APPENDIX

Table of Contents

APPENDIX A

Supreme Court of Mississippi

Jeffrey Clyde PITTS

v.

STATE of Mississippi

NO. 2021-CT-00740-SCT

03/20/2025

RANKIN COUNTY CIRCUIT COURT, HON. JOHN H. EMFINGER, JUDGE

ATTORNEYS FOR APPELLANT: J. EDWARD RAINER, Brandon, KIMBERLY M. PHILLIPS

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: LAUREN GABRIELLE CANTRELL, ALEXANDRA RODU ROSENBLATT

EN BANC.

ON WRIT OF CERTIORARI

RANDOLPH, CHIEF JUSTICE, FOR THE COURT:

¶1. In February 2021, Jeffrey Pitts was convicted for sexually battering his four-year-old daughter, AGC. *See* Miss. Code Ann. § 97-3-95(1)(d) (Rev. 2020). The Court of Appeals upheld his conviction. ***Pitts v. State***, No. 2021-KA-00740-COA, —— So.3d ––––, 2023 WL 1425289 (Miss. Ct. App. Jan. 31, 2023). Four Justices granted Pitts's petition for writ of certiorari. *See* Miss. R. App. P. 17(a) ("The Supreme Court may grant a petition for writ of certiorari on the affirmative vote of four of its members ...."). Finding that Pitts received the protections

guaranteed by the right to confrontation not only under the United States Constitution but also under the Mississippi Constitution, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. AGC and her grandmother (Gram) were having a normal day following AGC's return from spending the weekend of May 1-3, 2020, with her father, Pitts. While taking a break from schoolwork, AGC pulled Gram's arm, saying, "let's talk." AGC informed Gram that she "saw daddy's gina." Gram responded, "[o]h, ok." Gram changed the topic. A few minutes later, Gram said, "[l]et's go talk to [M]om[m]a."

¶3. AGC repeated to Momma what she had told Gram—she saw her father's "vagina." The child had been taught the anatomically correct words to describe female anatomy, but she had not been taught words to describe the male anatomy. When asked where her nine-year-old half sister was, AGC responded that she was in her own bedroom. Momma also asked where Pitts's mother was, and AGC responded that Pitts's mother was in the living room. AGC did not want to talk about it any longer. They did not.

¶4. Later that night, Momma asked AGC whether she simply saw her father naked in a bathroom, because, "to me I'm thinking ... she's four. She has no [sense] of privacy at that age and ... did she sling the bathroom door open; did she ... walk in while he was using the rest room or changing clothes?" AGC said that she saw "it" when she and Pitts were in his bed taking an afternoon nap and that Pitts was naked. AGC further told Momma that she touched Pitts's

"vagina," and then she stated, "[a]nd daddy put his finger in my vagina, in my gina and in my bootie and he made it go real fast."

¶5. When Momma asked whether it hurt, she responded, "[b]ut I love my daddy," and "he's my family and family is important" while repeating several times that Pitts put his finger in her "bootie" and vagina. AGC chose not to talk any longer and left to use the bathroom. After a few minutes, Momma became concerned and asked if she was alright. She answered, "[y]eah ... it kind of burned a little like when daddy put his finger in my gina."

¶6. Momma contacted Child Protection Services. She also filed a report with the Rankin County Sheriff's Office and the Richland Police Department (RPD). Both referred the victim to the Child Advocacy Center (CAC) for a forensic interview.

¶7. An officer was dispatched by RPD to take a report. He met with Momma, who provided him with a written statement detailing the events that occurred. A detective was assigned to investigate. The detective followed up with Momma and contacted the CAC. The detective also spoke with Gram and the mother of Pitts's nine-year-old daughter. She never spoke with AGC, as Rankin County followed a protocol requiring CAC to conduct all interviews of young victims. "They need to be specially trained in order to speak with the child." The detective observed the forensic interview, however. At its conclusion, she signed an affidavit to arrest Pitts.

¶8. A video recording of AGC's forensic interview was played to the jury in its entirety. AGC informed the social worker (SW) that "[w]hen I was trying to sleep he dug his finger in my vagina, [and] ... when

he was done he said touch mine, touch mine." AGC stated that no one else had ever done such acts to her. When asked by the SW whether anyone told her what to say during the interview, AGC denied that anyone had.

¶9. In August 2020, a Rankin County grand jury indicted Pitts for sexual battery under Mississippi Code Section 97-3-95(1)(d) (Rev. 2020). Pitts's trial began in February 2021. After the jury was selected, the trial court held a tender years hearing outside their presence pursuant to Mississippi Rule of Evidence 803(25).[1] Gram, Momma, and the SW each testified at the tender years hearing as to what AGC had told them. Before reaching a decision, the trial judge stated that he had heard all arguments of counsel and that he had reviewed all of the evidence presented, including the written statements and video of AGC's CAC interview. The trial judge then acknowledged that the question for him to determine was whether the time, content, and circumstances of AGC's statements provided substantial indicia of reliability. After analyzing each and every factor,[2] the

---

[1] Under Rule 803(25):

> A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:
>
> **(A)** the court—after a hearing outside the jury's presence—determines that the statement's time, content, and circumstances provide *substantial indicia of reliability*; *and*
>
> **(B)** *the child* either:
>
> (i) *testifies*; or
>
> (ii) is unavailable as a witness, and other evidence corroborates the act.

Miss. R. Evid. 803(25) (emphasis added).

[2] The advisory committee notes to Rule 803(25) sets forth that

> Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there

trial judge ruled that AGC's statements indeed provided a substantial indicia of reliability and that "it's for a jury to decide the credibility of those statements."

¶10. Before AGC testified, the State moved under Mississippi Code Section 99-43-101(2)(g) to put in place a screen that would obstruct her view of Pitts. It reads:

> (2) In any proceeding in which a child testifies, a child *shall have* the following rights to be enforced by the court on its own motion or upon motion or notice of an attorney in the proceeding:
>
> ....
>
> (g) To permit the use of a properly constructed screen that would permit the *judge* and *jury* in the courtroom or hearing room to see the child but would obscure the child's view of the defendant or the public or both.

Miss. Code Ann. § 99-43-101(2)(g) (Rev. 2020) (emphasis added).

---

is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated.

Miss. R. Evid. 803(25) advisory comm. n.

¶11. Defense counsel objected, contending that use of the screen would violate Pitts's right to confrontation, as

> The only ... thing that a shield would do in this particular case is to shield the child so that she won't make any kind of ... gestures or any kind of signs that she still loves her father, that she's not afraid of her father.... So I would ... say ... that it's not necessary in this case. It's not warranted in this case.... Why does the State want to keep the father from seeing the child? There's been no ... offer ... by the State why this is necessary. There's been no proof of why it is necessary. The only thing that the State wants to do is to try to keep this child from ... exhibiting any kind of affection for Mr. Pitts in the presence of this jury ....

¶12. The State responded that

> [T]he defendant's confrontation right is not violated.... He will be able to hear the witness. He will be in the same room as the witness.... [H]is attorney has the right to confront that witness, to cross-examine her. Judge, in this case we have a four-year-old child. At the request of her guardian, she believes that it will be difficult for [AGC] to testify while her father is staring at her.

¶13. The State further contended that the screen would be effective in preventing AGC from becoming distracted due to her young age. Moreover, the State argued that

> The statute states that she shall have that right and I'm not required to put on any proof

> that she be scared of the defendant. That would only be in the case where we'd asked for a deposition of the testimony of the victim rather than live testimony and we certainly don't want that. We do, in fact, want [AGC] to testify live and we would ask again, pursuant to her rights which is found ... in that section under the Mississippi Crime Victim's Bill of Rights that she shall be given that right if it's requested.

¶14. After the trial judge had meticulously considered the opposing arguments, case law, and Section 99-43-101, the trial judge ruled that

> I'm confronted with a couple of things. Number (1) I'm looking at a statute that appears to be mandatory .... I've heard the cases that you all have cited.... [W]e're not going to stop the trial at this point, I guess, to be able to provide for some type of video so that the defendant could see—
>
> ....
>
> No, I think I am going to do that. I am going to grant your motion only if we can provide—I'm doing it hesitantly because I'm concerned about the constitutionality of the statute. But I'm only going to grant your motion if we can arrange for there to be a zoom so that the defendant can observe the witness as the witness is testifying. We've gone through that in the courtroom before.... there will be no need for the sound to be on .... Because the courtroom sound system, [you all will] be able to hear there.

¶15. The screen and Zoom video were put in place. Defense counsel reiterated his objection, stating that

"I think that the jury is entitled to know what the relationship between these parties are and how much both of them love each other." The trial judge responded:

> *And you can certainly do that*, [defense counsel], *through your examination of the child*. And you know, *I think the point of this is a truth-seeking mission to try and have truthful testimony* and to the degree that the legislature is determined that this is appropriate and as long as the constitutional safeguards are met, I believe I'm compelled to follow the statute with this procedural safeguard by allowing the Defendant to view the child as the child testifies so that he can assist in cross-examination then. So we're going to go forward with that. We'll bring the jury in and then we'll call the little girl in.

(Emphasis added.)

¶16. On direct and cross-examination, AGC testified that she understood the importance of telling the truth and that she gets into trouble when she does not tell the truth. AGC related that she loved her father. She testified that when she stayed at her mother's house, she slept in her own bed; however, when she stayed at Pitts's residence, she slept with him in his bed. When asked whether she remembered Pitts touching her the last time that she stayed with him, AGC testified that her father touched her "[i]n my bootie and my vagina" and that Pitts touched her "[w]ith his finger" on the "inside" of her vagina. When asked how many times Pitts did that to her, she responded, "[h]e did it, like, a few times."

¶17. When asked whether she remembered if Pitts ever applied diaper cream on her, she responded that "[s]ometimes he put it on my nosey.... On my bootie.... And he put some on my belly." The State questioned whether the time that Pitts put his fingers inside her vagina and "bootie" was a different occurrence than when Pitts put diaper cream on her. AGC responded that it was, and also stated that it felt "[n]ot good" when Pitts put his finger in her vagina. When AGC was asked whether her mother ever touched her there, she responded that she never had, nor had anyone else.

¶18. AGC was thoroughly cross-examined by Pitts's counsel. Through extensive questioning, Pitts's counsel attempted to convey to the tribunal that AGC possessed a tendency to tell big stories and exaggerate. Counsel asked if she loved her father. She replied that she did. AGC agreed that she wanted to see her father. Pitts's counsel asked whether she got to see her father anymore. She answered that she did not. When asked why, she stated "[b]ecause I miss him. He's my daddy." Pitts's counsel repeated the question; then, she answered, "[b]ecause he did a bad thing to me."

¶19. AGC told defense counsel that she did not inform her mother right away "[b]ecause I thought she was going to be mad at me." When asked who told her that Pitts did a bad thing to her, at first she stated, "[m]y mommy," then she stated, "[b]ut I actually told my momma." She then testified, "[n]o. I already knew that. I just told my mommy." Counsel attempted to convince the jury that her memory was incomplete, confusing her father's sexual exploitation with application of diaper cream.

¶20. When asked whether she informed the SW that it hurt when Pitts put his finger in her vagina, AGC answered, "[i]t did hurt." AGC recalled telling her mother that she loved her daddy and that "he's family and family is important," and she asserted that Pitts was still important to her.

¶21. AGC expressed that she wanted to see Pitts again even though he put his finger in her vagina. She related that she had a plan to avoid further abuse: "I will just sleep somewhere else ...." Before the jury, AGC testified that "I've been missing him and I've been crying—well, I better not cry. I've been missing him and wanting to talk to him and go live with him." But "[h]e just did that.... He—he did that. He just did that, but—he really did." When asked who told her that Pitts really did "that," she responded, "I already knew it because I've been to his house."

¶22. On redirect examination, the State asked AGC why she thought that her mother would be mad at her for what her father had done. She responded, "[b]ecause I thought it wasn't—I thought—I didn't want my momma to be mad at me because I told daddy to do it." When the State asked, "[a]nd then sometimes you said daddy would do it without you asking him to do it," she answered, "[u]h-huh." When asked, "why don't you want to sleep in the bed with daddy anymore[?]" she responded, "[b]ecause what if he does that again?" The State asked her what "that" meant. AGC answered, "I don't want him to put it in my vagina again."

DISCUSSION

¶23. Pitts contends that the trial judge's decision to grant the State's motion under Mississippi Code Section 99-43-101(2)(g) (Rev. 2020) without making a specific finding that AGC would suffer emotional trauma from testifying face to face with him violated his right to confrontation. Pitts cited two decisions in support of his contention—***Coy v. Iowa***, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed. 2d 857 (1988), and ***Maryland v. Craig***, 497 U.S. 836, 110 S. Ct. 3157, 111 L.Ed. 2d 666 (1990).

¶24. "In reviewing questions of law, this Court proceeds de novo." ***Harrison v. State***, 800 So. 2d 1134, 1136 (Miss. 2001) (citing ***Sykes v. State***, 757 So. 2d 997, 999 (Miss. 2000)). It has long been the view of this Court that in reviewing any statute, our role begins and ends with the statutory text, which is the alpha and the omega of the interpretive process. *See* ***Miss. Dep't of Mental Health v. Lamar Cnty. (In re C.W.)***, 250 So. 3d 1248, 1252 (Miss. 2018); *see also* ***Weatherly v. Pershing, L.L.C.***, 945 F.3d 915, 921 (5th Cir. 2019) (The United States Court of Appeals for the Fifth Circuit agrees, finding that "[w]hen a statute controls, our first stop (and usually our last) is the statutory text."). Mississippi Code Section 99-43-101(2)(g) reads:

> (2) In any proceeding in which a child testifies, a child *shall have* the following rights to be enforced by the court on its own motion or upon motion or notice of an attorney in the proceeding:
>
> ....

> (g) To permit the use of a properly constructed screen that would permit the judge and jury *in the courtroom* or hearing room to see the child but would obscure the child's view of the defendant or the public or both.

Miss. Code Ann. § 99-43-101(2)(g) (Rev. 2020) (emphasis added).[3]

¶25. "In matters concerning statutory construction, '[t]he function of the Court is not to decide what a statute should provide, but to determine what it does provide.'" ***Smith v. Webster***, 233 So. 3d 242, 247 (Miss. 2017) (alteration in original) (quoting ***Lawson v. Honeywell Int'l, Inc.***, 75 So. 3d 1024, 1027 (Miss. 2011)). "When a statute is unambiguous, [we apply] ... the plain meaning of its words." ***Wallace v. State***, 360 So. 3d 231, 235 (Miss. 2023) (alterations in original) (quoting ***Smith***, 233 So. 3d at 247).

¶26. The plain words of Mississippi Code Section 99-43-101(2)(g) (Rev. 2020) unambiguously do not require a trial judge to make a specific finding of emotional trauma before allowing the application of a screen. Moreover, the plain words of Section 99-43-101(2)(g) do not require a trial judge to set up video equipment to ensure that the defendant can see the child witness while they testify from behind a screen as was permitted in the case sub judice.

¶27. Unquestionably, "[t]he [C]ourt has no right to add anything to or take anything from a statute, where the meaning of the statute is clear ...." ***State v. Traylor***, 100 Miss. 544, 56 So. 521, 523 (1911). It is a longstanding principle that

---

[3] *See* Miss. Const. art. 3, § 26A(3), *infra* ¶ 36.

> the legislature possesses the whole law-making power of the State, and may pass any law which does not contravene the provisions of the State constitution, or the constitution of the United States. With these exceptions, the legislature has the absolute, unlimited sovereign power of making laws. These laws, when made, although in the opinion of the court they may be unwise, impolitic, unjust, and oppressive, yet, if they do not contravene the provisions of the constitution of the United States, or of the State constitution, are imperative and obligatory, and it is the duty of the court to enforce them.

State v. Johnson, 25 Miss. 625, 783 (1853).

¶28. In determining whether a legislative enactment indeed contravenes the constitutions of either this state or of the United States, we begin with "a strong presumption of validity[.]" ***City of Starkville v. 4-Cnty. Elec. Power Ass'n***, 909 So. 2d 1094, 1112 (Miss. 2005). "A 'very heavy burden' rests upon this Court before it may find a statute unconstitutional." ***State v. Bd. of Levee Comm'rs for Yazoo-Miss. Delta***, 932 So. 2d 12, 19 (Miss. 2006) (citing ***Moore v. Bd. of Supervisors of Hinds Cnty.***, 658 So. 2d 883, 887 (Miss. 1995)). The unconstitutionality of a statute must be evident beyond a reasonable doubt. ***Id.*** (quoting ***Cities of Oxford, Carthage, Starkville & Tupelo v. Ne. Elec. Power Ass'n***, 704 So. 2d 59, 65 (Miss. 1997)). "Moreover, 'to state that there is doubt regarding the constitutionality of an act is to essentially declare it constitutionally valid.'" ***Id.*** at 20 (quoting ***Moore***, 658 So. 2d at 887).

¶29. The right to confront one's accusers is an Anglo-American common law right that long predated the ratification of the United States Constitution. ***Salinger v. United States***, 272 U.S. 542, 548, 47 S. Ct. 173, 71 L.Ed. 398 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions."). In the Bill of Rights, the Sixth Amendment 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. Similarly, the Mississippi Constitution sets forth that "[i]n all criminal prosecutions the accused shall have a right ... to be confronted by the witnesses against him ...." Miss. Const. art. 3, § 26.

