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Admissibility of Video-taped Testimony: What is the Standard After *Maryland v. Craig* and How Will the Practicing Defense Attorney be Affected?

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CASENOTE

Admissibility of Video-taped Testimony: What is the Standard After *Maryland v. Craig* and How Will the Practicing Defense Attorney be Affected?

I. INTRODUCTION

In *Maryland v. Craig*,[1] the Supreme Court addressed "whether the [c]onfrontation [c]lause of the [s]ixth [a]mendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television."[2] The majority, in an opinion written by Justice O'Connor,[3] held that provided the trial court makes a case-specific finding of necessity, the confrontation clause does not prohibit a state from using a one-way closed-circuit television procedure for receiving testimony by a child witness in a child sexual abuse case.[4]

Many courts and state legislatures have been grappling with the problem of minimizing the trauma of testifying in open court for child witnesses in sexual abuse cases, while at the same time trying to ensure that the accused's sixth amendment rights are protected. In an effort to pro-

1. 110 S. Ct. 3157 (1990).
2. *Id.* at 3160.
3. Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Blackmun, and Kennedy.
4. *Id.* at 3171.

tect children from the trauma of in-court testimony, thirty-seven states[5] have enacted provisions permitting introduction of a child abuse victim's videotaped testimony at trial in lieu of traditional face-to-face testimony.

This Note begins with a brief historical development of the sixth amendment confrontation clause and its application to child sexual abuse cases.[6] Next, it will detail the facts and procedural history of *Craig*, analyze the case itself, and critique the decision.[7] Finally, this Note will analyze the *Craig* standard for admissibility of testimony via closed-circuit television and the ramifications of *Craig* upon the practicing defense attorney.[8]

II. HISTORY OF THE CONFRONTATION CLAUSE

The sixth amendment of the United States Constitution states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him."[9] The Supreme Court has

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5. *See* ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-4251 & 4253(B), (C) (1989); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1990); COLO. REV. STAT. §§ 18-3-413 & 18-3-401.3 (1986); CONN. GEN. STAT. § 54-86g (1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. § 92.53 (1989); HAW. REV. STAT. ch. 626, Rule Evid. 616 (1985); ILL. REV. STAT. ch. 38, para. 106A-2 (1989); IND. CODE § 35-37-4-8(c), (d), (f), (g) (1988); IOWA CODE § 910A.14 (1987); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch. 278, § 16D (Supp. 1990); MICH. COMP. LAWS ANN. § 600.2163a(5) (West Supp. 1990); MINN. STAT. § 595.02(4) (1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. REV. STAT. §§ 491.675-491.690 (1986); MONT. CODE ANN. §§ 46-15-401 to -403 (1989); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. § 174.227 (1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. § 2907.41(A), (B), (D), (E) (Baldwin 1986); OKLA. STAT. tit. 22, § 753(C) (Supp. 1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(G) (1985); S.D. CODIFIED LAWS § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116(d)-(f) (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (Vernon Supp. 1990); UTAH RULE CRIM. PROC. 15.5 (1990); VT. RULE EVID. 807(d) (Supp. 1989); WIS. STAT. ANN. § 967.04(7) to (10) (West Supp. 1989); WYO. STAT. § 7-11-408 (1987). 110 S. Ct. at 3167-68 n.2.

6. *See infra* text accompanying notes 9-33.

7. *See infra* text accompanying notes 34-120.

8. *See infra* text accompanying notes 121-63.

9. U.S. CONST. amend. VI. In Mattox v. United States, 156 U.S. 237, 242-43 (1895), the Supreme Court first decided that the purpose of the sixth amendment was to

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

made the confrontation clause applicable to the states through the fourteenth amendment.[10]

Kirby v. United States[11] was one of the earliest cases recognizing the right of confrontation as a fundamental right, crucial for ensuring the veracity of witnesses. The Supreme Court held unconstitutional an 1875 statute which provided that a previous conviction against a person for stealing property "shall be conclusive evidence in the prosecution against such receiver that the property . . . has been embezzled, stolen or purloined."[12] The Court held that a defendant would have no connection with the previous trial and, therefore, no opportunity to confront crucial witnesses.[13]

Subsequent to *Kirby*, the Supreme Court decided a series of cases reflecting only a preference for face-to-face confrontation at trial. In *Douglas v. Alabama*,[14] the Supreme Court held that the right of cross-examination is the essential element of the confrontation right. In *Douglas* petitioner and his alleged accomplice were tried separately. The alleged accomplice, called to testify in petitioner's trial, refused to do so on the basis of self-incrimination. Under the guise of cross-examining the accomplice as a hostile witness, the prosecutor read a purported confession signed by the accomplice. This confession, which implicated petitioner, was read in the presence of the jury.[15] The Supreme Court held that petitioner's "inability to cross-examine [the alleged accomplice] . . . plainly denied [petitioner] the right of cross-examination secured by the [c]onfrontation [c]lause."[16]

Bruton v. United States[17] supplied additional evidence supporting the Supreme Court's adoption of the view that the confrontation clause primarily guarantees the right to cross-examine witnesses. In *Bruton* the Court held that admission of a confession by one defendant in a joint trial violated the confrontation clause because it precluded the other defendant from cross-examining the codefendant not taking the stand.[18] The Court emphasized that the error arose because the declarant did not testify and could not have been subject to cross-examination.[19]

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10. Pointer v. Texas, 380 U.S. 400, 406 (1965).
11. 174 U.S. 47 (1899).
12. *Id.* at 48.
13. *Id.* at 60-61.
14. 380 U.S. 415 (1965).
15. *Id.* at 416.
16. *Id.* at 419.
17. 391 U.S. 123 (1968).
18. *Id.* at 126.
19. *Id.* at 136. This reasoning suggests that there would not have been a confrontation problem if Bruton had been able to cross-examine his codefendant.

