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## Criminal Law - Witnesses: Child Sexual Abuse Victims Not Categorically Prohibited by Confrontation Clause from Testifying via One-Way Closed-Circuit Television

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**CRIMINAL LAW — WITNESSES: CHILD SEXUAL ABUSE  
VICTIMS NOT CATEGORICALLY PROHIBITED BY  
CONFRONTATION CLAUSE FROM TESTIFYING  
VIA ONE-WAY CLOSED-CIRCUIT TELEVISION**

Sandra Ann Craig owned and operated a pre-school and kindergarten in Howard County, Maryland.<sup>1</sup> Craig was alleged to have physically, sexually, and psychologically abused several children at the school.<sup>2</sup> Criminal charges were brought against Craig.<sup>3</sup> Prior to trial, the state moved to allow the alleged victims to testify outside of the presence of the defendant, Craig, via closed-circuit television.<sup>4</sup> Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland permits a court to allow a child abuse victim to testify outside the courtroom, and outside the physical presence of the defendant, through one-way closed-circuit television if "[t]he judge determines 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."<sup>5</sup> The trial judge made such a determina-

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1. *Maryland v. Craig*, 110 S. Ct. 3157, 3160 (1990).

2. *Id.*

3. *Id.* Defendant Craig was charged with "child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery." *Id.*

4. *Id.* at 3160-61. The Maryland statute allows, in certain situations, child witnesses in child abuse cases to testify via one-way closed circuit television. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989). The Maryland statute provides in relevant part that:

(a) (1) In a case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines 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.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b) (1) Only the following persons may be in the room with the child when the child testifies by closed-circuit television:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

*Id.*

5. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989).

tion based on expert testimony presented by the state.<sup>6</sup> After finding several of the children competent to testify, the trial judge, over Craig's objection, allowed the children to testify through means of one-way closed-circuit television.<sup>7</sup> Craig was convicted, and appealed.<sup>8</sup> The conviction was affirmed by the Maryland Court of Special Appeals.<sup>9</sup> The Court of Appeals of Maryland reversed and remanded.<sup>10</sup> The United States Supreme Court vacated the judgment of the Court of Appeals of Maryland, and remanded, and *held* that the confrontation clause does not invariably require a face-to-face confrontation between a defendant and a child witness in a child abuse case.<sup>11</sup> The Court found the requirements of the confrontation clause to be satisfied when a child witness in a child abuse case testifies using a procedure that protects the reliability of the evidence, provided the state has shown that the use of such procedure is required to protect the child witness from emotional trauma that would result from testifying in the physical presence of the defendant.<sup>12</sup> *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

The sixth amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>13</sup> Traditionally, the confrontation clause has been interpreted to require witnesses in a criminal trial to appear "face-to-face" with the defendant at

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6. *Id.* at 3161-62. The trial judge did not himself question the potential child witnesses. *Craig v. State*, 316 Md. 551, \_\_\_, 560 A.2d 1120, 1128 (1989). Rather, the trial judge heard testimony from expert witnesses who indicated that if the children were to testify in the courtroom, the children would suffer "serious emotional distress . . . such that each of these children [could] not reasonably communicate." *Id.* at \_\_\_, 560 A.2d at 1129.

7. *Craig*, 110 S. Ct. at 3161-62. Craig objected to the use of the Maryland procedure, contending that use of the procedure violated her sixth amendment right to confront accusatory witnesses. *Id.* The trial court rejected Craig's contention. *Id.* The trial court reasoned that while the procedure does take "'away the right of the defendant to be face to face with his or her accuser,' the defendant retains the 'essence of the right of confrontation,' including the right to observe, cross-examine, and have the jury view the demeanor of the witness." *Id.* at 3162.

8. *Id.*

9. *Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988).

10. *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

11. *Craig*, 110 S. Ct. at 3169-70. In *Craig*, the United States Supreme Court stated that:

[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.

*Id.* at 3170.