¶30. The United States Supreme Court has established that:

> The *primary object* of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner *in lieu of 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*. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if

> notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness *before the jury* which *the law has designed for his protection*. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.[4] To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. *The law*, in its wisdom, *declares that the rights of the public* shall not be *wholly sacrificed* in order that an *incidental* benefit may be preserved to the accused.

Mattox v. United States, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L.Ed. 409 (1895) (emphasis added).[5]

---

[4] Public policy exceptions to Constitutional protections have long been recognized. *See* ***Schenck v. United States***, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L.Ed. 470 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." (citing ***Gompers v. Buck's Stove & Range Co.***, 221 U.S. 418, 439, 31 S. Ct. 492, 55 L.Ed. 797 (1911))).

[5] United States Supreme Court decisions that cite this passage from ***Mattox*** include: ***Dowdell v. United States***, 221 U.S. 325, 330, 31 S. Ct. 590, 55 L.Ed. 753 (1911); ***Salinger***, 272 U.S. at 548, 47 S.Ct. 173; ***Pointer v. Texas***, 380 U.S. 400, 407, 85 S. Ct. 1065, 13 L.Ed. 2d 923 (1965); ***Douglas v. Alabama***, 380 U.S. 415, 418-19, 85 S. Ct. 1074, 13 L.Ed. 2d 934 (1965); ***Barber v. Page***, 390 U.S. 719, 721, 88 S. Ct. 1318, 20 L.Ed. 2d 255 (1968); ***California v. Green***, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L.Ed. 2d 489 (1970); ***Dutton v. Evans***, 400 U.S. 74, 80, 91

¶31. The United States Supreme Court has consistently defined the elements of confrontation as: (1) the witness is under oath, (2) the witness is subject to cross-examination, and (3) the witness is under observation by the *jury*, holding that confrontation:

> (1) insures that the witness will give his *statements under oath*—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> (2) *forces* the *witness* to *submit to cross-examination*, the 'greatest legal engine ever invented for the discovery of truth';
>
> (3) permits the *jury* that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 157, 90 S.Ct. 1930 (emphasis added) (footnote omitted) (quoting 5 J. Wigmore, *Evidence* § 1367).

¶32. Speaking for the United States Supreme Court, Justice Blackmun later wrote that "*[t]he Court has emphasized that 'a primary interest secured by [the Confrontation Clause] is the right of*

S. Ct. 210, 27 L.Ed. 2d 213 (1970); ***Chambers v. Mississippi***, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973); ***Ohio v. Roberts***, 448 U.S. 56, 63-64, 100 S. Ct. 2531, 65 L.Ed. 2d 597 (1980), *abrogated on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004); ***Kentucky v. Stincer***, 482 U.S. 730, 737, 107 S. Ct. 2658, 96 L.Ed. 2d 631 (1987); ***United States v. Owens***, 484 U.S. 554, 557, 108 S. Ct. 838, 98 L.Ed. 2d 951 (1988); ***Maryland v. Craig***, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L.Ed. 2d 666 (1990); ***Crawford***, 541 U.S. at 59 n.9, 124 S.Ct. 1354.

cross-examination." ***Stincer***, 482 U.S. at 736, 107 S.Ct. 2658 (alteration in original) (emphasis added) (quoting ***Douglas***, 380 U.S. at 418, 85 S.Ct. 1074 ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the *absence of physical confrontation*." (emphasis added))).

¶33. Clearly, the most sacred element of confrontation is the right to subject one's accuser to a full and complete cross-examination of their testimony. *See* ***Dowdell***, 221 U.S. at 330, 31 S.Ct. 590 ("[The Confrontation Clause] was intended ... particularly *to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination*." (emphasis added) (citing ***Mattox***, 156 U.S. at 242-43, 15 S.Ct. 337)); *see also* ***Pointer***, 380 U.S. at 406-07, 85 S.Ct. 1065 ("As has been pointed out, *a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him*." (emphasis added)); ***Davis v. Alaska***, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974) ("*The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination*." (emphasis added) (internal quotation mark omitted) (quoting 5 J. Wigmore, *Evidence* § 1395 (3d ed. 1940))).

¶34. Post ***Coy*** and ***Craig***, Mississippi, like a majority of states toward the end of the twentieth century, joined a public policy movement of enshrining the rights of crime victims into their state constitu-

tions.[6] In 1998, a victims' rights amendment to the Mississippi Constitution was proposed by the Senate Constitution Committee. S. Con. Res. No. 513, Reg. Sess., 1998 Miss. Laws ch. 691. Senate Concurrent Resolution Number 513 was unanimously adopted by the Senate. S. Journal, 1998 Reg. Sess. 50 (Mar. 17, 1998). The House of Representatives unanimously adopted the proposed constitutional amendment as well. H.R. Journal, 1998 Reg. Sess. 681 (Mar. 5, 1998).

¶35. On November 3, 1998, the legislatively referred constitutional amendment, the "Mississippi Crime Victim Rights Amendment," also known as "Amendment 2," was put on the ballot. The electorate overwhelmingly approved the amendment

---

[6] As of 2005, "[a] total of thirty-three states now have state victims' rights amendments." Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 583-91 (2005) (citing Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. XV, § 15; La. Const. art. I, § 25; Md. Const. Decl. of Rights art. XLVII; Mich. Const. of 1963, art. I, § 24; Miss. Const. art. III, § 26A; Mo. Const. art. I, § 32; Mont. Const. art. II, § 28; Neb. Const. art. I,§ 28; Nev. Const. art. I, § 8; N.J. Const. art. I, § 22; New Mex. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I,§ 24; Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m).

with 93.3 percent of the vote in favor of the proposed constitutional provision.[7]

¶36. That provision, Article 3, Section 26A, of the Mississippi Constitution unambiguously provides, in part, "[t]he Legislature *shall have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section*." Miss. Const. art. 3, § 26A(3) (emphasis added). In addition, Section 26A establishes that "[n]othing in this section shall ... impair the constitutional rights of the accused." Miss. Const. art. 3, § 26A(2). Following this overwhelming statement of public policy by the Mississippi electorate, as well as by legislative and executive branches of government, the Mississippi Crime Victims' Bill of Rights was enacted pursuant to the constitutional authority granted in Section 26A. *See* Miss. Code Ann. §§ 99-43-1 to -101 (Rev. 2020). That constitutional provision has been cited by this Court on multiple occasions. *See* ***Payton v. State***, 266 So. 3d 630, 637 (Miss. 2019); *see also* ***Moffett v. State***, 351 So. 3d 936, 943 (Miss. 2022).

¶37. Mississippi Code Section 99-43-1 established that the

> purpose of this chapter is to ensure the fair and compassionate treatment of victims of crime, to increase the effectiveness of the criminal justice system by affording rights and considerations to the victims of crime, and to preserve and pro-

---

[7] Mississippi Crime Victim Rights, Amendment 2 (1998), Ballotpedia, https://ballotpedia.org/Mississippi_Crime_Victim_Rights,_Amendment_2_(1998) (last visited Jan. 15, 2025).

> tect victims' rights to justice and fairness in the criminal justice system.

Miss. Code Ann. § 99-43-1 (Rev. 2020). Mississippi Code Section 99-43-101(2)(g) (Rev. 2020) is included within the Mississippi Crime Victims' Bill of Rights. It is specifically limited to the *live* testimony of a child in a courtroom.

¶38. Importantly, Mississippi Code Section 99-43-101(5)(d) also establishes that "[t]he defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child." Miss. Code Ann. § 99-43-101(5)(d) (Rev. 2020).

¶39. Unlike the statute at issue in today's case, in ***Coy***, an Iowa statute was challenged that read:

> The court may require a party be confined [*sic*] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

Coy, 487 U.S. at 1014 n.1, 108 S.Ct. 2798 (alteration in original) (internal quotation marks omitted) (quoting Iowa Code § 910.14 (1987)). Unlike the case sub judice, Iowa did not have a victims' rights provision enshrined in its state constitution when ***Coy*** was decided. Moreover, the procedure contained in the Iowa statute at issue in ***Coy*** was discretionary while the

statutory procedure at issue in today's case is unambiguously mandatory.

¶40. The Supreme Court was not persuaded by Iowa's purported justification, however; it found that "[i]t is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." ***Coy***, 487 U.S. at 1020, 108 S.Ct. 2798. Accordingly, the Supreme Court ultimately held that

> *We leave for another day*, however, the question whether any exceptions exist. Whatever they may be, they *would surely be allowed only when necessary to further an important public policy*. The State maintains that such necessity is established here by the statute, *which creates a legislatively imposed presumption of trauma*. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, *something more than the type of generalized finding underlying such a statute is needed when the exception is not* "*firmly ... rooted in our jurisprudence*." The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

Id. at 1021, 108 S.Ct. 2798 (alteration in original) (citation omitted) (emphasis added).

¶41. The victims in ***Coy*** were two *thirteen-year-old* girls. ***Id.*** at 1014, 108 S. Ct. 2798. AGC was four

years old at the time of Pitts's trial. Accordingly, ***Coy*** failed to consider that the common law has always provided protections to children of an extremely young age or that the law has often carved out exceptions for these individuals of tender age. For example, this Court has written that "[a]t common law a child under 7 years of age is conclusively presumed to be *without discretion*, and incapable of committing crime ...," not requiring a hearing before they may take the witness stand. ***Westbrook v. Mobile & Ohio R.R. Co.***, 66 Miss. 560, 6 So. 321, 322 (1889) (second emphasis in original) (citing 1 Bishop, *Criminal Law* § 368; 1 Wharton, *Criminal Law* § 68). This is because "[a] child of such age is generally incapable of choosing between *right and wrong*, *between good and evil*, and *between care and rashness*." ***Id.*** (emphasis added); *see also* ***Hines v. Moore***, 124 Miss. 500, 87 So. 1, 3 (1921).

¶42. The victims in ***Coy*** were camping out and assaulted by an *unknown masked* man. ***Coy***, 487 U.S. at 1014, 108 S.Ct. 2798. Unlike today's case, in ***Coy***, the identity of the perpetrator was a factual question for the jury to resolve, as "[a]ccording to the girls, the assailant entered their tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him; neither was able to describe his face." ***Id.***

¶43. Two years later in ***Craig***, ***Coy*** was weakened considerably. There,

> the State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse. To invoke the procedure, the tri-

> al judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

Craig, 497 U.S. at 840-41, 110 S.Ct. 3157 (alteration in original) (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-102(a)(1)(ii) (1989)). No such requirements for a four-year-old victim of sexual abuse by their parent exists in Section 99-43-101(2)(g).

¶44. Another clear distinction from Section 99-43-101(2)(g), moreover, is:

> Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

Craig, 497 U.S. at 841-42, 110 S.Ct. 3157.

¶45. Like ***Coy***, Maryland had no victims' rights provision enshrined in its state constitution when ***Craig*** was decided. Most importantly, the examination of the child witnesses in ***Craig*** were conducted outside the physical presence of not only the defendant but also the *jury and judge*. *See* ***Craig***, 497 U.S. at 841, 110 S.Ct. 3157 (emphasis added) ("Once the

procedure is invoked, *the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom*."). Similar distinctions were not present in today's case.

¶46. Yet the Court in ***Craig*** found that

> [t]he combined effect of these elements of confrontation—*physical presence, oath, cross-examination*, *and observation of demeanor by the trier of fact*—serves the purposes of the Confrontation Clause by *ensuring* that *evidence admitted* against an accused *is reliable* and *subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings*.

Id. at 846, 110 S.Ct. 3157 (emphasis added). While acknowledging that face-to-face confrontation may well provide some *symbolic value* to an accused, the majority found that the Supreme Court had also "nevertheless recognized that it is not the *sine qua non*[8] of the confrontation right." ***Craig***, 497 U.S. at 847, 110 S.Ct. 3157 (citing ***Delaware v. Fensterer***, 474 U.S. 15, 22, 106 S. Ct. 292, 88 L.Ed.2d 15 (1985) (per curiam). As it said in ***Coy***, the Court held that the right to face-to-face confrontation was *not absolute*. ***Craig***, 497 U.S. at 844, 110 S.Ct. 3157 ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.").

---

[8] I.e., "something absolutely indispensable or essential." *Sine qua non*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sine%20qua%20non (last visited Mar. 13, 2025).

¶47. Today's case is about live testimony. Pitts, however, conflates the requirements of Mississippi Code Section 99-43-101(5)(a) (Rev. 2020)—out of court deposition testimony—or Mississippi Code Section 99-43-101(5)(e) (Rev. 2020)—out of court testimony via closed circuit television—with Mississippi Code Section 99-43-101(2)(g), which unambiguously controls live testimony provided in open court. In ***Craig***, the child witnesses testified in a *separate room* from the *jury*, which is charged with deciding guilt or innocence based on the evidence presented. ***Craig***, 497 U.S. at 841, 110 S.Ct. 3157. Absent testifying in open court in the presence of the *jury*, an essential truth-finding element of the right to confrontation was limited. In such circumstances, to qualify as an exception to the Confrontation Clause, the trial judge must make certain findings to justify the limitation. The Mississippi legislature specifically provides for these certain circumstances by including Mississippi Code Section 99-43-101(5) within the Mississippi Crime Victims' Bill of Rights.

¶48. When introducing a child witness's *deposition* testimony, "[t]he court shall make a preliminary finding as to whether ... the child is likely to be *unable* to testify in *open court* in the physical presence of the defendant, jury, judge, or public ..." when a child cannot testify due to "fear," "emotional trauma," or "suffers a mental or other infirmity or medical condition[.]" Miss. Code Ann. § 99-43-101(5)(a), (b) (Rev. 2020) (emphasis added). Likewise, to utilize testimony via closed-circuit television,

> [i]f the court finds the child *unable* to testify in open court, based on evidence that the child is unable to testify in the physical presence of the

> defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted.

Miss. Code Ann. § 99-43-101(5)(e)(i) (Rev. 2020) (emphasis added).[9] Accordingly, "[i]f the court orders that the defendant be excluded from the deposition room, the court shall order that two-way closed-circuit television equipment be used ...." *Id.*

¶49. The Supreme Court in ***Craig*** held that "*we cannot say* that such *confrontation* is an *indispensable element* of the *Sixth Amendment's guarantee* of the right to confront one's accusers." ***Craig***, 497 U.S. at 849-50, 110 S.Ct. 3157 (emphasis added). Accordingly,

> [a]s we suggested in ***Coy***, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied *absent a physical, face-to-face confrontation at trial* only where denial of such confrontation *is necessary to further an important public policy* and only where *the reliability of the testimony is otherwise assured*.

Id. at 850, 110 S.Ct. 3157 (emphasis added).

¶50. What could be a more clear statement of public policy than a right enshrined in a state's constitution at the direction of the electorate of that state? What could be more necessary than protecting such a statement of the people? "It is well settled that the Constitution of Mississippi is the supreme law of our state. It 'is the highest known law.[']" ***Chevron U.S.A., Inc. v. State***, 578 So. 2d 644, 648 (Miss.

---

[9] *See also* Miss. R. Evid. 617.

1991) (quoting ***McGowan v. State***, 184 Miss. 96, 105, 185 So. 826 (1939)). "It is an expression of the will of [the] people by whom it was passed and by whom it can only be altered." ***Id.*** at 649. "It is our duty to interpret our Constitution when its meaning is put at issue." ***Reeves v. Gunn***, 307 So. 3d 436, 437 (Miss. 2020) (citing ***Alexander v. State ex rel. Allain***, 441 So. 2d 1329, 1333 (Miss. 1983), *overruled on other grounds by* ***5K Farms, Inc. v. Miss. Dep't of Revenue***, 94 So. 3d 221 (Miss. 2012)). "When interpreting a constitutional provision, we must enforce its plain language." ***Johnson v. Sysco Food Servs.***, 86 So. 3d 242, 244 (Miss. 2012) (citing ***Dye v. State ex rel. Hale***, 507 So. 2d 332, 349 (Miss. 1987)). "When a court is entreated to interpret the terms of a constitution, a court ought to 'bow with respectful submission to its provisions[.]'" ***Butler v. Watson (In re Initiative Measure No. 65)***, 338 So. 3d 599, 607 (Miss. 2021) (quoting ***Cohens v. Virginia***, 19 U.S. 264, 377, 6 Wheat. 264, 5 L. Ed. 257 (1821)).

¶51. Section 99-43-101(2)(g) sets forth no presumption of trauma. The people of this state have voiced their concern that victims of crime are thrust against their will into a complex system of justice without adequate protections. The people of this state recognized that while several provisions in the Mississippi Constitution provided protections for those accused of crimes, not one provision protected the unwilling victims of these crimes. The screen procedure found in Section 99-43-101(2)(g) was justified by an overwhelming majority of this state's electorate, who enshrined into the Mississippi Constitution the legislative authority to pass laws that pro-

vide certain protections for these individuals. Nothing could be more necessary to protect an important policy interest, especially when all of the essential elements of confrontation were met in the case sub judice.

