No. _____

In the Supreme Court of the United States
October 2019 Term

STEVEN RICHARD JOHNSON, Jr.,

Petitioner,

v.

NEIL MCDOWELL, Warden,

Respondent.

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

Geoffrey M. Jones
Counsel of Record, appointed under the
Criminal Justice Act of 1964
769 Center Blvd., PMB No. 162
Fairfax, CA 94930
Tel: (415) 517-3569
email: gffjones@comcast.net

Attorney for Petitioner
Steven Richard Johnson, Jr.

Question Presented

The sole question raised by this Petition for Certiorari is whether the Ninth Circuit Court of Appeals violated petitioner's fundamental rights by ruling that the California Courts reasonably applied this Court's decisions, including *Maryland v. Craig*, 497 U.S. 836 (1990), and *Coy v. Iowa*, 487 U.S. 1012 (1988), in rejecting petitioner's claim of a Confrontation Clause violation on direct appeal, where the state court permitted 17-year-old complaining witness to respond to all questions on cross-examination by writing out her answers, after which the presiding judge recited the witness's answers to the jury.

Parties to the Proceeding

The parties to the proceeding are only those listed in the caption: Richard Steven Johnson, Jr., and the warden of the California prison in which he is incarcerated, Neil McDowell.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The unpublished opinion of the Ninth Circuit Court of Appeal appears at Appendix ("App.") A. The district court's order denying habeas relief appears at App. B. Finally, the unpublished opinion of the California Court of Appeal denying petitioner's direct appeal (the last reasoned state court decision) appears at App. C.

Jurisdiction

The district court had jurisdiction pursuant to 18 U.S.C. § 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 2253(c)(1). The Ninth Circuit Court of Appeals entered judgment on October 24, 2018, affirming the district court's denial of the writ. *See* App. A at 3. Petitioner did not file a motion for rehearing before the Ninth Circuit. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI.

The Fourteenth Amendment states in pertinent part: "nor shall any State

deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Statutory Provisions

28 U.S.C. § 2254(d)(1) provides as follows: "An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved and unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

A. Procedural Background

This petition for certiorari arises out of an appeal of the district court's denial of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. *See* 28 U.S.C. § 2254.

In 2012, a California Jury convicted Mr. Johnson (hereinafter referred to as "Petitioner") of lewd and lascivious acts by force or violence on a minor under the age of 14,[1] and found true a sentencing enhancement allegation that Petitioner

[1] Cal. Penal Code § 288(b)(1). All further citations to the "Penal Code" refer to the California Penal Code.

kidnapped the victim during the commission of the offense.[2] App. C at 1. The jury was unable to reach a verdict on three other counts: two counts of forcible rape and one count of kidnapping to commit a sex offense. The trial court declared a mistrial as to those three counts. App. B at 1; ER 15; *see* Lodged Docs 202, 207-09, 927-28, 930.[3] Petitioner was sentenced to a term of 25 years-to-life. App. C at 1.

On direct appeal to the California Court of Appeal, Petitioner raised the certified claim that the trial court violated the Sixth Amendment's Confrontation Clause by restricting cross-examination of the 17-year-old complaining witness in a manner that allowed her "to testify without speaking and without allowing the jury and defendant to face and confront her." App. C at 7. The Court of Appeal affirmed Petitioner's conviction in an unpublished decision on January 27, 2015. App. C at 1-2. Petitioner filed a petition for review to the California Supreme Court, which was denied by summary order on April 15, 2015. ER 30; *see*

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[2] Penal Code § 667.61(d)(2).

[3] "ER" refers to the Appellant's Excerpts of Record filed with the Ninth Circuit in conjunction with the Opening Brief. "Lodged Docs" refers to the 1,089-page PDF file available on the Ninth Circuit's docket via PACER; citations refer to the page number of the PDF file where the document is located. This file contains the state court record lodged by respondent in the district court on August 23, 2016. *See* ER 167.

Lodged Docs 1089.

Proceeding *pro se*, Petitioner filed his habeas petition, pursuant to section 2254, in the Eastern District of California on April 11, 2016. ER 29, 43, 166. Petitioner raised a single claim of relief, arguing that his Sixth Amendment right to confrontation was violated by the state court's imposition of severe limitations on the defense's cross-examination of the complaining witness, resulting in a fundamentally unfair trial under the Fourteenth Amendment. ER 30.

On March 29, 2017, the district court issued an order denying the habeas corpus petition on the merits. App. B at 9-14. In the March 29th order, the court also granted a certificate of appealability, stating that "the undersigned determines that a Certificate of Appealability is appropriate in this case" with respect to Petitioner's single claim for relief under the Confrontation Clause. App. B at 14; *see* App. C at 2 & n.2; s*ee also* 28 U.S.C. § 2253(c)(3). The district court entered judgment on March 30, 2017. ER 28. On April 14th, Petitioner filed a timely notice of appeal. ER 27.

On October 24, 2017, the Ninth Circuit Court of Appeals affirmed the district court's denial of Petitioner's habeas petition. App. A at p. 3. The Ninth Circuit concluded that the California Court of Appeal did not unreasonably apply

this Court's precedent, despite the state court's procedure from cross-examining the complaining witness being "unusual" and potentially unconstitutional. App. A at p. 3.

This Petition for Writ of Certiorari is timely under Rule 13(3) of the rules of this Court, as the 90th day from the Ninth Circuit's decision falls on January 22, 2019.

B. Factual Background

After a brief introductory note, the following statement of facts will summarize the most salient facts from the written opinion of the California Court of Appeal, and additionally, where noted, will summarize other evidence from Petitioner's trial that was not included in the state court's opinion. *See Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011) (review under section 2254(d) includes entire record before state court). The state court's factual summary can be found in App. C, at pages 16-20.

As a preliminary point, Petitioner's defense theory at trial conceded that he had engaged in non-forcible sexual intercourse with the complaining witness, A.S., who was thirteen years old at the time. Thus, Petitioner admitted that he had violated a lesser charged offense, under Penal Code section 288(a), by engaging in lewd and lascivious conduct with a minor under 14 years of age. Petitioner

contested, however, that he had used force or fear to coerce A.S., either by forcing her to engage in sexual intercourse or by kidnapping her. As noted above, the jury convicted Petitioner of the greater charged offense of using force or fear to engage in lewd and lascivious conduct (Penal Code § 288(b)(1)), but was not able to reach a verdict on charges of rape and kidnapping to commit rape.

The following facts, quoted from the California Court of Appeal's written decision, were derived primarily from A.S.'s pretrial statements made close in time to the events in question. A.S.'s testimony at the trial, by contrast, affirmed some aspects of these statements but was of more limited scope.[4]

> In February 2009, 13-year-old A.S. lived at home with her mother S.S. and some of her siblings. Her sister J.S. lived in a separate apartment with her boyfriend – defendant – and their baby daughter.
>
> On February 28, 2009, defendant asked A.S. to go to the store with him and buy tampons for J.S. He did not want to buy tampons because he was a man. He drove A.S. to Foods Co., where she bought tampons for defendant.
>
> Rather than taking her home, defendant drove A.S. to a place she did not know. The place was about 15 minutes from the store and had a parking lot and buildings that looked like warehouses. A.S. felt she could not escape because there was no one else in the area. After parking, defendant got out of the car, opened the passenger door, and ordered A.S. into the trunk. A.S. got out of the car and defendant pushed her into the trunk.
>
> Defendant drove the car for a "pretty long" time. She did not know where she was when defendant stopped and opened the trunk. The place looked like a forest and she could not get away. Defendant then sexually assaulted

4 A.S.'s complete trial testimony is included in the ER at pages 59-93.

> A.S. in the back seat of the car. He told A.S. not to tell anyone and dropped her off near her home. A.S. went to a friend's house before going home.

App. C at 2; ER 16.

These events described by A.S. in her pretrial statements were partially corroborated by the results of a search of the car Petitioner had been driving, which yielded a box of tampons and a store receipt that was consistent with A.S.'s account of being driven to the Foods Co. store. App. C at 3. DNA evidence confirmed sexual intercourse between Petitioner and A.S. App. C at 3. However, as noted above, this was consistent with the defense's theory of the case, that is, that Petitioner engaged in nonforcible intercourse with J.S. The Court of Appeal also noted that DNA evidence established that A.S. had been inside the car, including her DNA being found in the trunk. App. C at 3-4. The state court failed to note, however, that the witness who testified that A.S.'s DNA was found in the trunk had failed to record the location inside the trunk from which the swab was taken. Lodged Docs 485, 535. Moreover, it was uncontested that the car had been in the family (first driven by A.S.'s mother, then by her sister and Petitioner) for a number of years. Thus, A.S. had been a passenger in the car on countless occasions prior to the incident in question. Lodged Docs 415-16, 418-19, 444-45.

Finally, in contrast to the A.S.'s pretrial statements summarized by the Court

of Appeal, A.S. also made two pretrial statements (one to a defense investigator and another to her sister, J.S.) in which she denied that Petitioner had forced her into the trunk of the car or forced her to engage in sexual intercourse. Lodged Docs 755-59 (statement to defense investigator); 444-454 (sister).

REASONS FOR GRANTING THE WRIT

I. Introduction

The petitioner, Richard Johnson, Jr., seeks a writ of certiorari in the instant case as to a single issue of exceptional importance, which turns on the Ninth Circuit's erroneous application of this Court's clearly established precedents interpreting the Sixth Amendment's Confrontation Clause and its guarantee of the opportunity to effectively cross-examine one's accuser.

Before the Ninth Circuit, Petitioner demonstrated that his Sixth Amendment right to confrontation was violated when the trial court allowed A.S. to respond to all questions on cross-examination by writing out her answers, after which the presiding judge recited the complaining witness's answers to the jury. For several independently sufficient reasons, Petitioner demonstrated to the Ninth Circuit that the California Court of Appeal unreasonably applied the Supreme Court's decisions in *Maryland v. Craig*, 497 U.S. 836 (1990), and *Coy v. Iowa*, 487 U.S. 1012 (1988), in rejecting Petitioner's claim of a Confrontation Clause violation on

direct appeal. First, these cases require that the jury be able to view the witness's demeanor contemporaneously with the witness's answers on cross-examination. Second, *Craig* and *Coy* require that cross-examination be oral, not written. Third, the elements of effective confrontation guaranteed by *Craig* preclude the presiding judge from delivering the witness's answers to the jury. Fourth and finally, *Craig* requires that the trial court hold a hearing before ordering any "special procedure" that supplants traditional cross-examination, and at such a hearing the court must find that the witness is traumatized specifically by the defendant's presence in court. Here, the trial court held no hearing, and the complaining witness explicitly stated that she was not upset due to the defendant's presence. Accordingly, despite the Ninth Circuit's erroneous decision to the contrary, the California Court of Appeal unreasonably applied *Craig* and *Coy* in rejecting Petitioner's claim under the Confrontation Clause. *See* 28 U.S.C. § 2254(d)(1).

