STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR JEMISON,

Defendant-Appellant.

Supreme Court No. 157812
Court of Appeals No. 334024
Circuit Court No. 15-10216-01

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AMICUS' BRIEF IN SUPPORT OF DEFENDANT-APPELANT

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STATEMENT OF JURISTICTION

Amicus concurs with Defendant's statement of appellate justification.

QUESTIONS PRESENTED

WAS MR. JEMISON DENIED HIS CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM WHEN THE PROSECUTION'S DNA EXPERT WAS ALLOWED, OVER OBJECTION, TO TESTIFY AT TRIAL VIA TWO-WAY VIDEO TRANSMISSION?

Court of Appeals answers "no."
Defendant-Appellant answers "yes."
Plaintiff-Appellee answers "no."
Amicus answers "yes."

WAS THE ERROR IN DENYING MR. JEMISON HIS CONFRONTATION RIGHT HARMLESS?

Court of Appeals answers "yes."
Defendant-Appellant answers "no."
Plaintiff-Appellee answers "yes."
Amicus answers "no."

STATEMENT OF INTEREST

Richard D. Friedman submits this brief, by invitation of the Court, *see* Order (granting leave to appeal), Jan. 16, 2019, as *amicus curiae* in support of the appellant. *Amicus* is an academic, much of whose writing and research has focused on the Confrontation Clause of the Sixth Amendment to the United States Constitution. He believes the decision of the court of appeals in this case is a mistaken application of basic principles underlying the confrontation rights of criminal defendants.

FACTUAL SUMMARY

The appellant in this case was convicted of first-degree criminal sexual conduct and sentenced to a long prison term, with a minimum of twenty-two years. The complainant was unable to identify the perpetrator. Identification of the appellant was made solely by DNA evidence. A crucial aspect of that evidence was the testimony of Derek Cutler, a forensic DNA analyst, regarding a male DNA profile his laboratory had developed from a vaginal swab taken from the complainant. But Cutler, who was employed by Sorenson Forensics, a company in Utah, did not testify live at trial. Over the accused's objections, Cutler testified by Skype, described by the court of appeals as "a real-time, two-way interactive videoconferencing service." App 892a. The trial court concluded that this was an adequate substitute for live testimony, because Cutler could see and be seen in the courtroom and it was technologically feasible to show tangible materials to him. It does not appear that any case-specific factors affected the trial judge's determination, other than that Cutler was far away and that he was an expert witness, meaning that, in the judge's view, "all emotions are gone." *Id.* at 5.

The court of appeals held the procedure constitutionally appropriate. Quoting *People v Pesquera*, 244 Mich App 305; 625 NW2d 407 (Mich Ct Apps 2001), one of its precedents from before the transformational decision of *Crawford v Washington*, 541 US 36 (2004), the court asserted that the Confrontation Clause has four requirements:

> (1) a face-to-face-meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.

App. 893a.

Cutler was indeed competent and testified under oath, and the defense was afforded an opportunity to cross-examine by Skype. Further, the court of appeals held, "[t]he jury was able to observe the expert as he responded to questions." Accordingly, the court concluded: "Because the testimony met three of the Confrontation Clause criteria, and the trial court appropriately dispensed with the face-to-face requirement, defendant's right to confrontation was not violated." App. 894a. In other words, there are four requirements, but if the prosecution satisfies the last three (or at least satisfies them in this way), good enough. Perplexingly, at an earlier point the court said that it agreed with appellant's contention that the procedure violated his confrontation right. App. 892a. And it went on to hold – and the prosecution acknowledges, Plaintiff-Appellee's Supplemental Brief on Appeal [hereinafter "Pl. Br."] at 46 – that the trial court abused its discretion by allowing Cutler's testimony to be given through interactive video technology notwithstanding defendant's objection, in violation of MCR 6.006(c). App. 894a.[1] But it concluded that any error was harmless. The court never offered a harmless-error analysis of the particular case, as required by *Delaware v Van Arsdall*, 475 US 673, 684 (1986) ("factors [in determining harmlessness of a Confrontation Clause violation] include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case"). Rather, the rationale of the court of appeals appears to be a general determination that, while satisfying all four criteria is desirable, for both constitutional and statutory purposes, if the last three are satisfied the first can be excused.

[1] The trial judge made clear that he would not have decided to allow the Skype testimony, but he did not feel at liberty to overrule a motions judge, who had ruled in favor of allowing it. App. 705a.

SUMMARY OF ARGUMENT

The violation of MCR 6.006(c) was blatant and is sufficient to dispose of the merits of this case. But the court of appeals' decision on the Confrontation Clause is unjustifiable and should not be allowed to stand.