¶52. It is clear that the reliability of AGC's testimony was assured in today's case. Every element of the right to confrontation was satisfied in Pitts's trial. All witnesses gave live testimony before the jury while under oath. All witnesses were subjected to cross-examination before the jury by Pitts's chosen counsel. All witnesses' demeanor was observable by the jury. At all times, including during the testimony of his four-year-old daughter, AGC, Pitts was present in the same courtroom. At all times, Pitts was able to watch, hear, and assist his counsel while AGC was vigorously cross-examined.

¶53. The screen did not prevent AGC from testifying under oath in real time, nor did the screen prevent her from being impressed upon the seriousness of telling the truth. The jury had front row seats, unobstructed to observe each and every witness, including the child testifying on direct and cross-examination by Pitts's chosen counsel, as well as each and every exhibit. The jury heard from Pitts as he took the stand to defend himself of the accusation and to testify to his version of events. The jury heard AGC express her love for Pitts and observed the sincerity of her testimony. They also heard AGC's child-like plan to resolve the problem—that she "will just sleep somewhere else" whenever she visits Pitts. *See supra* ¶ 21. The jury observed the victim testify that Pitts hurt her and that she did not want him to do it again.

¶54. In addition, Pitts was also able to observe his four-year-old daughter's demeanor while she testified in open court via Zoom video. *See* ***Mattox***, 156 U.S. at 243, 15 S.Ct. 337 ("The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."); *see also* ***Davis***, 415 U.S. at 316, 94 S.Ct. 1105 ("The opponent demands confrontation, *not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers*." (emphasis added) (internal quotation mark omitted) (quoting Wigmore § 1395)).

¶55. Pitts's accuser, his four-year-old daughter, *testified at trial*, *live* and *under oath* in the presence *of the jury*, that her own father committed unconscionable acts against her. His daughter was subjected to a *full*, *fair*, and *complete cross-examination* by his selected attorneys. Not only was AGC's *demeanor* observable to *the jury* and to *the trial judge* alike, who could scrutinize each and every answer that the victim and all other witnesses provided, but also observable to the jury was her quality, age, education, understanding, behavior, and inclination. Additionally, in ***Coy*** and ***Craig***, there was *no* tender years hearsay hearing predicting the indicia of reliability of the victims' statements. In today's case, the trial judge's tender years hearing allowed an analysis of the twelve factors, which led to the finding that the victim's statements provided substantial indicia of reliability. *See supra* ¶ 9 n.2. The use of the screen to shield AGC's view of her father did not hamper

the truth seeking mission of the trial or the reliability of her testimony.

¶56. The trial judge decided the issue on the most important ground of seeking the truth, ruling that "I'm only going to grant your motion if we can *arrange* for there to be a zoom so that *the defendant can observe* the *witness as the witness is testifying. We've gone through that in the courtroom before ....*" (Emphasis added.) When defense counsel contended that the jury was entitled to see how much AGC loved her father, the trial judge responded that

> *And you can certainly do that*, [defense counsel], *through your examination of the child*. And you know, *I think the point of this is a truth-seeking mission to try and have truthful testimony* and to the degree that the legislature is determined that this is appropriate and as long as the constitutional safeguards are met, I believe I'm compelled to follow the statute with this procedural safeguard by allowing the Defendant to view the child as the child testifies so that he can assist in cross-examination then.

(Emphasis added.)

¶57. Would any student of the law or dedicated jurist disagree that the ascertainment of truth is the ultimate goal of justice? The purpose of our rules of evidence is to "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Miss. R. Evid. 102. We have held that "courts exist to determine the truth." ***Parker v. Benoist***, 160 So. 3d 198, 204 (Miss. 2015). Similarly, the United States Supreme Court has determined that "[t]he function of a criminal trial is to seek out and determine the truth or falsity of the

charges brought against the defendant." ***Lopez v. United States***, 373 U.S. 427, 440, 83 S. Ct. 1381, 10 L.Ed. 2d 462 (1963). The Supreme Court further held that "the courtroom ... is a forum for the courteous and reasoned pursuit of truth and justice." ***Taylor v. Hayes***, 418 U.S. 488, 503, 94 S. Ct. 2697, 41 L.Ed. 2d 897 (1974).

¶58. In today's case, it is abundantly clear that the trial judge had a firm grasp as to his solemn obligations. We grant wide discretion to trial judges on such matters because

> [e]ach case must depend upon its own circumstances, and the trial judge is the person best situated to decide upon the course of conduct necessary to elicit the truth and yet safeguard the rights of the accused, and *unless this Court can say, from the whole record, he abused his discretion and the accused was deprived of a fair and impartial trial*, we should not reverse a case because of such action.

Summerville v. State, 207 Miss. 54, 41 So. 2d 377, 380 (1949) (emphasis added).

¶59. The trial judge in the case sub judice displayed Solomon-like discernment in exercising discretion to satisfy the constitutional and statutory protections provided to both the accused and the victim. We are compelled to imitate his wise example on review. This Court's first and foremost responsibility is to vigilantly guard the provisions of the Mississippi Constitution. Admittedly, this sacred duty becomes complex when the constitutionality of a statute is challenged under one provision of this state's constitution, which was expressly enacted pursuant to the authority granted under the unam-

biguous words of another provision also contained within this state's constitution. A review of the clear distinctions between the case sub judice and ***Coy*** and ***Craig***, however, demonstrates that Section 99-43-101(2)(g) is not unconstitutional beyond a reasonable doubt. Accordingly, as Pitts received all essential elements of confrontation guaranteed by the Confrontation Clause, we affirm.

¶60. **AFFIRMED.**

COLEMAN, P.J., ISHEE, SULLIVAN AND BRANNING, JJ., CONCUR. MAXWELL, J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED BY CHAMBERLIN AND GRIFFIS, JJ. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION.

MAXWELL, JUSTICE, CONCURRING IN RESULT ONLY:

¶61. I voted to deny certiorari review of the Court of Appeals' affirmance and would dismiss as improvidently granted. I join only in the majority's result.

CHAMBERLIN AND GRIFFIS, JJ., JOIN THIS OPINION.

KING, PRESIDING JUSTICE, DISSENTING:

¶62. Because the mandatory placement of a screen between a child witness and the defendant in this case clearly runs afoul of United States Supreme Court Confrontation Clause precedent, I respectfully dissent.

¶63. This case requires us to examine whether the mandatory placement of a screen between a criminal defendant and a testifying child violated the defend-

ant's rights under the Confrontation Clause of the United States Constitution. Mississippi Code Section 99-43-101(2)(g) (Rev. 2020)[10] provides:

> (2) In any proceeding in which a child testifies, a child shall have the following rights to be enforced by the court on its own motion or upon motion or notice of an attorney in the proceeding:
>
> ....
>
> (g) To permit the use of a properly constructed screen that would permit the judge and jury in the courtroom or hearing room to see the child but would obscure the child's view of the defendant or the public or both.

In ***Coy v. Iowa***, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed. 2d 857 (1988), the United States Supreme Court found that use of a screen to block the defendant from the view of the complaining witnesses violated the Confrontation Clause and constituted reversible error. While "leav[ing] for another day" the question of whether an exception "necessary to further an important public policy" might exist, the Court stated that such an exception could not be created by a state statute "which creates a legislatively imposed presumption of trauma." ***Id.*** at 1021, 108 S. Ct. 2798. In ***Maryland v. Craig***, 497 U.S. 836, 856, 110 S. Ct. 3157, 111 L.Ed. 2d 666 (1990), the Court upheld a conviction following a trial in which a child witness testified via one-way video camera, holding that the state interest in protecting child witnesses

---

[10] This statute became effective in July 2018. Our examination of this provision's constitutionality as applied to a particular case is a matter of first impression.

from trauma can justify such a procedure when the trial court hears case-by-case evidence and makes a finding that the child "would be traumatized, not by the courtroom generally, but by the presence of the defendant."

¶64. In the case before us, the trial court permitted the placement of a screen pursuant to the mandatory command of Section 99-43-101(2)(g). The court did not make a case-specific finding that use of the screen was necessary to prevent trauma to the individual witness, and the State did not present evidence that would support such a finding. In light of this case's similarity to ***Coy*** and in the absence of any individualized evidence supporting a public policy exception as outlined in ***Craig***, we should find that controlling United States Supreme Court precedent requires us to reverse the defendant's conviction and remand for a new trial.

¶65. The day before trial in this case, the court conducted a tender-years hearing to determine whether A.G.C.'s mother and grandmother would be permitted to testify regarding the statements A.G.C. made to them describing the abuse.[11] During the hearing, A.G.C.'s mother discussed the child's emotional attitude toward her father:

> Q. And I think earlier ... you said that [A.G.C.], even on the night she made these disclosures to you, she had said that she loved her daddy, right?
>
> A. Yes.

---

[11] The court permitted the testimony at trial, and the outcome of the tender-years hearing is not at issue on *certiorari* review.

> Q. And, in fact, I mean [A.G.C.] continues to tell you that –
>
> A. Yes.
>
> Q. — she loves her daddy?
>
> A. Yes. She is very adamant that she loves her dad, that she misses her dad, that she wants to see her dad. She was very distraught over the fact that she would have to come to court and testify with her daddy in the courtroom and not be able to talk to him.

¶66. Following the conclusion of the tender-years hearing and consideration of other pretrial matters, the State made an *ore tenus* motion pursuant to Section 99-43-101(2)(g), requesting the use of a screen to prevent A.G.C. from viewing Pitts during her testimony the following day. Pitts's attorney objected to the last minute nature of the State's request and argued that the use of the screen would violate Pitts's right to confront the witness. Pitts's attorney argued that "[i]t's very obvious, your Honor, that they don't want the child to see her father because they know that she ... loves her father and ... I think it's reprehensible that they would try to ... prevent him from confronting his accuser." Pitts's attorney argued that the State had presented no proof of why the screen was necessary and that the "only thing that the State wants to do is to try to keep this child from ... exhibiting any kind of affection for Mr. Pitts in the presence of this jury." The State responded by noting the mandatory nature of the statute and arguing that under the statute, "there are no requirements that the State put on proof on how the child might be affected viewing that defendant in that testimony." The State also argued that the screen would help the

child focus and not get distracted and noted that the child's mother thought it would be difficult for A.G.C. to testify while her father was staring at her.

¶67. The trial court stated, "I'm looking at a statute that appears to be mandatory and I have some concerns about my ability to declare the statute unconstitutional and fail to follow it." The court granted the motion "hesitantly because I'm concerned about the constitutionality of the statute." The screen was erected, and the defendant viewed a live video feed of A.G.C. during her testimony and cross-examination.

¶68. The United States Constitution 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. "[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." ***Coy***, 487 U.S. at 1016, 108 S.Ct. 2798. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" ***Id.*** at 1017, 108 S. Ct. 2798 (quoting ***Pointer v. Texas***, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L.Ed. 2d 923 (1965)).

¶69. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." ***Craig***, 497 U.S. at 845, 110 S.Ct. 3157. The United States Supreme Court never has held that the right to a face-to-face confrontation is absolute, but "[a] defendant's right to confront accusatory witnesses may be satisfied ab-

sent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." ***Id.*** at 850, 110 S. Ct. 3157. "The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential 'trauma' that allegedly justified" a screen being placed between accuser and accused. ***Coy***, 487 U.S. at 1020, 108 S.Ct. 2798. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." ***Id.***

¶70. In ***Coy***, the United States Supreme Court found that the placement of a screen between the defendant and the complaining child witnesses violated the Confrontation Clause. ***Coy***, 487 U.S. at 1022, 108 S.Ct. 2798. The state statute permitting the use of the screen provided:

> "The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony."

Id. at 1014 n.1, 108 S.Ct. 2798 (alteration in original) (quoting Iowa Code § 910A.14 (1987)). In describing the function of the screen as enabling "the complaining witnesses to avoid viewing appellant as they gave their testimony," the Court said "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." ***Id.*** at 1020, 108 S. Ct. 2798. The Court declined to consider whether a public-policy exception might apply given the absence of "individualized findings that these particular witnesses needed special protection[.]" ***Id.*** at 1021, 108 S. Ct. 2798. But the Court found that an exception to the protections of the Confrontation Clause *cannot* be created by a "legislatively imposed presumption of trauma." ***Coy***, 487 U.S. at 1021, 108 S.Ct. 2798.

¶71. The majority attempts to distinguish ***Coy*** based on several issues that it paints as true distinctions. None of its claimed distinctions are relevant to ***Coy***'s holding that individualized findings regarding special protection are necessary to justify infringing on Confrontation Clause rights. First, the majority argues that Iowa did not have a state constitution victims' rights provision. Maj. Op. ¶ 39. But, the majority seems to admit that the state statute is not sufficient to overcome Supreme Court precedent and the United States Constitution, because it finds it necessary to exaggerate what the state constitutional right is, arguing that this case implicates "a right enshrined in a state's constitution at the direction of the electorate of that state[.]" Maj. Op. ¶ 50. The right to a screen is decidedly found nowhere in our state constitution; that notion is found only in a state statute that, like every single state statute in

existence, may not violate the state or federal constitution. ***State v. Bd. of Levee Comm'rs for Yazoo-Miss. Delta***, 932 So. 2d 12, 21 (Miss. 2006). Second, the majority points out that "the Iowa statute at issue in ***Coy*** was discretionary while the statutory procedure at issue in today's case is unambiguously mandatory." Maj. ¶ Op. 39. But the Court in ***Coy*** specifically noted that individualized findings must be made to attempt a justification for chipping away at Confrontation Clause rights, and a mandatory statute leaves no room for a court to do that, while a discretionary statute leaves open the possibility of the trial court making individualized findings; those findings simply were not made in ***Coy*** despite the discretionary nature of the statute. Thus, the mandatory nature of the statute at issue today renders it even more constitutionally problematic than the statute at issue in ***Coy***, not less so. Third, the majority points out that the victims in ***Coy*** were thirteen years old and attacked by an unknown assailant, while the case at hand involves a four-year-old allegedly attacked by her father. Maj. Op. ¶¶ 41-42. Perhaps these distinctions would be important to our analysis had the trial courts in either case actually made individualized findings. But neither did so. The statute at issue in today's case applies mandatorily and equally to four year olds confronting their fathers and to thirteen year olds confronting an unknown assailant. The clear reasoning behind the Supreme Court precedent is that individualized findings should be made in cases that strip defendants of face-to-face confrontation of child witnesses, and those were made in neither ***Coy*** nor in today's case.

¶72. In ***Craig***, the United States Supreme Court upheld a conviction after examining a state statute permitting the use of one-way closed circuit television to prevent a child witness from face-to-face confrontation with the defendant upon a "determination that the child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate[.]'"[12] ***Craig***, 497 U.S. at 856, 110 S.Ct. 3157 (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-102(a)(2)(ii)). The Court held that:

> if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation of the defendant.

Id. at 855, 110 S.Ct. 3157. The Court proceeded to emphasize that 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 [special procedure] is necessary to protect the welfare of the particular child witness who seeks to testify." ***Id.***

¶73. Under ***Coy*** and ***Craig***, the State cannot invoke the mandatory language of Section 99-43-

---

[12] In that case, the prosecution presented expert testimony describing how the multiple child witnesses would meet this standard, including that one child "would probably stop talking and she would withdraw and curl up" and that another would "become highly agitated, that he may refuse to talk[,]" and another would "become extremely timid and unwilling to talk." ***Id.*** at 842, 110 S. Ct. 3157 (internal quotation marks omitted).

101(2)(g) to bypass presentation of case-specific evidence that the use of the screen is necessary to prevent trauma to the particular witness.[13] "[S]omething more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly ... rooted in our jurisprudence.'" ***Coy***, 487 U.S. at 1021, 108 S.Ct. 2798 (quoting ***Bourjaily v. United States***, 483 U.S. 171, 183, 107 S. Ct. 2775, 2782, 97 L.Ed. 2d 144 (1987)). The State relied heavily on the mandatory nature of the statute and did not present evidence of necessity for the screen that would support a variance from the result the United States Supreme Court reached in ***Coy***. The State's argument that the use of the screen would help the child focus does not constitute a public policy interest sufficient to override a defendant's right to face-to-face confrontation. Application of an exception requires a case-specific finding that the presence of the defendant in the courtroom would be the source of trauma to the child. Confusingly, the majority finds that "[w]e grant wide discretion to trial judges. on such matters because ['][e]ach case must depend upon its own circumstances[.]['] Maj. ¶ Op. 58. But the trial judge had no discretion on this

---

[13] In closer alignment with controlling Confrontation Clause jurisprudence, Mississippi Rule of Evidence 617 outlines a procedure permitting a child's testimony via closed-circuit television if certain conditions are met, including that the topic of testimony "is that an unlawful sexual act contact, intrusion, penetration, or other sexual offense was committed on the child" and that "there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify ... in the presence of the accused." MRE 617(a). Further, the rule requires that "the court must: **(A)** conduct a hearing *in camera*; and **(B)** make specific findings of fact, on the record as to the basis of the ruling." MRE 617(b)(2).

matter, as the statute is mandatory and uses "shall," and the case did not depend upon its own circumstances, but on a *general* policy finding of trauma. The trial judge even clearly noted his concern that the statute was unconstitutional, but pointed to his lack of discretion as reasoning for using the screen. Ultimately, the evidence supported that the child witness would be excited, not traumatized, to see her father and would be distressed at not being allowed to interact with him.[14]

¶74. The true legal question on appeal is whether this Court is bound by the controlling precedent of the Supreme Court of the United States. It should be without question that we are so bound. *See* ***Czekala-Chatham v. State***, 195 So. 3d 187 (Miss. 2015); ***Hicks v. Miranda***, 422 U.S. 332, 343-45, 95 S. Ct. 2281, 45 L.Ed. 2d 223 (1975). An exception to the protections of the Confrontation Clause cannot be

---

[14] At this point, I note a concern with the supplemental *certiorari* brief filed by the State. When arguing that the trial court heard sufficient evidence at the tender-years hearing that the child would be traumatized by viewing the defendant, the State's supplemental brief asserts that "[t]he trial court also heard A.G.C.'s mother's testimony that A.G.C. 'was very distraught over the fact that she would have to come to court and testify with her daddy in the courtroom.' " This partial quotation as extracted creates an impression in the reader that the mother testified the child would be distraught out of aversion to the presence of the defendant. But the full quotation of the excerpt of the mother's testimony is: "[s]he was very distraught over the fact that she would have to come to court and testify with her daddy in the courtroom and not be able to talk to him." Attorneys certainly are expected to present the most favorable view of the facts reasonably possible for their clients. But attorneys also have a professional responsibility to avoid extracting quotations in a misleading manner that falls short of their duty of candor to the Court.

created by a "legislatively imposed presumption of trauma." ***Coy***, 487 U.S. at 1021, 108 S.Ct. 2798. Here, the use of a screen to block the complaining witness's view of the defendant during trial was substantially similar to the circumstances of ***Coy*** that constituted reversible error according to the United States Supreme Court.