In *California v. Green*,[20] the Supreme Court affirmatively stated their proposition that what the confrontation clause guarantees is the right of cross-examination. Despite defendant's contention that his confrontation rights had been violated, the Supreme Court allowed the admission of testimony taken at the defendant's preliminary hearing.[21] The Court held that, "[v]iewed historically, then, there is good reason to conclude that the [c]onfrontation [c]lause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination."[22]

Similarly, *Ohio v. Roberts*[23] involved the introduction at trial of testimony taken during a preliminary hearing. In *Roberts* the witness was unavailable to testify at trial. The Supreme Court, focusing on the opportunity to cross-examine the witness during the preliminary hearing, ruled that the defendant's right of confrontation had not been violated.[24]

Finally, in *Coy v. Iowa*,[25] the Supreme Court determined that an Iowa statute,[26] which permitted a screen to be placed between a sexual assault defendant and the child witnesses, unconstitutionally violated the accused's right of confrontation.[27] In an opinion written by Justice Scalia, the Court stated that "[the Court has] never, therefore, doubted that the [c]onfrontation [c]lause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[28] The Court further recognized that the screen was specifically designed to enable the com-

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20. 399 U.S. 149 (1970). Respondent was convicted of distributing marijuana to a minor in violation of California law. Respondent's conviction was based chiefly on testimony given by the minor during the preliminary hearing.

21. *Id.* at 151.

22. *Id.* at 158. The Supreme Court supported its conclusion by comparing the purposes of the confrontation clause with the alleged dangers of admitting out-of-court statements. *See infra* text accompanying note 57.

23. 448 U.S. 56 (1980). Respondent was charged with forgery of checks and possession of stolen credit cards. Anita Isaacs testified during the preliminary hearing that she allowed respondent to live at her apartment for several days. During cross-examination she refused to admit that she had given respondent permission to use the alleged stolen property. Anita Isaacs refused to appear at trial and was held unavailable. *Id.* at 58.

24. *Id.* at 70.

25. 487 U.S. 1012 (1988). Appellant was charged with sexually assaulting two children. At appellant's jury trial, the Court granted prosecution's motion to place a screen between appellant and the children during their testimony. The motion was granted pursuant to a 1985 statute intended to protect child victims of sexual abuse. The screen blocked appellant from the children's sight, but allowed appellant to hear the children testify. *Id.* at 1014-15.

26. IOWA CODE § 910A.14 (1987) provides in pertinent part that, "[t]he 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."

27. 487 U.S. at 1022.

28. *Id.* at 1016.

plaining witnesses to avoid viewing appellant as they gave their testimony.[29]

The Court, however, noted past indications that the "rights conferred by the [c]onfrontation [c]lause are not absolute, and may give way to other important interests."[30] The Court held that "[s]ince there [were] no individualized findings that [the] particular witnesses needed special protection, the judgment . . . could not [have been] sustained by any conceivable exception."[31] The majority opinion left "for another day" a determination of whether any exceptions to the confrontation clause may exist in the child sexual abuse case, noting that such exceptions would be allowed "only when necessary to further an important public policy."[32] *Maryland v. Craig*[33] requires the Supreme Court to address the unanswered questions in *Coy*.

III. THE FACTS OF *Maryland v. Craig*

In October 1986 a Howard County grand jury charged Sandra Ann Craig with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. Brooke Etze, a six-year old child, was the named victim in each count. The victim had attended a kindergarten and pre-kindergarten center owned and operated by Craig.[34]

The State sought to invoke a Maryland statutory procedure[35] permitting a judge or jury to receive, by one-way closed-circuit television, the

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29. *Id.* at 1020.

30. *Id. See supra* text accompanying notes 11-28.

31. 487 U.S. at 1021. The State argued that the necessity prong was satisfied by the statute which created a legislatively imposed presumption of trauma.

32. *Id.*

33. 110 S. Ct. 3157 (1990).

34. *Id.* at 3160.

35. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989). Section 9-102 of the annotated code provides in pertinent parts:

> (a)(1) In a case of abuse of a child . . . a court may order that the testimony of the child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
>
> (ii) The judge determines that testimony by the child victim in the courtroom would result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> (b)(1) Only the following persons may be in the room 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
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

testimony of a child witness who is alleged to be a victim of child abuse.[36] In order to invoke the procedure, the statute requires the trial judge first to "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."[37] According to the Maryland statute, the child witness, prosecutor, and defense counsel withdraw to a separate room while the judge, jury, and the defendant remain in the courtroom. Examination and cross-examination of the child are videotaped in the separate room. A video monitor records and displays the witness's testimony to those remaining in the courtroom. During this procedure, 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.[38]

The prosecution presented expert testimony that the child victim would "suffer serious emotional distress" and would not be able to "reasonably communicate" if required to testify in Craig's presence.[39] Craig objected to the procedure on confrontation clause grounds, but the trial court rejected her claim.[40] The trial court held that, "although the statute take[s] 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."[41] The child testified via the one-way closed-circuit television procedure. Craig was convicted on all counts, and the Maryland Court of Special Appeals affirmed.[42]

The Maryland Court of Appeals reversed and remanded the case for a new trial, rejecting Craig's argument that the confrontation clause requires face-to-face courtroom encounters between the accused and his accusers.[43] The court of appeals, however, held that under Maryland Code section 9-102(2)(1)(ii), "the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined . . . from face-to-face confrontation with the defendant."[44] Fur-

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

36. 110 S. Ct. at 3160-61.

37. *Id.* at 3161 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)).

38. *Id.* at 3161.

39. *Id.*

40. *Id.* at 3161-62.

41. *Id.*

42. *Id.* at 3162 (citing 76 Md. App. 250, 544 A.2d 784 (1988), *rev'd*, 560 A.2d 1120 (1989), *vacated*, 110 S. Ct. 3157 (1990)).

43. *Id.* (citing 316 Md. 551, 566, 560 A.2d 1120, 1127 (1989), *vacated*, 110 S. Ct. 3157 (1990)).