This Court should not depart from the fundamental principle that the confrontation right requires an opportunity for the accused to have adverse witnesses testify against him face to face. If a system of "virtual confrontation," by testimony given remotely and transmitted electronically, is to be allowed, it should be the United States Supreme Court that makes that decision. To date, that Court has made no such decision outside the limited context of testimony by children for whom face-to-face confrontation would be traumatic, and even there the continuing validity of a system of remote testimony is in substantial doubt. An extra-judicial decision by the Court not to transmit a proposed rules change suggests that virtual confrontation does not satisfy the Confrontation Clause. Furthermore, scientific knowledge has not advanced to a state at which courts could assert with confidence that virtual confrontation is a full substitute for actual confrontation. Moreover, if this Court were to allow virtual confrontation in some cases, it should do so cautiously, and only in exigent situations. This case falls far short of that standard. And if virtual confrontation is to be allowed, this Court should first prescribe a careful protocol as to how it should be conducted.

It is clear that the error was not harmless. In assessing harmlessness of a Confrontation Clause error, a reviewing court may not speculate as to what would have happened had the witness in question testified subject to proper procedures. Rather, the court must assess the evidence in

the case without the testimony of that witness. Here, if there were no statement at all from Cutler there would be no showing that appellant's DNA was found in the vaginal swab, and without the DNA evidence there was no proof that appellant was the perpetrator. Even with the DNA evidence, the jury found this a difficult case, because the prosecution's other evidence was riddled with problems; without the DNA evidence, there would have been no case at all. These conclusions are not altered if, as the prosecution contends (though the record provides no firm support), Cutler's report could have been introduced absent his Skype testimony.[2] The prosecution found it necessary to present the Skype testimony; this Court should not second-guess that judgment.

ARGUMENT

I. THIS COURT SHOULD NOT DEEM VIRTUAL CONFRONTATION TO SATISFY THE CONFRONTATION CLAUSE OUTSIDE THE CONTEXT OF CHILDREN'S TESTIMONY.

The violation of MCR 6.006(c) was blatant, and the prosecution acknowledges it. Pl. Br. 46. That is sufficient to dispose of the merits of this case. But if this Court reaches only that substantive issue, the court of appeals' decision on the Confrontation Clause will cause considerable mischief in future cases.

The right of the accused to have adverse witnesses brought face to face with him is not a

[2] The prosecution contends that defendant failed to object to its Notice indicating intent to introduce Cutler's written report, and that defendant thereby waived his objection to Cutler's Skype testimony. Even assuming this argument is not itself deemed waived by delay in making it, it is mystifying. Even if the premise were true – *but see* App. 85a (prosecution stating in motion: "Attorney Glenn stated in an e-mail that he would be objecting to lab reports that do not comply with MRE 703") – waiver of objections with respect to written evidence could not constitute a waiver of objections with respect to Skype testimony.

collateral matter but at the core of the confrontation right. *See, e.g, California v Green*, 399 US 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Crawford*, 541 US at 43-45 (noting that the right "is a concept that dates back to Roman times" and, focusing on 16th and 17th centuries, reciting demands of accused persons that adverse witnesses be brought face to face and describing treason statutes guaranteeing the right). Indeed, the right to have witnesses brought face to face is much older than the right of cross-examination; the former was a clear feature of ancient Roman and Hebrew systems, *see* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 141 U PA L REV 1171, 1202 (2002), while the latter was not firmly established until the middle of the 17th century. *Id.* at 1205 n.125.

In *Maryland v Craig*, 497 US 836 (1990), the Supreme Court, by a 5-4 vote, held that in some circumstances a child witness could testify outside the immediate presence of the accused, with the testimony transmitted electronically to the courtroom. It is important to bear in mind two essential points related to *Craig*.

First, the continuing vitality of *Craig* is in substantial doubt. *United States v Carter*, 907 F3d 1199, 1206 (9th Cir 2018) ("the vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford.*"). *Craig* came before *Crawford*, during an era in which the United States Supreme Court treated the confrontation right as a consideration to be weighed in the balance along with others, in an attempt to ensure that only reliable evidence is admitted. *See, e.g., Craig*, 497 US at 849 ("[O]ur precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." (citations, quotation marks omitted)), 850 (denial of confrontation permissible only where "necessary to further an important

public policy and only where the reliability of the testimony is otherwise assured."). *Crawford* took a dramatically different approach to the Confrontation Clause – narrowing its focus to statements deemed "testimonial" in nature, rather than presumptively applicable to all out-of-court hearsay, and treating it as a categorical procedural right, rather than as a loose, exception-riddled substantive screen against unreliable evidence. It is not surprising that Justice Scalia, who wrote a bitter dissent for three other justices and himself in *Craig*, wrote the majority opinion in *Crawford*, and that Justice O'Connor, author of the majority opinion in *Craig* and a pre-eminent balancer, was one of two justices who declined to join the majority opinion in *Crawford*. *Craig* and *Crawford* concern different problems, of course. In *Craig*, the Court assumed that the Confrontation Clause required that the witnesses testify under oath and subject to cross-examination, and the question was whether that had to occur in the courtroom; in *Crawford*, the question was whether the declarant's out-of-court testimonial statements, not under oath or subject to cross, could suffice, and there was no doubt that if she testified it would be face to face with the accused. But the radically different approaches taken by the two decisions suggest that *Craig* should not survive *Crawford*.