¶75. In the absence of evidence supporting an individualized finding that the screen was necessary to prevent trauma to the particular child witness, we should reverse the judgments of the Court of Appeals and of the Rankin County Circuit Court and remand the case for a new trial. Accordingly, I dissent.

APPENDIX B

Court of Appeals of Mississippi

Jeffrey Clyde PITTS, Appellant
v.
STATE of Mississippi, Appellee

NO. 2021-KA-00740-COA
01/31/2023
Rehearing Denied May 30, 2023

McDonald, J., concurred in part and in result without separate opinion.

Wilson, P.J., dissented with separate written opinion in which Westbrooks, J., joined and McDonald, J., joined in part.

RANKIN COUNTY CIRCUIT COURT, HON. JOHN H. EMFINGER, JUDGE

ATTORNEYS FOR APPELLANT: J. EDWARD RAINER, Brandon, KIMBERLY MARIE PHILLIPS

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: LAUREN GABRIELLE CANTRELL, ALEXANDRA RODU ROSENBLATT

EN BANC.

LAWRENCE, J., FOR THE COURT:

¶1. Jeffrey Pitts was indicted for the sexual battery of his daughter A.G.C., who was four years old at the time of the offense. After a trial, Pitts was sentenced to thirty years in the custody of the Mis-

sissippi Department of Corrections (MDOC) with twenty years to serve and ten years suspended, and ordered to register as a sex offender. Pitts appeals, raising numerous issues. For the reasons discussed below, we affirm the conviction and sentence.

FACTS

¶2. A.G.C. is the child of K.C. and Jeffrey Pitts.[1] A.G.C. spent the weekend of May 1-3, 2020, with Pitts. After returning home, A.G.C. told her grandmother T.C. that she "saw daddy's gina" and "daddy's gina is this big" while using her hands to illustrate. T.C. had A.G.C. repeat the information to K.C. and A.G.C. told K.C. that her "daddy put his finger in [her] vagina, in [her] 'gina and in [her] bootie and he made it go really fast." K.C. filed a report online with Child Protection Services (CPS) and with the Richland Police Department. A.G.C. was interviewed by CPS and underwent a forensic interview.

¶3. A Rankin County grand jury indicted Pitts for one count of sexual battery under Mississippi Code Annotated section 97-3-95 occurring between May 1-3, 2020. A jury trial was held February 1-4, 2021.

¶4. The State noticed its intent to elicit hearsay testimony under the tender years exception. MRE 803(25). The trial court held two hearings to determine whether T.C. and K.C. could testify as to A.G.C.'s disclosure to them. The court considered the tender years factors under the Mississippi Rules of Evidence and ultimately found the statements admissible. The court reasoned the child "had no apparent motive to lie," and there was "nothing here

[1] We use initials to protect the minor's identity.

about the general character of the declaring that would weigh toward excluding the testimony." The court continued that the mother and grandmother heard the initial statements, the allegations were "made within days after the alleged event," and the statements were made spontaneously to the grandmother. The trial court found "the credibility of both the mother and the grandmother to be substantial that these statements were made to them." The court found that "in considering all these things, almost all of these factors weigh in factor and provides substantial indicia of reliability and I find that these statements should be admissible."

¶5. The State noticed its intent to elicit Rule 404(b) testimony of other bad acts committed by the Defendant. The court held a pre-trial hearing on the issue. The State explained that A.G.C. would testify to other sexual acts Pitts committed in addition to those in the indictment, to show Pitts' "motive, opportunity, intent, preparation, and plan." The State argued the Mississippi Supreme Court "has held that evidence of sexual relations between the Defendant and the victim is admissible to show the lustful, lascivious disposition of the Defendant toward that particular victim." Further, the State explained its intent to have Pitts' other daughter, A.P., testify that he also committed sexual acts toward her. However, this evidence was never introduced at trial. No other instances of sexual acts outside the indictment were mentioned, and A.P. did not testify.

¶6. Pitts sent to the State notice of his intent to call two expert witnesses: Dr. Mark Webb, a psychiatrist, and Dr. Gerald O'Brien, a forensic psychologist. The State filed a motion in limine to exclude both

witnesses. First, the State argued for the exclusion of both witnesses for discovery violations because the reports were received by the State "just a few days" before trial. Second, the State argued the experts "do not meet the requirements of M.R.E. 702 and experts are not allowed to opine on the credibility of witnesses."

¶7. During the hearing, both doctors were accepted and admitted as experts in their respective fields of practice. Dr. O'Brien testified that he administered the "Abel and Becker" assessment, which is a self-reporting test used to determine whether Pitts had "unusual thoughts outside the normal range, particularly regarding sexual behavior with children." Dr. O'Brien testified that Pitts denied having any unusual or inappropriate thoughts about children. Dr. O'Brien concluded that Pitts "did not meet the criteria for any significant mental disorder including paraphilic disorder such as sexual focus on children." Dr. O'Brien admitted he has been excluded in courts around the state from offering this type of evidence. After the judge asked, "[Y]ou're not saying that this man didn't molest this child, right?" Dr. O'Brien responded, "I can't speak to that. I can say that in my opinion he's not a person that's likely to do such a thing." Dr. O'Brien testified that the Abel and Becker test, "when used alone," was not widely accepted in the psychological community. The trial court noted that Dr. O'Brien's exclusion in a previous case had been upheld by the Mississippi Court of Appeals.[2]

---

[2] *Earnest v. State*, 805 So. 2d 599, 606 (¶24) (Miss. Ct. App. 2002).

¶8. The second expert, Dr. Mark Webb, testified that he used Dr. O'Brien's report to determine that Pitts "did not exhibit the characteristics of someone who was a sexual predator or a pedophile." Dr. Webb stated that the charges against Pitts "appear to be invalid because, within a reasonable degree of psychiatric certainty, Pitts did not possess the qualities or characteristics of someone who would sexually abuse a child." Dr. Webb admitted that he could not determine within a reasonable degree of certainty that Pitts did not commit sexual battery against A.G.C.

¶9. The trial court excluded both experts' testimony. The trial court stated there were clear discovery violations in failure to disclose the reports earlier.[3] Further, the judge reasoned, "I do not believe that these opinions meet the 702 standard in that they are not the product of reliable principles. The opinions were the products of self reports and an expert cannot render an opinion of the credibility of a witness; yet, that's exactly what these doctors purported to do.... Further, the doctors testified that there is no acceptable profile of a sex offender or a scientifically acceptable uniform diagnosis." Moreover, the judge continued, "those characteristics that are used to diagnose and treat an admitted offender and they're not geared toward determining whether a particular person committed an offense on a particular day."

---

[3] Dr. O'Brien saw Pitts in his office on October 27, 2020, but dated his assessment January 19, 2021. Dr. Webb listed his "dates of assessment" as October 8, 12, and 19, 2020, and January 28, 2021. Dr. O'Brien's report was provided to the State on January 27, 2021, and Dr. Webb's report was provided on January 29, 2021.

The trial court found that this testimony was not helpful to the jury and that any probative value was substantially outweighed by the danger of unfair prejudice.

¶10. At trial, the State's first witness was Officer Ryan Halbert who testified that on May 9, 2020, he met with K.C. and took a report of Pitts' alleged sexual abuse of A.G.C. The State then called Detective Amanda Brown who testified that she took over the investigation from Officer Halbert and scheduled a forensic interview for A.G.C.

¶11. A.G.C. testified next at trial. Before her testimony, the State requested a screen be placed in front of the victim to protect her from the trauma of having to look at her father while she testified. The court granted the motion and allowed the screen to be erected, but the court also required a computer monitor be arranged so Pitts could see A.G.C. For brevity, the facts of this hearing will be discussed further in the analysis.

¶12. On direct examination, A.G.C. was asked if she remembered her "daddy" touching her anywhere. A.G.C. responded, "[I]n my bootie and my vagina ...with his finger." She testified this touching happened "a few times." The State asked, "[S]o when you said your daddy put his fingers inside of your vagina and your bootie, is that a different time than when he put Butt Paste on you?" A.G.C. responded by nodding her head affirmatively. A.G.C. testified that no one else had ever put a finger inside her vagina. A.G.C. further testified that no one was telling her what to say.

¶13. The State's next witness was A.G.C.'s grandmother, T.C., who testified that on May 8,

2020, she had the following conversation with A.G.C.:

> She said, "I saw daddy's 'gina," which doesn't have a term for penis so she used the word 'gina, meaning vagina. "I saw daddy's 'gina." I remained calm. I didn't ask her any questions. I just, "Oh, okay." But then she said, "Daddy's 'gina this big," using her finger to show me daddy's 'gina this big. Again, I didn't ask any questions. I remained calm. I just said, "Okay." Then she went on with another topic. That was all she said about Jeff at that time.

T.C. testified she had A.G.C. repeat the allegation to her mother, K.C.

¶14. K.C. was the State's final witness. She recalled A.G.C.'s disclosure to her, "and she then proceeded to kind of tell the same story, that she saw daddy's vagina and it was this big. And at this point, she — she was demonstrating to me and she — she put her — her elbow in between her legs and she swung her arm back and forth and she says it was like an elephant trunk." K.C. testified she then made a report with CPS and the Richland Police Department.

¶15. Pitts called his mother J.P. as a witness. J.P. testified that she was in the home with Pitts and A.G.C. during the weekend of May 1-3, 2020. J.P. testified she saw the Butt Paste set out in the bathroom. As to the allegation of sexual abuse, J.P. stated, "[M]y son loved his girls and I loved my grandchildren and if someone, even ... even if I had ... I want to say this. If I would think anything like that would happen, as much as my son loves his children, we'd be having a funeral today instead of a trial."

¶16. Pitts called Annette Bonds as his next witness. Bonds testified she lived next door to Pitts and his mother. Bonds testified that during the weekend in question, she saw "nothing" out of the ordinary. Pitts then called his aunt Rebecca, who, when asked about Pitts, stated, "I believe in all my heart he is a good father and I know he loves his children with no doubt."

¶17. Pitts testified at trial and said that the child support he provided was an "honor system type thing" not being enforced by any court order. Pitts testified that during the weekend in question, he was watching television with A.G.C. and his other daughter. Pitts testified that he then asked A.G.C., "Why are you keeping your hands in your pants?" She responded that her "vagina itches really bad," so Pitts obtained some Butt Paste for her. Pitts explained how he applied it:

> [I] basically just took the ... my hand. I opened it, slathered some on and just went on the inside of her crease. Because when she was scratching, it was not her vagina, like anywhere near the opening. It was the side of her leg and whatever that little part is that connects to the little mound right there. So all I did was take the Butt Paste, smear it on and up kind of over her mound and then down the side of her leg.

¶18. Pitts testified when he dropped A.G.C. off with K.C. he informed K.C. "[Y]ou may want to look at her front" and alerted her to the itching and Butt Paste application. When asked on direct examination if Pitts had ever inappropriately touched any parts of A.G.C., Pitts replied, "[A]bsolutely not."

¶19. Pitts then called Dequian Johnson to the stand. Johnson testified he was employed at the Child Advocacy Center (CAC) and conducted a forensic interview with A.G.C. on May 11, 2020. Pitts introduced into evidence the videotaped forensic interview of A.G.C. It was published to the jury.

¶20. Pitts then called his cousin Penny Foster as a witness. When asked if she had any concerns about Pitts being around children, Foster stated, "I have never observed anything that's concerning or inappropriate. He's a good parent when he's around my children and cousins at family events." Pitts also called his friend John Yoakum, who testified that Pitts was "one of the best guys" he had ever known and stated he had never observed Pitts mistreating children. Pitts also called his cousin Tara Clark as a witness. She confirmed that she had never observed Pitts mistreating children and stated that he was a "very differential caring person."

¶21. The jury found Pitts guilty of sexual battery. Pitts was sentenced to a term of thirty years in the custody of MDOC, with twenty years to serve and ten years suspended. Pitts was also ordered to register as a sex offender. Pitts filed a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, which was denied. He then appealed, arguing the screen used during A.G.C.'s testimony violated his constitutional right to confront the witness and alleging errors in evidentiary rulings. He asks this Court to reverse and remand for a new trial.

STANDARD OF REVIEW

¶22. We will reverse the trial court's denial of a motion for a new trial only if the trial court abused its discretion by doing so. *Turner v. State*, 291 So. 3d 376, 384 (¶22) (Miss. Ct. App. 2020). Our role as an appellate court is to "view the evidence in the light most favorable to the verdict and disturb the verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* (citing *Little v. State*, 233 So. 3d 288, 289 (¶1) (Miss. 2017)). "We do not reweigh evidence. We do not assess the witnesses' credibility. And we do not resolve conflicts between evidence. Those decisions belong solely to the jury." *Id.* "When addressing a statute's constitutionality, we apply a de novo standard of review, bearing in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 243-44 (¶3) (Miss. 2012). This Court reviews a trial court's ruling on discovery violations for an abuse of discretion. *Turner v. State*, 292 So. 3d 1006, 1016 (¶23) (Miss. Ct. App. 2020) (citing *Conley v. State*, 790 So. 2d 773, 782 (¶20) (Miss. 2001)).

ANALYSIS

I. Did the construction of a screen to prevent the child victim from seeing Pitts violate the United States Constitution?

¶23. Prior to the victim's testimony, the State requested that pursuant to Mississippi Code Annotat-

ed 99-43-101(2)(g) (Supp. 2018), the trial court would permit a screen to be placed in an effort to obscure A.G.C.'s view of Pitts while she was testifying. The defense objected, stating that "there's been no proof of why it is necessary" and objected to the constitutionality of the statute. The defense argued that the placement of a screen violated Pitts' right to confront the witness.[4] The State argued that under section 99-43-101(2)(g) "the statute states that she shall have that right and I'm not required to put on any proof that she be scared of the defendant." When the trial judge required the State to nevertheless explain why the screen was necessary in this case, the State argued, "[W]e have a four year old child. At the request of her guardian, she believes that it will be difficult for [A.G.C.] to testify while her father is staring at her."[5]

¶24. The trial court ultimately struck a balance between protecting the child from emotional trauma and protecting Pitts' constitutional rights. The trial court explained, "We have the screen set up where the defendant cannot be seen from the witness stand and we have a zoom video set up with the audio that's off on that because you can hear through the court speakers and it's set up so that the defendant can view the child as she testifies." Pitts was able to

---

[4] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; *accord* Miss. Const. art 3, § 26.

[5] During oral arguments, the Appellant's counsel suggested the screen was placed to keep the child from "running to her daddy" during her testimony. This is not supported by the record.

view the victim during her testimony via the Zoom video at all times.[6]

¶25. On appeal, Pitts argues Mississippi Code Annotated section 99-43-101(2)(g) is "unconstitutional and that the use of the screen prejudiced the jury against Appellant." Although the defendant was able to see the child testifying through the Zoom video, on appeal, Pitts argues the placement of the screen was nevertheless unconstitutional due to a violation of the Confrontation Clause and the Due Process Clause of the United States Constitution.

¶26. Mississippi Code Annotated section 99-43-101(2)(g) states:

> (2) In any proceeding in which a child testifies, a child shall have the following rights to be enforced by the court on its own motion or upon motion or notice of an attorney in the proceeding:
>
> ....
>
> (g) To permit the use of a properly constructed screen that would permit the judge and jury in the courtroom or hearing room to see the child but would obscure the child's view of the defendant or the public or both.

---

[6] During oral arguments, the Appellant's counsel suggested the placement of the screen interfered with the defendant's access to his counsel during trial. This is not supported by the record. Further, the Appellant's counsel conceded during oral arguments that Pitts could see and communicate with his counsel at all times during the child's testimony.