II. The Ninth Circuit Erred in Concluding that the California Courts Reasonably Applied *Maryland v. Craig* and *Coy v. Iowa* in Rejecting Petitioner's Confrontation Clause Claim: The State Court Violated Petitioner's Sixth Amendment Rights by Severely Curtailing Cross-Examination of the Complaining Witness.

A. Clearly Established Federal Law.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

U.S. Const. amend VI.

This Court has held that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Cross-examination must include "a full and fair opportunity to probe and expose" any matter that materially bears on a witness's credibility. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam); *see Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988). As the Court wrote in *Davis*, a defendant has a "right of effective cross-examination," the deprivation of which constitutes "constitutional error of the first magnitude." *Davis*, 415 U.S. at 318; *see California v. Green*, 399 U.S. 149, 157-158 (1970) (Confrontation Clause permits admission of out-of-court statements, so long as declarant is "subject to full and effective cross-examination"); *see also Maryland v. Craig*, 497 U.S. 836, 851 (1990) (discussing the "elements of effective confrontation").

In order to be considered full, fair, and effective within the meaning of the Court's cases, cross-examination has traditionally required a face-to-face confrontation between the witness and the accused. *Coy v. Iowa*, 487 U.S. 1012, 1015-1020 (1988) (discussing *California v. Green*, 399 U.S. 149, among other authorities). In *Green*, the Court explained that the Sixth Amendment's

requirement of a face-to-face confrontation stems from the Founders' desire to prohibit criminal convictions being based on a witness's untested written statement:

> The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits … being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Green, 399 U.S. at 157-58, quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); *see Craig*, 497 U.S. at 845.

In the instant case, the clearly established Federal law required by section 2254(d)(1) is determined by the following of this Court decisions: *Maryland v. Craig*, 497 U.S. 836 and *Coy v. Iowa*, 487 U.S. 1012. The California Court of Appeal discussed both of these decisions in its opinion affirming Petitioner's conviction. *See* App. C at 7-8, 10.

In *Coy v. Iowa*, the Court addressed a procedure whereby the state trial court allowed two children to give their testimony from behind a screen that prevented them from seeing the defendant. *Coy,* 487 U.S. at 1014. The defendant was able "dimly to perceive the witnesses, but the witnesses could see him not at all." *Id*. at 1015; *see id*. at 1020. The Court held that "the Confrontation Clause

guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id*. at 1016; *see id*. at 1017-1020. With respect to the procedure employed by the Iowa trial court, the late Justice Scalia wrote for the majority that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id*. The Court "left for another day … the question whether any exceptions exist" to this right. *Id*. at 1021.

Two years later, in *Maryland v. Craig*, the Court took up the question of exceptions to the requirement of a face-to-face encounter. In *Craig*, the Court clarified that *Coy v. Iowa* did not establish an "*absolute* right to a face-to-face meeting" between a criminal defendant and the witnesses against him at trial. *Craig*, 497 U.S. at 844 (emphasis in original). The procedure addressed in *Craig* involved child witnesses testifying "by one-way closed circuit television" from a separate room where they could not see the defendant. *Id*. at 840-41. The attorneys examined the witnesses in-person, while the defendant, the jury, and the judge viewed the examination by video from the courtroom. *Id*. at 841-42. The defendant was able to communicate with his counsel electronically, and the court made rulings in the same manner. *Id*. at 842.

Although the Maryland trial court's alternative method of cross-examination

deviated from the traditional mode of confrontation, the Court found that it comported with the Sixth Amendment for two reasons: first, it preserved the essential "elements of effective confrontation," *Craig*, 497 U.S. at 851, and second, it was premised upon a "finding of necessity" by the trial court, *id*. at 855.

With respect to the trial court's findings, the Court explained that the "requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether" the use of a "special procedure," such as the one-way video feed at issue, "is necessary to protect the welfare of the particular child witness." *Id*. "The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id*. at 856. With respect to the latter requirement, the Court emphasized that it must be "the presence of the defendant that causes the trauma" to the child witness. *Id*.

In discussing the requirement that any "special procedure" employed as an alternative to traditional cross-examination must "preserve[] the essence of effective confrontation," *Craig*, 497 U.S. at 857, the Court explained why the one-way video feed preserved the elements of effective cross-examination: 1) the witness was competent and testified under oath; 2) the defendant retained "full opportunity for contemporaneous cross-examination;" and 3) "the judge, jury, and

defendant" were able to observe "the demeanor (and body) of the witness" while he or she was testifying. *Craig*, 497 U.S. at 851. The Court reasoned that the presence of "these elements of effective confrontation" – testimony under oath, contemporaneous cross-examination, and "observation of the witness' demeanor – adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id*.

Finally, the *Craig* opinion was clear in holding that these twin requirements for utilizing a "special procedure" to replace traditional cross-examination are conjunctive: the alternative procedure must both preserve the essential elements of effective confrontation ***and*** be supported by a finding of necessity. *See Craig*, 497 U.S. at 857; *see also id*. at 855, 860.

B. Relevant Proceedings before the State Court.

In its unpublished decision, the California Court of Appeal applied *Coy v. Iowa* and *Maryland v. Craig*, as well as a pair of California cases, to reject Petitioner's claimed violation of the Confrontation Clause. App. C at 7-8, 10-11. The Court of Appeal noted that after A.S. experienced difficulty answering questions on direct, including crying "during most of her testimony," and repeatedly expressing a desire not to testify about the details of the charged

offenses, the trial court granted the prosecutor's request to allow A.S. to give her answers in writing. App. C at 4-5. Thereafter, during the last portion "of A.S.'s direct," and throughout the entire cross-examination, A.S. "gave her answers in writing, which were then read by the trial court." App. C at 5.

The Court of Appeal further noted that when A.S. wrote down her answers to defense counsel's questions on cross-examination, she turned her back to defense counsel and to the defendant. The jury may have had difficulty seeing A.S. as she wrote down her answers. App. C at 6.

The court addressed as separate issues A.S.'s comportment on the witness stand (*e.g.*, turning her back to the defendant and turning away from defense counsel) and her being allowed to testify without speaking (*i.e.*, providing her answers in writing, which were then read in open court by the judge). App. C at 1.

Addressing the first question, the court concluded that A.S.'s refusal to face the defendant or defense counsel did not implicate Petitioner's confrontation right, reasoning that the Sixth Amendment does not require a witness to look at the defendant or counsel. App. C at 10-11; *see* App. C at 7 ("The Confrontation Clause does not … compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions") (*quoting Coy*, 487 U.S. at 1019). Because the Confrontation Clause did not

require A.S. to comport herself in a certain matter on the witness stand, the Court of Appeal reasoned, the trial court was not required to hold a hearing or make the findings required under *Maryland v. Craig*. App. C at 10.

With respect to A.S.'s participation in cross-examination via written answers which were then recited by the judge in open court, the Court of Appeal ruled that, for purposes of the Sixth Amendment, there was essentially no difference between a witness participating in cross-examination by the traditional method of giving spoken answers, and the witness giving her answers in writing. App. C at 10-11. Likewise, the court concluded that the trial judge having read the witness's answers to the jury was of no constitutional significance. App. C at 5-6, 10-11. The court reasoned that the trial judge orally reciting A.S.'s written answers was "no different than" the commonly-accepted practice of allowing a witness who cannot speak English to testify through an interpreter. App. C at 10-11.

C. The Decision of the Ninth Circuit Court of Appeal.

In its unpublished decision, the Ninth Circuit concluded that the state court's decision constituted a not-unreasonable application *Maryland v. Craig* and *Coy v. Iowa*, pursuant to 28 U.S.C. § 2254(d)(1). App. A at p. 3. The Ninth Circuit noted that the state court employed an "unusual" procedure for cross-examination of the state's primary witness, and expressed no opinion as to the constitutionality

of that procedure, but distinguished *Coy* and *Craig* on the basis that "[t]hose cases were concerned with when and how a traumatized child witness can testify *outside* the presence or view of the defendant," while the instant case involved a curtailment of traditional cross-examination during which the witness and defendant were both present in the courtroom. App. A at p. 3.

The Ninth Circuit interpreted this Court's precedents far too narrowly. In the following section, Petitioner will demonstrate that, contrary to the Ninth Circuit's decision, the state appellate court's ruling constituted an unreasonable application of the Sixth Amendment's Confrontation Clause, as interpreted by the Supreme Court's decisions in *Maryland v. Craig* and *Coy v. Iowa*. *See* 28 U.S.C. § 2254(d)(1). Briefly, under *Craig*, it was objectively unreasonable for the trial court, without first making the requisite findings, to supplant traditional cross-examination with the "special procedure" whereby A.S. gave her answers in writing, with the presiding judge then reciting A.S.'s responses to the jury and counsel. *See Craig*, 497 U.S. at 851, 855, 857 ("special procedure" that supplants traditional cross-examination must retain the "elements of effective confrontation" and be supported by a "case-specific finding of necessity").

D. The California Court of Appeal's Decision Rejecting Petitioner's Confrontation Clause Claim Constituted an Objectively Unreasonable Application of Federal Law.

1. The Testimony of A.S. and the State Trial Court's Rulings.

The complaining witness, A.S., was 17 years old when she testified at Petitioner's jury trial. ER 60. A "victim advocate" sat next to A.S. during her testimony. ER 67. The trial court also allowed A.S. to approach the witness stand by entering the through a non-public side door, because she had difficulty walking to the witness stand in view of the jurors. ER 67-68.

During A.S.'s direct examination, she was able to provide spoken answers to preliminary background questions, but expressed a strong reluctance to testify when the prosecutor asked about the incident in question. ER 65; *see* ER 60-64, 69-70, 72. She repeatedly answered with statements such as "I can't do this," or "I don't want to talk about it," or by asking "can I leave?" ER 65; *see* ER 70-71, 73-76, 79-81. During a break in the proceedings, defense counsel estimated that that A.S. said "at least 12 to 14 times" that she did not want to, or was unable to testify. ER 81-82.