A further suggestion that *Craig* may not survive re-examination may be derived from the Supreme Court's treatment in 2002 of a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed a trial witness, in a limited set of circumstances, to give her trial testimony from a remote location, with her image presented in the courtroom by a video connection. Usually, the Court regards itself as "merely a conduit" for proposed Rules amendments, *United States v Abel*, 469 US 45, 49 (1984), but the Court declined, by a 7-2 vote, to pass this one along to Congress. (Justice O'Connor was one of the dissenters; the other was

Justice Breyer, who had not been on the Court at the time of *Craig*.) In an explanatory statement, Justice Scalia wrote that the majority regarded the rule as being "of dubious validity under the Confrontation Clause," Statement of Scalia, J., 535 US 1159, 1159 (2002), and he added, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Id.* at 1160; *see generally,* Richard D. Friedman, *Remote Testimony*, 35 U. MICH J L REF 695 (2002).

For now, of course, *Craig* remains the law, and it is appropriate for this Court to continue to apply it in the particular context that it governs. But the second essential point related to *Craig* is that it is a very narrow decision. The Court's basic holding was that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." 497 US at 853. And the Court elaborated:

> 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 one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.

Id. at 855-56 (citations omitted).

Even if, despite the clear holding of *Crawford* to the contrary, this Court could somehow still read *Craig* to stand for a broader principle that electronically transmitted testimony is acceptable "where necessary to further an important state interest," *id.* at 852, the Court should proceed cautiously.[3] As elaborated further below, even if it were valid to allow such testimony

[3] Despite the fact that in this case the witness in question was not a child or other vulnerable person, the prosecution offers a surprising argument that a *weaker* standard than the one established by *Craig* applies here, apparently on the basis that transmission was two-way rather than one-way as in *Craig.* Pl. Br. 31. But courts have rejected such a theory, *State v. Rogerson*, 855 NW 2d 495, 501-04 (Iowa 2014);

when a witness is gravely ill or overseas and beyond the power of the state to procure confrontation, there is no justification for doing so in a case like this, in which the prosecution plainly could bring the witness to trial, or even bring the accused to the witness, but chose not to simply because it could not be bothered and wished to save money.

II. SCIENTIFIC KNOWLEDGE DOES NOT YET SUPPORT THE PROPOSITION THAT VIRTUAL CONFRONTATION IS AN ADEQUATE SUBSTITUTE FOR ACTUAL CONFRONTATION.

Amicus does not take a dogmatic view that what Justice Scalia aptly called virtual confrontation should never be held to satisfy the Confrontation Clause. *Amicus* does believe that it should not be held to do so until such time as there is a clear scientific basis for concluding that video confrontation is essentially the equivalent of actual confrontation, face to face. As of now, there is no basis for drawing this conclusion.

Three empirical questions bear on the matter. First, to what extent is there a differential in *impact on the witness* between video and actual confrontation, making it more likely that the witness will give false testimony against the accused when the confrontation is by video? Second, to what extent is there a differential in the *ability to cross-examine*? And third, to what extent is there a differential in the *jury's ability to assess the testimony*?

The first two questions are the most crucial, because the rights to be face to face with the witness and to have an opportunity for cross-examination are categorically protected by the Confrontation Clause. If distance and a sense of insulation would make a prosecution witness

State v. Thomas, 376 P3d 184, 194 (NM 2016)**,** and for good reason. Concerns over the nature and quality of transmission are proper to address only after making the critical decision that actual confrontation can be excused in the particular case.

testifying by video significantly more likely to testify falsely (whether intentionally or not) than if she were brought face to face with the accused, that should be the end of the matter; we should not accept a substitute for the constitutionally guaranteed right of confrontation if it is not as effective. Similarly, if (even apart from technological issues like a time lag), similar factors make it significantly more difficult for defense counsel to cross-examine effectively, that also should end the matter. The third question is less critical because the Confrontation Clause does not absolutely require that the witness testify in front of the jury, or in a way that the jury can assess her demeanor: *If* the witness is unavailable *and* the accused has had a prior opportunity for confrontation (including cross-examination), then it is permissible on traditional principles, and under *Crawford*, to present even a transcript of the witness's prior testimony. But the third question is still significant, because in some cases unavailability is a matter of degree, and whether a witness should be deemed sufficiently unavailable that remote testimony should be allowed might depend on the extent to which the jury's ability to assess the testimony is impaired by the fact that the witness is testifying by video.