A. The Confrontation Clause

¶27. There are no Mississippi appellate cases specifically interpreting 99-43-101(2)(g). However, since the appellant argues the constitutionality of the statute, it is important to review the standards the Mississippi Supreme Court has set forth in reviewing this issue. "When addressing a statute's constitutionality, we apply a de novo standard of review, bearing in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 243-44 (¶3) (Miss. 2012).

¶28. "The statutes must be shown to be in direct conflict with 'the clear language of the constitution.'" *Clark v. Bryant*, 253 So. 3d 297, 300 (¶8) (Miss. 2018) (quoting *5K Farms, Inc. v. Miss. Dep't of Rev.*, 94 So. 3d 221, 227 (Miss. 2012)). "The interpretation of a statute is a question of law, and the standard of review on appeal is de novo." *Dancy v. State*, 287 So. 3d 931, 935-36 (¶14) (Miss. 2020) (citing *Rex Distrib. Co. Inc. v. Anheuser-Busch LLC*, 271 So. 3d 445, 449 (Miss. 2019)). "Therefore, we review the circuit court's interpretation and application of the law de novo, and its findings of fact will not be reversed if supported by substantial evidence." *Id.* (citing *Falkner v. Stubbs*, 121 So. 3d 899, 902 (Miss. 2013)). "Statutes ... come before us clothed with a heavy presumption of constitutional validity. The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect. When a par-

ty invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the [same] constitution as are we." *Trainer v. State*, 930 So. 2d 373, 377 (¶7) (Miss. 2006) (quoting *Hart v. State*, 87 Miss. 171, 39 So. 523, 524 (1905)). To be successfully challenged, the legislation must be shown to be in "palpable conflict with some plain provision of the constitution." *In re B.C.M.*, 744 So. 2d 299, 301 (¶7) (Miss. 1999) (citing *State v. Miss. Ass'n of Sup'rs Inc.*, 699 So. 2d 1221, 1223 (¶6) (Miss. 1997)).

¶29. Further, we must remember our position as the Mississippi Court of Appeals. The Mississippi Court of Appeals is "duty bound to apply existing precedent." *Bosarge v. State*, 786 So. 2d 426, 431 (¶11) (Miss. Ct. App. 2001). However, in this case, there are no cases directly on point. The fundamental task raised to this Court in the present case is interpreting the constitutionality of the particular statute. In doing this, we must look to the language of the statute to interpret the purpose of the Legislature. "Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rest." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 323-24, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (Breyer, J., dissenting).

¶30. As there are no Mississippi cases directly on point, the Mississippi Supreme Court has instructed us that turning to other states for guidance may

prove helpful. *Weatherly v. Welker*, 943 So. 2d 665 (¶8) (Miss. 2006). "In a case of first impression Mississippi Courts look to other jurisdictions in determining the matter." *Par. Transp. LLC v. Jordan Carriers Inc.*, 327 So. 3d 45, 54 (¶25) (Miss. 2021) (quoting *Forrest Gen. Hosp. v. Upton*, 240 So. 3d 410, 418 (¶32) (Miss. 2018)).

¶31. The United States Supreme Court addressed a child witness testifying behind a screen in *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). The defendant was charged with sexually assaulting two children. *Id.* At the jury trial, "the court granted the State's motion, pursuant to a 1985 statute intended to protect child victims of sexual abuse, to place a screen between the defendant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them." Under the statutory scheme in Iowa at the time, the child witness was permitted to testify either via closed-circuit television or behind a screen. The defendant was convicted of two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed. On appeal, the United States Supreme Court held the Confrontation Clause guaranteed the defendant a face-to-face meeting with witnesses appearing before the trier of fact. The United States Supreme Court explained:

> What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any dam-

> age to him, without suffering the penalty of an outraged citizenry. **In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.**" Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in *Pollitt*, *supra*, at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness, the right of confrontation "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 2062, 90 L.Ed. 2d 514 (1986).

Id. at 1017-19, 108 S.Ct. 2798 (emphasis added).

¶32. The Court reversed and remanded the conviction, holding, "[S]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.* at 1020, 108 S.Ct. 2798. The Court importantly noted, "We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." *Id.* at 1021, 108 S.Ct. 2798. The Court held that rights conferred by the Confrontation Clause are not absolute and may give way to other important interests, but a "legislatively imposed presumption of trauma" was not sufficient to justify an exception. *Id.*

¶33. Justice O'Connor, in her concurrence in *Coy*, gave further latitude and explained that future cases

may prove not to be a violation of the Confrontation Clause:

> But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. Rather, the Court has time and again stated that the Clause **"reflects a preference for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants**.

Id. at 1024, 108 S.Ct. 2798 (emphasis added) (citations omitted).

¶34. Just two years later, the United States Supreme Court expanded on what a permissible exception would be under *Coy*. The defendant in *Maryland v. Craig* was charged with sexual assault and sexual battery arising out of her operation of a preschool and abuse of the students. *Maryland v. Craig*, 497 U.S. 836, 840, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Under the Maryland statute in place at the time, the child was permitted to testify via one-way closed-circuit television. *Id.* To invoke the procedure, the trial judge had to first "determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.* at 841, 110 S.Ct. 3157. "Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child wit-

ness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom." *Id.* "During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel ...." *Id.* at 841-42, 110 S.Ct. 3157. The Supreme Court approved this statutory scheme as an exception under *Coy*. *Id.* at 860, 110 S.Ct. 3157. The United States Supreme Court held a state's "interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure," provided that the State makes an adequate showing of necessity in an individual case. *Id.* at 855, 110 S.Ct. 3157.

¶35. The Supreme Court held the right to face-to-face confrontation was not absolute and could be denied if the denial was necessary to further an important public policy and the reliability of the testimony was otherwise assured. *Id.* The Court stated that "a State's interest in the physical and psychological well-being of child abuse victims" was an important public policy that would "outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853, 110 S.Ct. 3157. The Court explained that the core elements of the confrontation clause must be preserved:

> The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause **by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversar-**

> **ial testing** that is the norm of Anglo-American criminal proceedings.

Id. at 846, 110 S.Ct. 3157 (emphasis added). The Court explained that an exception to the rights under the Confrontation Clause "would surely be allowed only when necessary to further an important public policy ... only upon a showing of something more than the generalized, legislatively imposed presumption of trauma underlying the statute at issue in that case." *Id.* at 844-45, 110 S.Ct. 3157 (internal quotation marks omitted).

¶36. Under *Craig*, the trial court must make individualized findings that each child witness needs special protection. *Id.* First, the requisite finding of necessity must be case-specific. *Id.* at 855, 110 S.Ct. 3157. "The trial 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, 110 S.Ct. 3157. "Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify." *Id.* at 856, 110 S.Ct. 3157 (internal quotation mark omitted).

¶37. The Supreme Court upheld the Maryland statute, holding:

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause **does not prohibit use of a procedure** that, despite the absence of face-to-face

> confrontation, **ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation**. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consistent with the Confrontation Clause.

Id. at 846, 110 S.Ct. 3157 (emphasis added).

¶38. In *Griffith v. State*, 584 So. 2d 383, 388 (Miss. 1991), the Mississippi Supreme Court reversed Griffith's conviction for felonious sexual penetration and remanded upon finding the statements made by the child victim to her teacher were hearsay and impermissibly admitted. In doing so, the Court furnished "guidelines for the courts to use in determining whether out-of-court statements made by a victim of child sexual abuse should be admitted into evidence before a jury." *Id.* at 384. Importantly, the Court analyzed exceptions to the Confrontation Clause for child victims under *Craig*. The Court explained in order to justify using one of these procedures, such as a closed circuit, the State must make an adequate showing of necessity. *Id.* at 387.

¶39. Looking to other states, the Georgia Court of Appeals handled a similar issue in *Harris v. State*, 316, 269 Ga.App. 316, 604 S.E.2d 565 (2004). In that case, the defendant was charged with one count of molesting a child. *Id.* "Before trial, the State had requested that the victim be allowed to testify by

closed circuit television or in some other way such that she would not have to look directly at Harris. The State then requested that a blackboard be positioned so that the child would not be able to see Harris's face but that the jury could see her and Harris. After Harris objected, the court required the State to justify its request." *Id.* After a hearing in which the mother of the victim testified to the fear the child felt about seeing the defendant again, the trial judge permitted a blackboard to be placed at an angle in front of the testifying child to block the child's view of the defendant. *Id.* The Georgia Court of Appeals noted the defendant and jury were able to see the child as she testified. *Id.* The Georgia Court of Appeals upheld the conviction stating the defendant never raised the issue of the constitutional violation and had therefore waived the argument and the defendant's trial counsel was not ineffective for failing to object. *Id.*[7]

¶40. *People v. Rose*, 289 Mich.App. 499, 808 N.W.2d 301, 315 (2010), involves a case strikingly similar to the one at bar.[8] The defendant was

---

[7] *See also People v. Laframboise*, No. 323674, 2016 WL 299778, at *2 (Mich. Ct. App. Jan. 21, 2016), in which the Michigan Court of Appeals held that although the child victims were permitted to testify behind a screen, "all elements of defendant's right to confront these children remained in place."

[8] *See also United States v. Anderson*, 51 M.J. 145, 150 (C.A.A.F. 1999) (the Court of Appeals for the Armed Forces holding that a military judge did not commit error by permitting several child victims to testify behind a screen); *Washington v. Commonwealth of Kentucky*, No. 2003-SC-0703-MR, 2005 WL 924332, at *6 (Ky. Apr. 21, 2005) (the Supreme Court of Kentucky holding that the child victim's testimony while the defendant was behind a screen in the courtroom did not violate the Confrontation Clause); and *State v. Vogelsberg*, 297 Wis.2d

charged with four counts of first-degree sexual criminal conduct. *Id.* The victim was permitted to testify behind a screen under a Michigan statute, which provided that "if the trial court finds, on the motion of a party, that "the special arrangements specified in subsection (16) are necessary to protect the welfare of the witness, the court shall order those special arrangements." *Id.* The special arrangements under the statute "include excluding unnecessary persons from the courtroom during the witness's testimony, rearranging the courtroom to move the defendant as far from the witness stand as is reasonable, and using a questioner's stand or podium." *Id.* at 508, 808 N.W.2d 301. On appeal, Rose argued that the trial court erred to the extent that it relied on the Michigan statute because it failed to make the necessary findings under that statute and because the statute does not specifically permit the use of witness screens. *Id.* The appellate court concluded the necessary findings were made:

> In this case, the trial court clearly found that the use of the witness screen was necessary to protect J.B. when it invoked MCL 600.2163a and stated that it was "necessary to permit this to protect the welfare of this child." In making its findings, the trial court also clearly referred to the fact that J.B. had expressed fear of Rose

---

519, 724 N.W.2d 649, 655 (Ct. App. 2006) (the Court of Appeals of Wisconsin holding that the placement of a barrier between the defendant and child witness did not violate the Confrontation Clause). *See also People v. Laframboise*, No. 323674, 2016 WL 299778, at *4 (Mich. Ct. App. Jan. 21, 2016) (the Michigan Court of Appeals holding that although the child victims were permitted to testify behind a screen, "all elements of defendant's right to confront these children remained in place").

> and that, given her age, the nature of the offenses, and her therapist's testimony, there was "a high likelihood" that testifying face to face with Rose would cause her to "regress in her therapy, have psychological damage" and could cause her "to possibly not testify...." These findings were sufficient to warrant limiting Rose's ability to confront J.B. face to face. *See Craig*, 497 U.S. at 856-857, 110 S. Ct. 3157. In addition, aside from J.B.'s inability to see Rose, **the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process**.

Id. (emphasis added).[9]

¶41. Mississippi Code Annotated section 99-43-101(2)(g) is titled the Child Witness Standards of Protection. The statute states that "a child shall have the following rights" in any proceeding when the child testifies. Pitts raises concern about the word "shall" requiring the placement of a screen without requiring the court to specifically make a finding of fact for the necessity of a screen. The statute also states, "The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child." *Id.* Clearly, the leg-

---

[9] On federal habeas corpus review, the United States District Court for the Western District of Michigan held the Michigan Court's "resolution of Petitioner's confrontation clause challenge was neither contrary to, nor unreasonable application of, clearly established federal law." *Rose v. Rapelje*, No. 1:12-CV-1344, 2016 WL 4394214, at *4 (W.D. Mich. Aug. 18, 2016).

islative intent of this statute was to balance the defendant's rights and provide a child witness with certain protective rights. The statute contemplates and incorporates the importance of confrontation rights of the defendant to ensure compliance with those constitutional rights. The Supreme Court has addressed those confrontation concerns in the context of balancing a child's protection when testifying by requiring a finding of necessity for accommodation procedures.[10]

¶42. The trial court inquired of the State as to the necessity of a screen to be placed. The State responded on the record. In essence, the State argued that the child was a tender four years old. The State argued that the guardian of the child was concerned about the trauma to the child from having to testify with Pitts "staring" at her and requested precautionary measures. The court allowed the parties time for argument on the issue and *Craig* was specifically discussed. Then the court made its ruling allowing the placement of the screen but requiring a monitor be set up so the defendant could view the child witness.[11]

---

[10] *See Craig*, 497 U.S. at 855, 110 S.Ct. 3157; *Coy*, 487 U.S. at 1021, 108 S.Ct. 2798.

[11] The Court never made a specific finding of trauma to the child. Nothing requires the judge to recite the magic words to suddenly meet constitutional requirements if it is clear the judge made a finding of necessity. By way of analogy, in *Jones v. Mississippi*, —— U.S. ——, 141 S. Ct. 1307, 1320, 209 L.Ed.2d 390 (2021), the United States Supreme Court held that trial courts were not required to make on-the-record findings of facts. The Court stated it "has never required an on-the-record sentencing explanation or an implicit finding regarding those mitigating circumstances.... A sentencing explanation is not

¶43. In the present case, a four-year-old child was forced into an adult world, when sexually abused, while still emotionally immature. Further, this child was forced back into an adult world when required to testify about sexual abuse in the courtroom when the trial occurred. Courtrooms are open, usually large rooms and intimidating to most adults not familiar with its procedures. It can only be more for to a child who did not ask for any of the emotional abuse suffered at the hands of an adult. Instead of protecting the child as was meant throughout nature, the adult in this case, her father, was charged with and later convicted of sexually abusing her.

¶44. The trial court struck a balance between protecting legislatively established rights of a child witness and the constitutional rights of a person charged with a crime.[12] That balance, derives from

---

necessary to ensure that the sentencer in death penalty cases considers the relevant mitigating circumstances. It follows that a sentencing explanation is likewise not necessary to ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth." *Id.* Further, in *Jenkins v. State*, 75 So. 3d 49, 55 (¶18) (Miss. Ct. App. 2011), in the context of a Rule 403 balancing test, this Court held that although the trial judge did not use the "magic words," it was implicit in the judge's statements that the trial judge found the evidence more probative than prejudicial. Further, formal language is not required in making a finding under the Daubert standard. *See generally Clark v. State*, 315 So. 3d 987 (Miss. 2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 466, 211 L.Ed.2d 283 (2021).

[12] Other courts have upheld the use of other objects and the configuration of the courtroom to block the defendant from the view of the testifying child victim. In *Wilson v. State*, 121 Nev. 345, 114 P.3d 285, 297 (2005), the Supreme Court of Nevada held the prosecutor's placement of a podium which allowed the child to have her back to the defendant while testifying was not a violation of the Confrontation Clause. In *Smith v. State*, No.

the inherent power of the trial judge to control their courtroom. It is a longstanding rule that trial judges have the power to maintain control over the proceedings before it, one grounded in the "necessary and inherent power to regulate its proceedings." *Knott v. State*, 731 So. 2d 573, 576 (¶11) (Miss. 1999) (discussing the contempt power of courts). Furthermore, "[t]he manner of trial decorum ... are matters largely left to the discretion of the trial judge, as he is present, has the opportunity, as well as the duty, to see that the course of the trial is conducted in conformity with traditional notions of fairness and impartiality to the litigants." *New Orleans &N.E.R. Co. v. Weary*, 217 So. 2d 274, 279 (Miss. 1968). The Mississippi Supreme Court explained in *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377, 380 (1949), where a trial judge permitted the district attorney to ask a victim leading questions about the sexual act:

> It is of the greatest importance, in legal proceedings, that the truth be ascertained, yet, at the same time, that the fundamental rights of litigants be protected. Can we say the court abused its discretion under the circumstances

---

07-09-0009-CR, 2010 WL 2010914, at *6 (Tex. App. May 20, 2010), the Court of Appeals of Texas held the prosecutor standing between the child witness and the defendant during the victim's testimony did not constitute a violation of the Confrontation Clause. In *State v. Owens*, No. M201801830CCAR3CD, 2020 WL 1130667, at *7 (Tenn. Crim. App. Mar. 9, 2020), the Court of Criminal Appeals of Tennessee held the configuration of the courtroom which prevented the defendant from seeing the testifying child victim did not violate Confrontation Clause. *See also* Fern L. Kletter, *Conditions Interfering with Accused's View of Witness as Violation of Right of Confrontation*, 61 A.L.R.7th Art. 2 (2021).