Eventually, after two breaks were taken for A.S.'s benefit, *see* ER 66, 81, the prosecutor asked the court for permission to approach A.S. with a pen and paper so that A.S. could write out the answers she was having difficulty articulating. ER

83. The trial court allowed this. ER 83. The transcript reflects that, from this point onward, "[t]he witness is now writing her answers and the Court is reading the answers into the record." ER 83; see ER 84 (A.S. passes pad of paper to court after writing out each answer).

With A.S. writing her responses on a notepad, the presiding judge read aloud the remainder of A.S.'s answers on direct examination. ER 83-84. Thus, with A.S. sitting silently, the jury heard the judge recite the following evidence: On February 28, 2009, A.S. engaged in sexual intercourse, but she did not want to do so; she was forced. This happened inside the Honda Civic, after she left the Foods Co store. ER 84. On redirect, A.S. wrote, and the judge recited, that Petitioner had forced her into the trunk of the Civic, and that he took her against her will to the location where he forced her to have sex. ER 92.

The defense's cross-examination of A.S. was conducted in the same manner, with A.S.'s written answers recited by the judge. ER 84-92; *see* ER 100 (recording defense counsel's earlier objection at sidebar). Defense counsel attempted to question A.S. about statements she had purportedly made to her sister and to a defense investigator, in which she denied that Petitioner had forced her into the trunk of the Civic, or forced her to have sex. ER 87-92. A.S. responded to this line of questioning by writing that she did not remember talking to a defense

investigator. However, she denied having made the exculpatory statements attributed to her by the investigator. ER 87-90. A.S. also denied having told her sister that her statement to the police, in which she accused Petitioner of forcible kidnapping and rape, had not been true. ER 89.

A.S.'s hand-written answers, made on a note pad during her examination, appear in the appellant's excerpts at pages 163-65. *See* ER 163-65; *see also* ER 97, 99 (trial court retains written answers as Court Exh. 1).

Shortly after A.S. was excused, defense counsel renewed her objection and moved to have A.S.'s testimony stricken, arguing, among other things, that Petitioner's Sixth Amendment right to effective confrontation was violated by A.S. being permitted to participate in cross-examination by giving written answers. ER 95. The trial court denied the defense's motion to strike, ruling that the special procedure it had adopted involved only "slight deviations from regular practice." ER 97-98.

2. The California Court of Appeal Unreasonably Applied *Maryland v. Craig* and *Coy v. Iowa* Within the Meaning of § 2254(d)(1).

As noted above, the California Court of Appeal applied *Coy* and *Craig* to conclude that **1)** the procedure adopted by the trial court, where A.S. responded to cross-examination in writing after which the presiding judge recited her answer to the jury, was no different than a witness being aided by an interpreter, and thus of

no constitutional significance; and **2)** even if findings were required under *Craig*, the trial court satisfied this requirement by observing on the record that A.S. appeared traumatized. App. C at 10-11; *see* App. C at 6.

In the following sections, Petitioner will demonstrate that the Ninth Circuit erred by concluding that the California Court of Appeal reasonably applied *Coy* and *Craig*, and thus that Petitioner failed to meet the AEDPA threshold under section 2254(d)(1). First, for several independently sufficient reasons, the procedure employed by the trial court patently failed to meet the elements of effective confrontation required by the *Craig* decision. Therefore, under *Craig*, the state trial court's procedure violated the Sixth Amendment's Confrontation Clause, irrespective of any findings made by the trial court. Second, even if the trial court's special procedure is deemed to satisfy *Craig*'s elements of effective confrontation, such that the procedure would be constitutionally permissible if premised upon proper findings, the findings made by the trial court here cannot reasonably be seen as meeting the criteria required by *Craig*.

a. The State Court Unreasonably Applied *Coy* and *Craig* by Allowing A.S. to Write Her Answers on Cross-Examination, With the Presiding Judge Then Reciting A.S.'s Responses to the Jury.

The *Craig* Court wrote that "the right guaranteed by the Confrontation Clause includes not only a 'personal examination'" of adverse witnesses, but also

an opportunity for effective confrontation. *Craig*, 497 U.S. at 845 (*quoting Mattox*, 156 U.S. at 242); *see id*. at 851. Cross-examination provides the requisite opportunity for effective confrontation where the witness is physically present, under oath, and the examination is "contemporaneous" with the witness subject to "observation of demeanor by the trier of fact." *Id*. at 846, 851. Critically, this last element of effective confrontation – contemporaneous cross-examination – must "permit[] the jury … to observe the demeanor of the witness ***in making his statement***, thus aiding the jury in assessing his credibility." *Id*. (*quoting Green*, 399 U.S. at 158) (emphasis added); *see id*. at 851.

The "special procedure" approved by the Court in *Craig* allowed the jury to view the witnesses' demeanor by video as they responded to the attorneys' examination. *Id*. at 840-42. To the Court, a necessary feature of this protocol was that, although the witness could not see the defendant, the jury was "able to view … the demeanor (and body) of the witness as he or she testifies." *Id*. at 851. Thus, because the jury can observe the witnesses' demeanor ***as they give*** their answers, an examination-by-video "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing" as required by the Confrontation Clause. *Id*. (citing *Mattox*, 156 U.S. at 242, and *Green*, 399 U.S. at 179 (Harlan, J., concurring)).

Here, the California Courts did not comport with the element of effective confrontation that cross-examination must be contemporaneous so that that the jury can observe the witness as she gives her answers: when the jury heard A.S.'s answers, the presiding judge was speaking.

As the jurors listened to the judge recite A.S.'s written words, they could look to A.S.'s demeanor on the witness stand, but she had already responded to defense counsel's question, in writing, some seconds earlier. Thus, the procedure utilized here lacked the saving grace of the video examination approved in *Craig*, where the defendant's "full opportunity for ***contemporaneous*** cross-examination" ensured that the jury was "able to view … the demeanor (and body) of the witness ***as he or she testifies***." *Id*. at 851 (emphasis added). Indeed, there is not a single passage in the *Craig* decision where the Court separates the witness's act of giving testimony from the jury's observation of her demeanor: under *Craig*, confrontation requires that these two events happen at precisely the same time. *See, e.g.*, *id*. ("as he or she testifies"); *id*. at 846 ("in making his statement"); *id*. at 857 ("witnesses … were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified").

Coy v. Iowa and other decisions confirm that a required element of effective cross-examination is that the jury can observe the witness's demeanor ***while*** she is

responding to defense counsel's questions. For example, the *Coy* opinion refers to "the importance of the right to live, oral cross-examination." *Coy*, 487 U.S. at 1018, n.2. Thus, the Court begins its analysis from the premise that cross-examination will be oral (with the witness's answer and demeanor observed contemporaneously). Moreover, it is worthwhile to note that the "extraordinary procedure" disallowed in *Coy*, which blocked the witness's view of the defendant, nevertheless allowed the jury to observe the witnesses' demeanor as they reacted to each of the questions posed by defense counsel. *Id*. at 1020. Indeed, the core holding of *Coy* – that the defendant has the right to meet his accuser face-to-face – is premised on the assumption that the trier of fact will observe this meeting and scrutinize the witness's responses. *See, e.g., id*. at 1019 ("even if the lie is told, it will often be told less convincingly").

This Court's decision in *California v. Green* further demonstrates that a necessary element of effective confrontation is an immediate response by the witness so that the jury may judge her credibility in the context of a particular answer. In *Green*, the Court ruled that a testifying witness's prior out-of-court statement may be admitted as substantive evidence of the defendant's guilt. *Green*, 399 U.S. at 152, 164. However, for the out-of-court statement to be admissible, "the declarant [must be] testifying as a witness and subject to full and

effective cross-examination." *Id*. at 158. The Court considered the cross-examination full and effective because the jury could "judge [the witness] by his demeanor upon the stand ***and the manner in which he gives his testimony*** whether he is worthy of belief." *Id*. at 158 (*quoting Mattox*, 156 U.S. at 242-43) (emphasis added); *see id*. at 160 (referring to cross-examination as "giving the jury a chance to observe and evaluate [the witness's] demeanor as he either disavows or qualifies his earlier statement").

Common sense aligns with the words of this Court's decisions: effective cross-examination requires that the jury's observation of the witness's demeanor be precisely contemporaneous with the witness's answer. One evaluates a speaker's credibility by observing her demeanor as she speaks, not at some other time. The manner in which the witness comports herself even a few seconds after answering a critical question cannot reliably be connected to that answer. And critically, under the AEDPA, this disassociation between answer given and demeanor observed patently falls short of what the Court required in *Craig*. *See Craig*, 497 U.S. at 846, 851, 857; § 2254(d)(1).

In addition to A.S.'s cross-examination not permitting the jury to observe A.S.'s demeanor contemporaneously with hearing her answers, the written format of her examination constitutes an unreasonable application of *Craig* for a separate

yet closely related reason. The jury could not gain meaningful insight into A.S.'s credibility by observing her demeanor as she wrote her answers on a piece of paper. The evaluation of witness demeanor required by *Craig* presupposes that the jury is watching the witness as she gives *spoken* answers (as was the case with the video examination procedure the Court approved). *See Craig*, 497 U.S. at 841-42.

As this Court explained in *Craig* (and in *Green*), "[t]he primary object of the" Confrontation Clause "was to prevent depositions or *ex parte* affidavits … being used against a prisoner in lieu of a personal examination and cross-examination of the witness …." *Craig*, 497 U.S. at 845 (*quoting Mattox*, 156 U.S. at 242-43); *see Green*, 399 U.S. at 157-58. Here, of course, A.S. was physically present in court. But the procedure adopted by the state court precluded A.S.'s presence from serving the constitutional function required by this Court's precedent: that she give "testimony" while the jury observes her demeanor. *Id*. Instead, A.S. was permitted, in essence, to give witness by affidavit while she sat in court.

Allowing the declarant to draft her affidavit (or interrogatory) in front of a jury does precious little to allay the Founder's concerns with respect to criminal trials conducted entirely by writing, that is, without "the witness [being] present at

trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact." *Green*, 399 U.S. at 157; *see id*. at 156. Critically, the witness's explanation or repudiation must be given in the form of *testimony*: "that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Craig*, 497 U.S. at 845 (*quoting Mattox*, 156 U.S. at 242-43). Put simply, "testimony" as the term is used in *Craig*, *Coy*, and *Green*, is by definition oral. *See id*. at 851, 857; *Coy*, 487 U.S. at 1018-1020 & n.2 ("the right to live, oral cross-examination"); *Green*, 399 U.S. at 157-58, 160; *cf. Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive").