Amicus believes that the burden of proof with respect to these questions must be on the prosecution. For centuries, the confrontation right has meant that prosecutors must bring their witnesses to court. If an alternative procedure is to be adopted as an adequate substitute, the prosecution must demonstrate that it is a true equivalent.

As of now, the prosecution cannot do so. On none of the three questions set out above has there been a showing that video confrontation is the equivalent of actual confrontation.[4] Indeed,

[4] *See generally* Friedman, *Remote Testimony, supra,* 35 U. MICH. J. L. REF. at 702-03 & n.17.

on each of the three, though research findings are far from settled,[5] there is ground for concern.[6] It appears that witnesses may be more likely to speak falsely when confrontation is by video than when the witness and accused are face to face.[7] Cross-examination may well be less effective.[8] And the jury's ability to assess the truthfulness of the testimony may well be significantly impaired.[9]

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[5] Though videoconferencing is now widespread, that is a relatively recent phenomenon, and so the scientific study of it, and of its effects on participants and observers, is far from mature. *See* Joey F. George & John R. Carlson *Media Selection for Deceptive Communication*, 2005 PROCEEDING OF THE 38TH HAW INT'L CONFERENCE ON SYSTEM SCIENCES 1, 5, www.ieeexplore.ieee.org/document/1385271/ (noting that videoconferencing was the communication method respondents said they had the least experience with).

[6] It may be in some settings that video evidence is less beneficial to the prosecution than live evidence would be because the witness will tend to be less persuasive and effective by video. *See* Chris Fullwood *et al.*, *The Effect of Initial Meeting Context and Video-Mediation on Jury Perception of an Eyewitness*, 2008 INTERNET J CRIMONOLOGY 1, 3-4, www.internetjournalofcrimonology.com (literature review, noting research support for the conclusion that video mediation may present "a barrier to successful communication," in part because of dilution of visual signals, and may lead to "negative evaluations of the witness"). That does not matter for purposes of the Confrontation Clause. What matters for the Clause is whether the accused has had a genuine opportunity for confrontation, not whether the witness was strong or weak.

[7] *See* Nancy Gertner, *Videoconferencing: Learning Through* Screens, 12 WM & M B of RJ 769, 784 (2004) (federal judge contending, on the basis of observations: "Testimony in a courtroom, in the gravitas of that setting, has an impact on all participants. We are used to looking at screens . . . . The court, however, is different . . . . The courtroom suggests to everyone a different set of rules, a more rigorous analysis."); Patrick R. Brundell, *Deception and Communication Media* 287 (unpublished Ph.D. dissertation, Nottingham University) (Sept. 2011) (http://eprints.nottingham.ac.uk/ 27962/1/604892.pdf), at 110-24 (concluding that, as compared to face-to-face communication, video communication is far more likely, in proportion to amount of use, to be used for deception, across a range of contexts, and noting that "[m]edia types which showed a higher likelihood of use for deception were also the media types that were judged to have a low frequency of general use."). Fullwood *et al.*, *supra* note 6, note that in the United Kingdom, where vulnerable adult witnesses as well as children are allowed to testify by video link, "it is clear that many witnesses would not give evidence if the only option was to present it in open court." *Id.* at 2. Of course, securing truthful testimony from witnesses is beneficial. But presumably many of those who would not testify in open court would be dissuaded by the presence of the accused, and the lessening of that impact when the testimony is by video means that some false testimony, as well as truthful, will be generated.

[8] *See* Fullwood *et al.*, *supra* note 6, at 3 (noting conclusion of a Scottish Office report that "[t]he video link . . . made it difficult for lawyers to cross examine the witness").

[9] *See* Gertner, supra note 7, at 786 (concluding, after reviewing social science literature, that "it is clear that in live testimony, face-to-face transmission plainly increases the information available to the fact-finder"; emphasizing the screen's limitations on the jury's ability to see the witness's body, which is not as easy to control by a witness bent on deception as is the face, and to assess "the relationship of all three

There may come a day when courts can say with confidence that virtual confrontation is fully as satisfactory as actual confrontation. But that day has not arrived.[10]