12. *Id.*

13. *Id.* at 3162 (quoting U.S. CONST. amend. VI). See also *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988) (discussing origins of defendant's right to confront witnesses against him).

trial.<sup>14</sup>

The requirement that witnesses appear "face-to-face" at trial serves to assure the reliability of evidence admitted against the defendant.<sup>15</sup> When a witness testifies at trial, the witness testifies under oath and is subject to cross examination by the defendant.<sup>16</sup> When a witness testifies at trial, the jury is able to observe the manner in which the witness testifies, and the witness's demeanor while testifying.<sup>17</sup> Therefore, the jury is able to assess whether the testimony given by a witness against the defendant is credible.<sup>18</sup>

In *Maryland v. Craig*,<sup>19</sup> the United States Supreme Court found that the requirement of face-to-face confrontation is not indispensable.<sup>20</sup> In limited situations, face-to-face confrontation has been held to be not required by the confrontation clause.<sup>21</sup> These limited situations have generally involved the admission of various hearsay statements such as dying declarations and those of nontestifying co-conspirators.<sup>22</sup> In such situations, the Court has "attempted to harmonize the goal of the Clause — placing limits on the kind of evidence that may be received against a defendant — with a societal interest in accurate factfinding, which may require consideration of out-of-court statements."<sup>23</sup> Thus, while under the confrontation clause a preference exists for face-to-face confrontation, in exceptional circumstances a defendant's right to

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14. *Craig*, 110 S. Ct. at 3162. Generally, a defendant has a right to a face-to-face confrontation with accusatory witnesses at trial. *Id.* However, a defendant's right to confront witnesses against him has not been held to afford a defendant an absolute right to a face-to-face confrontation with those witnesses. *Id.* at 3163 (citing *Coy*, 487 U.S. at 3802-03).

15. *Id.* at 3163-64. The Court noted that "[t]he 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." *Id.* at 3163.

16. *Id.* The requirements of face-to-face confrontation are "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. . . ." *Id.* These elements of face-to-face confrontation help to assure that evidence admitted against a defendant is reliable. *Id.*

17. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237 (1895)).

18. *Id.*

19. 110 S. Ct. 3157 (1990).

20. *Maryland v. Craig*, 110 S. Ct. 3157, 3164-66 (1990).

21. *Id.* at 3164-65. The Court noted in *Craig*, that under certain circumstances, hearsay statements have long been admissible at trial, even though the defendant is unable to confront the declarant at trial. *Id.* at 3164 (citations omitted). *But see Maryland v. Craig*, 110 S. Ct. 3157 (1990) (Scalia, J., dissenting). In his dissent in *Craig*, Justice Scalia argued that the confrontation clause specifically requires that a defendant be given the opportunity for face-to-face confrontation with witnesses against him. *Id.* at 3171-76. Justice Scalia noted that in the hearsay situation, the accused is not denied his confrontation clause right to be confronted with the witnesses against him. *Id.* at 3173. In the hearsay situation, the witness against the criminal defendant is not the declarant, but rather the person who testifies as to the declarant's statements. *Id.*

22. *Craig*, 110 S. Ct. at 3173.

23. *Id.* at 3165 (quoting *Bourjaily v. United States*, 483 U.S. 171 (1987)).

be confronted with the witnesses against him may be met without face-to-face confrontation.<sup>24</sup> These exceptional circumstances exist only when the trustworthiness of the testimony is guaranteed, and only when denial of face-to-face confrontation is necessary to advance an "important public policy."<sup>25</sup>

In *Craig*, the Court determined that, provided the requisite determination of necessity was made, Sandra Ann Craig's right to confront accusatory witnesses was not violated by use of the one-way closed-circuit television procedure provided for in the Maryland statute.<sup>26</sup> Under the Maryland procedure, in certain circumstances, a child witness in a child abuse case may testify at trial outside the physical presence of the defendant.<sup>27</sup> In order to use the procedure, the trial judge must make a specific finding that the child would suffer serious emotional distress if the child were to testify in the courtroom.<sup>28</sup> When the procedure is invoked, the child witness testifies via one-way closed-circuit television.<sup>29</sup> The defendant, judge and jury can all observe the child on the television screen and hear as the child testifies; however, the child cannot see the defendant.<sup>30</sup>