44. *Id.* (quoting 316 Md. at 566, 560 A.2d at 1127).

thermore, the court of appeals construed, for sixth amendment purposes, the language " 'in the courtroom' " to mean " 'in the courtroom [while] in the presence of the defendant.' "[45]

Applying the reasoning in *Coy v. Iowa*,[46] the court of appeals found that the State's showing was insufficient to reach the high threshold required to invoke Maryland Code section 9-102.[47] The court of appeals stated that, " '[u]nless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.' "[48] The Supreme Court granted certiorari to resolve the conflict between the sixth amendment confrontation rights of the accused and the admission of closed-circuit testimony by child witnesses.

IV. Error in the Court of Appeals

The Maryland Court of Appeals held that "although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only whe[n] there is a 'case-specific finding of necessity.' "[49] However, the court of appeals additionally interpreted *Coy* to impose two subsidiary requirements for the invocation of Maryland Code section 9-102. The first requirement mandates the trial judge's personal observation of initial questioning of the child witness in the presence of the defendant.[50] Second, before using a one-way closed-circuit television procedure, the trial judge must determine that the child witness would suffer "severe emotional distress" by testifying via a two-way closed-circuit television procedure.[51]

After reviewing the evidence presented to the trial court, the court of appeals determined that " 'the finding of necessity required to limit the defendant's right of confrontation through invocation of section 9-102 . . . was not made here.' "[52] The court of appeals specifically noted that the trial court judge did not question the child himself, observe her in the presence of the defendant, nor explore any alternatives to the use of one-way closed-circuit television.[53] The judge based his decision solely on evidence of expert opinion regarding the ability of the child to communicate. The court of appeals held that since the judge failed to observe the child's behavior in the defendant's presence and failed to explore less restrictive

45. *Id.*
46. 487 U.S. 1012 (1988).
47. 110 S. Ct. at 3162 (citing 316 Md. at 554-55, 560 A.2d at 1121).
48. *Id.* (quoting 316 Md. at 566, 560 A.2d at 1127).
49. *Id.* at 3170 (quoting 316 Md. at 564, 560 A.2d at 1126).
50. *Id.* (citing 316 Md. at 566, 560 A.2d at 1127).
51. *Id.* (citing 316 Md. at 567, 560 A.2d at 1128).
52. *Id.* (quoting 316 Md. at 570-71, 560 A.2d at 1129).
53. *Id.* at 3170-71 (quoting 316 Md. at 568-69, 560 A.2d at 1128-29).

alternatives, the judgment of the trial court and the Court of Special Appeals must be reversed and the case remanded for a new trial.[54]

V. The Supreme Court's Opinion

A. *Confrontation Clause*

The Supreme Court began its opinion by reiterating that the confrontation clause has never been interpreted to guarantee criminal defendants the absolute right to a face-to-face meeting with opposing witnesses at trial.[55] The majority stated that the central thrust of the confrontation clause is to "ensur[e] the reliability of the evidence against a criminal defendant by subjecting [the evidence] to rigorous testing in the context of an adversary proceeding before the trier of fact."[56] The majority set out the three essential elements and purposes of the confrontation clause:

> (1) [to] insure[] 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) [to] force[] the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) [to] permit[] 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.[57]

The Court reasoned that the combined effect of these elements serves the purpose of the confrontation clause by ensuring that evidence admitted against an accused is reliable because it has been subjected to rigorous adversarial testing.[58]

The majority further stated that although face-to-face confrontation forms " 'the core of the values furthered by the [c]onfrontation [c]lause,' " the Court has nevertheless recognized that face-to-face confrontation is not the "sine qua non" of the confrontation right.[59] Writing for the majority, Justice O'Connor, reasoned that a literal reading of the confrontation clause would " 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.' "[60] Therefore, in "certain narrow circumstances, 'competing interests, if closely examined,

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54. *Id.* at 3171 (citing 316 Md. at 568-71, 560 A.2d at 1128-29).
55. *Id.* at 3163.
56. *Id.*
57. *Id.* (quoting California v. Green, 399 U.S. 149, 158 (1970)).
58. *Id.*
59. *Id.* at 3164 (quoting *Green*, 399 U.S. at 157).
60. *Id.* at 3165 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

may warrant dispensing with confrontation at trial.' "[61] Recognizing that Supreme Court precedent establishes a preference for face-to-face confrontation at trial, the majority held that such preference must occasionally give way to considerations of public policy and the necessities of the case.[62]

In rejecting Craig's claim that the face-to-face confrontation requirement was absolute, the Court did, however, recognize that the right to confront may not easily be dispensed. Based upon the holding in *Coy*, the Court reaffirmed the principal position that a defendant's right to confront accusatory witnesses may be denied only when necessary to further an important state interest and only when the reliability of the testimony is assured.[63]

B. State's Interest

The critical question for the Supreme Court was whether the use of videotaped testimony via a closed-circuit television procedure was necessary to further an important state interest. Maryland contended that it had a "substantial interest in protecting children who are allegedly victims of child abuse from the trauma of [having to] testify[] [face-to-face] against the alleged perpetrator," and that the statutory procedure of receiving testimony via closed-circuit television was "necessary to further that interest."[64]

The Court began its evaluation of the State's interest by reiterating the long established principle that "the protection of minor victims of sex crimes from further trauma and embarrassment is a compelling [interest]."[65] Furthermore, the majority noted that the Supreme Court had previously sustained legislation designed to protect children " 'even when the laws have operated in the sensitive area of constitutionally protected rights.' "[66] The Court held that the State's interest in protecting child witnesses from the trauma of testifying in the presence of the accused is

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61. *Id.* (quoting *Roberts*, 448 U.S. at 64).

62. *Id.*

63. *Id.* at 3166 (citing Coy v. Iowa, 487 U.S. 1012, 1021 (1988)).

64. *Id.* at 3167.

65. *Id.* (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-09 (1982)). In *Globe* the Supreme Court held that a State's interest in the physical and emotional well-being of a minor victim was sufficiently weighty to justify depriving the press and the public of their constitutional right to attend criminal trials, when the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. 457 U.S. at 608.