III. THIS IS A PARTICULARLY POOR CASE IN WHICH TO ALLOW REMOTE TESTIMONY.

Even if this Court is now going to countenance remote testimony by adults, it should only do so in a compelling case. Some courts have allowed remote testimony when a witness was gravely ill, *e.g., Horn v Quarterman*, 508 F3d 306 (5th Cir 2007) (on *habeas*), or overseas, *United States v Abu Ali*, 528 F3d 210 (4th Cir 2008), in such circumstances that the witness could not feasibly be brought to the trial. Even given such exigencies, careful courts recognize that there can be no basis for allowing remote testimony if the accused can be brought to the witness for a deposition. *United States v Yates*, 438 F3d 1307 (11th Cir 2006) (*en banc*) (holding that unwillingness of witnesses in Australia to come to the United States was insufficient to allow video evidence given that depositions in Australia, with the accused present, could have been arranged); *United States v Prokop*, Docket No. 2:09–cr–00022–MMD–GWF (unpublished, USDC Nev 2014) (denying motion for testimony by video but granting motion for out-of-state deposition). But in this case there is no reason even to consider the possibility of a deposition, because there was no exigency preventing the witness from attending trial in person.[11]

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channels [face, body, voice] of nonverbal expression"); *id.* at 788 (noting that jurors in a case in which she allowed remote testimony from Japan "reported that they found the videoconferenced testimony very difficult to follow"); Fullwood *et al., supra* note 6, at 3-4 (noting that video-linked communication may make it more difficult to assess audio signals and bodily activity).

[10] *See* Gertner, supra note 7, at 773 (with respect to testimony taken by videoconferencing, issuing "a resounding call not to stop the technology train, but to slow it down in criminal trials until more research has been done").

[11] No reason appears in *Horn* why a deposition could not have been arranged.

Here, the witness, Cutler, was a DNA expert who worked for an out-of-state forensics company chosen by the State to analyze the vaginal swab taken from the alleged victim. It was the prosecution's choice to send the swab to a distant lab for analysis, presumably for cost-saving purposes. Certainly the prosecution could have decided to use a lab in or closer to Michigan.

So far as appears from the record, the prosecution could easily have secured Cutler's presence at trial if it had chosen to do so. And if for some reason that was not so, the fault would be entirely that of the State: The problem arose in the first instance only because of the total breakdown of a state actor, the Detroit Police Crime Laboratory. App. 599-600a. Even assuming the State could not itself analyze the sample, it could have decided to contract with Sorenson Forensics, Cutler's employer, only if Sorenson agreed that Cutler would, if necessary, appear to testify at trial. As the classic repeat player in a classic repeat-player situation – a state conducting a prosecution with the aid of forensic lab analysis – the State should be accountable for not conducting its affairs in such a way that it could guarantee in advance that a witness would be readily available to testify at trial if necessary. Even if it did not do so, once it became apparent that Cutler's testimony was needed, the prosecution could have invoked the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which has been adopted in all states, to guarantee Cutler's appearance. MCL § 767.93; Utah Code § 77-21-2. And if the prosecution did not do even *that*, it still probably could have secured Cutler's presence at trial by offering to pay for his trial expenses; the State plainly was obligated to make the offer. *Cf. Barber v Page*, 390 US 719, 724 (1968) (endorsing statement that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff").

In short, the only reason *not* to secure Cutler's testimony at trial was to save money. Even

assuming that remote testimony by an adult witness should be allowed in compelling circumstances, this case presents an extremely *un*compelling set of circumstances. This Court should bear in mind the response of the United States Supreme Court in *Melendez-Diaz v Massachusetts*, 557 US 305, 325 (2009), when it was asked "to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process'":

> It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

Moreover, there are affirmative reasons making this a particularly bad case for remote testimony. The accused was convicted of a serious crime, and sentenced to a minimum of twenty-two years of imprisonment; this makes it especially inappropriate to allow the cost of airfare to prevent him from having a full opportunity for confrontation. And testimony in some form from Cutler, describing the development of the male DNA profile that led to identification of the accused, was plainly critical to the prosecution case.

So far as *amicus* is aware, in only one other case has an appellate court allowed remote testimony on facts nearly so weak – and that case, *City of Missoula v Duane*, 355 P3d 729 (Mont 2015), involved only a misdemeanor charge and only a contention under the state constitution. In all other cases in which the expense and inconvenience of live testimony would be comparable to or even greater than here, appellate courts have been very firm that these are an inadequate basis for allowing remote testimony. Indeed, one state supreme court has noted "a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation." *State v*

Rogerson, 855 NW2d 495, 507 (Iowa 2014) (holding that video testimony by out-of-state witnesses and by distant state lab employees was invalid). *See, e.g.*, *State v Johnson*, 812 SE2d 739 (SC Ct Apps 2018) (testimony of an investigator who was 2,500 miles away, deemed by trial court to be an "ancillary" witness; Skype testimony held improper); *State v Smith*, 308 P3d 135, 138 (NM Ct Apps 2013) (holding that trial court erred by allowing video testimony of analyst from state lab on the basis that the analyst would have to drive several hours, resulting in the lab being shorthanded, and inconveniencing the analyst in her work; reaffirming prior decision that "a chemist's busy schedule and inconvenience to him or his laboratory caused by traveling to testify" does not justify video testimony); *Haggard v State*, 2019 WL2273869 (Tex Ct Apps 2019) (assuming, without deciding, that it was error to allow witness to testify remotely; witness was out of state and, after previously expressing willingness, "chose not to attend the trial for personal and economic reasons"); *see generally Commonwealth v Atkinson*, 987 A2d 743, 748 (Pa Super Ct 2009) (stating that "[i]n addition to child witness cases, there appear to be two situations in which courts have considered the use of video testimony for adult witnesses: when a witness is too ill to travel and when a witness is located outside of the United States"; holding that "convenience and cost-saving" are insufficient bases to allow prisoners to testify by video).[12]