In *Craig*, the Court reasoned that Maryland's statutory procedure would assure the reliability of testimony against the defendant.<sup>31</sup> All of the elements of confrontation, absent testimony within the physical presence of the defendant, were provided for in the procedure.<sup>32</sup> The procedure requires that the child witness be competent to testify and testify under oath.<sup>33</sup> The child witness may be cross-examined by the defendant.<sup>34</sup> As the child witness testifies, the child's demeanor is observed by the judge, jury and defendant.<sup>35</sup> Thus, under the Maryland procedure, the testimony of a child witness is "subject to rigorous adversarial testing in a

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24. *Id.* at 3165-66 (citations omitted).

25. *Id.* (citations omitted).

26. *Id.* at 3170. A defendant's right to a face-to-face confrontation with witnesses against him may not be deprived absent a "case-specific finding of necessity." *Id.*

27. *Id.* at 3161. See *supra* note 4 (partial text of relevant Maryland statute).

28. *Craig*, 110 S. Ct. at 3161. In order to invoke the Maryland procedure, the emotional distress that the child witness would suffer, if the child were to testify in the courtroom, must be so serious "that the child [could] not reasonably communicate." *Id.* (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)). See *supra* note 4 (partial text of Maryland statute).

29. *Craig*, 110 S. Ct. at 3161.

30. *Id.*

31. *Id.* at 3166-67.

32. *Id.* at 3166. See *supra* notes 15-16 and accompanying text (elements of confrontation assure reliability of testimony against defendant).

33. *Craig*, 110 S. Ct. at 3166.

34. *Id.*

35. *Id.*

manner functionally equivalent to that accorded live, in-person testimony."<sup>36</sup> Therefore, subjecting the child witness's testimony to such "rigorous adversarial testing" assures the reliability of the testimony.<sup>37</sup>

A defendant's right to a face-to-face confrontation with accusatory witnesses may only be denied upon a finding of necessity.<sup>38</sup> A finding of necessity requires that the denial of face-to-face confrontation be required to advance an "important public interest."<sup>39</sup> The Court noted as evidence of the importance of protecting child victims, that many states have enacted laws aimed at protecting child witnesses in child abuse cases.<sup>40</sup> The United States Supreme Court has traditionally recognized the states' interests in the protection of the physical and mental health of children.<sup>41</sup> Thus, the Court reasoned that protecting the physical and mental health of victims of child abuse is an "important public policy."<sup>42</sup>

In *Craig*, the Court held that a defendant's right to confront witnesses is satisfied under a procedure like the Maryland procedure, if the use of the procedure is required to protect the well-being of the individual child witness who is to testify.<sup>43</sup> The procedure must be necessary to protect the child witness from emotional trauma that would result from testifying in the physical presence of the defendant.<sup>44</sup> The Court stated that any emotional distress that would result from merely testifying in a courtroom

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36. *Id.* The *Craig* court noted that the "assurances of reliability and adversariness [provided for in the Maryland procedure] are far greater than those required for admission of hearsay testimony under the Confrontation Clause." *Id.* at 3167.

37. *Id.* at 3166-67.

38. *Id.* at 3166. See also *Idaho v. Wright*, 110 S. Ct. 3139, 3146 (1990) (confrontation clause reflects a preference for face-to-face confrontation, therefore, denial of face-to-face confrontation generally requires a finding of necessity).

39. *Craig*, 110 S. Ct. at 3166-69. The United States Supreme Court, in *Craig*, noted that the states' "interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." *Id.* at 3167 (citations omitted).