66. 110 S. Ct. at 3167 (quoting New York v. Ferber, 458 U.S. 747, 757 (1982)). In *Ferber* the Supreme Court held that a state may ban the distribution of material showing children engaging in sexual conduct, even though the material is not legally obscene. 458 U.S. at 764-65.

sufficiently compelling to outweigh, at least in some cases, a defendant's right to face his accusers in court.[67]

The Court also acknowledged that a significant majority of states have enacted similar child witness protection statutes, demonstrating a widespread belief in the importance of such a public policy.[68] The Court held that "[g]iven the State's traditional and 'transcendent interest in protecting the welfare of children,' and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, we will not second-guess the considered judgment of the Maryland legislature."[69]

C. *The Maryland Statute*

The Court noted that although the Maryland statutory procedure, when invoked, denies the defendant a face-to-face confrontation with his accuser, the statute preserves the essential elements of the confrontation right: the child witness must be competent to testify; the child must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (via closed-circuit television) the demeanor of the witness as she testifies.[70]

The Court found it significant that the Maryland statute preserved these "other elements of confrontation," and thus, the procedure was held "adequate[] [to] ensure[] that the testimony is both reliable and subject to rigorous adversarial testing."[71] The Court also noted that the elements of effective confrontation not only permit a defendant to " 'confound and undo the false accuser, or reveal the child coached by a malevolent adult,' but may well aid the defendant in eliciting favorable testimony from the child witness."[72] Therefore, the Court held that "[w]e are . . . confident that use of the one-way closed-circuit television procedure, whe[n] necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the [c]onfrontation [c]lause."[73]

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67. 110 S. Ct. at 3167.

68. *Id.* at 3167-68. *See supra* note 5.

69. 110 S. Ct. at 3168-69.

70. *Id.* at 3166.

71. *Id.*

72. *Id.* at 3166-67 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)).

73. *Id.* at 3167.

D. Requirement of a Case-Specific Finding of Necessity

The Court limited the use of testimony via closed-circuit television by requiring a finding of case-specific necessity.[74] For example, the Court held in *Globe Newspaper Co. v. Superior Court*[75] that a finding of "a compelling interest in protecting child victims does not justify a mandatory trial closure rule."[76] 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."[77] Furthermore, the Court held that the judge must conclude the "child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant."[78] The Court also held that the finding of emotional distress must be more than "de minimis," or more specifically, "more than 'mere nervousness or excitement or some reluctance to testify.' "[79]

The Court, however, chose not to define the minimum showing of emotional trauma required for the use of closed-circuit testimony. The Maryland statute requires a determination that the child witness will suffer " 'serious emotional distress such that the child cannot reasonably communicate.' "[80] The majority adopted this standard, holding that the "unable to reasonably communicate" gauge "clearly suffices to meet constitutional standards."[81]

E. New Standard Established

The Court concluded that when it is necessary to protect a child witness from the trauma of testifying in the physical presence of the accused, the State may deny the accused the right of face-to-face confrontation with his accuser. Under the *Craig* rule, the State must show that such trauma would impair the child's ability to communicate effectively, and the State must ensure the reliability of such testimony through rigorous adversarial testing.[82] The Court held that "there [was] no dispute that the child witness[] in this case testified under oath, [was] subject to full cross-examination, and [was] able to be observed by the judge, jury, and

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74. *Id.* at 3169.
75. 457 U.S. 596 (1982).
76. *Id.* at 608-09.
77. 110 S. Ct. at 3169.
78. *Id.* It is important to note that the State's interest must be more than merely protecting child witnesses from the general trauma of courtroom testimony.
79. *Id.* (quoting Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).
80. *Id.* (citing MD. CTS & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)).
81. *Id.*
82. *Id.* at 3170.

defendant as [she] testified."[83] Therefore, the Court reasoned that "to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the [c]onfrontation [c]lause."[84]

The Supreme Court, however, declined to establish any categorical evidentiary prerequisites for the use of one-way closed-circuit testimony.[85] The majority reasoned that the trial court "could well have found," on the basis of expert opinion, that testifying in the defendant's presence would result in the child witness suffering serious emotional distress.[86] Concerned with the Maryland Court of Appeals holding that "the trial court had not made the requisite finding of necessity under [the Court of Appeals] interpretation of 'the high threshold required by [*Coy*] before [invocation of] section 9-102,' " the Supreme Court reversed and remanded the court of appeals decision.[87] The Supreme Court reached its decision by reasoning that "[it is uncertain] whether the Court of Appeals would reach the same conclusion in light of the [new] legal standard . . . ."[88]

VI. The Dissenting Opinion

The dissenting opinion, written by Justice Scalia,[89] began by stating, "[s]eldom has this court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."[90] Justice Scalia based his textualist view of the sixth amendment on the theory that the "purpose of enshrining [confrontation] protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[91] Justice Scalia's theory in his dissent was that the subordination of explicit constitutional text to the currently favored public policy of protecting child victims could potentially lead to manifest injustice for the accused.[92]

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83. *Id.*
84. *Id.*
85. *Id.* at 3171.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* Justice Scalia was joined by Justices Brennan, Marshall, and Stephens. It is important to note that Justice Scalia was the author of the majority opinion in Coy v. Iowa, 487 U.S. 1012 (1988).
90. 110 S. Ct. at 3171.
91. *Id.*
92. *Id.* at 3172. Justice Scalia envisioned extreme circumstances in which a father had been sentenced to prison for sexual abuse on the basis of testimony by a child whom the parent had not seen for many months. In this scenario, a guilty verdict could be rendered

Justice Scalia's opinion also stressed that the Supreme Court had no authority to question the value of confrontation: "It is not within our charge to speculate that, 'whe[n] face-to-face confrontation causes significant emotional distress in a child witness,' confrontation might 'in fact *disserve* the [c]onfrontation [c]lause's truth-seeking goal.' "[93] Furthermore, Scalia noted that the sixth amendment requires confrontation, and the Court is not at liberty to ignore it.[94]