The prosecution's attempt to characterize Cutler as a "neutral" and "scientific" expert – its brief uses the word "neutral" 39 times – does nothing to alter this conclusion. First, as the

[12] Note also *Johnson v. Warden*, Docket No. 1:13–cv–82 (unpublished, USD.C. S.D. Oh. 2014), a *habeas* case, holding that use of video testimony was reasonable to prevent witness intimidation. Intimidation is a common basis for a conclusion that the accused has forfeited the confrontation right, and arguably the resolution adopted by *Johnson* can be justified as a mitigation – preserving part of the confrontation right – of the situation created by the accused's wrongful conduct.

Because both parties have provided the Court with extensive appendices of cases, *amicus* has not attempted to provide a comprehensive list of citations.

prosecution recognizes, Pl. Br. at 29 n.71, the United States Supreme Court has already flatly rejected the idea that the Confrontation Clause can be evaded by characterizing a witness as a neutral or scientific expert. *Melendez-Diaz*, *supra*, 557 US at 316-21. The prosecution tries to avoid this clear holding by saying that *Melendez-Diaz* "was concerned with [an] analyst's affidavits being admitted without any testimony at all." Pl. Br. at 29 n.71. Putting aside the fact that the affidavits in *Melendez-Diaz* were *themselves* testimonial, 557 US at 311, the distinction does not work: *Melendez-Diaz* broadly rejected the contention "that there is a difference, for Confrontation Clause purposes" between testimony recounting historical events and that reporting the results of lab testing. 557 US at 317. And it did so because it refused to return to the pre-*Crawford* era in which "particularized guarantees of truthfulness" would satisfy the Clause; instead, it insisted, the Clause guarantees one form of procedure across all types of testimony: confrontation. *Id.* Moreover, the Court did not accept that what the prosecution there called "neutral scientific testing" was "as neutral or as reliable" as the prosecution suggested. *Id.* at 318. The Court noted that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," problems not only of incompetence but of fraud and manipulation as well. *Id.* at 318-19.

Indeed, even if a witness could as a theoretical matter gain a special status for Confrontation Clause purposes by being characterized as neutral, a witness like Cutler would fall far short of the mark. He was called by the prosecution – not by the court. He, or his employer, was paid by the prosecution; the lab was operating under contract to help the state work off its backlog of cold DNA kits. App. 599-600a; Pl. Br. at 10. And he was not a disinterested bystander – if he wanted his lab to continue getting business from the State he had a clear interest in cooperating with the

prosecution and providing evidence favorable to it. *Cf. Crawford*, 541 US at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

Similarly, the prosecution gains no benefit by characterizing Cutler's testimony as "foundational," notwithstanding the 36 uses of *that* term in its brief. Even if that term is accurately applied here – *amicus* is dubious, because Cutler described how the DNA profile that was critical to the conviction was determined – foundational evidence is not peripheral. Rather, as the term suggests, it lays a foundation on which other evidence rests. It is an essential part of the story that the prosecution wishes to tell, and to be considered by the jury it must satisfy the requirements of admissibility no less than any other type of evidence.

In short, this Court should recognize that if it were to allow remote testimony here then it would be countenancing such testimony in a wide array of cases in which a prosecutor *could* secure the live testimony of the witness, even a highly significant one, but would rather not pay the expense, or put up with the bother, or would prefer insulating the witness from the intensity of live confrontation and cross-examination. Such a change threatens to transform the nature of criminal trials to one in which remote testimony plays a large role, largely at the discretion of the prosecutor. The Court should hesitate long and hard before taking a significant step down that path.

IV. A CAREFULLY DESIGNED PROTOCOL WOULD BE NECESSARY FOR THE PRESENTATION OF REMOTE TESTIMONY.

Even if virtual confrontation is to be allowed, it must be under a carefully designed protocol to ensure that the testimony is presented properly and resembles actual confrontation as closely as

possible.[13] Such a protocol would have to resolve issues such as: What minimum resolution of the video transmission, both into the courtroom and into the room where the witness is, would be necessary? What kind of lighting would be used? How large would the screens have to be, and where would they be placed? Who, if anybody, could be, or must be, in the room with the witness when she testified? Where would the cameras be placed? What would they show, and with how tight a focus? Would the accused be able to look at the screen and the camera simultaneously (so as to maintain two-way, albeit video-mediated, eye contact)? The record does not reflect how well these concerns were satisfied in this case; indeed, the courts below appear to have shown little or no interest in these issues. If virtual confrontation is to be allowed over the objections of an accused, this Court must ensure not only that it is done only in appropriate cases but also that it is done in an appropriate manner.