> of this case? We do not think so. **In the first place, the trial court was in much better position to judge the necessity and propriety of his action than is this Court. He saw the witness and observed the delicacy of the situation. He noted her sensibility to going forward and explaining in detail the intimate acts necessary for the State to prove to make out its case.** One girl of sixteen years might be much more humiliated to give the necessary intimate details essential to the crime here charged than another of the same age. **Each case must depend upon its own circumstances, and the trial judge is the person best situated to decide upon the course of conduct necessary to elicit the truth and yet safeguard the rights of the accused, and unless this Court can say, from the whole record, he abused his discretion and the accused was deprived of a fair and impartial trial, we should not reverse a case because of such action.**

(Emphasis added).

¶45. The dissent argues Mississippi Code Annotated section 99-43-101(2)(g) could be applied in a manner consistent with the Confrontation Clause if the trial judge had supplemented the statute by making the findings that *Coy* and *Craig* require and if the record contained substantial evidence to support those findings. There was an on-the-record discussion where the court with the attorneys for the State and the defense discussed the statute and *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), and *Coy v. Iowa*, 487 U.S. 1012,

108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). It can be deduced from that on-the-record discussion that the court was aware of the statute and the requirements of *Craig* and *Coy*. The court inquired of the State as to the necessity of the screen. Only then did the court authorize the use of the screen.

¶46. At all times, Pitts was permitted to hear the child's testimony live and view her by looking at the monitor, which relayed the testimony in real-time. From a review of the record, it is obvious the child was subject to a full and thorough cross-examination. The jury, judge, and defense attorney all were able to view the witness and her demeanor at every moment during every word of her testimony. Pitts viewed the child's emotions and demeanor in real time and had unfettered access to his attorney at all times while in the same courtroom. Further, the concerns expressed as to the "adversarial" testing were met with the procedure utilized by the trial court in this case. Section 99-43-101(2)(g) functioned as legislators intended when considered in conjunction with *Craig* and *Coy*. Our rules of statutory construction and the supremacy of federal law require reading the statute in accordance with Supreme Court precedent. The child was protected while the defendant's right to confrontation also was ensured. As explained by the United States Supreme Court in *Craig*, certain "elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause." *Craig*, 497 U.S. at 861, 110 S.Ct. 3157. Each of those essential elements were protected and ensured in the present

case. The defendant's confrontation rights were not violated by the procedure used in this case.

B. Harmless Error

¶47. Notwithstanding the findings above, any Confrontation Clause violation is analyzed under a harmless error standard. *See Smith v. State*, 986 So. 2d 290, 300 (¶31) (Miss. 2008). In *Haynes v. State*, 934 So. 2d 983, 991 (¶40) (Miss. 2006), the Mississippi Supreme Court held, "[E]rrors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming." For a violation of a constitutional right to be held harmless, this Court must determine that the violation was harmless beyond a reasonable doubt. *Id.* at (¶31) (citing *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), similarly, "errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming." *Id.* at (¶38) (citing *Clark v. State*, 891 So. 2d 136, 142 (Miss. 2004)).

¶48. The Court of Appeals of Arkansas examined this issue in an analogous case. In *Bertrand v. State*, 2018 Ark. App. 274, 550 S.W.3d 416, 417 (Ark. Ct. App. 2018), an eight-year-old child was permitted to testify behind a screen without making the findings required by *Craig*. The screen in *Bertrand* was described as "a translucent screen through which shadows could be seen, but a direct view between the victim and the defendant was prohibited. The form of the individual sitting in the witness chair could be

seen, but details or a clear line of sight were obstructed." *Id.* The trial judge in *Bertrand* made no finding that the denial of the right of confrontation was necessary to further an important public policy. *Id.* The court held, "[W]hile we agree with Bertrand that this was error, we hold under the facts of this case that the error was harmless and therefore affirm." *Id.* The Court held that "the evidence overwhelmingly established Bertrand's guilt, and thus, any error was harmless." *Id.* at 418.

¶49. The screen did not prejudice the jury against Pitts; the evidence did. We find that if the placement of the screen were error, it was harmless. Under the standard in *Haynes*, there was overwhelming evidence of Pitts' guilt presented at trial. Both the child's mother and grandmother testified as to the child's consistent disclosure of the abuse. The child victim took the stand, and on cross-examination testified that while she still loved her father and wanted to see him, she "will just sleep somewhere else" so another incident with her father would not happen.

¶50. The most incriminating evidence was presented by Pitts himself. Pitts introduced the written statements of the mother and the grandmother at trial despite both having testified live. Pitts also introduced the child's forensic CAC interview and played it for the jury. During the video, the child was very talkative at first but appeared withdrawn when the touching was discussed. She told the interviewer, in a description consistent with her trial testimony, that her father put his finger in her vagina. Her exact words in the forensic interview were, "[W]hen I was trying to sleep he dug his finger in my vagina, [and] ... when he was done he said touch mine, touch

mine." Substantial evidence of Pitts' guilt was presented to the jury, and we find any error in placing the screen was harmless.

¶51. The dissent argues the placement of the screen was not harmless error. Under *Coy*, "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged ... had there been confrontation; such an inquiry would obviously involve **pure speculation**, and harmlessness must therefore be determined on the basis of the **remaining evidence.**" *Coy*, 487 U.S. at 1021-22, 108 S.Ct. 2798 (emphasis added).

¶52. The dissent argues that under this analysis, this Court should not consider the testimonies of the mother and grandmother because they were admitted under the tender-years exception. Under the Rules of Evidence, hearsay is admissible if the child (i) testifies or (ii) is unavailable as a witness, and other evidence corroborates the act. MRE 803(25). Unavailability is defined in Mississippi Rule of Evidence 804(6) as "a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially." A.G.C. was a four-year-old child and clearly met the definition of tender years. The testimonies of the mother and the grandmother were corroborated by each other's testimony and the forensic interview. The testimony of the mother and the grandmother should be considered as "remaining evidence" in a harmless error analysis.

¶53. The dissent further argues A.G.C.'s testimony should not be considered in a harmless error analysis. The dissent then speculates that Pitts

would "have had no need" to introduce the video of A.G.C.'s forensic interview, and, therefore, this Court also should not consider that evidence. Making such a tenuous connection appears to be the type of "pure speculation" that *Coy* seeks to avoid. Pitts never raises this argument or offered any reason why he wanted to introduce the forensic interview. The dissent admits that during closing arguments Pitts' attorney argued A.G.C. gave inconsistent statements in the forensic interview. If we are to speculate, Pitts likely would have argued this point whether A.G.C. testified at trial with or without a screen. Further, the forensic interview of a child has been held admissible evidence under the tender-years exception by this Court and the Mississippi Supreme Court and was, in fact, admitted by Pitts himself. *Little v. State*, 72 So. 3d 557, 561 (¶15) (Miss. Ct. App. 2011); *Lambert v. State,* 101 So. 3d 1172, 1175 (¶10) (Miss. Ct. App. 2012); *Cook v. State*, 161 So. 3d 1057, 1069 (¶33) (Miss. 2015). Yet the dissent wants this Court to speculate as to Pitts' trial strategy and ignore the clearly admissible evidence that Pitts introduced in its harmless error analysis. We decline to do so.

C. Due Process Clause

¶54. Pitts further argues the placement of the screen "only served the purpose to prejudice him in the eyes of the jury" and likens the practice to the defendant being shackled in front of the jury. The appellant argues the screen "tainted the presumption of innocence in the minds of the jury" and violated his constitutional right to due process.

¶55. Pitts failed to present this argument to the trial court. "This Court's general policy is that errors raised for the first time on appeal will not be considered, especially where constitutional questions are concerned." *Almasri v. Miss. Dep't of Rev.*, 282 So. 3d 698, 702 (¶10) (Miss. Ct. App. 2019) (quoting *Powers v. Tiebauer*, 939 So. 2d 749, 752 (¶8) (Miss. 2005)) (citing *In re Miss. Medicaid Pharm. Average Wholesale Price Litig.*, 190 So. 3d 829, 845 (¶35) (Miss. 2015)). Pitts did object to the placement of the screen as a Confrontation Clause violation but never argued to the trial court it was a Due Process Clause violation. Pitts, therefore, waived this issue by failing to raise it at the trial level.

¶56. Notwithstanding the procedural bar, the Due Process Clause of the Fourteenth Amendment to the United States Constitution mandates that "criminal prosecutions must comport with prevailing notions of fundamental fairness." *Blakeney v. State*, 236 So. 3d 11, 27 (¶60) (Miss. 2017) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)) (citing *Freeman v. State*, 121 So.3d 888, 895 (Miss. 2013)). Trials are chaotic and adversarial. We strive not for a perfect trial, but for a fundamentally fair trial. The Supreme Court of Mississippi explained in *Clark v. State*, 891 So. 2d 136, 141 (¶19) (Miss. 2004):

> "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 1570, 36 L.Ed. 2d 208 (1973).... That is, the Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial.

Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L.Ed. 2d 674 (1986).

¶57. In *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), the defendant was charged with the first-degree assault of a child. The state requested the child testify in chambers, and after a hearing on the request, the Court permitted the child to testify behind a screen. *Id.* at 672, 757 N.W.2d 7. The Supreme Court of Nebraska held the use of a screen in front of a testifying child was inherently prejudicial and a violation of the Due Process Clause. *Id.* at 673, 757 N.W.2d 7.[13] The court held, "We conclude that the screen unduly compromised the presumption of innocence fundamental to the right to a fair trial. The presence of the screen in the courtroom, in an obvious and peculiar departure from common practice, could have suggested to the jury that the court believed S.M. and endorsed her credibility, in violation of Parker's right to a fair trial." *Id.* at 663, 757 N.W.2d 7 The Nebraska Court explained jurors could conclude that trial court placed the screen "because the court believed her accusations were true." *Id.* at 672, 757 N.W.2d 7. We disagree.

¶58. In *People v. Rose*, 289 Mich.App. 499, 808 N.W.2d 301, 315 (2010), which we discussed above, the Michigan Court of Appeals upheld the conviction holding there was no due process violation where a screen was placed in front of the defendant. The court explained that not every practice that tends to single out the accused must be struck down. *Id.* This is because the jurors are understood to be "quite

---

[13] The court found this issue dispositive and did not discuss the Confrontation Clause.

aware that the defendant appearing before them did not arrive there by choice or happenstance...." *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The United States Supreme Court explained in *Holbrook*, 475 U.S. at 569, 106 S.Ct. 1340, "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." The court in *Rose*, 808 N.W. 2d at 316, explained:

> Although a juror might conclude that the witness fears the defendant because the defendant actually harmed the witness, a reasonable juror might also conclude that the witness fears to look upon the defendant because the witness is not testifying truthfully. A reasonable juror could also conclude that the screen is being used to calm the witness's general anxiety about testifying rather than out of fear of the defendant in particular.

¶59. A screen is not the sort of trapping that generally is associated with those who have been convicted of a crime as prison garb or shackles are. *Coy*, 487 U.S. at 1034-35, 108 S.Ct. 2798 (Blackmun, J., dissenting). It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward the defendant. The placement of a screen in front of a child victim is clearly about the protection of the child, not about placing undue fault or burden on the defendant.

¶60. In the present case, the jury was instructed, "You should not be influenced by bias, sympathy or

prejudice. Your verdict should be based on the evidence and not be open to speculation, guesswork or conjecture." We hold that the use of a screen was not inherently prejudicial to Pitts, nor was Pitts prejudiced by the use of a screen in this case.

II. Did the trial court err by excluding the testimony of the Appellant's expert witnesses, Dr. Mark Webb and Dr. Gerald O'Brien?

¶61. The trial court held that both proposed defense experts were excluded because the late disclosure of their reports was "a clear discovery violation." The experts examined Pitts in October 2020. The reports were not turned over to the State until January 2021, days before trial. There was no explanation given as to why this information could not have been turned over earlier.

¶62. Under Mississippi Rule of Criminal Procedure 17.3, a defendant must "promptly" disclose any reports, statements, or opinions of experts that the defendant may offer into evidence. This Court reviews a trial court's ruling on discovery violations for an abuse of discretion. *Turner v. State*, 292 So. 3d 1006, 1016 (¶23) (Miss. Ct. App. 2020) (citing *Conley v. State*, 790 So. 2d 773, 782 (¶20) (Miss. 2001)). "This Court must determine (1) whether such a violation occurred[,] and, if so, (2) whether the exclusion of this evidence was an appropriate remedy." *Myers v. State*, 145 So. 3d 1143, 1147-48 (¶10) (Miss. 2014) (citing *Williams v. State*, 54 So. 3d 212, 213-14 (¶5) (Miss. 2011)). Trial courts are vested with substantial discretion over the admission of evidence outside of discovery deadlines, and appellate courts will not reverse a trial court's decision regarding discovery

violations without finding an abuse of discretion. *Chase v. State*, No. 2018-KA-01501-COA, 2020 WL 772661, at *2 (¶11) (Miss. Ct. App. Feb. 18, 2020) (quoting *Gray v. State*, 799 So. 2d 53, 60 (¶26) (Miss. 2001) (citing *Hunter v. State*, 187 So. 3d 674, 678 (¶15) (Miss. Ct. App. 2016)).

¶63. In this case, this disclosure was clearly not "prompt" as required by the Rules of Criminal Procedure. Exclusion of the evidence was a proper remedy because the prosecution was not given a reasonable time to review the evidence prior to trial. The trial judge did not abuse his discretion in excluding the experts' testimonies because of a discovery violation.

¶64. The judge stated the "second basis" for the exclusion of the expert testimony was that the judge did not believe the opinions met the standard in Mississippi Rule of Evidence 702, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

¶65. Citing *Middleton v. State*, 980 So. 2d 351, 359 (¶31) (Miss. Ct. App. 2008), Pitts argues that the Mississippi Supreme Court has held that an expert in child-sexual-abuse cases may testify about common characteristics associated with child-sexual-abuse, and this Court should extend that ruling to expert testimony concerning a defendant's characteristic of a sexual disorder. The Court of Appeals of Mississippi in *Middleton* upheld the introduction of expert testimony concerning the physical characteristics of a sexually abused child. *Id.* at (¶32). This decision was based on examining the medical report of the child and conclusion based on scientifically reliable methods that the injuries were a result of abuse or human intervention. *Id.* at (¶29). The proposed expert testimony in this case is different from that approved in *Middleton* because no physical characteristics exist to tell an expert whether a person is a pedophile. Importantly, the trial judge noted, "I do not believe that these opinions meet the 702 standard in that they are not the product of reliable principles."

¶66. A trial judge's decision to exclude expert testimony is reviewed for an abuse of discretion and the trial court's decision will stand unless it was arbitrary and clearly erroneous. *Clark*, 315 So. 3d at 994-95 (¶6). Pursuant to Mississippi Rule of Evidence 702, the trial judge must act "as gatekeeper on questions of admissibility of expert testimony." *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 40 (¶25) (Miss. 2003). "The proponent of expert testimony must show by a preponderance of the evidence that the expert is qualified, that he possesses scientific knowledge that will assist the jury, and that his

testimony is based on sufficient facts and data and reliable principles and methods, reliably applied to the facts of the case." *Brown v. Prof'l Bldg. Servs. Inc.*, 284 So. 3d 754, 761-62 (¶30) (Miss. Ct. App. 2017), *aff'd*, 252 So. 3d 23 (Miss. 2018). The trial judge "must consider whether the expert opinion is based on scientific knowledge (reliability) and whether the expert opinion will assist the trier of fact to understand or determine a fact in issue (relevance)." *Edmonds v. State*, 955 So. 2d 787, 791 (¶5) (Miss. 2007). "To be relevant, the evidence must 'fit' the case by being 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Corrothers v. State*, 148 So. 3d 278, 294 (¶24) (Miss. 2014) (quoting *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

¶67. Mississippi applies the *Daubert* standard for admissibility of expert testimony. *McLemore*, 863 So. 2d at 35 (¶5) (adopting the federal standard for admissibility of expert witness testimony articulated in *Daubert*, 509 U.S. at 592-94, 113 S.Ct. 2786, for Mississippi courts). It is the task of the trial court to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786.

¶68. Both experts were admitted without objection as experts in their respective fields. The trial court excluded both doctors' testimonies stating their reports were not based on reliable scientific knowledge. This Court repeatedly has upheld the exclusion of nearly identical expert testimony. *See*

McCammon v. State, 299 So. 3d 873 (Miss. Ct. App. 2020), *cert. denied*, 299 So. 3d 794, 884 (¶34) (Miss. 2020). In *Earnest v. State*, 805 So. 2d 599, 606 (¶22) (Miss. Ct. App. 2002), this Court upheld the exclusion of Dr. O'Brien's testimony in a similar case, holding that his testimony that the defendant did not fit the profile of a sexual offender was not derived from scientific principles generally accepted in the field because no scientifically acceptable profile of a sex offender exists.

¶69. The trial judge did not abuse his discretion in excluding both Dr. Webb and Dr. O'Brien's expert testimony. The defense committed a clear discovery violation in the late disclosure of the expert reports. Further, the expert opinions failed to meet the second prong of the *Daubert* test, as they were not based on reliable scientific means.