In his first attack upon the majority's reasoning, Justice Scalia evaluated the following quote: "We cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the [s]ixth [a]mendment's guarantee of the right to confront one's accusers."[95] He viewed this reasoning as "mak[ing] the impossible plausible by recharacterizing the [c]onfrontation [c]lause, so that confrontation (redesignated 'face-to-face confrontation') becomes only one of many 'elements of confrontation.' "[96] Justice Scalia characterized and evaluated the majority's reasoning as follows:

> The [c]onfrontation [c]lause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the [c]onfrontation [c]lause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE).[97]

Justice Scalia argued that this line of reasoning "abstracts from the right to its purposes, and then eliminates the right."[98] This reasoning, he argued, is invalid because the confrontation clause does not guarantee reliable evidence, rather, it guarantees specific trial procedures thought to assure reliable evidence.[99] Justice Scalia stated: "Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least

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without giving the parent the opportunity to sit in the presence of the child and ask, "Is it really true, is it I who did this to you?"

93. *Id.* at 3176 (quoting from the majority opinion at 3169).

94. *Id.*

95. *Id.* at 3172 (quoting from the majority opinion at 3166).

96. *Id.* (quoting from the majority opinion at 3163-64).

97. *Id.* Justice Scalia's harsh critique of the majority's reasoning further illustrates his textualist view of the sixth amendment.

98. *Id.*

99. *Id.* Justice Scalia argued that the specific trial procedures guaranteed by the confrontation clause include face-to-face confrontation.

what it explicitly says: the 'right to meet face-to-face all those who appear and give evidence at trial.' "[100]

Justice Scalia based his second attack on the Court's claim that its interpretation of the confrontation clause " 'is consistent with our cases holding that other [s]ixth [a]mendment rights must also be interpreted in the context of the necessities of trial and the adversary process.' "[101] Justice Scalia conceded that the " 'necessities of trial and the adversary process' limit the *manner* in which [s]ixth [a]mendment rights may be exercised, and limit the *scope* to the extent that scope is textually indeterminate."[102] He argued, however, that *Craig* does not deal with denying expansive scope to a sixth amendment provision whose scope is unclear: " '[T]o confront' plainly means to encounter face-to-face, whatever else it may mean in addition."[103] Furthermore, Justice Scalia argued that "[t]he 'necessities of trial and the adversary process' are irrelevant here, since the Court cannot alter the constitutional text."[104]

Justice Scalia also criticized the majority for its misplaced analogy to the admissibility of hearsay evidence. He argued that the test governing hearsay cannot be applied to permit what is explicitly prohibited by the constitutional text, and any analysis to the child's testimony to some sort of permissible hearsay exception is error.[105] Justice Scalia stated that, "[o]ur [c]onfrontation [c]lause conditions for the admission of hearsay have long included a 'general requirement of unavailability' of the declarant."[106] Live closed-circuit testimony is a " 'weaker substitute for live testimony' " and must only be employed when the genuine article is unavailable.[107] The majority's test "requires unavailability only in the sense that

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100. *Id.* (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988)).

101. *Id.* at 3173 (quoting from the majority opinion at 3165-66).

102. *Id. See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970) (the right to confront is not the right to confront in a manner that disrupts the trial); Taylor v. Illinois, 484 U.S. 400 (1988) (the right to have compulsory process for obtaining witnesses is not the right to call witnesses in a manner that violates fair and orderly procedures); Perry v. Leeke, 488 U.S. 272 (1989) (the scope of the right to have the assistance of counsel does not include consultation with counsel at all times during the trial); Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (the scope of the right to cross-examine does not include access to the State's investigative files).

103. 110 S. Ct. at 3173. Justice Scalia analogized his argument by stating that the Court was not dealing with the manner of arranging face-to-face confrontation, but rather if such confrontation should occur at all.

104. *Id.*

105. *Id.* at 3174.

106. *Id.* (quoting Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990)).

107. *Id.* (quoting United States v. Inadi, 475 U.S. 387, 395 (1986)).

the child is unable to testify in the presence of the defendant."[108] Justice Scalia argued that this "cannot possibly be the relevant sense."[109]

Finally, the dissenting opinion addressed the issue of the State's interest. Justice Scalia stated that the State's interest that "outweighs" the explicit text of the Constitution is not the interest in the physical and psychological well-being of the child abuse victims.[110] Rather, Justice Scalia stated, "[t]he State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants."[111] Noting, however, that this is not an unworthy interest, he warned that the State should not dress it up to be a humanitarian interest.[112]

Justice Scalia also recognized that the State's "other interest" is fewer convictions of innocent defendants, specifically, innocent defendants accused of particularly heinous crimes.[113] He expressed concern about the veracity of a child's testimony, noting that "[s]ome studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality."[114] Therefore, the so-called "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony (face-to-face confrontation) are matched by "special" reasons for being particularly insistent upon it.[115]

Furthermore, Justice Scalia suggested that the protection of child witnesses from the trauma of testifying is totally within the prosecution's control: "Why would a prosecutor want to call a witness who cannot reasonably communicate."[116] Justice Scalia reasoned that if the prosecution allows the child to testify, any further trauma to the child is the State's own fault.[117]

Finally, as evidence to the injustice of erroneous child testimony in a sexual abuse case, Justice Scalia elaborated on the tragic Scott County

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108. *Id.* (citing MD. CTS. & JUD. PRO. CODE ANN. § 9-102(a)(1)(ii) (1985)).

109. *Id.* Justice Scalia argued that unwillingness to testify cannot be a valid excuse under the confrontation clause. The object of the confrontation clause is to place the witness under the sometimes hostile glare of the defendant.