As matters stand, criminal defendants have the protection of MCR 6.006(c) – video evidence cannot be admitted against them without consent – and if the trial court had adhered to that Rule these issues would not have arisen in this case. This Court may of course decide to amend that Rule, but it should only do so in the prescribed manner, not by tolerating blatant violations of the Rule.

V. THE ERROR IN DENYING THE ACCUSED'S CONFRONTATION RIGHT WAS NOT HARMLESS.

Violations of the Confrontation Clause are subject to harmless-error analysis. *Delaware v Van Arsdall*, 475 US 673, 684 (1986). But, as in other contexts, a reviewing court cannot treat

[13] *See*, *e.g.*, Gertner, *supra*, at 786 ("Plainly, the image can be orchestrated - by decisions about lighting, the size of the image, the perspective.").

a constitutional error as harmless unless it concludes beyond a reasonable doubt that the error did not affect the outcome of the case. *E.g.*, *Chapman v California*, 386 US 18, 24 (1967); *People v Anderson*, 444 Mich 392, 404; 521 NW2d 538, 545 (Mich 1994). And in the context of a Confrontation Clause violation, harmless-error analysis must be applied in a particular way. In *Coy v Iowa*, 487 US 1012, 1021-22 (1988), the Court instructed:

> 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.

So the question is not whether, had Cutler testified live at trial, rather than by Skype, his testimony or its impact would have been any different; a reviewing court may not speculate on that matter. Rather, the question is whether the case might have come out differently *had Cutler not given his oral testimony at all.*

In this case, the answer is clearly affirmative. The alleged victim, Talisha Sams Dowe, *never* identified defendant as the man who raped her. Indeed, shown a photo array after defendant was identified as a suspect, Ms. Sams was unable to identify anybody as the rapist, App. 417a**,** 737a, and even at trial, though she knew him by name and as her nieces' uncle, she did not identify him as the rapist. *Id.* at 420a. Thus, the prosecution case depended entirely on demonstrating a DNA match, between the defendant's known profile and a male profile determined by Cutler's lab, Sorenson, to have been found in the rape kit taken from Ms. Sams after the alleged crime. Cutler did not testify to the match; another witness, Catherine Maggert, did. But obviously an essential predicate for the testimony of a match was the determination of the profile from the rape kit; without that, the prosecution case would have been as effective as one hand clapping. Cutler was the only witness from Sorenson to testify. That testimony was critical to the prosecution

case.

The conclusion that the error was not harmless is fortified by the fact that the jurors clearly found this to be an excruciatingly difficult case. App. 845-47a (deliberations as long, or longer, than trial). It took them more than twelve hours, over three deliberation days, to reach a verdict, and when they did it was split: They found the defendant guilty on Count I, involving vaginal penetration, and not guilty on Count II, involving fellatio. App. 850a, 876-77a. The split was particularly significant in assessing harmless error, because it reflected not merely uncertainty about the case in general but the critical role of the DNA evidence and serious skepticism about the testimony given by Ms. Sams; Count I directly implicated the DNA evidence, while Count II relied entirely on Ms. Sams's testimony.

It is hardly surprising that the jury had such difficulty in reaching a verdict of guilty, even on one count and even given the DNA evidence. Ms. Sams was hardly an ideal witness. In several important particulars, her testimony was inconsistent with other evidence – most notably, with statements she made the day of the alleged rape:

• At trial, Ms. Sams testified that, shortly before the rape, early on the same morning, she had consensual sex with an acquaintance, Delano. App. 377a**.** But she did not say anything about this later that day either to the police intake officer, App. 499a, or to an investigator with the Sex Crimes Unite (SCU), App. 652a, 657a**.**

• At trial, Ms. Sams testified that immediately before the rape, the rapist forced her to have oral sex. App. 389a, 390a**.** But she said nothing about this later that day to either police officer. App. 498a, 652a, 660a.

• At trial, Ms. Sams testified that after the rape she walked to the house of a friend Ebony,

and that there she got into a fight with other women, which left her with a black eye. App. 397a. At first she indicated that the fight resulted from the other women not believing her account of the rape, *id.*, but shortly after she testified that she didn't remember what the fight was about. App. 462a. She said nothing to the police intake officer about going to Ebony's house, App. 499a, and she told the SCU investigator that she went directly home. App. 652a. She told neither officer about a fight with anyone else, App. 499a, 658a. She told the intake officer that the perpetrator struck her over the eye with a gun, App. 652a; in the version she gave the SCU officer, it was again the perpetrator who caused the injury, but with his fist. App. 657a.

