

**In the
Supreme Court of the United States**

STEPHEN JOSEPH JOHNSON,
Petitioner,

v.

MONTANA,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of Montana**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its brief in opposition, Montana makes four arguments: (1) that the Question Presented was not preserved below (BIO 5-8); (2) that resolving the Question Presented would not change the outcome of the case (*id.* at 8-10); (3) that the decision below is correct (*id.* at 11-13); and (4) that the lower courts are not divided (*id.* at 13-15). These arguments are all incorrect.

I. The Question Presented was preserved below.

Montana argues that the Question Presented was not preserved below, because our brief in the Montana Supreme Court did not argue that *Craig* had been overruled by *Crawford*. *Id.* at 5-8. But Montana misunderstands the preservation requirement.

In several cases decided shortly before ours, the Montana Supreme Court repeatedly held that *Craig*, not *Crawford*, is the appropriate standard for assessing whether testimony by two-way video complies with the Confrontation Clause. *See State v. Mercier*, 479 P.3d 967, 976 (Mont. 2021) (“While *Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony, ... we are not prepared to declare the proverbial death knell to *Craig* just yet, and prefer to await further direction from the Supreme Court.”) (brackets and internal quotation marks omitted); *State v. Walsh*, 525 P.3d 343, 345-46 (Mont. 2023) (applying the *Craig* standard); *State v. Whitaker*, 558 P.3d 741, 746 (Mont. 2024) (applying the *Craig* standard).

The Montana Supreme Court's precedent thus required us to argue, in that court, that we should prevail under the *Craig* standard. It would have been futile to urge the court to use the *Crawford* standard instead, when the court had recently and decisively opted to stick with *Craig*. Indeed, it would have been worse than futile, because it would have suggested to the court that we did not think we could win under *Craig*.

The Montana Supreme Court nevertheless, sua sponte, raised and resolved the question of whether *Crawford* supplanted *Craig* as the standard for evaluating testimony by two-way video. Pet. App. 11a-12a. The court once again decided that *Craig* is the right standard. *Id.* "Importantly," the court reasoned, "*Crawford* did not involve two-way videoconferencing." *Id.* at 11a. The court interpreted *Crawford* as governing only "the admission of testimonial hearsay." *Id.* "Accordingly," the court concluded, "we clarify and reaffirm that the proper test for remote witness testimony is the two-prong test first set out in *Craig*." *Id.* at 12a.

The question is therefore preserved for this Court's review, for two reasons.

First, a federal claim is preserved if "it was *either* addressed by, *or* properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (emphases added). These requirements are in the disjunctive. Here, because the Montana Supreme Court unmistakably addressed the Question Presented, this Court may address it too.

Second, preservation is about *claims*, not *arguments*. “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Here, the claim we have made all along is that Eugene Maw’s testimony by video violated the Confrontation Clause. We raised this claim before trial. Pet. App. 4a. We raised it again on appeal to the state supreme court. *Id.* at 5a. Now we are raising it yet again in this Court, where, because we are no longer constrained by erroneous state court precedent, we are finally free to make the argument that the Montana Supreme Court rejected—that *Crawford*, not *Craig*, supplies the appropriate standard.

Montana relies (BIO 7) on *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993), but that was a case where the petitioner failed to raise a *claim* in the state court. *Id.* (“TXO did not squarely argue in the West Virginia Supreme Court of Appeals that these aspects of the jury instruction violated the Due Process Clause.”). Here, by contrast, we have squarely argued throughout that Maw’s video testimony violated the Confrontation Clause.

II. Resolving the Question Presented will determine the outcome of this case.

Montana contends that resolving the Question Presented would not change the outcome of this case, because (a) the error was invited by petitioner (BIO 8-9), and (b) the error was harmless (*id.* at 9-10). Montana is mistaken on both counts.

A. The error was not invited by petitioner. It was the state, not Stephen Johnson, that moved to permit Maw to testify by video. Johnson objected at every opportunity to the video testimony.