110. *Id.* at 3175.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (citing Lindsay & Johnson, REALITY MONITORING AND SUGGESTIBILITY: CHILDREN'S ABILITY TO DISCRIMINATE AMONG MEMORIES FROM DIFFERENT SOURCES, in CHILDREN'S EYEWITNESSES MEMORY 92 (S. Ceci, M. Toglia & D. Ross eds. 1987)).

115. *Id.*

116. *Id.*

117. *Id.*

investigations of 1983-1984.[118] The report by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation described the investigation as full of well-intended techniques employed by the prosecution, police, child protection workers, and foster parents that distorted, and in some cases even coerced, the children's false recollections.[119] Justice Scalia pointed out that some of the children were told that "reunion with their real parents would be hastened by 'admission' of their parents' abuse."[120] Justice Scalia reflected on "how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom," or "how devastating it might be . . . [to permit a child] to tell his story to the jury on closed-circuit television."[121]

VII. What is the Standard for Admissibility of Closed-Circuit Testimony and how will the Practicing Defense Attorney be Affected?

A. *Standard of Admissibility after Craig*

The Supreme Court's holding in *Craig* balanced the State's interest in the physical and psychological well-being of child abuse victims against a defendant's right to face his accusers in court. The Court used a two-part analysis in examining the constitutionality of Maryland Code section 9-102. First, the Court determined that the statute contained enough of the other "elements of confrontation" (oath, cross-examination, and observation of the witness's demeanor) to ensure the testimony was reliable and subject to adversarial testing in a manner functionally equivalent to actual in-court testimony.[122] Second, the Court found the State's interest in minimizing the trauma of in-court testimony of alleged child victims to be an important public policy, sufficient in some circumstances to outweigh a defendant's right to face his accusers in court.[123]

The Court refused, however, to decide the minimum showing of emotional trauma required for the use of closed-circuit testimony.[124] The Court reasoned that the Maryland statute, which requires a determination that the child witness will suffer " 'serious emotional distress such that the child cannot reasonably communicate,' " sufficiently met consti-

118. *Id.* at 3175-76.
119. *Id.* at 3176 (citing H. Humphrey, report on Scott County Investigations 8, 7 (1985)).
120. *Id.* (quoting H. Humphrey, report on Scott County Investigations at 9).
121. *Id.*
122. *Id.* at 3163. *See supra* text accompanying notes 70-73.
123. 110 S. Ct. at 3167. *See supra* text accompanying notes 65-69.
124. 110 S. Ct. at 3169. *See supra* text accompanying notes 79-81.

tutional standards.[125] Therefore, the Court's only guidance was that "[s]o long as a trial court makes such a case-specific finding of necessity, the [c]onfrontation [c]lause does not prohibit a State from using a one-way closed-circuit television procedure for the receipt of testimony by a child witness in a child abuse case."[126]

B. Guidelines for the Practicing Defense Attorney[127]

The right of confrontation may be viewed as having two distinct components: (1) the physical presence between accuser and accused, and (2) a reliability aspect that comprises cross-examination, testimony given under oath, and allowance of hearsay exceptions. The majority in *Craig* held that the verbal component of confrontation outweighs the physical component when the State demonstrates a compelling interest in protecting child abuse victims.[128] Practicing defense attorneys now face two problems. First, when the State seeks to invoke a procedure to allow a child victim to testify via closed-circuit television, what method determines necessity? Second, if the State is successful in demonstrating a case specific necessity, what, if anything, compensates for the loss of physical confrontation?

Method For Determining Admissibility of Testimony Via Closed-Circuit Television. The first issue confronting defense counsel is the method for determining invocation of a procedure to receive testimony via closed-circuit television. The holding in *Craig* demands the prosecution demonstrate, in each case, that the child witness would be traumatized by having to testify in the defendant's presence.[129] Furthermore, the prosecution must show that the emotional distress suffered by the child witness would be "more than *de minimis*."[130]

An initial consideration must be made regarding the desirability of having the child testify in the presence of the defendant. There will be cases in which the child's live testimony could do more damage to the client's defense than the out-of-court testimony. In determining the desirability of confrontation, defense counsel must consider the following factors: the relationship between the child and defendant, the child's personality, and whether the alleged abuse was violent.

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125. 110 S. Ct at 3169. *See supra* text accompanying notes 79-81.

126. 110 S. Ct. at 3171. *See supra* text accompanying note 84.

127. The author wishes to express his appreciation to Professor Laura G. Webster, Professor at Walter F. George School of Law, Mercer University, for her invaluable assistance with the following section.

128. 110 S. Ct. at 3169. *See supra* text accompanying notes 64-67.

129. 110 S. Ct. at 3169. *See supra* text accompanying note 78.

130. 110 S. Ct. at 3169. *See supra* text accompanying note 79.

Once defense counsel determines that in-court confrontation between the child and the defendant is in the best interest of the client, counsel should file a *motion in limine* seeking to preclude the use of any means other than live testimony of the child witness.[131] In addition, defense counsel should immediately examine the child's capacity to testify at trial. It is very important that defense counsel take every opportunity to have defense experts examine the child and make separate evaluations. Defense counsel must be aware that this procedure invites a battle of expert testimony regarding the likelihood that the child witness will suffer trauma from testifying in the defendant's presence.

Expenses for expert examinations present a common problem when defending an indigent client. Based on the holding in *Ake v. Oklahoma*,[132] defense counsel should submit a request for a court provided expert. Counsel's request may be supported by an analogy to the Supreme Court's holding requiring the State to provide psychiatric assistance to indigent inmates whose convictions are based upon expert testimony. Defense counsel should argue that the defendant is entitled to have his own expert examine the child and evaluate the likelihood of the child suffering further trauma from testifying in defendant's presence. Also, defense counsel may request a court appointed expert under Federal Rule of Evidence 706.[133] This rule provides that a court may appoint an expert witness upon its own motion or the motion of any party.[134]

The *Craig* standard of a case-specific finding of necessity does not require observation of the child witness's behavior in the defendant's presence.[135] Therefore, the judge is free to speculate, based upon expert testimony, that the child witness would be traumatized in the defendant's

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131. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.05[4] (1990).