III. Did the trial court err by admitting prior bad acts under Mississippi Rule of Evidence 404(b)?

¶70. Pitts argues the court erred in admitting A.G.C.'s "past allegations," but after a close reading of the transcript, the jury never heard evidence of any other allegations against Pitts. The trial court held a pre-trial conference concerning the State's intent to introduce evidence of Pitts' prior bad acts against the victim. This evidence was never introduced at trial. Pitts makes no mention of any specific testimony to explain what "past allegations" he is referring to. The trial court did not have to conduct a Rule 403 balancing inquiry or grant a limiting instruction because this testimony was never introduced at trial. This issue is moot.

IV. Did the trial court err by allowing witnesses to testify pursuant to the tender-years exception?

¶71. The trial court conducted a pre-trial hearing on the admissibility under the tender-years exception of the testimony of K.C. and T.C. concerning statements made by A.G.C. The trial court ruled both statements were admissible. Pitts argues the testimony had no probative value, was used to bolster the victim's testimony, and was a ruse to place his prior bad acts in front of the jury.

¶72. The State failed to address this argument in its brief. Appellate courts have two options in addressing an appellee's failure to file a brief:

> The first alternative is to take the appellee's failure to file a brief as a confession of error and reverse, [and] this should be done when the record is complicated or of large volume and the case has been thoroughly briefed by the appellant with apt and applicable citation of authority so that the brief makes out an apparent case of error[;] the second alternative is to disregard the appellee's error and affirm[, and] this alternative should be used when the record can be conveniently examined and such examination reveals a sound and unmistakable basis or ground upon which the judgment may be safely affirmed.

In re L.T. v. Youth Ct. of Warren Cnty., 335 So. 3d 599, 602 (¶6) (Miss. Ct. App. 2022). In *Jordan v. State*, 211 So. 3d 713, 716 (¶11) (Miss. Ct. App. 2016), this Court held, "[A]n appellee's failure to file a brief on appeal is tantamount to confession of the errors alleged by the appellant. The same rule ap-

plies where the appellee files a brief, but fails to address an issue." But "automatic reversal is not required if this Court can say with confidence that the case should be affirmed." *Id.* at (¶12); *Dille v. State*, 334 So. 3d 1162, 1188 (¶71) (Miss. Ct. App. 2021).

¶73. This court reviews the admission of hearsay evidence for abuse of discretion. *Blocton v. State*, 340 So. 3d 384 (¶14) (Miss. Ct. App. 2022) (citing *Garcia-Lebron v. State*, 323 So. 3d 1159, 1165 (¶21) (Miss. Ct. App. 2021)). To satisfy the element of the tender-years exception that statements have "substantial indicia of reliability" the trial judge has to make an overall determination that a child declarant was particularly likely to be telling the truth. *See* MRE 803(25); *accord Webb v. State*, 113 So. 3d 592, 596 (¶18) (Miss. Ct. App. 2012).

¶74. Here, the trial court, on the record, thoroughly considered and weighed the tender years factors. The court found that the child "had no apparent motive to lie" and that there was "nothing here about the general character of the declaring that would weigh toward excluding the testimony," there was more than one person who heard the statement, the statements were made spontaneously to the mother and to the CAC worker using techniques not suggestive in nature, the allegations were made within days after the event, "I don't believe that there's any possibility it's a faulty recollection," and the statements to CAC were on video. The child was "very verbal," and nothing about her age and maturity would weigh against the admissibility. "She is young enough that she would not have any knowledge or experience about digital penetration of her vagina." "Almost all these factors weigh in favor and provide[

] substantial indicia of reliability." The court found that "the probative value of these statements [is] not substantially outweighed by the danger of unfair prejudice."

¶75. The judge conducted a thorough tender-years analysis on the record and found the child was likely telling the truth. This testimony was not "a ruse to place prior bad acts in front of the jury"; no prior bad acts were ever placed in front of the jury. There was no concern of confusing the jury. The testimony was used to describe A.G.C.'s initial disclosures that led to the charges against Pitts. The court did not abuse its discretion in admitting the testimony.

V. Was there cumulative error?

¶76. Pitts argues that "as a result of the cumulative errors in the trial, Appellant was denied a fair trial." The State responds that "there can be no cumulative error where, as here, there is no individual error," citing *Whittaker v. State*, 269 So. 3d 1226, 1230 (¶9) (Miss. Ct. App. 2018). Thus, the State contends, no cumulative error exists.

¶77. The cumulative-error doctrine provides that "where one error, standing alone, may not warrant reversal, reversal may be required if the errors, taken together, 'create such an atmosphere of bias, passion, and prejudice that they effectively deny the defendant a fundamentally fair trial.'" *Jones v. State*, 203 So. 3d 600, 617 (¶58) (Miss. 2016) (quoting *Dickerson v. State*, 175 So. 3d 8, 35 (¶58) (Miss. 2015)).

¶78. As stated above, Pitts was not prejudiced by the use of the screen in the courtroom. Further, the trial court did not err when it excluded the expert testimony. There was no prior bad-acts testimony

introduced in this case. The trial court did not err when it admitted the hearsay testimony under the tender-years doctrine. Thus, no cumulative error exists.

¶79. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, McCARTY AND SMITH, JJ., CONCUR. McDONALD, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. WILSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, J.; McDONALD, J., JOINS IN PART. EMFINGER, J., NOT PARTICIPATING.

WILSON, P.J., DISSENTING:

¶80. The use of a screen to block the alleged victim's view of Pitts during her testimony at trial clearly violated Pitts's constitutional right "to be confronted with the witnesses against him," U.S. Const. amend. VI, as interpreted by the United States Supreme Court. That Court has held that in a case such as this, a child witness must testify in the defendant's presence unless the evidence shows, and the trial court specifically finds, that testifying in the defendant's presence would cause the child significant trauma or emotional distress. In the present case, there was no such evidence, and the trial court made no such findings. This Court is, of course, "under authority of the United States Supreme Court," and we must follow its decisions in all "comparable cases." *Bolton v. City of Greenville*, 253 Miss. 656, 666, 178 So. 2d 667, 672 (1965). Therefore, we are bound to recognize that the use of a screen in this

case violated Pitts's rights under the Confrontation Clause. In addition, the State cannot show that this constitutional error was harmless beyond a reasonable doubt. Accordingly, we must reverse the conviction and remand the case for a new trial. Since the majority instead affirms, I respectfully dissent. I also note that trial courts should avoid using the statute at issue in this case because it likely violates the separation-of-power provisions of the Mississippi Constitution, as interpreted by the Mississippi Supreme Court.

I. Under binding United States Supreme Court precedent, a trial court *must* make a case-specific and individualized finding that testifying in the defendant's presence would traumatize a child witness before the child can testify at trial in the absence of face-to-face confrontation with the defendant.

¶81. Two United States Supreme Court cases clearly resolve the Confrontation Clause issue in this case. First, in *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), Coy was charged with sexually assaulting two thirteen-year-old girls. *Id.* at 1014, 108 S.Ct. 2798. Over Coy's objection, "[t]he trial court approved the use of a large screen to be placed between [Coy] and the witness stand during the girls' testimony. After certain lighting adjustments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all." *Id.* at 1014-15, 108 S.Ct. 2798. The trial court's ruling was based on an Iowa statute that permitted a screen to be placed between a child witness and the defendant if the court

(a) took steps to ensure that the defendant and his attorney could confer during the testimony and (b) informed the child witness that the defendant could see and hear the child during the testimony. *Id.* at 1015 n.1, 108 S.Ct. 2798 (quoting Iowa Code § 910A.14 (1987)).

¶82. However, the United States Supreme Court held that the screen violated Coy's constitutional right to confront his accusers. *Id.* at 1020, 108 S.Ct. 2798. The Court reviewed the historical roots of the defendant's right "to be confronted with the witnesses against him" and held that the Confrontation Clause clearly guarantees a "face-to-face encounter" or "confrontation" between the defendant and the witnesses who testify against him at trial. *Id.* at 1015-20, 108 S.Ct. 2798. The Court noted that most of its prior Confrontation Clause decisions had addressed the admissibility of out-of-court statements or limitations on cross-examination because "there is at least some room for doubt (and hence litigation)" regarding the Clause's application to such issues. *Id.* at 1016, 108 S.Ct. 2798. In contrast, "'simply as a matter of English' [the Confrontation Clause] confers at least 'a right to meet *face to face* all those who appear and give evidence at trial.'" *Id.* (quoting *California v. Green*, 399 U.S. 149, 175, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring)). The Court held that the screen used in *Coy* violated the Confrontation Clause because it "was specifically designed to enable the complaining witnesses to avoid viewing [Coy] as they gave their testimony, and ... it was successful in this objective." *Id.* at 1020, 108 S.Ct. 2798. Indeed, the Court concluded that it was "difficult to imagine a more obvious or damaging vio-

lation of the defendant's right to a face-to-face encounter." *Id.*

¶83. In *Coy*, the State argued that the defendant's right to confront the witnesses at trial "was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 1020, 108 S.Ct. 2798. But the Supreme Court stated that it would "leave for another day ... the question whether any exceptions exist" to the defendant's right to confront witnesses at trial "face to face." *Id.* at 1021, 108 S.Ct. 2798. The Court stated that any such exception would require "something more than the type of generalized legislative finding underlying [the Iowa] statute." *Id.* The Court further stated that "any conceivable exception" would require "individualized findings that the[ ] particular witness[ ] needed special protection." *Id.*

¶84. In a concurring opinion, Justice O'Connor stated that she "would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy." *Id.* at 1025, 108 S.Ct. 2798 (O'Connor, J., concurring). But Justice O'Connor agreed that an exception would require "more than [a] generalized legislative finding of necessity." *Id.* She stated "that the strictures of the Confrontation Clause [might] give way to the compelling state interest of protecting child witnesses" only if the court first made "a case-specific finding of necessity." *Id.*

¶85. In *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Court revisited the issue *Coy* left open. In *Craig*, child witnesses in a sex abuse prosecution were allowed to testify outside the defendant's presence by one-way closed-circuit tele-

vision. *Id.* at 840-43, 110 S.Ct. 3157. Under Maryland law, the trial judge could allow such testimony only if the judge first found that testifying in court in the defendant's presence would cause the child witness to "suffer[ ] serious emotional distress such that the child [could not] reasonably communicate." *Id.* at 841, 110 S.Ct. 3157 (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-102(a)(1)(ii) (1989)). If the judge made that finding, the child would be examined and cross-examined in a separate room in the presence of the prosecutor and defense counsel, while the judge, the jury, and the defendant would remain in the courtroom and observe by one-way closed-circuit television. *Id.* In addition, the defendant would remain in electronic communication with his attorney throughout the child's testimony. *Id.* at 842, 110 S.Ct. 3157.

¶86. In *Craig*, the Supreme Court held "that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855, 110 S.Ct. 3157. The Court also held that "[t]he requisite finding of necessity *must of course be a case-specific one*: The trial court *must* hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* (emphasis added). More specifically, the Court held that "[t]he trial court must ... find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the

defendant." *Id.* at 855-56, 110 S.Ct. 3157. That is, "[d]enial of face-to-face confrontation" is constitutionally permissible only if "it is the presence of the defendant that causes the trauma." *Id.* "Finally, *the trial court must find* that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify." *Id.* (emphasis added) (quotation marks and citations omitted). The Court held that the Maryland statute satisfied these constitutional requirements because it required a preliminary judicial "determination that the child witness would suffer 'serious emotional distress such that the child cannot reasonably communicate.'" *Id.*

¶87. Less than a year after *Craig* was decided, the Mississippi Supreme Court adopted a rule of evidence that incorporates and complies with *Craig*'s constitutional requirements. MRE 617. Under Mississippi Rule of Evidence 617,

> the court may order that a child's testimony be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if the court determines that:
>
> (1) the child is under the age of 16 years;
>
> (2) the testimony is that an unlawful sexual act, contact, intrusion, penetration, or other sexual offense was committed on the child; and
>
> (3) there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify:
>
> (A) in open court; and

> (B) in a criminal case, in the presence of the accused.

MRE 617(a). In addition, "the court *must*: (A) conduct a hearing in camera; and (B) make specific findings of fact, on the record, as to the basis of the ruling." MRE 617(b)(2) (emphasis added).

II. In the absence of a finding—or any evidence—that A.G.C. would be traumatized by testifying in Pitts's presence, the use of a screen to block A.G.C.'s view of Pitts violated Pitts's rights under the Confrontation Clause.

¶88. In the present case, the State opted not to proceed under Rule 617. Instead, at the end of proceedings on the afternoon before trial, the State for the first time requested permission to use a "screen" during A.G.C.'s testimony pursuant to a statute enacted in 2015, Miss. Code Ann. § 99-43-101(2)(g) (Rev. 2020). After the jury had been selected and the trial judge had finished hearing pretrial motions, the judge asked if there was "[a]nything else" he needed to address before trial began the following morning. At that point, the State cited the statute and "ask[ed] for permission to permit the use of a properly constructed screen that would prevent [A.G.C.] from having to view [Pitts] in the courtroom during her testimony." The State argued that A.G.C. had a "right" to such a screen because the statute provides that "a child shall have" that and certain other "rights." Defense counsel objected to the lateness of the State's request, and the judge stated that he would have to research the issue overnight because, like defense counsel, he had "never heard of that statute."

¶89. The following day, before A.G.C. testified, Pitts objected that the proposed screen would violate his rights under the Confrontation Clause and that there was no evidence that A.G.C. was afraid of him. Pitts argued that testimony from the pretrial tender-years hearing indicated that A.G.C. was "not afraid of him" and indeed still "ha[d] a great deal of love for him." In response, the State asserted that A.G.C.'s mother "believe[d] that it [would] be difficult for [A.G.C.] to testify [with Pitts] staring at her."

¶90. But the State also argued,

> We don't have to put on that proof .... [T]he statute states that [A.G.C.] shall have that right[,] and I'm not required to put on any proof that she's scared of [Pitts].... [T]he Mississippi Crime Victim's Bill of Rights [provides] that she shall be given that right if it's requested.

Moreover, the State specifically pointed out that "a different subsection" of the same statute provided that a child could testify by video deposition outside the defendant's presence, and this different subsection did "outline[ ] ... certain requirements or certain proof that the State must put on about the child and any reason that [procedure] may be necessary." *See* Miss. Code Ann. § 99-43-101(5). But the State argued that under subsection (2)(g), the child witness has a "right" to a screen while testifying in court, and "there are no requirements that the State put on proof on how the child might be affected by viewing [the] defendant [during her] testimony." The trial judge then directed defense counsel to address the fact that subsection (2)(g) "appears to be mandatory" and "appears not to require any proof."

¶91. When the trial judge ultimately announced his ruling, he again stated that the "statute ... appear[ed] to be mandatory," and he expressed "some concerns about [his] ability to declare the statute unconstitutional and fail to follow it." The judge also stated that he was "concerned about the constitutionality of the statute." Nonetheless, the judge ruled that A.G.C. could testify behind a screen that blocked her view of Pitts.

¶92. The use of a screen in this case was clearly inconsistent with the United States Supreme Court's holdings in *Coy* and *Craig*. In *Coy*, the Court held that any possible exception to the defendant's right to confront witnesses "face to face" would require "something more than [a] generalized legislative finding." *Coy*, 487 U.S. at 1021, 108 S.Ct. 2798. The Court held that "any conceivable exception" would require "individualized findings that the[ ] particular witness[ ] needed special protection." *Id.* Then in *Craig*, the Court held that a child witness may "testify at trial ... in the absence of face-to-face confrontation with the defendant" *only* if the trial court first makes a case-specific finding of "necessity." *Craig*, 497 U.S. at 855, 110 S.Ct. 3157. The Court also held that "[t]he requisite finding of necessity *must of course be a case-specific one*: The trial court *must* hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* (emphasis added). In addition, "[t]he trial 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, 110 S.Ct. 3157. "Finally, *the trial court must*

find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify." *Id.* (emphasis added) (quotation marks and citations omitted).

¶93. In this case, the trial judge made no such individualized findings. The problem is not just that the judge did not "recite the magic words," as the majority suggests. *Ante* at n.11.[14] The problem is that the judge did not—in form or substance—make any of the individualized, case-specific findings that the United States Supreme Court has held are absolutely necessary in a case such as this. *Coy*, 487 U.S. at 1021, 108 S.Ct. 2798; *Craig*, 497 U.S. at 855-56, 110 S.Ct. 3157. In support of its eve-of-trial request for a screen, the State argued that it "was not required to put on any proof" that testifying in Pitts's presence would traumatize A.G.C., and the trial judge ultimately agreed that the statute was "man-

---

[14] The majority's "analogy" to *Jones v. Mississippi*, —— U.S. —— –, 141 S. Ct. 1307, 209 L.Ed.2d 390 (2021), *see ante* at n.11, is misplaced. In *Jones*, the United States Supreme Court "unequivocally stated that a separate factual finding of permanent incorrigibility is *not* required before a sentencer imposes a life-without-parole sentence on a murderer under 18." *Id.* at 1318-19 (emphasis added). In *Jones*, the Court also held that not even "an 'implicit finding' of permanent incorrigibility" is required when a sentencing court addresses that issue. *Id.* at 1319. In stark contrast, addressing the defendant's right to face-to-face confrontation, the United States Supreme Court has twice held that the Constitution *does* require the trial judge to make individualized and case-specific findings that testifying in the defendant's presence will traumatize the child witness. *Coy*, 487 U.S. at 1021, 108 S.Ct. 2798; *Craig*, 497 U.S. at 855-56, 110 S.Ct. 3157.

datory." Accordingly, the judge made none of the individualized findings required by *Coy* and *Craig*.