Montana suggests instead that Johnson forfeited his Confrontation Clause claim by failing to appear in court while Maw still lived in Helena. *Id.* at 9. If the Montana Supreme Court had so held, that would be a decision based on state law that would bar this Court's review. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). But the Montana Supreme Court did *not* hold that Johnson forfeited his Confrontation Clause claim. Rather, the court addressed the claim on the merits. This Court can therefore address the merits too.

Montana also contends that we invited the error by failing to urge the state supreme court to use the *Crawford* standard rather than the *Craig* standard. *Id.* This is the same preservation argument as the one discussed above in point I. It is just as wrong here as it was there.

B. Montana errs further in suggesting that the error was harmless.

To begin with, this consideration is no reason to deny certiorari. The Court's "normal practice" when the respondent claims an error was harmless is to resolve the question presented and then remand the case for the lower courts "to consider in the first instance whether the ... error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999). The Montana courts did not consider whether the error was harmless because they found no error in the first place. The lower courts need to know whether *Craig* or

Crawford provides the right standard. The Court can decide this question and then let the Montana courts determine the ultimate outcome of this case.

In any event, the error here was certainly not harmless beyond a reasonable doubt. With this kind of error, “[a]n 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 v. Iowa*, 487 U.S. 1012, 1021-22 (1988). In deciding whether the error was harmless, a reviewing court thus cannot assume Maw’s testimony would have been the same had he delivered it in person. The court would have to consider only the testimony of the other witnesses. But Maw was the only government witness whose testimony supported the burglary charge. The error was prejudicial as to this charge at the very least.

Montana makes much of the fact that some of Stephen Johnson’s testimony was consistent with some of Maw’s. BIO 10. But Johnson only testified about entering Maw’s garage because Maw had already testified to that effect. Without Maw’s testimony, Johnson would likely not have testified at all. He would have had no reason to, because the state would have failed to prove its case. The evidence on which Montana relies to argue that the error was harmless was itself a product of the error.

It is clear, moreover, that the choice between *Craig* and *Crawford* will determine whether the trial court was right to let Maw testify by video. The trial

court found that Maw was available, Pet. App. 11a, which means the state could not have satisfied the first of *Crawford*'s two requirements—that the witness be unavailable. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The state could not have satisfied *Crawford*'s second requirement either, because the defense had no prior opportunity to cross-examine Maw. *Id.* Resolving the question presented will thus determine the outcome of this case.

III. The decision below is wrong.

Montana defends the decision below by supposing that *Craig* and *Crawford* address two distinct situations. BIO 11-13. As we explained in our certiorari petition, a few of the lower courts agree. Pet. 10.

Most of the lower courts, however, have identified a “tension” or a “contradiction” between *Craig* and *Crawford* and have accordingly expressed uncertainty about which is the proper standard to apply to testimony by two-way video. *See, e.g., State v. Carter*, 238 N.E.3d 87, 94 (Ohio 2024) (“Numerous courts and commentators have noted the inherent tension between *Craig* and *Crawford*.”); *Campbell v. Commonwealth*, 671 S.W.3d 153, 159 (Ky. 2023) (“The U.S. Supreme Court has not dealt with the inherent contradiction between *Crawford* and *Craig*.”); *State v. Tate*, 985 N.W.2d 291, 300 (Minn. 2023) (“*Crawford* casts some doubt on the reasoning underlying the reliability prong of the *Craig* test.”); *State v. Smith*, 636 S.W.3d 576, 585-86 (Mo. 2022) (“When *Crawford* overruled *Roberts*, it put *Craig*'s reliability focused rule into serious doubt.”); *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020) (“*Crawford* did not specifically overrule *Craig*, but it took out its legs.”);

United States v. Wandahsega, 924 F.3d 868, 879 (6th Cir. 2019) (“[C]ourts and scholars have struggled to reconcile *Craig* with the Court’s subsequent holding in *Crawford*.”); *United States v. Carter*, 907 F.3d 1199, 1206 n.3 (9th Cir. 2018) (“The vitality of *Craig* itself is questionable in light of the Supreme Court’s later decision in *Crawford*.”); *State v. Thomas*, 376 P.3d 184, 193 (N.M. 2016) (“*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony.”). As Chief Judge Sutton said of *Craig* and *Crawford*, “the two opinions would give Janus a run for his money.” *United States v. Cox*, 871 F.3d 479, 492 (6th Cir. 2017) (Sutton, C.J., concurring).