132. 470 U.S. 68 (1984). Indigent petitioner was charged with first degree murder. At the sentencing proceeding, the State asked for the death penalty, relying on the State's examining psychiatrist's testimony. Petitioner had no expert witness to rebut the State's testimony or give evidence in mitigation of his punishment. Petitioner was sentenced to death. The Supreme Court overruled petitioner's sentence and held that when a defendant has made a preliminary showing that his sanity is likely to be a significant factor at trial, the Constitution requires that the State provide access to a psychiatrist's assistance if the defendant cannot otherwise afford one. 470 U.S. at 73-74.

133. FED. R. EVID. 706.

134. FED. R. EVID. 706(a). The rule also includes provisions concerning compensation and disclosure of the appointment to the jury and does not limit parties calling expert witnesses of their own selection.

135. 110 S. Ct. at 3171. *See supra* text accompanying notes 85-86. The majority recognized that such evidentiary requirements could strengthen the grounds for the use of closed-circuit testimony, but refused to establish any such categorical evidentiary prerequisites.

presence.[136] This opportunity for judicial speculation raises theoretical questions that defense counsel should address. For instance: "Is a judge the proper authority to decide the potential trauma of child witnesses?"; and "How does one determine that the potential trauma will be attributable to testifying in the presence of the defendant, as opposed to testifying generally?"[137]

Frye v. United States[138] presents another argument that defense counsel may want to consider. Counsel may preserve this issue for challenging the expertise offered by the State. The *Frye* test requires the proponent of the evidence to demonstrate that the expertise employed and its underlying principles have gained acceptance in the scientific community.[139] Defense counsel should request a specific type of expertise for determining whether the child will suffer potential trauma from testifying in defendant's presence.[140]

Furthermore, defense counsel must realize that personal observation by the judge is still a viable argument. Even though the Court in *Craig* held that the child does not have to be used as a litmus test to determine capacity, defense counsel should argue that the child be initially questioned and observed in the defendant's presence before being rendered incapable of face-to-face testimony.[141] This argument should advance the premise that judicial observation be the rule rather than the exception.[142]

If the child witness is able to confront the defendant during the preliminary hearing, or any other period prior to the trial, chances are great that defense counsel will be able to get the child in the courtroom for live testimony. Any subsequent finding that the child cannot reasonably communicate in the presence of the defendant suggests outside influences not directly attributable to the client. Defense counsel should carefully examine the basis upon which the prosecution seeks to use closed-circuit testimony. This enables counsel to amass any evidence that may negate the prosecution's argument of a compelling need.[143] Defense counsel

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136. 110 S. Ct. at 3171. The judge uses his discretion to evaluate the differing expert evaluations.

137. Although the author acknowledges that these issues are not defense arguments per se, these issues are worthy of consideration by the legal community.

138. 293 F. 1013 (D.C. Cir. 1923).

139. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.06[2][i] (1990).

140. *Id.* Counsel should request that the court determine which area of expertise is best suited to evaluate the child's likelihood of trauma (i.e., psychiatrist, psychologist, or social workers).

141. Respondent's Brief at 30, Maryland v. Craig, 110 S. Ct. 3157 (No. 89-478) (1990).

142. *Id.* (*See* Wildermuth v. State, 310 Md. 496, 523-24, 530 A.2d 275, 289 (1987)).

143. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.05[4][h] (1990).

should consider the following influences that may adversely affect the child: the child's communication with physicians, police officers, social workers, parents, psychotherapists, prosecutors, and malevolent adults.[144] Because alleged victims of child sexual abuse are exposed to more pretrial influences than adults, defense counsel should argue that a greater demand for the right of confrontation exists.[145]

Another important issue for defense counsel to argue is a loss of the presumption of innocence.[146] When the jury learns that the child is testifying via closed-circuit television because the child may be traumatized by having to testify in the defendant's presence, the fact finder immediately assumes that the defendant has dramatically harmed the child in some manner.[147] Counsel must also move to exclude any testimony dealing with the witness's fear or trauma in regard to testifying in open court as irrelevant and prejudicial.[148] Furthermore, to secure confrontation and avoid a possible presumption of guilt, defense counsel must argue that the probative value of protecting child witnesses does not outweigh the prejudicial aura of guilt bestowed upon the defendant. This argument may be difficult to advance because today's court system and society place a higher value on the protection of child victims than upon the physical confrontation rights of the accused.[149]

The last argument that defense counsel will want to consider is Justice Scalia's textualist view of the sixth amendment: " '[T]o confront' plainly means to encounter face-to-face."[150] Even though the majority in *Craig* did not accept Justice Scalia's view of the confrontation clause, defense counsel must realize that the admissibility of closed-circuit testimony is in its infant stage. With the changing composition of the Supreme Court[151] and the views of society, it is important to note that the textualist view of the sixth amendment will always be a viable argument.

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144. Respondent's Brief at 17, Maryland v. Craig, 110 S. Ct. 3157 (No. 89-478) (1990).

145. *Id.*

146. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.05[4][i] (1990).

147. *Id.* See Estes v. Texas, 381 U.S. 532 (1965). The Supreme Court in *Estes* held that state procedures which involve a probability that prejudice will result are inherently lacking in due process.

148. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.05[4][i] (1990).

149. 110 S. Ct. at 3168-69. *See supra* text accompanying notes 65-69.

150. 110 S. Ct. at 3173. *See supra* text accompanying notes 102-04.

151. On Sept. 27, 1990, the Senate confirmed President Bush's appointment of David H. Souter to replace Justice William J. Brennan, Jr.

Finally, it is imperative that defense counsel raise all constitutional rights and issues that the client may have. Even if such arguments are rejected, counsel has at least laid the ground work for an appeal.