• At trial, Ms. Sams testified variously that the perpetrator was slim, that he weighed about 150 to 160 pounds, and that he weighed about 160 to 170 pounds. App. 387a, 423a, 447a. She told the police intake officer that he weighed about 140 pounds. App. 493-94a. When she met defendant in 2000, just a few years later, he weighed about 300 pounds. App. 422a.

Moreover, even apart from the inconsistencies, the account advocated by the prosecution was a strange one. According to it, Delano twice left Ms. Sams in his very distinctive car – nearly 20 years later, Ms. Sams remembered that it was a maroon '88 Monte Carlo, with gold rims, App. 375a – once for an extended period, with the keys in it and the motor running. App. 380-81a. The perpetrator then abducted her in the car, raped her in broad daylight in a vacant lot, App. 388a, and then drove off with the car. App. 395a. Though Ms. Sams had seen Delano pretty much every day in the months before the incident, App. 431a, 467-68a, and was fearful that he would think she stole the car, App. 407-08a, she never saw Delano again, 409a, or heard from either Delano or the police about the car. App. 467-68a – though, coincidentally, she did see the car once again, months later. App. 408-409a. And, in a more remarkable coincidence, the person identified as

the perpetrator happened to be someone who she came to know after the rape through a family connection. App. 419-22a.[14]

The conclusion that the error was not harmless is not altered by the fact that at trial the defense contended that any sexual contact between the defendant and Ms. Sams was consensual. Given that the DNA evidence was admitted, naturally this was what the defense did. Had the DNA evidence not been admitted, there would have been no prosecution case at all.

Nor is the conclusion altered by the prosecution's argument that had Cutler's oral testimony not been admitted his report still would have been. First, though the record is unclear, the premise is dubious at best. The prosecution gave notice pursuant to MCR 6.202(C)(1) of intent to offer the report as evidence at trial, and it contends that the defense filed no written objection within the 14-day period prescribed by MCR6.202(C)(2). But it acknowledges that defense counsel "stated in an e-mail that he would be objecting to lab reports that do not comply with MRE 703." App. 85a. If that e-mail was somehow not deemed sufficient to preserve the objection, it should not have mattered ultimately, because the 14-day deadline is not a hard and fast one. MCR 6.202(C)(3) (providing that "[f]or good cause the court shall extend the time period of filing a written objection"). And the prosecution said it would present oral testimony by Cutler "should his testimony become necessary." App. 85a, 109a. Evidently, the prosecution *did* find it necessary to introduce Cutler's oral testimony. Pl. Br. at 4 ("Cutler's testimony was necessary to lay a foundation for Maggert's conclusions . . . .").

But even if this Court were to conclude somehow that the prosecution could have relied on the written report, the fact is that the prosecution did not do so; it chose to get the benefit of

[14] And, though the trial court prevented the evidence from being presented to the jury, at around that time, the two had consensual sex. App. 59-60a.

presenting oral testimony from Cutler, rather than merely the report. The oral testimony contained substance that the written report did not. App. 717-26a, 730-31a. Thus, even under the assumption that the report *could* have come in without Cutler's testimony, it is not permissible to conclude on that basis, as the prosecution argues, Pl. Br. 3, 46, that defendant got more confrontation rights than he was entitled to: The prosecution *did* present oral testimony from Cutler, and so the defendant was entitled to full rights of confrontation with respect to him, *see Melendez-Diaz*, *supra*, 557 US at 311 n.1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."). Moreover, it is axiomatic that "statements from a cold transcript will have less impact than those of a live witness." *People v Nuss*, 75 Mich App 346; 254 NW2d 883 (Mich Ct Apps 1977); *see also, e.g.*, *People v Swilley*, 540 Mich 350, 402; 934 NW2d 771, 801 (Mich 2019) (Markman, J., concurring in the judgment) (emphasizing "the advantage of observing tone and body language" over "a cold transcript"), and the same is plainly true of statements from a cold report. See *Kraushaar v Flanigan*, 45 F3d 1040, 1051 (7th Cir 1995) (emphasizing "the significance of . . . ability to present live testimony as opposed to a cold report").

This Court should take the prosecution at its word: It presented oral testimony from Cutler because it did indeed find that doing so was "necessary" for its case. Especially in a case that the jury found so difficult, this Court cannot conclude beyond a reasonable doubt that the improper admission of such evidence "did not tip the scale in favor of the prosecution and contribute to the jury's verdict." *Anderson*, *supra,* 446 Mich at 407.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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