The difference between *Craig* and *Crawford* lies in how they understand the Confrontation Clause. Under *Craig*, “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990). So long as testimony is reliable, the Court reasoned, the Confrontation Clause allows it to be introduced without any confrontation. “Although face-to-face confrontation forms the core of the values furthered by the Confrontation Clause,” the Court said, “it is not the *sine qua non* of the confrontation right.” *Id.* at 847 (internal quotation marks omitted). Rather, “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial.” *Id.* at 849.

Under *Crawford*, by contrast, the central concern of the Confrontation Clause is to ensure confrontation. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty,”

the Court explained. *Crawford*, 541 U.S. at 62. *Crawford* implemented the view Justice Scalia expressed in his dissenting opinion in *Craig*—that “the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was ‘face-to-face’ confrontation.” *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

If reliability cannot substitute for confrontation in *Crawford*’s hearsay context, there is no principled reason for allowing reliability to substitute for confrontation when it comes to testimony by two-way video. The Confrontation Clause is not the Reliability Clause. It guarantees confrontation, not reliability.

Craig involved a very young child who testified by one-way video so she would not have to see the defendant, a preschool teacher who sexually abused her. Regardless of whether the *Craig* standard should still govern in that situation—a question that involves stare decisis concerns along with the merits and one the Court need not address in this case—there is no reason to extend the *Craig* standard to govern *adults* testifying by *two-way* video.

Montana notes (BIO 15) that the Court recently applied the *Craig* standard in *Pitts v. Mississippi*, 607 U.S. 1, 3-4 (2025) (per curiam). But *Pitts* was another child-abuse case involving one-way video to prevent trauma to the child witness, and both parties agreed that *Craig* supplied the appropriate standard.

Unlike *Pitts*, our case squarely raises the issue of whether *Craig* or *Crawford* is the right standard when the prosecutor proposes to have adults testify

by two-way video. The text, purpose, and original meaning of the Confrontation Clause all demonstrate that *Crawford* provides the appropriate standard. Pet. 19-22.

IV. The lower courts are divided.

Finally, Montana errs in suggesting that the lower courts are not divided. BIO 13-15.

Montana concedes that the Missouri and Michigan Supreme Courts apply *Crawford*, not *Craig*. *Id.* at 13 (citing *State v. Smith*, 636 S.W.3d 576 (Mo. 2022), and *People v. Jemison*, 952 N.W.2d 394 (Mich. 2020)). Most lower courts apply *Craig*. And the Second Circuit applies neither *Craig* nor *Crawford*. *See* Pet. 15-16. The Confrontation Clause is interpreted differently in different jurisdictions. If Stephen Johnson lived in St. Louis or Detroit rather than in Helena, Maw could not have testified by video at his trial. Lower court conflicts don't get much clearer than that.

Montana misreads the lower court cases when it asserts that most jurisdictions treat *Craig* and *Crawford* as “precedents controlling different issues.” BIO 13. In fact, as we showed in our certiorari petition, Pet. 8-10, most of the lower courts have stuck with *Craig* because they are uncertain about the extent to which it is still good law and because they recognize that only this Court can overrule its precedents. This is not “academic chatter.” BIO 15. It is a chorus of sitting judges asking the Court to clarify how to assess whether video testimony complies with the Confrontation Clause.

Until recent years, there was less need for the Court to provide the guidance the lower courts are

seeking, because testimony by two-way video was uncommon. The technology was cumbersome and expensive. Not so today, when we all have two-way video software on our computers and our phones. Testifying by video can often save witnesses time and money, so it is becoming much more common for witnesses to ask if they can testify by video rather than in person. Sometime soon, the Court will have to let the lower courts know what the appropriate standard is for evaluating whether video testimony satisfies the Confrontation Clause. This case provides as good an occasion as any.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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