Compensation for the Loss of Confrontation. The second problem confronting practicing defense attorneys is how to compensate for the loss of physical confrontation between accused and accuser. Restoration of the presumption of innocence in the minds of the fact finders must be the foremost objective for defense counsel. There are four excellent means by which to accomplish this goal: the questioning of potential jurors during *voir dire*, defense counsel's opening statement, defense counsel's closing statement, and the jury instruction charged by the judge.

The process by which jurors are selected varies considerably according to jurisdiction. The Federal Rules of Criminal Procedure leave the decision of who will conduct *voir dire* to the discretion of the judge.[152] In dealing with the lack of physical confrontation, *voir dire* will be the most important aspect of a successful defense. Using *voir dire* to expose and explain the use of closed-circuit testimony is crucial. Defense counsel must attempt to de-emphasize the fact that the child is testifying via closed-circuit television.[153] Defense counsel's ability to confront difficult aspects of the case from the outset establishes credibility with the jury and begins to neutralize the unfavorable procedure.[154]

Furthermore, defense counsel must select a jury that will be unbiased given that the child is testifying outside the defendant's presence. This will not be an easy task. *Voir dire* allows defense counsel to elicit a promise from each juror that even though the law allows a child victim to testify outside the defendant's presence, such circumstances do not automatically render the defendant guilty of the alleged act. Prior planning and careful execution of *voir dire* will provide defense counsel with a jury unbiased to the lack of physical confrontation.

The opening statement at trial provides defense counsel with an opportunity to communicate directly with the jury. In addition to developing the theory of defense, counsel should stress to the jury that there is nothing peculiar about this case or this defendant which necessitates the use of closed-circuit testimony.[155] It is important to note, however, that this is a judgment call. Defense counsel may want to offer possible outside influ-

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152. FED. R. CRIM. P. 24(a). In many jurisdictions, the judge alone conducts *voir dire*; in others, the judge and the attorney jointly conduct *voir dire*; and in some districts, the attorney alone conducts *voir dire*.

153. Dixon, *Defense of Sex Crimes*, in 2 CRIMINAL DEFENSE TECHNIQUES § 53.04[2] (1990).

154. *Id.*

155. *Id.*

ences that factored into the judge's decision allowing the child to testify via closed-circuit television.[156] Furthermore, the opening statement allows counsel to remind the jury that the law presumes the client innocent and that they must adhere to this presumption.[157]

Defense counsel's closing argument also provides an excellent opportunity for direct communication with the jury. Along with reiterating the points counsel advanced during the opening statement,[158] counsel should point out probable influences to which the child has been exposed prior to testifying.[159] Also, counsel may want to suggest the degree of possible manipulation that may have occurred since the accusations were brought.[160]

Jury instruction provides the last means of compensating for the loss of physical confrontation. Defense counsel must request that the judge instruct the jury before and after the admission of the child's closed-circuit testimony. Defense counsel should analyze and draft specific instructions for specific issues in the context of the facts of the case and the current law.[161] These instructions should explain the nature of the closed-circuit procedure and the responsibility of the jury to consider the witness's demeanor and credibility as if the child were testifying in the courtroom.

At the conclusion of the proceedings, defense counsel must also submit a final jury instruction that includes elements of counsel's specific jury instruction, along with general instructions regarding the presumption of innocence and the burden of proof. The importance of a carefully drafted final instruction is enhanced because this is defense counsel's last opportunity to compensate for the loss of physical confrontation. Counsel should instill upon the jury that the client is not guilty merely because the law allows child victims to testify via closed-circuit television. If the

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156. Defense counsel must determine whether the exploitation of the lack of confrontation is in the best interest of the client. For possible outside influences affecting the child's capacity to testify in the presence of the defendant, see *supra* text accompanying notes 143-45.

157. The defendant is presumed to be innocent of the charge. This presumption remains with defendant throughout every stage of the trial and during the jury deliberation. This presumption shall not be overcome unless, based upon all the evidence, the jury is convinced beyond a reasonable doubt that the defendant is guilty. *See* MANUAL OF MODERN CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (West ed. 1989).

158. *See supra* text accompanying notes 154-56.

159. *See supra* text accompanying notes 143-45.

160. Summers, *Closing Argument*, in 1B CRIMINAL DEFENSE TECHNIQUES § 36.04[25] (1990).

161. Counsel should refer to the rules of their respective jurisdictions, because the instructions their courts give may affect counsel's closing argument; conversely, counsel's argument may affect the instructions. *See* Spix, *Jury Instructions in Criminal Cases*, in 1B CRIMINAL DEFENSE TECHNIQUES § 37.04 (1990).

judge's final instruction fails to incorporate elements favorable to the defense, counsel has laid the ground work for an appeal.

VIII. CONCLUSION

In *Craig*, a divided Court decided that the confrontation clause of the sixth amendment does not categorically prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television.[162] The majority announced the Court's recognition that "our precedents establish that 'the [c]onfrontation [c]lause 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.' "[163]

The standard adopted by the Court may hardly be considered a "balance" because the test weighs more heavily in the State's interest than the confrontation rights of the accused. Not requiring an observation of the child witness's behavior in the defendant's presence fatally weakens the "case-specific requirement of necessity." If the judge determines after an initial meeting that the child witness would be traumatized by testifying in the defendant's presence, then, and only then, should the defendant's right of face-to-face confrontation be denied.

The result of *Craig* can only be seen as establishing the constitutionality of section 9-102 of the Annotated Code of Maryland. The Supreme Court should have identified the constitutional standard by which trial courts are to judge the admissibility of closed-circuit testimony and the minimal procedure by which this standard is to be applied. Practicing defense attorneys must now confront such problems as the method for determining the need of necessity for closed-circuit testimony and compensation for the loss of physical confrontation. Until society changes its posture of protecting child victims over the defendant's right of face-to-face confrontation, defense counsel is left with only theoretical suggestions and courtroom tactics to compensate for the loss of the client's constitutional guarantees.

CHRISTOPHER A. WHITLOCK

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162. 110 S. Ct. at 3170-71.

163. *Id.* at 3165 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980) (emphasis in original)).