40. *Id.* at 3167-68. See *id.* at 3167-68 n.2 (legislation allowing videotaped testimony); *id.* at 3168 n.3 (legislation allowing one-way closed-circuit televised testimony); *id.* at 3168 n.4 (legislation allowing two-way closed-circuit televised testimony).

41. *Id.* at 3167-68. The Maryland statute was enacted for the specific purpose of protecting the physical and mental health of child abuse victims. *Id.* at 3168 (citing *Windermuth v. State*, 310 Md. 496, 518, 530 A.2d 275, 286 (1987)). The statute was intended to protect "child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Id.* (quoting *Windermuth*, 310 Md. at 518, 530 A.2d at 286). In *Craig*, the Court stated that it would not "second-guess" the importance given the public policy in protecting child victims. *Id.* at 3169.

42. *Id.*

43. *Id.* (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982) (right of press and public to attend criminal trials should not be restricted absent case-by-case finding of necessity)).

44. *Id.*

would not be sufficient to deny a defendant the opportunity of face-to-face confrontation.<sup>45</sup> The Court also held that any emotional trauma that the child might suffer must be more than minor.<sup>46</sup> Thus, in order for a child witness in a child abuse case to testify using the Maryland procedure, use of the procedure must protect the child from emotional distress that is not minor, and that would result from testifying in the physical presence of the defendant.<sup>47</sup>

The Court of Appeals of Maryland had held that a finding of necessity required the judge to first question the child witness in the presence of the defendant, and that the possibility of using a two-way closed-circuit television be explored before using a one-way closed-circuit television procedure.<sup>48</sup> As the trial judge had not examined the child witnesses in the presence of the defendant, and did not explore the possibility of using two-way closed-circuit television, the court of appeals reversed and remanded for a new trial.<sup>49</sup> In *Craig*, the United States Supreme Court declined to require that states employ "as a matter of federal constitutional law, any such categorical evidentiary prerequisites [for a determination of necessity] for the use of the one-way television procedure."<sup>50</sup> Therefore, the Court vacated the judgment of the lower

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45. *Id.* Were the emotional distress of the child witness merely to result from testifying in a courtroom situation, it would not be necessary to deny a defendant face-to-face confrontation. *Id.* Rather, "the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present." *Id.*

46. *Id.* In *Craig*, the Court did not determine the minimal amount of emotional distress required to permit the use of a procedure such as the Maryland procedure. *Id.* The Court found that the Maryland requirement of "serious emotional distress . . ." was clearly sufficient. *Id.* (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989)).

47. *Id.* at 3169-70.

48. *Craig v. State*, 316 Md. 551, \_\_\_, 560 A.2d 1120, 1127-29 (1989). The Court of Appeals of Maryland interpreted the United States Supreme Court decision of *Coy v. Iowa* to require that before allowing a child to testify via one-way closed-circuit television, the trial judge must first question the witness in the physical presence of the defendant. *Id.* at \_\_\_, 560 A.2d at 1128 (interpreting *Coy v. Iowa*, 487 U.S. 1012 (1988)). Under the court of appeals' interpretation of *Coy*, where "the child suffer[s] serious emotional distress such that the child cannot reasonably communicate," in the presence of the defendant, the trial judge must next explore the possibility of using two-way closed-circuit television. *Id.* If the use of a two-way television procedure would also result in serious emotional trauma, then the court of appeals would sanction use of the one-way closed-circuit television procedure. *Id.*

49. *Craig*, 110 S. Ct. at 3171 (quoting *Craig v. State*, 316 Md. at \_\_\_, 560 A.2d at 3171). See *supra* note 6 and accompanying text (trial judge heard expert testimony that the children would suffer emotional distress were the children to testify).

50. *Craig*, 110 S. Ct. at 3171. The Court noted that the "evidentiary requirements [advocated by the court of appeals] would strengthen the grounds for use of protective measures. . . ." *Id.* The Court, however, refused to require these measures under federal constitutional law. *Id.*

court, and remanded.<sup>51</sup>

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51. *Id.*



