower court erred. In our circumstances – which are decidedly different from those in *Craig* – the reliability of [redacted]'s testimony was not "otherwise assured." Defendant pivots to a discussion of why that is so, followed by analysis of why the court's error is not harmless beyond a reasonable doubt.

1. Unlike *Craig*, here, identity was at issue.

The reader is familiar with defendant's discussion, above, about how and why defendant's identity was at issue. In *Craig*, in contrast, there was no such issue for two constellations of reasons.

First, the Maryland statute at issue in *Craig* provided an exception similar to, but materially different from, 15 M.R.S. § 1321(3). It read:

> This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Md. Courts and Judicial Proceedings Code Ann. § 9-102(3)(d) (1984 Repl. Vol., 1986 Supp.), quoted in *Wildermuth v. State*, 530 A.2d 275, 278 (Md. 1987); *see Craig v. State*, 560 A.2d 1120, 1122 n. 4 (Md. 1989) ("For a more detailed description of the § 9-102 procedure, *see Wildermuth*, 310 Md. at 503-504, 530 A.2d at 278-279.") overruled on other grounds by *Craig*, 497 U.S. 836.[11] This is to say, *Craig's* conceptualization of the Sixth Amendment,

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[11] The current version of the since-recodified statute reads:

> This section may not be interpreted to prevent a child victim and a defendant or child respondent from being in the courtroom at the same time when the child victim is asked to identify the defendant or child respondent.

provides for the presence of complainants and defendants in the same room "for purposes of identification." We do not have that in our case.

Second, in *Craig*, *several* children accused the defendant, and four of them testified (by one-way recording) at trial. 497 U.S. at 843. The point is: with several children pointing the finger at the defendant, corroboration and – to some degree – positive identification were present in ways unlike our case.

The deficits in our case are important ones. Skipping the basic step of ensuring that the man on trial is the man actually accused undermines reliability. Arrangements such as remote testimony are "guilt-suggestive technology." *United States v. Cox*, 871 F.3d 479, 495 (6th Cir. 2017) (Sutton, J., concurring). Jurors must naturally wonder why, unless defendant did what she accused him of, [redacted] should need to avoid physically appearing in court. The judge's grant of leave to testify remotely, jurors might understandably infer, implies some degree of judicial endorsement of her allegations. The very process of remote testimony erodes the assurance of positive identification while simultaneously implying identification by simple fact of the distance between the seats in which defendant and the complainant sit.

2. Unlike *Craig*, here, the adversarial nature of the proceeding was significantly diminished.

In *Craig*, the children testified from the judge's chambers, immediately adjacent to the courtroom. *Brief of Respondent Sandra Ann Craig*, 1990

Md. Criminal Procedure Code Ann. § 11-303(f).

WL 505649 * 6, No. 89-478 (Mar. 30, 1990). They were accompanied in chambers by a prosecutor, a defense attorney, a court clerk and the video-technician. *Ibid.* As the Tennessee Court of Criminal Appeals has recognized, these circumstances "provided the defendant some assurance of the veracity of the testimony." *State v. Seale*, 2020 Tenn. Crim. App. LEXIS 491, * 22 (Tenn. Crim. App. 2020). Such solemnity is not to be sacrificed for the sake of expediency:

> [T]wo-way video conferencing allows for the witness to testify remotely and not come to the courthouse at all. The physical presence of the witness in the courthouse is, itself, a significant moment for the witness, during which any witness in a criminal proceeding understands the wide-ranging implications their testimony may have on the life of another. Foregoing in-person testimony potentially removes a witness's understanding of the enormity of those implications. We are not inclined to remove the requirement of physical presence of a witness in the courthouse, save for instances in which the most necessary public policy considerations arise.

Id. at ** 22-23.

In contrast, in our case, not only did [redacted] not come to the courthouse or appear in the presence of any lawyer (let alone one opposing her), her short testimony was undertaken from a supportive "child-centered" CAC – presumably, the very room in which [redacted]'s allegations had been preserved in ember interview a year prior. Tr. 22 (State: "Would likely be the same

room that the interview is taking place in."). Present with her was a VWA – [redacted]'s own privileged advocate, available to facilitate the prosecution.[12]

The risks of this cozy arrangement are not just hypothetical. Here, [redacted] looked to the VWA for assistance, at least twice. Tr. 57-58. Certainly, the not-so-subtle priming – the VWA's presence, the location in the same room in which her interview had been conducted, etc. – would signal to any competent witness that she is supposed to reaffirm her prior statements.