¶94. Moreover, the record evidence in the case would not have supported a finding that testifying in Pitts's presence would have traumatized A.G.C. During a pretrial hearing, A.G.C.'s mother testified that A.G.C. was still "very adamant that she love[d] her dad, that she misse[d] her dad, *and that she want*[*ed*] *to see her dad*." (Emphasis added). The only evidence regarding the effect that testifying in Pitts's presence would have on A.G.C. was her mother's statement that A.G.C. "was very distraught over the fact that she would have to come to court and testify with her daddy in the courtroom *and not be able to talk to him*." (Emphasis added). But A.G.C.'s distress that she would not be able to talk to Pitts if she saw him in the courtroom does not establish that Pitts's presence would have traumatized A.G.C. or caused her significant emotional distress. Indeed, at trial, A.G.C. testified that she loved and missed Pitts and that she would want to hold him and hug him if she could see him. Thus, in addition to the lack of any actual findings regarding the potential for trauma to A.G.C., there is simply no evidence in the record that could satisfy the requirements of *Coy* and *Craig*.[15] In

---

[15] Despite the absence of such evidence, the majority says that "[*t*]*he State argued that* the guardian of the child was concerned about the trauma to the child from having to testify with Pitts 'staring' at her ...." *Ante* at ¶42 (emphasis added). Of course, mere "arguments of counsel are not evidence." *One 1970 Mercury Cougar v. Tunica County*, 115 So. 3d 792, 796 (¶20) (Miss. 2013) ("No citation of authority is necessary for the fundamental proposition[ ] ... that the arguments of counsel are not evidence."). In addition, what the State actually argued was that A.G.C.'s "guardian ... believe[d] that it [would] be difficult for

the absence of such findings and evidence, the use of a screen in this case clearly violated the Confrontation Clause, as interpreted in *Coy* and *Craig*.[16]

III. The constitutional error in this case cannot be dismissed as "harmless error."

¶95. A violation of the Confrontation Clause may be deemed harmless error only "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Smith v. State*, 986 So. 2d 290, 300 (¶31) (Miss. 2008) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Moreover, "[o]nce the constitutional error has been established, the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt." *Id.*

¶96. Applying this exacting harmless-error standard, the error in this case cannot be dismissed as harmless. To begin with, the majority's harmless-

---

[A.G.C.] to testify while her father [was] staring at her." But as the trial judge noted, the defendant and "everybody in the room" *should be* "staring at the witness while they're testifying." Moreover, the fact that testifying in the defendant's presence may be "difficult" for a witness is not sufficient to override the defendant's right to face-to-face confrontation under *Coy* and *Craig*.

[16] Mississippi Code Annotated section 99-43-101(2)(g) could be applied in a manner consistent with the Confrontation Clause if the trial judge supplemented the statute by making the findings that *Coy* and *Craig* require and the record contained substantial evidence to support those findings. But such findings and evidence are absent in this case. In addition, as discussed in Part IV, *infra*, the statute likely violates the separation-of-powers provisions of the Mississippi Constitution, as interpreted by the Mississippi Supreme Court.

error argument improperly relies on A.G.C.'s testimony. *Ante* at ¶49. In this precise context, the United States Supreme Court has held that a determination of harmless error cannot rest on the very testimony that violated the Confrontation Clause. In *Coy*, the Court stated, "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and *harmlessness must therefore be determined on the basis of the remaining evidence*." *Coy*, 487 U.S. at 1021-22, 108 S.Ct. 2798 (emphasis added).

¶97. The majority's harmless-error analysis also problematically relies on hearsay testimony from A.G.C.'s mother and grandmother that was admissible only because A.G.C. also testified at trial. The mother's and grandmother's testimony was admitted under the tender-years exception to the hearsay rule. *See* MRE 803(25). Hearsay is admissible under that exception only if, among other things, "the child either: (i) testifies; or (ii) is unavailable as a witness, *and* other evidence corroborates the act." MRE 803(25)(B) (emphasis added). In this case, A.G.C. was not "unavailable as a witness,"[17] nor is there

[17] A child witness is considered unavailable if "testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially." MRE 804(a)(6). The proponent of hearsay bears the burden of proving that the declarant is unavailable. *See, e.g.*, *Ellis v. State*, 196 So. 3d 1029, 1034 (¶15) (Miss. Ct. App. 2015). As discussed above, there was no evidence that testifying in Pitts's presence was substantially likely to impair A.G.C.'s emotional or psychological health substantially.

any "other evidence" that "corroborates" the alleged sexual battery.[18] Thus, the admissibility of the mother's and grandmother's hearsay testimony depended on A.G.C.'s testifying at trial.[19] I do not see how we can deem a Confrontation Clause violation harmless based on hearsay that was admitted at tri-

---

[18] The majority asserts that there is "other evidence" that "corroborates the act" because A.G.C.'s out-of-court statements to her mother, her grandmother, and the CAC interviewer all corroborate each other. *Ante* at ¶52. Although the issue does not appear to have been addressed in Mississippi, the Colorado Supreme Court and two Florida District Courts of Appeal have held that other hearsay statements by the same child cannot satisfy the other-corroborative-evidence requirement. *People v. Bowers*, 801 P.2d 511, 527 (Colo. 1990) (holding that Colorado's tender-years exception "was not intended to sanction the use of one of the child's hearsay statements as corroborative evidence of the act described in another hearsay statement made by the same child"); *Delacruz v. State*, 734 So. 2d 1116, 1122 (Fla. 1st Dist. Ct. App. 1999) ("[W]e hold that out-of-court statements of the alleged child victim may not be used to satisfy the 'other corroborative evidence' requirement of [Florida's tender-years exception]."); *R.U. v. Dep't of Children & Families*, 777 So. 2d 1153, 1160 (Fla. 4th Dist. Ct. App. 2001) ("The child declarant's hearsay statements cannot be 'other' corroborating evidence within the meaning of [Florida's tender-years exception]. We read the word 'other' in the rule as denoting evidence derived from a source other than the child victim's own statements."). As one of the Florida courts noted, the majority's interpretation of the rule "would permit those charged with crimes against children to be convicted based solely upon hearsay evidence." *Delacruz*, 734 So. 2d at 1121-22. I find these decisions persuasive and would likewise hold that other hearsay statements by the same child cannot satisfy Rule 803(25)(B)(ii)'s other-corroborative-evidence requirement.

[19] Prior to trial, in response to questions by the trial court, the State made clear that A.G.C. would testify at trial and that it was seeking admission of her out-of-court statements under Mississippi Rule of Evidence 803(25)(B)(i).

al only because of the very testimony that violated the Confrontation Clause. In any event, we cannot "confidently say ... *beyond a reasonable doubt*" that the jury would have convicted Pitts based solely on pure hearsay. *Smith*, 986 So. 2d at 300 (¶31) (emphasis added) (quoting *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. 1431).

¶98. Finally, the majority states that any error was harmless because "[t]he most incriminating evidence was presented by Pitts himself," citing the video of A.G.C.'s CAC interview and the written statements of A.G.C.'s mother and grandmother. *Ante* at ¶50. Reliance on this evidence is also problematic because Pitts introduced it in response to A.G.C.'s trial testimony, which violated the Confrontation Clause, and the mother's and grandmother's hearsay testimony, which was allowed only because A.G.C. first testified in violation of the Confrontation Clause. Had A.G.C. not first been allowed to testify in violation of the Confrontation Clause, Pitts would have had no need to introduce this allegedly "most incriminating evidence."

¶99. But even setting that problem to the side, I respectfully disagree that this Court can "confidently say ... *beyond a reasonable doubt*" that the jury would have convicted Pitts based on the video of the CAC interview or written statements relaying hearsay. *Smith*, 986 So. 2d at 300 (¶31) (emphasis added) (quoting *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. 1431). The interview is approximately one-hour long, statements that A.G.C. makes during the course of the interview are incriminating, and a jury certainly could find A.G.C.'s account to be truthful and credible. But Pitts introduced the video because he be-

lieved that, on balance, the interview raised doubts about A.G.C.'s allegations. During the interview, A.G.C. initially stated that no one had ever touched her vagina. Later in the interview, A.G.C. talked about the incident when Pitts applied Butt Paste or "medicine" to or around her vagina because her vagina was itching and red and she had been scratching it. A.G.C. said "it felt much better when he put the medicine on it," and Pitts told her "not to scratch it" anymore. A.G.C. said that her half-sister was present during that incident. Finally, approximately thirty-five minutes into the interview, in response to further questions from the interviewer, A.G.C. stated that Pitts had inserted his finger into her vagina on other occasions. In his closing argument, Pitts's counsel argued that the A.G.C. gave inconsistent statements during the interview and incriminated Pitts only in response to excessive prodding and questioning by the interviewer.

¶100. To be clear, I am not suggesting that A.G.C.'s testimony or her statements to the interviewer are not credible. Nor am I suggesting that A.G.C.'s testimony would not be *sufficient* to support a conviction if she were to give similar testimony in compliance with the requirements of the Confrontation Clause. But under *Coy*, this Court's harmless-error analysis *may not consider A.G.C.'s testimony*. *Coy*, 487 U.S. at 1021-22, 108 S.Ct. 2798. Moreover, the issue for this Court is not whether "the remaining evidence" was merely *sufficient* to support the conviction; rather, the issue is whether we can confidently say "beyond a reasonable doubt" that the jury would have convicted Pitts *without A.G.C.'s testimony*. *Id.* Further, as discussed above, there is the ad-

ditional problem that "the remaining evidence" against Pitts was admissible at trial or introduced by Pitts only because A.G.C. first testified in violation of the Confrontation Clause. But even setting that issue aside, the State cannot show,[20] and this Court cannot find "beyond a reasonable doubt," that the jury would have convicted Pitts of this serious crime *without the alleged victim's testimony and based solely on hearsay*. Accordingly, the constitutional error in Pitts's trial cannot be deemed harmless.

IV. Mississippi Code Annotated section 99-43-101 likely violates the separation-of-powers provisions of the Mississippi Constitution.

¶101. Although the parties did not raise the issue, section 99-43-101(2)(g) also raises a significant constitutional question under the separation-of-powers provisions of Mississippi Constitution, as interpreted by the Mississippi Supreme Court. In *Hall v. State*, 539 So. 2d 1338 (Miss. 1989), the Court addressed the constitutionality of a prior statute on this subject, the Evidence of Child Sexual Abuse Act, 1986 Miss. Laws ch. 435, codified at Miss. Code Ann. §§ 13-1-401 to -415 (Rev. 2019). Specifically, the Court addressed the Act's legislatively created exception to the hearsay rule for certain out-of-court statements by children in child sex abuse prosecutions. *Hall*, 539 So. 2d at 1340-41, 1343-44 (discussing section 13-1-403). The defendant in *Hall* had been convicted based on hearsay testimony from social workers regarding out-of-court statements by the alleged vic-

---

[20] *Smith*, 986 So. 2d at 300 (¶31) ("[T]he burden is on the State to demonstrate [that a constitutional] error is harmless beyond a reasonable doubt.").

tim. *Id.* at 1340-41. Their testimony was inadmissible under the Mississippi Rules of Evidence but admissible under the Evidence of Child Sexual Abuse Act. *Id.* at 1341-44. On appeal, the Supreme Court reversed the conviction, holding that the Act violated the separation-of-powers provisions of the Mississippi Constitution. *Id.* at 1346. The Court stated,

> As trials are the core activity of the judiciary, so the promulgation of rules for the regulation of trials lie at the core of the judicial power. That being so, it only follows that the officers of neither the legislative nor executive departments of government, acting jointly or severally, had authority to confer legal validity upon the Evidence of Child Sexual Abuse Act.

Id.

¶102. Although *Hall* specifically involved provisions of the Evidence of Child Sexual Abuse Act regarding hearsay, the Supreme Court's opinion indicated that the entire Act was unconstitutional. *Id.*[21] That Act also included provisions that permitted a child to testify by closed-circuit television or videotaped testimony if the trial court first made certain on-the-record-findings. *See generally* Miss. Code Ann. §§ 13-1-405 & -407. While declaring the Act unconstitutional, the Court also referred "the entire subject of evidence of child sexual abuse" to the Su-

---

[21] *See also id.* at 1349 (Hawkins, P.J., dissenting) (recognizing that "[u]nder the majority's holding the Legislature had no constitutional authority to enact [the entire Evidence of Child Sexual Abuse Act], a comprehensive series of statutes dealing with evidence in child sexual abuse cases"); *Bowen v. State*, 607 So. 2d 1159, 1161 (Miss. 1992) (stating that *Hall*'s holding extended to other provisions of the Act).

preme Court Advisory Committee on Rules and directed the Committee to "study and investigate the matter and, in the end, recommend whether and to what extent [the Court] ought amend the Mississippi Rules of Evidence" to address that subject. *Hall*, 539 So. 2d at 1347-48. After studying the subject, the Committee recommended certain amendments to Rules 803 and 804, and the Court ultimately adopted those amendments along with a new Rule 617 governing testimony by a child witness by closed-circuit television, which is discussed above (*see supra* ¶87). *See In re: Mississippi Rules of Evidence Nos. 617, 803 and 804 and Comments to Rules 617, 803 and 804*, No. 89-R-99002 (Miss. Mar. 27, 1991), reported at 574-576 So. 2d XXVIII (West's Miss. Cases 1991). As discussed above, Rule 617 incorporates *Craig*'s constitutional requirements and provides for the child witness to testify by closed-circuit television if those requirements are satisfied. *See* MRE 617.

¶103. Despite *Hall*'s holding and the Mississippi Supreme Court's subsequent adoption of Rule 617, in 2015 the Legislature once again attempted to establish rules governing evidence in child sexual abuse cases when it enacted Mississippi Code Annotated section 99-43-101, which, among other things, purports to grant a child witness a right to testify behind a screen that will "obscure the child's view of the defendant" in a criminal case. Miss. Code Ann. § 99-43-101(2)(g); *see* 2015 Miss. Laws ch. 493, § 2 (H.B. 959). With respect to separation-of-powers concerns, there is no meaningful difference between the 1986 Evidence of Child Sexual Abuse Act and the 2015 statute at issue in this case. Therefore, under *Hall*, the 2015 statute likely violates the separation-

of-powers provisions of the Mississippi Constitution.[22] Indeed, if anything, the 2015 statute is more problematic from a separation-of-powers standpoint because it mandates a procedure and rule that differ materially from what the Supreme Court adopted in Rule 617.

¶104. Although Pitts has not raised the separation-of-powers issue in this case, the trial judge alluded to the problem indirectly when he observed that he was "looking at a statute that appear[ed] to be mandatory" and that he "ha[d] some concerns about [his] ability to declare the statute unconstitutional and fail to follow it." When the trial judge granted the State's request for a screen, the judge was not, as the majority suggests, exercising his "inherent power" or "discretion" "to control [his] courtroom." *Ante* at ¶44. Rather, he was acceding to a *legislative mandate* regarding the manner in which a witness should testify at trial. Under *Hall*, such mandates violate the Mississippi Constitution.

¶105. In the present case, I would not declare the statute unconstitutional under *Hall* because Pitts has not raised the issue.[23] But in future cases, prose-

---

[22] For a recent criticism of *Hall*, see Channing J. Curtis & Christopher R. Green, *Forty Years Across the Rubicon*, 92 Miss. L.J. (forthcoming 2023), available at https://ssrn.com/abstract=4080396 (revised Dec. 30, 2022). This Court is, of course, bound by *Hall*. *See, e.g.*, *Hudson v. WLOX Inc.*, 108 So. 3d 429, 432 (¶10) (Miss. Ct. App. 2012) ("[T]his court lacks authority to overrule Mississippi Supreme Court precedent.").

[23] *See, e.g.*, *Rosenfelt v. Miss. Dev. Auth.*, 262 So. 3d 511, 519 (¶27) (Miss. 2018) ("[W]e decline to address an issue that has not been briefed on appeal.... Simply put, we will not act as an advocate for one party to an appeal." (quotation marks omit-

cutors and trial courts should avoid this significant constitutional problem by proceeding under Rule 617, if necessary, rather than under this statute.

* * * * *

¶106. The manner in which the alleged victim testified at trial violated the Confrontation Clause under clear holdings of the United States Supreme Court. Furthermore, this Court cannot determine "beyond a reasonable doubt" that the jury would have convicted Pitts without the alleged victim's testimony and based solely on hearsay. Therefore, we are bound to reverse the conviction and remand the case for a new trial. Accordingly, I respectfully dissent from the majority's decision to affirm.

WESTBROOKS, J., JOINS THIS OPINION. McDONALD, J., JOINS THIS OPINION IN PART.

---

ted)). *But see Leatherwood v. State*, 548 So. 2d 389, 407 (Miss. 1989) (Hawkins, P.J., dissenting) (criticizing the Supreme Court for raising the separation-of-powers issue sua sponte in *Hall*).