A third reason that Petitioner's trial was inconsistent with any reasonable application of *Craig* and its antecedents is that the presiding judge recited A.S.'s written answers to the jury. Even if a reasonable application of *Craig* could permit a witness to answer cross-examination in writing, with the result that the jury was unable to observe her demeanor at the specific point when she answered each question from the defense, there would still be an unreasonable application here because of the role assumed by the trial judge.

It is a well-settled proposition that a trial judge has tremendous influence

over the jury. "The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (*quoting Starr v. United States*, 153 U.S. 614, 626 (1894)). Not only the judge, but even a lesser court official such as the bailiff "beyond question carries great weight with a jury." *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (per curiam). In addition to occupying an exalted position in the eyes of the jurors, the presiding judge also plays a unique role – in both the jurors' perception and in fact – as the impartial arbiter of a partisan contest. *See Quercia v. United States*, 289 U.S. 466, 469-472 (1933); *Glasser v. United States*, 315 U.S. 60, 82 (1942) ("Upon him rests the responsibility of striving for that atmosphere of perfect impartiality").

Contravening these fundamental principles, the California Court of Appeal held that the presiding judge reciting A.S.'s written answers to the jury was "no different" than a witness being assisted by an interpreter. App. C at 10-11. This was objectively unreasonable. Surely, there can be no reasonable debate that a jury will be much more influenced by the judge's words and actions than by those of an interpreter. The judge's roles as both neutral arbiter and preeminent authority figure do not allow the judge to recite a key witness's answers on cross-examination without infringing upon the defendant's Sixth Amendment right to

"cross-examination [that] permits the jury … to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Craig*, 497 U.S. at 846 (*quoting Green*, 399 U.S. at 158). No jury could be expected to apply the same scrutiny to statements coming from the presiding judge as it would the same words spoken by a witness; such an arrangement could not help but bolster the witness's credibility. *See Bollenbach*, 326 U.S. at 612 (*quoting Starr*, 153 U.S. at 626).

Additionally, even if the jurors did succeed in appropriately scrutinizing the words of the witness as they flow from the judge's mouth, what could they learn? Certainly not much from the witness's demeanor, because her comportment while the judge speaks would reveal little about the veracity of her previously-written answer. *See Craig*, 497 U.S. at 846 (*quoting Green*, 399 U.S. at 158).

Finally, in deeming the judge's recitation of A.S.'s written answers to be of no constitutional significance, the California Court of Appeal unreasonably applied *Craig* by ignoring the implications of the judge's critical role as the impartial arbiter of a partisan contest. *See Quercia*, 289 U.S. at 471-72. That a jury trial is conducted as a contest of partisans goes to the foundation of the Confrontation Clause, as is reflected by its name. *See Coy*, 487 U.S. at 1015-16; *Craig*, 497 U.S. at 845. The *Craig* Court repeatedly stressed that the "central concern" of the

right to effective confrontation – with its elements of "oath, [contemporaneous] cross-examination, and observation of the witness' demeanor" – is to ensure that "testimony is both reliable and subject to rigorous adversarial testing." *Craig*, 497 U.S. at 845, 851. The "elements of effective confrontation" thus safeguard the "reliability and adversariness" that distinguishes a fair trial "from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition." *Id*. at 851 (*citing Mattox*, 156 U.S. at 242, and *Green*, 399 U.S. at 179); *see id*. at 846 ("ensuring … the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings"); *see also id*. at 845, 847, 849, 857.

Here, from the perspective of the lay jurors, the adversarial nature of the proceedings (with its corollary of an impartial judge) could not be preserved with the judge reciting the answers of the prosecution's star witness on cross-examination. This could not help but render the jury's credibility determination less reliable. *See Craig*, 497 U.S. at 845-46. The judge taking on the role of A.S.'s "interpreter" (App. C at 10-11) likely created a risk that the jurors would view the court as favoring the complaining witness over the defendant. By contrast, the video examination procedure approved in *Craig* did not carry any risk of conveying an appearance of judicial partiality: the jurors and the judge watched the examination on television together from the courtroom. *Id*. at 841-42. In

this regard, Petitioner notes that the trial court here did not give a cautionary instruction to dispel any misperceptions of favoritism by the court. Most importantly, under section 2254(d)(1), what took place here is wholly incompatible with the *Craig* Court's observation of "the strong symbolic purpose served by requiring" the adverse witness (not the presiding judge) "to testify in the accused's presence." *Craig*, 497 U.S. at 847.

In conclusion, the extraordinary procedure adopted by the California trial court and approved by the Court of Appeal constitutes an unreasonable application of *Maryland v. Craig* and its antecedents by patently failing to fulfill the required elements of effective confrontation, for three closely related but independently sufficient reasons: (1) the procedure did not preserve "contemporaneous cross-examination" that would have allowed the jury to observe A.S.'s demeanor as she gave her answers; (2) A.S. giving her answers in writing was antithetical to the Confrontation Clause as interpreted by *Craig*, *Coy*, and *Green*; and finally, (3) the role taken by the presiding judge, by reciting A.S.'s written answers to the jury, prevented the jurors from evaluating A.S.'s credibility in a manner consistent with "the rigorous adversarial testing" guaranteed by the Confrontation Clause.

Thus, for the several reasons discussed above, the procedure adopted here by the California courts patently failed to meet the "elements of effective

confrontation" required by *Craig*. Failing to meet these elements renders the procedure unconstitutional, such that no finding by the trial court can support its application. *See Craig*, 497 U.S. at 851, 855 (explaining that state may employ a "special procedure" only where it both preserves the elements of effective confrontation and is premised upon a "finding of necessity").

In the subsection that follows, Petitioner will show that, even if the state court's special procedure satisfied *Craig*'s elements of confrontation, the state trial court's "findings" cannot reasonably be considered to comply with the Court's holding in *Craig*.

b. Even If the "Special Procedure" Adopted by the Trial Court Satisfied the Elements of Effective Confrontation Required by *Craig*, the State Court Nonetheless Patently Violated *Craig* by Failing to Hold a Hearing or Make the Required Findings.

The *Craig* Court held that trial courts were permitted to employ "a special procedure" to facilitate the cross-examination of a child witness, "where necessary to further an important state interest." *Craig*, 497 U.S. at 852, 855. As discussed at length above, any alternative procedure must comport with the "elements of effective cross-examination." *Id*. at 851. Where these elements are met, the procedure may be employed "if the State makes an adequate showing of necessity." *Id*. at 855.

"The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the … procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id*. Additionally, the court must "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id*. at 856. The Court emphasized that it must be "the presence of the defendant that causes the trauma." *Id*.

Here, the California Court of Appeal concluded that no findings were required, but opined that the trial court would have met any such requirement by observing that A.S. appeared to be traumatized, along with noting "the nature of the alleged crimes, and the victim's age." ER 24. The Court of Appeal was referring to the following statement by the trial court:

> from when she entered the courtroom, the witness was extremely emotional. She was crying when she first entered, and there were many times that she started crying, especially when she was asked questions specifically related to the alleged offense. She had great difficulty.
>
> The Court took into consideration the age of the witness now, the age of the witness when these offenses allegedly occurred, the nature of the charges, the violent nature of the charges, the sexual nature of the charges, what I observed about the witness, to allow this process by which she could write the answers down.

ER 96-97.

These observations by the trial court do not even arguably satisfy the

requirements of *Craig*. First, the court did not hold a hearing to take "evidence and determine whether use of the [special procedure] is necessary to protect the welfare of the" minor witness. *Craig*, 497 U.S. at 855. No other alternative procedures were considered, such as conducting a video examination like that approved in *Craig*. Instead, the court merely observed that the witness was "extremely emotional" and having difficulty testifying.

Second, and most importantly, the trial court did not find that it was the "presence of the defendant that cause[d] the trauma," as opposed to A.S. being upset "by the courtroom generally." *Id*. at 856. The court could easily have made this determination by examining A.S. outside of the jury's presence, but it did not bother to do so. In this regard, it is far from clear that A.S. was actually upset by the presence of the defendant. When asked by the prosecutor if she was having difficulty testifying because she was scared of Petitioner, A.S. replied that she was not:

> Q: And you told us numerous times today that you can't do this?
> A: Yes.
> Q: Okay. Is it because you are embarrassed, or is it because you are scared?
> A: I just don't want to talk about it.
>
> *** *** ***
>
> Q: Why don't you want to talk about it, though? Is it because you are embarrassed?
> A: Yeah.
> Q: Are you afraid of hurting your sister Jennifer?

A: No.
Q: Are you afraid of the defendant?
A: No. I just don't want to think about it. I don't want to talk about it.

ER 75-76.

Thus, the trial court obviously failed to make the requisite finding "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Craig*, 497 U.S. at 856; *see id*. at 860; *see also United States v. Moses*, 137 F.3d 894, 898-99 (6th Cir. 1998) (reversing conviction under *Craig*, where district court allowed special procedure despite witness stating she was not afraid of defendant). Moreover, this failure violates a core principle of *Craig*'s holding: Where the child witness only needs protection "from courtroom trauma generally," a less restrictive accommodation will adequately serve the state's interest. *See id*. at 856.

Accordingly, for the several reasons set forth above, the California Court of Appeal's decision constitutes an unreasonable application of *Maryland v. Craig* and the cases upon which it relies. *See* § 2254(d)(1). Because the Ninth Circuit Court of Appeals affirmed the denial of Petitioner's habeas corpus petition in a manner that erroneously approved of the state court's unreasonable application of this Court's precedents governing the Sixth Amendment's Confrontation Clause and that clause's guarantee of an opportunity for effective cross-examination, the

instant Petition for Writ of Certiorari should be granted.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals affirming the denial of his petition for writ of habeas corpus in order to correct the error of constitutional magnitude by that court, and the violation of Petitioner's Sixth Amendment right to confrontation by the courts of California.

Dated: December 20, 2018

Respectfully submitted,

_____

GEOFFREY M. JONES
Attorney for Petitioner
Richard Steven Johnson, Jr.

No. _____

In the Supreme Court of the United States
October 2019 Term

STEVEN RICHARD JOHNSON, Jr.,

Petitioner,

v.

NEIL MCDOWELL, Warden,

Respondent.

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

APPENDIX
to Petition for Writ of Certiorari

Geoffrey M. Jones
Counsel of Record, appointed under the
Criminal Justice Act of 1964
769 Center Blvd., PMB No. 162
Fairfax, CA 94930
Tel: (415) 517-3569
email: gffjones@comcast.net

Attorney for Petitioner
Steven Richard Johnson, Jr.

APPENDIX A

Unpublished Opinion of the United States Court of Appeals for the Ninth Circuit

Filed October 24, 2018

FILED

OCT 24 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD STEVEN JOHNSON, Jr., Petitioner-Appellant, v. NEIL MCDOWELL, Warden, Respondent-Appellee.	No. 17-15761 D.C. No. 2:16-cv-00745-GGH MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Gregory G. Hollows, Magistrate Judge, Presiding

Argued and Submitted October 10, 2018
San Francisco, California

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

Richard Johnson appeals the district court's denial of his petition for writ of habeas corpus. The district court's denial of a habeas petition is reviewed de novo. *See Campbell v. Rice*, 408 F.3d 1166, 1169 (9th Cir. 2005) (en banc). We have jurisdiction under 28 U.S.C. § 2253 and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Because Johnson filed his federal habeas petition after the effective date of the Anti–Terrorism and Effective Death Penalty Act ("AEDPA"), he can prevail in federal court only if he can show the "last reasoned" state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Vasquez v. Kirkland*, 572 F.3d 1029, 1035 (9th Cir. 2009). If "fairminded jurists could disagree" about whether the state court correctly applied Supreme Court precedent, this court cannot grant relief under § 2254(d)(1). *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

The California Supreme Court denied Johnson's petition for review, so the "last reasoned" decision in this case was from the California Court of Appeal on January 27, 2015. On direct appeal, Johnson argued that the manner in which the minor victim of his alleged sexual assault, A.S., testified against him at trial violated the Confrontation Clause. After giving most of her testimony on direct examination verbally, A.S. gave the remainder of her testimony, on cross and redirect examination, by listening to counsel's questions, writing her responses on a pad of paper, and then handing the pad to the trial judge, who read the answers aloud in what the judge described as an "emotionless" manner. The California

Court of Appeal held that there was no Confrontation Clause violation either by A.S. turning her back on defense counsel while writing her responses or by A.S. responding to questions in writing.

Johnson argues that the California Court of Appeal unreasonably applied *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. 836 (1990). We disagree. The procedure used here, while unusual, presents different constitutional questions than the procedures addressed in *Coy* and *Craig*. Those cases were concerned with when and how a traumatized child witness can testify *outside* the presence or view of the defendant—from behind a screen and on one-way closed-circuit television, respectively. Here, A.S. was at all times visible to the defendant, defense counsel, and the jury. We do not express a view on the constitutionality of the procedure employed to obtain A.S.'s testimony. However, we hold that it was not unreasonable, within the meaning of § 2254(d)(1), for the California Court of Appeal to hold that the procedure satisfied the Confrontation Clause, as interpreted by the United States Supreme Court.

AFFIRMED.

APPENDIX B

District Court's Order Denying Petition for Writ of Habeas Corpus

Filed March 29, 2017

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD STEVEN JOHNSON,

Petitioner,

v.

NEIL McDOWELL, Warden

Respondent.

No. 2: 16-cv-0745 GGH

ORDER[1]

Introduction and Summary

Petitioner was convicted of performing a lewd act on a child under the age of 14 by force or violence combined with a kidnapping which facilitated the sex crime. The jury could not come to a verdict on forcible rape and other charges. He was sentenced to 25 years to life.

To a scientific certainty, petitioner committed some type of sex act with the victim on the day of the crime. This fact is not in dispute here, and does not depend upon the testimony of the victim. Rather, petitioner focuses his petition on the force or violence aspect and the kidnapping which was dependent on the victim's testimony. He asserts that the trial court's permitting the then seventeen year old victim/witness to testify turned away from himself and defense counsel,

[1] The case is before the undersigned as presider pursuant to 28 U.S.C. section 636(c).

and the trial court's permitting the victim/witness to write her answers on cross-examination, which were then read by the judge, violated his right of confrontation guaranteed by the Sixth Amendment.[2] Petitioner believes his right to confront the witness was violated per se and, in any event, the trial court did not make required factual findings at an evidentiary hearing to allow the victim/witness to testify as she did.

For the reasons given herein, the undersigned denies the petition.

I. *Factual Background*

The factual background is helpful to put the confrontation issue in perspective:

> *The Crime*
>
> *The Prosecution's Case*
>
> In February 2009, 13–year–old A.S. lived at home with her mother S.S. and some of her siblings. Her sister J.S. lived in a separate apartment with her boyfriend—defendant—and their baby daughter.
>
> On February 28, 2009, defendant asked A.S. to go to the store with him and buy tampons for J.S. He did not want to buy tampons because he was a man. He drove A.S. to Foods Co., where she bought tampons for defendant.
>
> Rather than taking her home, defendant drove A.S. to a place she did not know. The place was about 15 minutes from the store and had a parking lot and buildings that looked like warehouses. A.S. felt she could not escape because there was no one else in the area. After parking, defendant got out of the car, opened the passenger door, and ordered A.S. into the trunk. A.S. got out of the car and defendant pushed her into the trunk.
>
> Defendant drove the car for a "pretty long" time. She did not know where she was when defendant stopped and opened the trunk. The place looked like a forest and she could not get away. Defendant then sexually assaulted A.S. in the back seat of the car. He told A.S. not to tell anyone and dropped her off near her home. A.S. went to a friend's house before going home.
>
> S.S. became worried when A.S. did not return home after several hours. A.S. said she was going with defendant; S.S. tried to call her after a few hours but got no answer. S.S. knew something was wrong when A.S. finally returned home, as her daughter's clothes were torn and her hair was messed up. S.S. asked what was

[2] Petitioner also couches his claims in terms of a Due Process Clause violation; however, the confrontation issue is governed by the specific terms of the Sixth Amendment.

wrong; A.S. said, "Mom, he lied to me." A.S. then told S.S. about the sexual assault, after which S.S. called the police.

A.S. was taken to the hospital for a medical examination. An officer who contacted her at the hospital found A.S. was crying and upset. She said defendant picked her up at around 10:55 a.m., took her to Foods Co., and then later struck her and forced her into the trunk of the car. Defendant had sex with her even though she told him not to. He dropped her off at an elementary school rather than her home.

J.S. testified she did not ask defendant to buy her tampons that day. He was supposed to pick up their daughter from S.S.'s home and return in time to take J.S. to work. J.S. called defendant when he did not return; defendant said he was fixing the car. She told an officer that defendant sounded "weird" and said he was out with A.S. when she talked to him on the phone that day.

A.S. told the examining nurse practitioner that defendant sexually assaulted her around noon that day. Defendant also backhanded her in the face and grabbed her by the arm during the assault. The nurse saw A.S. had a laceration and bruise on her elbow as well as dried blood in her nose. The gynecological exam found tearing of the hymen indicating a penetrating injury with a large object; the injuries were consistent with sexual assault.

A search of defendant's car revealed a Foods Co. receipt for the purchase of a box of tampons on February 28, 2009, at around 10:39 a.m. DNA taken from A.S.'s vagina and panties matched defendant's with probabilities of a random match ranging from one in 340 trillion to one in 130 quintillion. DNA from a swab taken from defendant's penis matched A.S.'s DNA with probabilities of a random match ranging from one in three million to one in 170 million. DNA swabs from a legal pad in the back seat of defendant's car, shorts found in the trunk, and from the trunk itself matched A.S.'s with probabilities of a random match ranging from one in 300 quadrillion to one in 9 quintillion.

A.S. gave a special assault forensic evaluation interview on March 2, 2009. A recording of the interview was played to the jury.

The Defense

A defense investigator interviewed A.S. on March 2, 2009. A.S. told the investigator defendant tried to kiss her. She denied being in the trunk of the car, and said sex may or may not have happened.

A nurse testifying as an expert in sexual assault examinations testified that an examination cannot determine whether the sex was consensual. She opined that the findings in this case could be consistent with consensual sex.

People v. Johnson, 2015 WL 365817 at * 1-2 (Cal. App. 2015).

II. *AEDPA Standards*

As respondent points out, the key review standard is that supplied by AEDPA—whether the Supreme Court has announced a rule which can be applied to this case, and if so, could reasonable jurists could find as the Court of Appeal found: that no Confrontation Clause violation took place which would even necessitate findings by the trial judge, and whether in any event, the trial judge did make case specific findings.

The statutory limitations of federal courts' power to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As a preliminary matter, the Supreme Court has recently held and reconfirmed "that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Harrington v. Richter, 562 U.S. 86, 98 (2011). Rather, "when a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication of state-law procedural principles to the contrary." Id. at 99, *citing* Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Id.

The Supreme Court has set forth the operative standard for federal habeas review of state court decisions under AEDPA as follows: "For purposes of § 2254(d)(1), 'an unreasonable

application of federal law is different from an incorrect application of federal law.'" Harrington, supra, at 101, *citing* Williams v. Taylor, 529 U.S. 362, 410 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Id. at 101, *citing* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

Accordingly, "a habeas court must determine what arguments or theories supported or . . could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. at 102. "Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.'" Id. Emphasizing the stringency of this standard, which "stops short of imposing a complete bar of federal court relitigation of claims already rejected in state court proceedings[,]" the Supreme Court has cautioned that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id., *citing* Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

The undersigned also finds that the same deference is paid to the factual determinations of state courts. Under § 2254(d)(2) factual findings of the state courts are presumed to be correct subject only to a review of the record which demonstrates that the factual finding(s) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." It makes no sense to interpret "unreasonable" in §2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1) – i.e., the factual error must be so apparent that "fairminded jurists" examining the same record could not abide by the state court factual determination. A petitioner must show clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546 U.S. 333, 338 (2006).

The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19 (2002). Specifically, the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, supra, at 102. "Clearly established" law is law that has been "squarely addressed" by the United States Supreme Court. Wright v. Van Patten, 552 U.S. 120, 125 (2008). Thus, extrapolations of settled law to unique situations will not qualify as clearly established. See e.g., Carey v. Musladin, 549 U.S. 70, 76 (2006) (established law not permitting state sponsored practices to inject bias into a criminal proceeding by compelling a defendant to wear prison clothing or by an unnecessary showing of uniformed guards does not qualify as clearly established law when spectators' conduct is the alleged cause of bias injection). The established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. 3, 9 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decisions. Id. at 8. Where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

Finally, if the state courts have not adjudicated the merits of the federal issue, no AEDPA deference is given; the issue is reviewed de novo under general principles of federal law. Stanley v. Cullen, 633 F.3d 852, 860 (9th Cir. 2012). However, when a state court decision on a petitioner's claims rejects some claims but does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, __U.S.__, 133 S.Ct. 1088, 1091 (2013).

III. *The Confrontation Clause Issue*

A. Facts Regarding Confrontation or Lack Thereof

As is nearly always the case, The Court of Appeal has concisely, yet completely, set out the facts pertinent to the issues in this case:

A.S.'s Testimony

The direct examination of A.S. began with general questions about her and her family, which she answered without a problem. She then admitted not wanting to testify, and having said so to the prosecutor in an e-mail. After A.S. answered general questions about her sister J.S. and defendant, the prosecutor asked her about the events surrounding the sexual assault. A.S. answered some of the questions, but to others, she gave replies like, "I can't do this" or, "Can I leave?" She soon asked to take a break, and the trial court ordered a 15–minute recess.

During the recess, defense counsel moved for a mistrial based on a violation of defendant's right to due process. In support of the motion, counsel relied on A.S. being brought into the courtroom through a back door rather than the normal means of entry. Counsel noted that A.S., who was sitting next to a victim's advocate, cried during most of her testimony and continually stated that she did not want to testify. Admitting that these facts may not individually support a due process violation, counsel asserted that their cumulative effect deprived defendant of his right to a fair trial. The trial court disagreed and denied the motion.

When examination resumed, A.S. was able to answer questions about her sister's car and her desire to get a job, without any problem. As questioning moved to the events on the day of the sexual assault, she answered some questions, but others were answered with statements like, "I can't do this, I told you," or, "I don't remember." When the prosecutor asked A.S. whether she got in the trunk of defendant's car on the day of the incident, she replied, "I can't do this. I can't testify. Can I leave?" The prosecutor switched to asking A.S. about her reluctance to testify. She replied that it was because she was embarrassed and not because she was afraid of hurting her sister.

A.S. was initially able to answer the prosecutor's questions as the examination went into the events after the sexual assault. When the prosecutor again asked her about the events leading up to the sexual assault, A.S. increasingly answered with, "I don't remember" or, "I don't want to talk about it." The trial court called a break after she answered consecutive questions with, "Can I leave?" and, "I can't do this."

During the break, defense counsel said A.S. had replied she did not want to talk about it 12 to 14 times. Counsel renewed the due process objection, which the trial court denied.

Following the recess, the prosecutor asked to have A.S. give written answers during the examination. The trial court agreed. During the rest of A.S.'s direct and cross-examination, she gave her answers in writing, which were then read by the trial court.

The defense later renewed the objection. Defense counsel asserted A.S. effectively chose which questions she was going to answer before she wrote the answers down by stating she did not want to be there more than 14 times in reply to

> questions. When A.S. wrote down her answers, her back was turned to counsel and the jury might not have been able to see her and assess her credibility. Counsel additionally asserted that the act of writing the answers to her cross-examination rather than facing counsel and answering prevented effective cross-examination.
>
> The trial court found the defense had ample opportunity to cross-examine A.S., and she answered every one of the defense questions. The court stated that A.S. was "extremely emotional" before she was allowed to write down her answers. A.S. "was crying when she first entered," and was especially emotional "when she was asked questions specifically related to the alleged offense[s]." In deciding to allow A.S. to give written answers, the trial court relied on "the age of the witness now, the age of the witness when these offenses allegedly occurred, the nature of the charges, the violent nature of the charges, the sexual nature of the charges," and the court's observation of A.S.
>
> The trial court additionally noted that it read the answers in a "speakable" but "emotionless" manner. A.S. did turn her back to defendant after the last break, and turned away from counsel when she wrote her answers. The trial court found this was part of A.S.'s demeanor that the jury could take into account. Denying defendant's motion, the trial court concluded by stating, "these slight deviations from regular practice were necessary to facilitate taking of the evidence and to facilitate the search for the truth, which this process is all about."

People v. Johnson, at * 2-3.

B. The Court of Appeal Ruling

In treating each issue separately, i.e., the turning of the back issue separately from the writing of the answers and the reading of those answers by the trial judge, the Court of Appeal discussed the two primary Supreme Court cases ruling on situations where the confrontation allowed at trial was less than that usually had. In Coy v. Iowa, 487 U.S. 1012 (1988), the Court found that placing a screen between the defendant and the complaining witnesses violated the defendant's confrontation rights. Stressing the importance of confrontation as the norm, the Court found that a defendant was "guaranteed" a face-to-face meeting in court with the complaining witnesses. Id. At 1020. As the Court of Appeal stressed however, the Confrontation Clause did not require the witness to look at the defendant and/or defense counsel; the witness was free to look away, or at the ground, or elsewhere. Id. at 1021.

In Maryland v. Craig, 497 U.S. 836, 857 (1990), the Court permitted a child to testify via a one-way closed circuit television (the defendant could see the child, but not vice versa). The

general rule to be applied was:

> "The requisite finding of necessity to depart from face-to-face confrontation must be case specific; the court must hear evidence and determine the procedure is necessary to protect the welfare of the particular child witness. (Id. at p. 855 [111 L.Ed.2d at p. 685].) The court must find the child witness would be traumatized by the presence of defendant and that such emotional distress is more than de minimis. (Maryland at p. 856 [111 L.Ed.2d at p. 685] (1990)].)

People v. Johnson at *4.

The Court of Appeal looked to similar examples of confrontation issues in California case law to assist in determining whether the trial judge had erroneously applied the general rules set forth in Coy and Craig. In People v. Sharp, 29 Cal. App 4th 1772 (1994), disapproved on other grounds, People v. Martinez, 11 Cal. 4th 434, 452 (1995), a prosecutor was permitted to be so situated that the defendant's view of the witness was somewhat obstructed (limited to a side and back of the witness" head. People v. Gonzalez, 54 Cal. 4th 1234 (2012), involved a situation where a the testifying witness, an eight year old boy who had presumably observed the murder of a sibling, was permitted at preliminary hearing to sit at an angle to the defendant in view of the questioning counsel; the testimony was videotaped and permitted to be played at the trial. The Court of Appeal herein likened its situation to simply one akin to the situation where the victim/witness purposefully refused to look at the petitioner. People v. Johnson at *5. The Court of Appeal then turned to the issue of having the victim/witness write her answers in lieu of verbally responding, and then having the trial judge read those answers in a "speakable" yet "emotionless" manner. This procedure was likened (citing state cases) to situations where a witness was compelled to utilize an interpreter either because of a disability or the inability to understand and speak English. The judge was acting, more or less, just like another type of interpreter. Id.

C. Application to This Case

Thus, for AEDPA purposes, the Supreme Court has fashioned a general rule to be applied in each individual case depending on the circumstances of that case. It is to be stressed that in applying the general rule, the undersigned is not looking for the "best" or "most correct" answer

to the victim/witness predicament that faced the trial court. Rather the undersigned emphasizes again, that the only issue here is whether the Court of Appeal (and hence the state supreme court) decided the issues in such a way that reasonable jurists could not agree with those findings/holdings. And, as set forth in the AEDPA standards, application of a general rule to case specific situations requires that greater leeway be given to the state courts.

In assessing the AEDPA reasonableness, the undersigned initially has difficulty with the treating of each confrontation issue separately, i.e., the back turning, *and then* the writing of answers verbally read by the trial judge, instead of reviewing the entire range of issues as they would have collectively impacted the confrontation issue. This is so because the impact of the procedures was a collective impact on the jury and the petitioner—not one with singular and separate impact.[3] The jury was forced to interpret the witness's demeanor not only with an obstructed view of the witness, but also without hearing the witness's voice with all its different credibility indicia, e.g., hesitating voice, emotion laden answers, evasiveness, inability to formulate efficient answers to questions which should have been quickly answered, and the like. Rather, the procedure here was slow, even ponderous, with each question awaiting a writing of the answer from a view obstructed witness, and then the reading of the answer by the judge with the logical inference that the jury would be focusing on the judge as the answers were verbally given. The minimization of the collective issue by its division was not a reasonable way to assess the confrontation problem.

Moreover, it is not reasonable to conclude that the confrontation circumstances here were merely a "slight deviation" from the norm in most cases.

This does not end the issue, however, because an assessment must be made of the ultimate AEDPA reasonableness even viewing the issues collectively. Upon review of all the

[3] The undersigned agrees with the Court of Appeal that if viewed singularly, the turning of one's back to the defendant and/or counsel is probably not a violation of the Confrontation Clause. See Bailey v. Woodford, 2010 WL 4702348 (C. D. Cal. 2010) (back was turned to defense counsel and defendant); Spencer v. Yates, 2011 WL 2118862 (E.D. Cal. 2011) (left side of face was shielded from view of defendant). The more problematic issue, when viewed singularly was the witness' writing of answers to the questions and then having those answers read by the *judge* instead of an anonymous court functionary.

circumstances, the undersigned cannot find the Court of Appeal decision AEDPA unreasonable.

First, the parties have not cited, and the undersigned is not aware of, on point Supreme Court cases dealing with the *collective* circumstances.[4] Therefore, the conclusion of the Court of Appeal holding that no Confrontation Clause violation took place is given even greater leeway in an already very deferential AEDPA setting.

Moreover, the jury had seen for some time the verbal answers of the defendant--emotional and evasive as they were. These responses and the manner in which they were made, may well have stuck in the jury's mind when the judge was reading the answers, some of which, according to defense counsel were also similarly very evasive. If the *entire* testimony had been written and read, the outcome here might well be different.

Also, previous statements that the victim/witness made, when the criminal event was fresh in the victim's mind—and not necessarily the statements made four years afterwards by a then reluctant child, witness, were most probably the more important evidence before the jury.

Importantly, the trial judge did make reasonable findings concerning the procedures he utilized, and his certain observation of the witness turning her back, given the circumstances. Although problematic, the procedures were thought out, and the trial judge was faced with a difficult situation.

Finally, for all of the asserted confrontation errors, at least the witness was in court, visible to the jury, and not in the sterilized atmosphere of a sound and view proof room (from the witness' standpoint) which would have been the case had one-way closed circuit television been utilized as a means to calm the witness.

The undersigned has reviewed petitioner's cited case of People v. Murphy, 107 Cal. App. 4th 1150 (2003). Of course, this case does not bind the undersigned in this AEDPA context, nor is it binding precedent even if this state case correctly analyzed the Supreme Court precedents, and the appellate court in this case was in error. Nevertheless, it is useful for purposes of

[4] The undersigned has not found lower court cases with very similar factual collective circumstances.

persuasive analysis. In this case, a very distraught *adult* witness was found by the trial court to be hyperventilating and sobbing and making noises which made hearing her testimony very difficult. The prosecution told the judge (no evidence was taken) that the witness was disturbed at seeing the defendant. The trial court determined that the interests of justice were the main concern, and such warranted the placing of a plexi-glass screen, a type of one-way glass which enabled the defendant to view the witness, but not vice-versa.

The Murphy appellate court found fault with the trial judge's actions after review of the Supreme Court precedents discussed above. The major problems found were associated with the fact that this was an adult, not a child witness, and that the trial court had not taken evidence to ferret out the cause of the undoubted problems that the witness was having. The Murphy case is distinguishable from the case at bar for those issues. However, like the case here, the appellate court did not believe that the screen was simply a slight deviation from normal confrontation in court. Like the case here, it was evident in Murphy that the entirety of the witness testimony had not taken place behind the plexi-glass.

This case gives the undersigned some doubt about his conclusions, even in the AEDPA context. Moreover, the victim witness here claimed to be "embarrassed" by the events perpetrated against her—not "traumatized" by petitioner's presence at trial. It is perhaps an open question whether embarrassment could be equated with traumatization. Nevertheless, the undersigned has not been cited cases which find that such is not the case; in any event it is not AEDPA unreasonable to so find. Even the Maryland v. Craig court found traumatization and embarrassment to be the same, at least in portions of the opinion. "The critical inquiry in this case, therefore, is whether the use of the procedure is necessary to an important State interest… We have of course recognized that a State's interests in 'the protection of minor victims of sex crimes from further *trauma* and *embarrassment*'is a 'compelling'one." Maryland v. Craig, 497 U.S. at 852 (emphasis added). Moreover, in analogous circumstances, "embarrassment" has been a sufficient factor to modify confrontation rights. See Graham v. Addison, 304 Fed. Appx. 670 *2 (10th Cir. 2008); LaChappelle v. Moran, 699 F.2d 560, 564-565 (1st Cir. 1983).

As noted above, Murphy involved an adult witness. Although the "child" in this case was 17 years old, the trial judge thought she was still a child in need of some assistance in testifying. Moreover, testimony concerning embarrassment by the victim/witness in the case at bar was elicited by the prosecution; the facts were not simply told to the judge by the prosecutor. And, there is no requirement that the judge actually does the questioning, nor is there a requirement for a formal evidentiary hearing. Further, the victim/witness' conduct was evidence itself observable to the judge. Repeating the facts at evidentiary hearing of what was clearly evident at trial would serve no purpose.

At the risk of unnecessary repetition, the point here is not whether petitioner's appellate court was incorrect, but whether it was so *unreasonably* incorrect that an AEDPA remedial violation took place. The undersigned ultimately cannot go that far.

Even if the undersigned is giving too much AEDPA deference herein to the state courts on the violation issue, and even if there were a Confrontation Clause violation, the undersigned must still assess whether the error had a substantial and injurious effect on the verdict. Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011), holding that the Brecht v. Abrahamson, [5] analysis must be applied to an alleged Confrontation Clause violation. Much of the undersigned's reasoning set forth above would also apply to this analysis. And, importantly, there was not a scintilla of doubt that petitioner had sex with a thirteen year old girl—a serious crime in its own right. This is not a case where the sex act itself was in question, just the means by which it was carried out. In this regard, the jury was certainly entitled to believe the victim witness' damning statements made right after the events in question, e.g., that the victim was forced into the trunk of the car and so forth, as opposed to the after-the-fact emotional, pressured or contrived, but contradictory, statements/actions of the victim/witness given to defense investigators and others months or years after the criminal event. The fact that the victim/witness in this case was equivocal with the defense investigator even about the occurrence of a sex act *per se*, in light of the scientific

[5] 507 U.S. 619 (1993).

certainty that some type of sex act took place, must have spoken volumes to the jury about which version was correct.[6]

Conclusion

AEDPA matters. The petition shall be denied. However, the undersigned determines that a Certificate of Appealability is appropriate in this case.

The Clerk shall enter judgment for respondent.

DATED: March 28, 2017

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

[6] Petitioner does not contend that the evidence elicited at trial in its entirety was insufficient for conviction on the forcible lewd act count.

APPENDIX C

Unpublished decision of the California Court of Appeal, Third Appellate District, on direct appeal (last reasoned decision of state court)

Filed January 27, 2015

Filed 1/27/15 P. v. Johnson CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD STEVEN JOHNSON, JR., Defendant and Appellant.	C071975 (Super. Ct. No. 09F01545)

A jury convicted defendant Richard Steven Johnson, Jr., of lewd and lascivious acts by force or violence on a minor under the age of 14 (Pen. Code, § 288, subd. (b)(1))[1] and sustained an allegation that he kidnapped his victim in the commission of the crime (§ 667.61, subd. (d)(2)). The trial court sentenced defendant to 25 years to life in state prison.

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1 Undesignated statutory references are to the Penal Code.

On appeal, defendant contends accommodations made to the complaining witness violated his right to confrontation and there is insufficient evidence to support the true finding on the kidnapping allegation. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Crime

The Prosecution's Case

In February 2009, 13-year-old A.S. lived at home with her mother S.S. and some of her siblings. Her sister J.S. lived in a separate apartment with her boyfriend—defendant—and their baby daughter.

On February 28, 2009, defendant asked A.S. to go to the store with him and buy tampons for J.S. He did not want to buy tampons because he was a man. He drove A.S. to Foods Co., where she bought tampons for defendant.

Rather than taking her home, defendant drove A.S. to a place she did not know. The place was about 15 minutes from the store and had a parking lot and buildings that looked like warehouses. A.S. felt she could not escape because there was no one else in the area. After parking, defendant got out of the car, opened the passenger door, and ordered A.S. into the trunk. A.S. got out of the car and defendant pushed her into the trunk.

Defendant drove the car for a "pretty long" time. She did not know where she was when defendant stopped and opened the trunk. The place looked like a forest and she could not get away. Defendant then sexually assaulted A.S. in the back seat of the car. He told A.S. not to tell anyone and dropped her off near her home. A.S. went to a friend's house before going home.

S.S. became worried when A.S. did not return home after several hours. A.S. said she was going with defendant; S.S. tried to call her after a few hours but got no answer.

S.S. knew something was wrong when A.S. finally returned home, as her daughter's clothes were torn and her hair was messed up. S.S. asked what was wrong; A.S. said, "Mom, he lied to me." A.S. then told S.S. about the sexual assault, after which S.S. called the police.

A.S. was taken to the hospital for a medical examination. An officer who contacted her at the hospital found A.S. was crying and upset. She said defendant picked her up at around 10:55 a.m., took her to Foods Co., and then later struck her and forced her into the trunk of the car. Defendant had sex with her even though she told him not to. He dropped her off at an elementary school rather than her home.

J.S. testified she did not ask defendant to buy her tampons that day. He was supposed to pick up their daughter from S.S.'s home and return in time to take J.S. to work. J.S. called defendant when he did not return; defendant said he was fixing the car. She told an officer that defendant sounded "weird" and said he was out with A.S. when she talked to him on the phone that day.

A.S. told the examining nurse practitioner that defendant sexually assaulted her around noon that day. Defendant also backhanded her in the face and grabbed her by the arm during the assault. The nurse saw A.S. had a laceration and bruise on her elbow as well as dried blood in her nose. The gynecological exam found tearing of the hymen indicating a penetrating injury with a large object; the injuries were consistent with sexual assault.

A search of defendant's car revealed a Foods Co. receipt for the purchase of a box of tampons on February 28, 2009, at around 10:39 a.m. DNA taken from A.S.'s vagina and panties matched defendant's with probabilities of a random match ranging from one in 340 trillion to one in 130 quintillion. DNA from a swab taken from defendant's penis matched A.S.'s DNA with probabilities of a random match ranging from one in three million to one in 170 million. DNA swabs from a legal pad in the back seat of

defendant's car, shorts found in the trunk, and from the trunk itself matched A.S.'s with probabilities of a random match ranging from one in 300 quadrillion to one in 9 quintillion.

A.S. gave a special assault forensic evaluation interview on March 2, 2009. A recording of the interview was played to the jury.

The Defense

A defense investigator interviewed A.S. on March 2, 2009. A.S. told the investigator defendant tried to kiss her. She denied being in the trunk of the car, and said sex may or may not have happened.

A nurse testifying as an expert in sexual assault examinations testified that an examination cannot determine whether the sex was consensual. She opined that the findings in this case could be consistent with consensual sex.

A.S.'s Testimony

The direct examination of A.S. began with general questions about her and her family, which she answered without a problem. She then admitted not wanting to testify, and having said so to the prosecutor in an e-mail. After A.S. answered general questions about her sister J.S. and defendant, the prosecutor asked her about the events surrounding the sexual assault. A.S. answered some of the questions, but to others, she gave replies like, "I can't do this" or, "Can I leave?" She soon asked to take a break, and the trial court ordered a 15-minute recess.

During the recess, defense counsel moved for a mistrial based on a violation of defendant's right to due process. In support of the motion, counsel relied on A.S. being brought into the courtroom through a back door rather than the normal means of entry. Counsel noted that A.S., who was sitting next to a victim's advocate, cried during most of her testimony and continually stated that she did not want to testify. Admitting that these

facts may not individually support a due process violation, counsel asserted that their cumulative effect deprived defendant of his right to a fair trial. The trial court disagreed and denied the motion.

When examination resumed, A.S. was able to answer questions about her sister's car and her desire to get a job, without any problem. As questioning moved to the events on the day of the sexual assault, she answered some questions, but others were answered with statements like, "I can't do this, I told you," or, "I don't remember." When the prosecutor asked A.S. whether she got in the trunk of defendant's car on the day of the incident, she replied, "I can't do this. I can't testify. Can I leave?" The prosecutor switched to asking A.S. about her reluctance to testify. She replied that it was because she was embarrassed and not because she was afraid of hurting her sister.

A.S. was initially able to answer the prosecutor's questions as the examination went into the events after the sexual assault. When the prosecutor again asked her about the events leading up to the sexual assault, A.S. increasingly answered with, "I don't remember" or, "I don't want to talk about it." The trial court called a break after she answered consecutive questions with, "Can I leave?" and, "I can't do this."

During the break, defense counsel said A.S. had replied she did not want to talk about it 12 to 14 times. Counsel renewed the due process objection, which the trial court denied.

Following the recess, the prosecutor asked to have A.S. give written answers during the examination. The trial court agreed. During the rest of A.S.'s direct and cross-examination, she gave her answers in writing, which were then read by the trial court.

The defense later renewed the objection. Defense counsel asserted A.S. effectively chose which questions she was going to answer before she wrote the answers

down by stating she did not want to be there more than 14 times in reply to questions. When A.S. wrote down her answers, her back was turned to counsel and the jury might not have been able to see her and assess her credibility. Counsel additionally asserted that the act of writing the answers to her cross-examination rather than facing counsel and answering prevented effective cross-examination.

The trial court found the defense had ample opportunity to cross-examine A.S., and she answered every one of the defense questions. The court stated that A.S. was "extremely emotional" before she was allowed to write down her answers. A.S. "was crying when she first entered," and was especially emotional "when she was asked questions specifically related to the alleged offense[s]." In deciding to allow A.S. to give written answers, the trial court relied on "the age of the witness now, the age of the witness when these offenses allegedly occurred, the nature of the charges, the violent nature of the charges, the sexual nature of the charges," and the court's observation of A.S.

The trial court additionally noted that it read the answers in a "speakable" but "emotionless" manner. A.S. did turn her back to defendant after the last break, and turned away from counsel when she wrote her answers. The trial court found this was part of A.S.'s demeanor that the jury could take into account. Denying defendant's motion, the trial court concluded by stating, "these slight deviations from regular practice were necessary to facilitate taking of the evidence and to facilitate the search for the truth, which this process is all about."

DISCUSSION

I. Defendant's Right of Confrontation

Defendant contends his right to confrontation was violated when the trial court allowed the victim "to testify without speaking and without allowing the jury and defendant to face and confront her." We disagree.

The confrontation clause of the Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Coy v. Iowa* (1988) 487 U.S. 1012, 1016 [101 L.Ed.2d 857, 864], the court, stressing the time-honored view that face-to-face confrontation was essential to fairness, observed "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." The court held that placing a screen between the complaining witnesses and defendant violated defendant's right to a face-to-face encounter. (*Id.* at p. 1020 [101 L.Ed.2d at p. 866].) The *Coy* decision left for another day whether there were exceptions to the right of face-to-face confrontation. (*Id.* at p. 1021 [101 L.Ed.2d at p. 867].)

Although the *Coy* court did not address exceptions to the right to confrontation, it did find limits to what was guaranteed by that right. Specifically, the right to a face-to-face confrontation did not mean that the witness must look at defendant. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1019 [101 L.Ed.2d at p. 866].)

In *Maryland v. Craig* (1990) 497 U.S. 836, 857 [111 L.Ed.2d 666, 686], the court held the confrontation clause did not prohibit a child witness from testifying against a defendant at trial, outside defendant's presence, by a one-way closed circuit television to protect the child from trauma that would impair the child's ability to communicate where

the reliability of the evidence is ensured by subjecting it to rigorous adversarial testing. The requisite finding of necessity to depart from face-to-face confrontation must be case specific; the court must hear evidence and determine the procedure is necessary to protect the welfare of the particular child witness. (*Id.* at p. 855 [111 L.Ed.2d at p. 685].) The court must find the child witness would be traumatized by the presence of defendant and that such emotional distress is more than de minimis. (*Maryland*, at p. 856 [111 L.Ed.2d at p. 685].)

People v. Sharp (1994) 29 Cal.App.4th 1772 (*Sharp*), disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452, is an example of how the right to confrontation is satisfied so long as the witness is cross-examined in the courtroom in the defendant's presence. In *Sharp*, the prosecutor stood or sat next to the witness stand so the child witness did not have to look at defendant. Defendant could see the side and back of the witness's head while she testified; even if he could not see all her facial expressions, he could see her general demeanor and reactions to questioning. The witness could, but chose not to, see defendant and the jury could see both the witness and defendant. (*Sharp*, *supra*, at pp. 1781-1782.) The Court of Appeal found the situation "not materially different from one in which a witness might stare at the floor, or turn her head away from the defendant while testifying." (*Id.* at p. 1782.)

The *Sharp* court rejected the defendant's contention that his confrontation rights were violated. "Surely, appellant cannot be claiming a constitutional right to stare down or otherwise subtly intimidate a young child who would dare to testify against him. Nor can he claim a right to a particular seating arrangement in the courtroom. A witness who avoids the gaze of the defendant may be exhibiting fear, embarrassment, shyness, nervousness, indifference, mendacity, evasiveness, or a variety of other emotional states or character traits, some or all of which might bear on the witness's credibility. [¶] It is, however, the function of the jury to assess such demeanor evidence and 'draw its own

conclusions' about the credibility of the witness and her testimony. [Citation.] There was no interference with the jury's ability to perform that function in this case." (*Sharp*, *supra*, 29 Cal.App.4th at p. 1782.)

The California Supreme Court relied on *Sharp i*n reaching a similar conclusion in *People v. Gonzales* (2012) 54 Cal.4th 1234 (*Gonzales*). *Gonzales* involved the murder by torture of a four-year-old girl by her uncle, the defendant, with whom she was living. (*Gonzales*, at pp. 1242-1243.) The People were allowed to admit the videotaped preliminary hearing testimony of the defendant's eight-year-old son, Ivan, Jr., at trial after the trial court found that the trauma Ivan, Jr., would suffer from testifying rendered him unavailable. (*Id.* at pp. 1247, 1261.) At the preliminary hearing, Ivan, Jr., was allowed to sit at an angle, not directly facing the defendants.[2] (*Gonzales*, at p. 1265.) The podium was placed "so that the lawyers had eye contact with the witnesses during questioning, and the witnesses were free to look around the courtroom and make eye contact with [the] defendants, if they desired." (*Ibid.*)

The Supreme Court found this arrangement did not violate the defendant's right to face-to-face confrontation. (*Gonzales*, *supra*, 54 Cal.4th at p. 1266.) In support of its conclusion, the high court cited and quoted from *Sharp*, which involved the same seating arrangement as in *Gonzales*. (*Gonzales,* at p. 1267.) In *Gonzales*, the trial court made extensive findings that testifying against the defendant would traumatize the witness. (*Id.* at p. 1268.) The "seating arrangement at the preliminary hearing satisfied the central concerns of the confrontation clause: 'physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.' " (*Ibid.*) Accordingly, the defendant's right

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[2] Ivan, Jr.'s mother was prosecuted in a separate capital trial. (*Gonzales*, *supra*, 54 Cal.4th at p. 1261.)

to confrontation was not violated by the use of the videotaped preliminary hearing testimony. (*Ibid.*)

There is no meaningful distinction between A.S.'s refusal to face defendant or counsel and what was held not to violate the right to confrontation in *Sharp* and *Gonzales*. Since there is no right to have the witness look at defendant or defense counsel, it was not necessary for the trial court to make the findings required by *Maryland*. Nonetheless, the trial court here made findings that the witness was traumatized based on its own observations of her, the nature of the alleged crimes, and the victim's age. While the trial court did not hear testimony or take evidence on the trauma from testifying, detailed findings are not required when any infringement on the right to confrontation is de minimis. (See *Gonzales*, *supra*, 54 Cal.4th at p. 1267 ["the less the intrusion on Sixth Amendment rights, the less detail is required in a trial court's findings," citing *Ellis v. U.S.* (1st Cir. 2002) 313 F.3d 636, 650].) A.S.'s refusal to face defendant or counsel did not violate defendant's right to confrontation.

Allowing A.S. to give some of her testimony in writing likewise does not infringe on the Sixth Amendment right. Numerous witnesses testify through intermediaries without violating a defendant's right to confrontation. The right to confrontation does not prohibit a deaf witness from testifying through a sign language interpreter. (*People v. Younghanz* (1984) 156 Cal.App.3d 811, 819.) Witnesses not capable of testifying in English are allowed to testify through interpreters without violating the right to confrontation. (See *People v. Roberts* (1984) 162 Cal.App.3d 350, 356 [use of interpreter not on statutorily required list of court-approved interpreters does not violate right to confrontation without a showing of prejudice]; Evid. Code, § 752 [procedure for appointing interpreters for witnesses].) A.S. was not able to give spoken answers to questions about the details of the sexual assault. Allowing her to write down the answers and have them read by the trial court was no different than allowing a deaf witness or a

witness who does not speak English to communicate his or her answers to the jury through an interpreter. As in those situations, accommodating the witness here did not violate defendant's right to confrontation.

II. Sufficiency of the Evidence

Defendant contends there is insufficient evidence to support the true finding on the kidnapping special allegation.[3] He claims there was insufficient evidence to find he moved the victim a substantial distance that increased the risk of harm to her. His contention borders on the frivolous.

In determining the sufficiency of the evidence, we ask whether " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, italics omitted.) We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

Section 667.61 incorporates the standard for aggravated kidnapping by requiring that "the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ." (§ 667.61, subd. (d)(2); see *People v. Rayford* (1994) 9 Cal.4th 1, 11-12, 22.)

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[3] In addition, defendant claims, "the evidence was insufficient as to count 2," defendant's conviction for lewd and lascivious acts by force or violence on a minor under the age of 14. This claim is made without a separate heading and without any supporting authority or factual analysis. It is therefore forfeited. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error."].)

The asportation element for aggravated kidnapping requires only movement more than incidental to the crime, which substantially increased the danger beyond that inherent in the crime. This conclusion may be based on any of the following factors: Defendant decreased the likelihood of being detected by moving the victim out of the way; the danger was increased to the victim based on the victim's foreseeable attempt to escape; or the movement enhanced the defendant's opportunity to commit the crime. (*People v. Jones* (1997) 58 Cal.App.4th 693, 713.)

Here, substantial evidence supports the jury's asportation finding. Defendant moved A.S. against her will twice. First he drove about 15 minutes from the store to a warehouse area where no one was around. Taking advantage of the isolated location, defendant forced A.S. into the trunk and drove her to a wooded location where defendant sexually assaulted her. Moving A.S. to increasingly isolated areas decreased defendant's chance of being caught and foreclosed the possibility of her escaping. The fact that A.S. spent part of the trip in the trunk of a car increased the danger of the kidnapping.

Since the asportation clearly increased the danger to the victim beyond that inherent in the crime, the true finding on the aggravated kidnapping enhancement is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.