3. Unlike *Craig*, where the children's live testimony was substantial, here, it was minimal and marred by reliability-eroding factors.

The "purposes of the Confrontation Clause" include ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Craig*, 497 U.S. at 846. It is not possible to say, in our case, that either reliability or rigorous testing was fulfilled.

In *Craig*, as defendant noted above, four children testified. The trial lasted twelve days. *Craig v. State*, 544 A.2d 784, 787 (Md. Ct. Spec. App.

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[12] The absurdity of this arrangement is underscored by the converse: Is it possible to imagine a presumed-to-be-innocent defendant being permitted to testify remotely from her attorney's office (with counsel sitting next to her), because a court has found that, were she to be forced to testify in person, she would be emotionally scarred by the presence of the prosecutor and witnesses falsely accusing her of crimes? What if, in lieu of direct-examination, the emotionally scarred defendant was permitted to display a video of an interview with her private investigator recorded a year prior?

We are affording rights to others that, notwithstanding the presumption of innocence and right to counsel, we deny to defendants. *Cf. Perry v. Leeke*, 488 U.S. 272 (1989) (judge may bar a defendant from consulting with defense attorney during brief recess in defendant's testimony).

1988) overruled by *Craig*, 560 A.2d 1120. Child witnesses' testimony was "extensive" and cross-examination "lengthy." *Craig*, 544 A.2d at 791, 793. In our case, [redacted]'s entire testimony barely covered a hundred words – mostly inconsequential and unresponsive.

In *Craig*, immediately prior to their testimony, "the trial court examined [the children] for competency, determining that each child knew the difference between telling the truth and telling lies; that each knew that it was wrong to lie; and that each would testify about what he or she remembered and would not say things that someone else may have told them." *Reply Brief of State of Maryland*, * 6, 1990 WL 10013119, No. 89-478 (Apr. 11, 1990). In our case, [redacted]'s CAC interview – really, the *only* substantive evidence against defendant – was unsworn. She did not visit the robe-clad judge in his chambers, or even step foot in a courthouse.

In *Craig*, the children testified live. *Id.* * 7 ("Under the rule proposed by *Craig*, only live testimony from a witness in a courtroom ... would be available for a jury's consideration."). [redacted]'s CAC interview was recorded approximately a year before trial. Tr. 57. In the life of a nine-year old, a year – or more, as many Maine trials will lag far after CAC interviews – that is a long time. A juror's natural sympathies for a child – the younger the child, the more sympathetic – are bolstered by the appearance on their screen of a young, adorable interviewee.

In *Craig*, of course, the jury was able to view the children's demeanor and reactions during both the cross-examination and the direct. Not so here. [redacted] was not "present" – either in the courtroom or via Zoom – for the sole

substantive portion of her "testimony," the CAC interview. *See* Tr. 52 (court sets up "Zoom link" only immediately prior to [redacted]'s testimony). They could not see, therefore, whether she gestured or appeared in some manner that might indicate discomfort (or other hallmarks of untruthfulness) with her CAC interview. While [redacted] testified that she "remembered doing that interview," Tr. 62, she denied ever viewing it, making no effort to endorse its accuracy a year later. Tr. 58. She testified that she could not remember why she went to the interview. Tr. 62.

These are significant impediments to a jury's ability to evaluate [redacted]'s testimony – none of them presented by *Craig*. She said almost nothing. Her prior statements, made a year earlier, were unsworn. She was not in sight during the presentation of her sole substantive statements. We aren't even sure that she stands by what she said in the interview displayed for the jury.

4. Prejudicial error

Craig establishes the *minimum* requirements for confrontation. Moreover, it was decided by a one-vote margin. Anything less protective of reliability than *Craig* does not pass Sixth-Amendment muster. Above, defendant catalogued the numerous reliability-deficits in our case. The bottom line is that the "confrontation" defendant permitted was insufficient to ensure reliability.

The State cannot prove that the error is harmless beyond a reasonable doubt. The court and [redacted]'s mother acknowledged that [redacted] would likely freeze up and be unable to testify. That would plausibly indicate to

jurors that she did not stand by her CAC interview. And that's all there really was in this case: a leading-question-filled, "I-don't-know"-replete allegation that is not meaningfully corroborated.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE & FILING

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara