Volume 36 | Issue 6 Article 5

1991

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Recommended Citation

Karen L. Tomlinson, *Maryland v. Craig: Televised Testimony and an Evolving Concept of Confrontation*, 36 Vill. L. Rev. 1569 (1991).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol36/iss6/5

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Notes

MARYLAND v. CRAIG: TELEVISED TESTIMONY AND AN EVOLVING CONCEPT OF CONFRONTATION

I. INTRODUCTION

The sixth amendment right to confrontation guarantees a defendant the right to *confront* his accuser at trial. This fundamental right is deeply rooted in Anglo-Saxon common law.[1] Its beginnings date back to the first century, where the right to confront one's accuser at trial served as an essential element in reaching the truth.[2] Although this right has been preserved in the Bill of Rights,[3] its contours have never been clearly or explicitly defined by the Supreme Court.[4]

1. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959). While we do not know how far back in time the concept of a right to confrontation existed in England, we do know that the right to confrontation in English law predated the right to trial by jury. *Id.* As early as the twelfth century, the injured party would make an accusation, recite under oath that he had been injured and would then have to prove his injury by exhibiting the wound or, if unable to do so, by presenting witnesses who would swear that he was a man of good reputation whose oath could be believed. *Id.* at 385.

By the thirteenth century, an accuser was required to present at least two witnesses before the accused could be put to trial, and the accused had the right to cross-examine those witnesses. *Id.* at 385-86. Statutes in the sixteenth and seventeenth centuries that allowed the testimony of only one witness to suffice for conviction of an accused led the courts to increasingly emphasize the character of the evidence presented and the character of the witness who presented it. *Id.* at 387. One consequence of this practice was the right to confront and cross-examine that one accusing witness in order to test the witness' credibility. *Id.*

In the mid-sixteenth century, Parliament extended this common law right to confrontation to treason accusations; the right to confront accusers, however, was not extended to other political prisoners until the seventeenth century. *Id.* at 388-89.

2. *Id.* at 384. The rights to confrontation and cross-examination have been considered important truth-seeking elements since biblical and ancient Roman times. *Id.* One biblical example is Festus' report to King Agrippa concerning a prisoner named Paul: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." *Id.* (quoting *Acts* 25:2). Similarly, Pliny, asking what was to be done with the Christians, was instructed by the Emperor Trajan that the Christians were to be prosecuted like other offenders, but anonymous accusations were not to be admitted into evidence against anyone, including the Christians. *Id.*

3. The sixth amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

4. For a discussion of cases involving the Supreme Court's interpretation of the confrontation clause, see *infra* notes 23-147 and accompanying text.

In *Maryland v. Craig*,[5] the United States Supreme Court held that the confrontation clause does not prohibit a state from enacting legislation to allow the use of a one-way closed circuit television to receive the testimony of a child witness in a child abuse case.[6] This decision contracted the sixth amendment right to confrontation to narrower limits than those previously set in precedent.[7] As a result of this decision, a defendant accused of child sexual abuse can now be found guilty and sentenced to prison without ever having had the opportunity to meet face-to-face with or talk in person to the child he or she has allegedly abused.

The *Craig* decision stirred numerous questions concerning the sixth amendment. What does the confrontation clause mean? Does this clause ensure the right to literal face-to-face confrontation?[8] Alternatively, does the clause bundle together a collection of rights designed to ensure a fair trial, such as the right to cross-examine and the right to have the trier of fact observe the demeanor of the witness?[9] The ultimate question is whether, in a *Craig* type of situation, the defendant's rights have been adequately protected.

This Note will discuss the impact of *Craig* on a criminal defendant's rights by reviewing past Supreme Court decisions interpreting the meaning of the confrontation clause[10] and comparing this precedent with the holding in *Craig*.[11] Ultimately, this Note will propose that the purpose and rationale of the confrontation clause, as historically interpreted by the Supreme Court, are served by the *Craig* holding, and thus the rights of the accused are adequately protected.[12]

II. BACKGROUND

A. *The Source of the Right to Confrontation*

The confrontation clause of the sixth amendment, which is binding

5. 110 S. Ct. 3157 (1990).

6. *Id.* at 3171. For a discussion of *Craig*, see *infra* notes 107-47 and accompanying text.

7. Previous Supreme Court cases defining the boundaries of the sixth amendment were primarily limited to fact situations involving the admission of out-of-court statements of witnesses who were physically unavailable to testify at trial. For a discussion of these cases, see *infra* notes 23-83 and accompanying text.

8. This interpretation is espoused by Justice Scalia. *See Craig*, 110 S. Ct. at 3171 (Scalia, J., dissenting); Coy v. Iowa, 487 U.S. 1012 (1988).

9. This position is the *Craig* majority interpretation. *Craig*, 110 S. Ct. at 3162-66.

10. For a discussion of United States Supreme Court cases addressing the meaning of the confrontation clause prior to *Craig*, see *infra* notes 23-106 and accompanying text.

11. For a discussion of the *Craig* decision as compared to prior Supreme Court precedent, see *infra* notes 148-207 and accompanying text.

12. For a discussion of the *Craig* decision with respect to a defendant's confrontation right, see *infra* notes 107-47 and accompanying text.

on the states,[13] guarantees that a defendant shall enjoy the right "to be confronted with the witnesses against him."[14] Very little is known about the early development of the clause, or about the intentions of the Framers in including the clause in the Bill of Rights.[15] Yet, a known fact is that several states including this right in their state constitutions demanded that the right to confrontation be included in the Bill of Rights as a prerequisite for ratification of the federal Constitution.[16] As with

13. In *Pointer v. Texas*, the United States Supreme Court held that an accused's sixth amendment right to confront the witnesses against him is a fundamental right essential to a fair trial and is therefore made obligatory on the states by the fourteenth amendment. 380 U.S. 400, 403 (1965). For a discussion of *Pointer*, see *infra* notes 34-39 and accompanying text.

14. U.S. CONST. amend. VI.

15. James Madison prepared and introduced the amendments included in the Bill of Rights for the First Congress. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 28 (1951). Madison correlated amendments proposed by the states, including several proposed amendments concerning criminal procedures, and introduced them to the House of Representatives. *Id.* at 28-29. One of these amendments stated:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with his accusers and with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id. at 30. After passage by the House of Representatives, this amendment was among those sent to the Senate. *Id.* at 31. The Senate's consideration of the amendments lasted for a week. *Id.* Senator Maclay, whose journal serves as the primary source of information on the Senate proceedings, was ill during this time period, and thus there is no record of the Senate's reaction. *Id.* at 31-32. Available records simply show that the amendments were returned to the House with several changes and deletions. *Id.* at 32-33. It was in this form that the amendments were eventually submitted to, and ratified by, the states. *Id.*

16. The Constitution of the United States, when completed in 1778, did not provide for a right to confrontation; it did provide for a federal judiciary, guarantee the right to a trial by jury in all criminal cases and contain a provision that no person should be convicted of treason without the testimony of two witnesses to the same overt act. U.S. CONST. art. III, § 3, cl. 1.

When the Constitution was put before the states for ratification, there were objections to the lack of procedural safeguards in criminal trials. J. ELLIOT, DEBATES OF THE STATE CONVENTIONS ON THE FEDERAL CONSTITUTION, 124-25 (1836). A Massachusetts representative to the convention objected to the lack of trial procedures and, in particular, to the lack of provisions for the accused's right to counsel, the accused's right to meet his accuser face-to-face, the accused's right to confront witnesses and the accused's right to cross-examination. *Id.* Patrick Henry, representative from Virginia, also objected to the lack of safeguards, pointing to the procedural safeguards contained in Virginia's Constitution, such as the accused's right to be confronted with the witnesses against him and right to call for evidence in his favor. *Id.* at 134.

These objections were the basis of a compromise. *Id.* at 124. Virginia, Massachusetts and several other states agreed to ratify the Constitution with the understanding that the first Congress would propose a Bill of Rights. *Id.* at 124-25. As a result of this compromise, the sixth amendment to the Constitution now provides that the accused has the right to confront the witnesses against him.

Thus, the sixth amendment is based, at least in part, on criminal defend-

the other amendments to the Constitution, the confrontation clause has led to its share of court challenges. Courts considering confrontation clause issues have encountered particular problems in determining whether exceptions to the right to confrontation that were recognized in common law were carried over into the sixth amendment. Common law exceptions to the right to confrontation considered by the Supreme Court in past confrontation clause challenges included the use of dying declarations,[17] transcribed testimony of trial witnesses who died before retrial,[18] and preliminary hearing testimony from witnesses who were later unavailable at trial.[19]

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ants' rights already guaranteed by several states to their citizens. The North Carolina Declaration of Rights, the first state constitution, provided that a defendant had a right in all criminal proceedings to be informed of the accusation against him and to confront his accusers. F. HELLER, *supra* note 15, at 22. The Pennsylvania and New Jersey Constitutions both provided that criminal defendants should be afforded the privilege to call witnesses and to retain counsel. *Id.* The Virginia Bill of Rights contained provisions for the accused to know the nature of the accusation and to be confronted with his accusers and witnesses. *Id.* at 23. The Declaration of Rights of Massachusetts and the Bill of Rights of New Hampshire both guaranteed the accused the right to know the nature of the accusation against him and to meet the witnesses against him. *Id.*

17. In *Mattox v. United States*, the Court stated that dying declarations, although rarely made in the defendant's presence and always made outside the presence of the jury without the opportunity for examination or cross-examination, have "from time immemorial" been treated as competent testimony. 156 U.S. 237, 243 (1895). Impending death, like an oath, presumedly removes temptation to lie and enforces strict adherence to the truth. *Id.* at 244. These declarations are admitted as an exception to the rules governing the admission of testimony "simply from the necessities of the case and to prevent a manifest failure of justice." *Id.*

18. In *Mattox*, the Court addressed the issue of whether a transcribed copy of the testimony of a government witness who died after the first trial could be used at retrial, or whether the sixth amendment right to confrontation prohibited the use of such testimony. *Id.* at 238-44. The Court held that admission of the transcribed testimony did not violate the confrontation clause. *Id.* at 242. For a discussion of *Mattox*, see *infra* notes 23-33 and accompanying text.

19. In *Barber v. Page* and *Pointer v. Texas*, the Court addressed the issue of whether the use at trial of a transcript of a witness' prior testimony at a preliminary hearing where the witness had since become unavailable violated the defendant's sixth amendment right to confrontation. Barber v. Page, 390 U.S. 719, 720-25 (1968); Pointer v. Texas, 380 U.S. 400, 401-08 (1965). For a further discussion of *Barber* and *Pointer*, see *infra* notes 40-44 and 34-39, respectively, and accompanying text.

All of these exceptions also raise hearsay concerns. Pollitt, *supra* note 1, at 400. In 1973, Professor Irving Young stated:

> The Supreme Court has thus far failed to work out a coherent theory of the relationship between confrontation and hearsay. This is bad judicial craftsmanship, for unilluminated by such a theory, the court decides in the dark, heedless of consistency with the past and implications for the future. . . . A coherent theory of the relationship between confrontation and hearsay should afford the accused adequate protection against the possibility of conviction by affidavit or gossip and simultaneously preserve whatever logic and flexibility have been achieved over the centuries of development of the hearsay rule.

B. *Supreme Court Precedent*

Until recently, Supreme Court decisions on the boundaries of the confrontation clause fell into two broad classifications: (1) cases dealing with the admission of out-of-court statements where the witness was not available to testify at trial; and (2) cases involving restrictions imposed by law or by the trial court on the scope of cross-examination of a testifying witness at trial.[20] Neither category, however, involved the constitutionality of legislatively-created court procedures that are designed to protect child witnesses from the trauma of face-to-face questioning, while preserving the accused's right to confrontation. This issue was not addressed by the United States Supreme Court until *Coy v. Iowa*[21] and *Maryland v. Craig*.[22] To place *Coy* and *Craig* in proper perspective, the Supreme Court's previous confrontation clause decisions must first be reviewed.

Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32, 41-42 (1973).

20. Delaware v. Fensterer, 474 U.S. 15, 18-19 (1985) (Court, after identifying two categories of confrontation clause cases, held that confrontation clause guarantees opportunity for effective cross-examination and right to cross-examination is not necessarily denied by state when witness' lapse of memory impedes one method of discrediting him). The first category, reflecting the Court's recognition of the right of the accused to confront the witnesses against him at trial as the core of the confrontation clause, includes such cases as Ohio v. Roberts, 448 U.S. 56, 73-75 (1980) (where prior testimony of witness was subject to some form of cross-examination, testimony had sufficient indicia of reliability to satisfy confrontation clause), Dutton v. Evans, 400 U.S. 74, 88 (1970) (witness who is under oath, subject to cross-examination and whose demeanor can be observed by trier of fact is reliable informant as to what he or she has seen or heard), and California v. Green, 399 U.S. 149, 166 (1970) (where declarant's out-of-court statements are admitted at trial, purposes of confrontation clause satisfied if declarant testifies as witness at trial, is subject to cross-examination and demeanor can be observed by trier of fact). In the second category, the Court has acknowledged that confrontation means more than physical confrontation of the witness, and thus the scope of cross-examination by the accused may not be overly restricted. This category includes such cases as Smith v. Illinois, 390 U.S. 129, 131 (1968) (trial court restrictions on scope of cross-examination may emasculate right to cross-examination and raise confrontation clause questions) and Davis v. Alaska, 415 U.S. 308, 315 (1974) (confrontation is more than being allowed to confront witness physically).

21. 487 U.S. 1012 (1988). The *Coy* Court held that, because the confrontation clause provides the accused the right to confront witnesses at trial face-to-face, a legislatively-created courtroom procedure allowing placement of a screen between a child sexual abuse victim and a defendant during the child witness' testimony violates the defendant's constitutional right to confrontation. *Id.* at 1019-22. For a further discussion of *Coy*, see *infra* notes 84-106 and accompanying text.

22. 110 S. Ct. 3157 (1990). The *Craig* Court held that a state statutory procedure permitting a judge to receive the testimony of an alleged child abuse victim by one-way closed circuit television was not a per se violation of the defendant's constitutional right to confrontation. *Id.* at 21. For a complete discussion of *Craig*, see *infra* notes 107-47 and accompanying text.

1. *Confrontation Clause Defined*

The Supreme Court first addressed the meaning of the right to confrontation in *Mattox v. United States*.[23] The *Mattox* Court considered a confrontation challenge to the use at retrial of the sworn testimony of two witnesses who had testified at the defendant's first trial, but who had died before the defendant's retrial.[24]

The *Mattox* Court, citing federal,[25] state[26] and English[27] cases, concluded that overwhelming authority favored admitting at trial the testimony of an absent or deceased witness when the defendant had been present at the examination of that witness at a preliminary hearing or at a previous trial.[28] The Court held that no hardship was placed on the defendant by allowing the testimony of the deceased witness to be read to the jury because the defendant already had the opportunity to exercise his right to cross-examination at the prior trial or hearing.[29] The Court stated that the main objective of the confrontation clause was to

23. 156 U.S. 237 (1895).

24. *Id.* at 240. Mattox had been convicted of murder with the testimony of two witnesses, Whitman and Thornton, constituting the strongest evidence against him. *Id.* Mattox appealed, and his conviction was reversed by the United States Supreme Court. *Id.* at 238. The case was then remanded to the district court for a new trial. *Id.* At the retrial, the district court admitted into evidence transcribed copies of the court reporter's notes of Whitman's and Thornton's prior testimony because both Whitman and Thornton had died prior to the retrial. *Id.* at 240. Mattox claimed that the admission of the transcripts from the previous trial infringed upon his right to be confronted with the witnesses against him. *Id.*

25. The *Mattox* Court cited an early federal case as an example of an instance where the testimony of a deceased witness was held to be admissible. *Id.* at 242 (citing United States v. Macomb, 26 F. Cas. 1132 (C.C.D. Ill. 1851) (No. 15,702)).

26. The *Mattox* Court cited Kendrick v. State, 29 Tenn. (10 Hum.) 479 (1850), and People v. Oiler, 66 Cal. 101, 4 P. 1066 (1884), as examples of state cases which held that testimony of deceased and absent witnesses was admissible and constitutional under state constitutions. *Mattox*, 156 U.S. at 241.

27. The *Mattox* Court cited The King v. Joliffe, 100 Eng. Rep. 1022, 4 Term R. 285, 290 (K.B. 1791), The King v. Radbourne, 168 Eng. Rep. 330, 1 Leach 457 (Cr. Cas. 1787), The King v. Smith, 171 Eng. Rep. 622, 2 Starkie 208 (N.P. 1816), and Buckworth's Case (Taylor v. Brown), 83 Eng. Rep. 90, 170 Raym. T. (K.B. 1669), as examples of English cases in which the testimony of a deceased witness was held admissible in a criminal prosecution. *Mattox*, 156 U.S. at 240-41.

28. *Mattox*, 156 U.S. at 241.

29. *Id.* at 244. The *Mattox* Court, recognizing that this precise question had not previously arisen before the Court, stated that the defendant's proposition that the prior testimony of a deceased witness could not be used at a criminal trial resulted from a misinterpretation of a parliamentary ruling in 1696, which stated that a material witness' testimony was inadmissible after that witness had been spirited away. *Id.* at 240 (citing Case of Sir John Fenwick, 13 How. St. Tr. 538, 579 (1696)). The Court, stating that the rule in England was clearly the opposite, distinguished *Fenwick* as a case where the witness was not deceased and where there had been no opportunity for cross-examination at a former trial. *Id.*

prevent ex parte affidavits or depositions from being used against a defendant "in lieu of a personal examination and cross-examination of the witness."[30]

Moreover, the *Mattox* Court noted that the substance of the right to confrontation is comprised of the right to examine and cross-examine and the right to compel the witness to stand in front of the jury so that the jury is able to properly judge the testimony presented.[31] The Court stated that a defendant may never be deprived of this *substance* of the right.[32] The Court, however, also specifically noted that the right to confront a witness at trial may give way to public policy considerations or the necessities of the case when strict adherence to the letter of the confrontation clause would provide only an incidental benefit or unnecessary protection for the accused.[33]

The Supreme Court expanded the scope and reach of the confrontation clause in *Pointer v. Texas*,[34] in considering whether the right of the accused to confront the witnesses against him was a fundamental right made obligatory on the states by the fourteenth amendment.[35] The precise issue before the Court was whether an absent witness' preliminary hearing testimony could be introduced at trial in lieu of his live testimony, given that the witness had moved out of state and would be unequivocally unavailable to testify at trial.[36] In his defense, Pointer

30. *Id.* at 242.

31. *Id.* at 242-43. The Court stated that examination and cross-examination of witnesses provides not only defendants with an opportunity to test the recollection and sift the conscience of a witness, but also affords juries the opportunity to observe the demeanor of the witness on the stand and judge whether the witness' testimony is "worthy of belief." *Id.* at 243.

32. *Id.* at 244. The *Mattox* Court would not allow much abrogation of the right to confront. The Court specifically stated that the substance of the defendant's constitutional protection, the defendant's right to see the witness face-to-face and to cross-examine the witness, must be preserved. *Id.* As the defendant in *Mattox* had once seen the witness face-to-face and had subjected the witness to cross-examination, he was not deprived of the substance of his right to confront the witnesses against him. *Id.*

33. *Id.* The Court recognized that the reading of the notes of the testimony of a witness deprives a defendant of the advantage of the presence of the witness before the jury, but the Court stated that, however beneficial rules of law are to the accused, they must "occasionally give way to considerations of public policy and the necessities of the case." *Id.* The example used by the Court was that a criminal, having once been convicted of a crime, should not be allowed to go "scot free" because "death had closed the mouth" of a witness. *Id.* According to the Court, there could be nothing more contrary to the right of confrontation than the admission of dying declarations because they: (1) are rarely made in a defendant's presence; (2) are made without an opportunity for cross-examination; and (3) are made without the jury having an opportunity to observe the witness. *Id.* The *Mattox* Court observed, however, that dying declarations have been treated "from time immemorial" as competent testimony and are admitted when necessary to "prevent a manifest failure of justice." *Id.* at 243-44.

34. 380 U.S. 400 (1965).

35. *Id.* at 401.

36. *Id.* The defendant (Pointer) and another man had been arrested and

argued that he had not had an adequate opportunity to cross-examine the absent witness at the preliminary hearing.[37] In response to this argument, the Court held that, because the right to confrontation and cross-examination is an essential, fundamental requirement for a fair trial, depriving a defendant of the right to cross-examine the witnesses against him would be a denial of the fourteenth amendment's guarantee of due process of law.[38] At the same time, the *Pointer* Court, referring to *Mattox*, not only recognized the admissibility of dying declarations and transcribed testimony of deceased witnesses who had testified at a former trial of the defendant, but also recognized the possibility of other analogous situations that would not fall within the scope of the confron-

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taken before a state judge for a preliminary hearing on a robbery charge. Pointer v. State, 375 S.W.2d 293, 294 (Tex. Crim. App. 1963). The chief witness for the state at the hearing was the person allegedly robbed. *Id.* This witness gave his version of the alleged robbery and identified Pointer as the man who had robbed him at gunpoint. *Id.* Pointer was indicted on the robbery charge. *Id.* The witness moved to California some time before Pointer's trial and the prosecution, after establishing that the witness did not intend to return to Texas, offered the transcript of the witness' preliminary hearing testimony as evidence against Pointer. *Id.* Pointer objected to the introduction of the transcript, but his objection was overruled on the ground that he had been afforded the opportunity to cross-examine the witness at the preliminary hearing. *Id.* Pointer's conviction was affirmed by the Texas Court of Criminal Appeals. *Id.* at 296. The Supreme Court granted certiorari. Pointer v. Texas, 379 U.S. 815 (1964).

37. *Pointer*, 380 U.S. at 407.

38. *Id.* at 404-05. Justice Black wrote the majority opinion. *Id.* at 400-08. Justices Harlan, Stewart and Goldberg each wrote separate concurring opinions. *Id.* at 408-09 (Harlan, J., concurring), 409-10 (Stewart, J., concurring), 410-14 (Goldberg, J., concurring). The Court based its holding on the fact that the right to confrontation appears in the Bill of Rights, reflecting the belief of the Framers that this right is fundamental and essential to a fair trial in a criminal prosecution. *Id.* at 404. The Court compared the sixth amendment's right of the accused to confront the witnesses against him to the right to assistance of counsel. *Id.* at 403. As the right to assistance of counsel was held to be fundamental and essential to a fair trial and therefore made obligatory upon the states by the fourteenth amendment, so was the right of a defendant to confront his accusers a fundamental right and therefore obligatory on the states by the fourteenth amendment. *Id.* (citing Gideon v. Wainwright, 372 U.S. 335, 342 (1963)).

The *Pointer* Court expressly stated its view that the right to cross-examination is included in the right to confrontation and asserted that no one would deny the value of cross-examination in "exposing falsehood and bringing out the truth in the trial of a criminal case." *Id.* at 404. The Court stated that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." *Id.* at 406-07. According to the *Pointer* court, past Supreme Court decisions, as well as decisions from lower courts, have "constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." *Id.* at 404. Because the transcript of the witness' statement offered at Pointer's trial had not been taken at a time or under circumstances where Pointer had an adequate opportunity to cross-examine the witness, the introduction of this transcript at trial would have amounted to the denial of the right to confrontation guaranteed by the sixth amendment. *Id.*

tation requirement.[39]

2. *Contours Added to the Meaning of the Clause*

Once the Supreme Court had determined that the confrontation clause was applicable to the states through the fourteenth amendment, the Court had more opportunity to address the purposes and the meaning of the right to confrontation. In *Barber v. Page*,[40] the Supreme Court clarified the requirements for the witness unavailability exception to the confrontation clause and reaffirmed its interpretation of the purpose of the right to confrontation.[41] The Court held that a witness cannot be said to be "unavailable" for purposes of an exception to the confrontation requirement unless the prosecution has made a good faith effort to obtain the presence of the witness at trial.[42] Thus, a witness' prior pre-

39. *Id.* at 407 (citing Mattox v. United States, 156 U.S. 237, 240-44 (1895)). While recognizing that there would be other analogous situations that might not fall within the scope of the confrontation clause, the *Pointer* Court stated that the case before it was not one of those exceptional situations. *Id.*

40. 390 U.S. 719 (1968).

41. *Id.* at 721-22. Barber and another man, Woods, were jointly charged with armed robbery. Barber v. State, 388 P.2d 320, 323 (Okla. Crim. App. 1963). Woods testified at the preliminary hearing, incriminating Barber. *Id.* at 322. At the time of Barber's trial in Oklahoma, however, Woods was incarcerated in a Texas federal prison. *Id.* at 324. The prosecution did not attempt to obtain Woods' presence at Barber's trial, but instead introduced the transcript of Woods' testimony from the preliminary hearing on the basis that Woods was out of the state and was therefore unavailable to testify. *Id.* Barber's objection to the introduction of the testimony of a key witness by transcript was overruled by the trial court. *Id.* Barber was convicted and his conviction was upheld on appeal to the Oklahoma Court of Criminal Appeals. *Id.* at 323, 327. Barber then sought federal habeas corpus relief on the basis that the use of the transcript of Woods' testimony deprived him of his constitutional right to confrontation. Barber v. Page, 239 F. Supp. 265, 266 (E.D. Okla. 1965). Barber's contention was rejected by the district court. *Id.* at 268. The Supreme Court granted certiorari, Barber v. Page, 389 U.S. 819 (1967), and reversed. Barber v. Page, 390 U.S. 719 (1968). Justice Marshall wrote the majority opinion. *Id.* Justice Harlan wrote a brief concurrence, agreeing that the state's failure to attempt to obtain the presence of the witness denied the defendant due process. *Id.* at 726 (Harlan, J., concurring).

42. *Barber*, 390 U.S. at 724-25. The *Barber* Court emphasized that the state had made no effort to obtain Woods' presence at trial and that the only reason that Woods did not testify in person was because the state had not attempted to seek Woods' presence. *Id.* at 725. The prosecution argued that Barber had waived his right to confrontation by not cross-examining Woods at the preliminary hearing. *Id.* The Court rejected this argument, stating that failure to cross-examine under these circumstances is in no way an "intentional relinquishment or abandonment of a known right or privilege." *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Court, citing *Mattox* as an example, did acknowledge that traditionally an exception to the right to confrontation existed where a witness was unavailable at trial but had previously testified at a judicial proceeding against that defendant and had been subject to cross-examination by that defendant. *Id.* at 721-22 (citing *Mattox*, 156 U.S. at 242-43). The Court stated that this exception was justified by the necessity of the case and by the fact that previous cross-examination of the witness provided substantial compliance with

liminary hearing testimony could not be introduced at trial in lieu of the witness' live testimony unless the prosecution could establish that it had made a substantial attempt to obtain the witness' presence, but failed.[43] In addition, the Court reaffirmed its conviction that the right to confrontation is a trial right that "includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[44]

Two years later, in *California v. Green*,[45] the Supreme Court once again reiterated the importance of the right to cross-examination and the jury's observance of the demeanor of the witness. The *Green* Court emphasized the literal right to confront a witness at the time of trial as

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the purposes behind the confrontation requirement. *Id.* at 722. According to the Court, although courts and commentators had assumed that the mere absence of a witness was grounds for dispensing with the confrontation requirement, that was no longer the case for imprisoned witnesses. *Id.* at 723. Not only did federal courts have the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities, but it was also the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state criminal proceedings in response to writs of habeas corpus *ad testificandum* that were issued by state courts. *Id.* at 724. More was required, therefore, to dispense with the confrontation clause than the mere allegation that a witness was unavailable due to incarceration. *Id.* at 724-25.

43. *Id.*

44. *Id.* at 725. The Court theorized that, even if Barber's counsel had cross-examined Woods at the preliminary hearing, the result would have been the same because the right to confrontation is basically a trial right and a preliminary hearing, due to its limited function, usually searches less into the merits of a case than does a trial. *Id.* In *Barber*, however, as it had done before in *Pointer*, the Court left open the possibility that the confrontation clause might be satisfied by less than confrontation at trial if a witness was shown to be actually unavailable. *Id.* at 725-26. For a discussion of *Pointer*, see *supra* notes 34-39 and accompanying text.

45. 399 U.S. 149 (1970). Green's conviction for selling marijuana to a minor was based on two prior inconsistent statements made by the minor—one to a police officer and one at Green's preliminary hearing. People v. Green, 71 Cal. Rptr. 100, 100-02 (Cal. Ct. App. 1968). The California District Court of Appeals reversed Green's conviction, holding that the use of the minor's prior statements to prove the truth of the matter asserted therein denied Green his right to confrontation. *Id.* at 102. The California Supreme Court affirmed, holding that the provision of the California Evidence Code allowing the substantive use of a witness' prior inconsistent statements was unconstitutional even though the prior statements were subject to cross-examination at a prior hearing. People v. Green, 70 Cal. 2d 654, 665, 451 P.2d 422, 429, 75 Cal. Rptr. 782, 789 (1969). The Supreme Court granted certiorari. California v. Green, 396 U.S. 1001 (1970). Upon consideration of the case, the majority held that Green's right to confrontation was not violated by the admission of the out-of-court statements because the declarant testified as a witness at trial, was under oath, was subject to full cross-examination, and his demeanor was observed by the trier of fact. *Id.* at 160-61, 164. Justice White wrote the majority opinion. *Green*, 399 U.S. at 150-170. Chief Justice Burger and Justice Harlan each wrote concurrences. *Id.* at 171-72 (Burger, J., concurring), 172-89 (Harlan, J., concurring). A dissent was filed by Justice Brennan. *Id.* at 189-203 (Brennan, J., dissenting). Neither Justice Marshall nor Justice Blackmun took part in the decision. *Id.* at 170.

the core value furthered by the confrontation clause.[46] The Court did not find, however, that the confrontation clause necessarily excluded the prior out-of-court testimony of a witness, but rather found that the exclusion of such testimony would be a matter of evidence under the hearsay rules.[47] According to the Court, although hearsay rules and the confrontation clause are designed to protect similar values, the overlap in values protected by each is not complete.[48] The Court concluded that if out-of-court statements could be admitted under a hearsay exception, then the possibility of a violation of the defendant's right to confrontation must be considered.[49] The *Green* Court outlined its view of

46. *Green*, 399 U.S. at 157. The Court, referring to *Mattox*, stated that historically there was good reason for concluding that the admission of a declarant's out-of-court statements did not violate the confrontation clause as long as the declarant testified at trial and was subject to full cross-examination. *Id.* at 158 (citing Mattox v. United States, 156 U.S. 237, 252-53 (1895)).

47. *Id.* at 153-54. The Court acknowledged two competing positions regarding the introduction of a witness' prior statements at trial. *Id.* at 154. The Court noted that most jurisdictions adhered to the orthodox view that out-of-court statements were inadmissable because they may not have been made under oath, the declarant may not have been subjected to cross-examination when he made the statement and the jury did not have an opportunity to observe the declarant's demeanor at the time the statement was made. *Id.* The statement, therefore, could not be used to prove the truth of the matters asserted therein, but could be used to impeach the credibility of the witness. *Id.* The minority view, supported by commentators such as Wigmore, would allow the substantive use of prior inconsistent statements because the usual dangers of hearsay are non-existent if the witness testifies at trial. *Id.* at 154-55 (citing 3 J. WIGMORE, WIGMORE ON EVIDENCE § 1018 (3d ed. 1940) (purpose of hearsay rule satisfied because witness is present and subject to cross-examination and there is opportunity to test witness on his former statement)). The *Green* court saw the issue before it, not as deciding which of these two positions was more sound as a matter of law, but rather as whether Green's constitutional right to be confronted with the witnesses against him was "necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view described above." *Id.* at 155.

48. *Id.* The *Green* Court cited *Barber* and *Pointer* as examples of cases in which the Court had found violations of the right to confrontation, even though out-of-court statements had been admitted under recognized hearsay exceptions. *Id.* at 155-56 (citing Barber v. Page, 390 U.S. 719 (1968); United States v. Pointer, 380 U.S. 400 (1965)). The Court also stated that the converse was true—evidence admitted in violation of a hearsay rule did not necessarily violate the confrontation clause. *Id.* at 156. The Court, however, recognized that there was some similarity in the values protected by the hearsay rules and the right to confrontation, and therefore expressed concern for the protection of a defendant's constitutional rights when a state's hearsay rule is modified to create a new exception for the admission of evidence against a defendant. *Id.* In *Green*, the Court was specifically concerned about the impact on the defendant's right to confrontation caused by the change in the California Evidence Code permitting the substantive use at trial of prior inconsistent statements of a witness. *Id.* at 154-55. For a further discussion of *Green*, see Thompson, *The Use of Modern Technology to Present Evidence in Child Sex Abuse Prosecutions: A Sixth Amendment Analysis and Perspective*, 18 U. WEST L.A. L. REV. 1, 9-11 (1986).

49. *Green*, 399 U.S. at 161-62. The Court stated that no Supreme Court decision interpreting the confrontation clause required the exclusion of out-of-

the purposes of confrontation as: (1) requiring the witness to give his statement under oath to impress upon him the seriousness of the matter at hand; (2) forcing the witness to submit to cross-examination to discover the truth; and (3) permitting the jury to observe the demeanor of the witness to aid the jury in assessing credibility.[50] The Court then stated that if the witness had died or had become otherwise unavailable for trial, the opportunity for cross-examination at a prior preliminary hearing afforded substantial compliance with the purposes behind the confrontation clause—as long as the witness' inability to give live testimony was not the fault of the prosecution.[51]

After *Green*, the Court continued to grapple with a practical concern for accuracy in the truth-determining process in criminal trials presenting confrontation clause issues. For example, in *Dutton v. Evans*,[52] hearsay statements were admitted to corroborate the in-court testimony of an alleged accomplice of the defendant.[53] Evans, the defendant, was convicted of murder at a trial in which a witness, Shaw, testified to corroborate a statement purportedly made by one of Evans' alleged accomplices.[54] Shaw testified that Williams, another alleged accomplice, had told him, in effect, that Evans was responsible for Williams being in jail.[55] Shaw's testimony was admitted under a Georgia statute which allowed into evidence a co-conspirator's out-of-court statement made during the concealment phase of the conspiracy.[56] Evans claimed that the Georgia hearsay exception was unconstitutional because it differed from

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court statements of a witness who was available and who testified at trial. *Id.* at 161. Past cases had involved situations in which statements were admitted when the declarant was not available at trial and could not be cross-examined. *Id.* Those situations arose because of exceptions to the hearsay rule that permitted the introduction of out-of-court statements, despite the unavailability of the declarant, on the theory that the evidence was reliable and was incapable of being admitted in a way that would secure confrontation with the declarant. *Id.* at 161-62. The *Green* court emphasized that these exceptions, which dispensed with the literal right to confrontation and the right to cross-examination, were subjected to careful scrutiny by the Court. *Id.* at 162.

50. *Id.* at 158. The Court characterized cross-examination as the "greatest legal engine ever invented for the discovery of truth." *Id.* (citing 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1367 (3d ed. 1940)).

51. *Id.* at 166. The Court further stated that the confrontation clause could not be construed to bar admission of the witness' prior statements if the witness could be cross-examined at trial. *Id.* If the witness had died before trial, introduction of his testimony from the preliminary hearing would not have violated Green's right to confrontation, and nothing in the Court's prior decisions indicated that a different result would follow where the prosecution produces and swears in the witness at trial. *Id.*

52. 400 U.S. 74 (1970).

53. *Id.* at 77-78.

54. *Id.* at 77.

55. *Id.* There were many other prosecution witnesses, including an eyewitness who testified that Evans had participated in the crime. *Id.* at 74.

56. *Id.* at 78. The Georgia statute at issue provided: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during

the federal rules of evidence hearsay exception for conspiracy trials.[57] The federal hearsay exception applies only if the out-of-court statement was made in the course of and in furtherance of the conspiracy, while the Georgia hearsay exception applies to the concealment phase of the conspiracy as well.[58] The *Evans* Court stated that an extension of a hearsay exception by a state statute to include out-of-court statements made during the concealment phase of the conspiracy did not necessarily violate the confrontation clause simply because the federal hearsay exception did not extend as far.[59]

In addressing the confrontation issue, the Court again recognized that the right to confrontation is not identical to the hearsay rules and focused on whether the trier of fact in this case had a satisfactory basis for evaluating the truth.[60] In doing so, the Court employed various "indicia of reliability"—factors that would determine whether a statement could be placed before a jury in the absence of confrontation with the declarant—in its inquiry.[61] These factors include the circumstances surrounding the statement of the declarant, the declarant's motivation to make the statement, the declarant's ability to accurately recall the events of which he or she spoke, and corroboration of the declarant's personal

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the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1954).

Evans was convicted of murder and his conviction was affirmed by the Georgia Supreme Court. Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1966). The United States Supreme Court denied certiorari. Evans v. Georgia, 385 U.S. 953 (1966). After exhausting his state court appeals, Evans brought a petition for habeas corpus relief, alleging that he had been denied his constitutional right to confrontation at trial. Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968). The district court denied the relief sought, but the Fifth Circuit reversed and remanded. *Id.* at 798-99. After a second denial of a writ of habeas corpus by the district court, and a reversal and remand by the Fifth Circuit, the Supreme Court noted probable jurisdiction. Dutton v. Evans, 393 U.S. 1076 (1969). After considering the case, Justice Stewart wrote the majority opinion, joined by Chief Justice Burger and Justices White and Blackmun. Dutton v. Evans, 400 U.S. 74, 76-90 (1970). Justice Blackmun filed a concurring opinion, joined by Chief Justice Burger. *Id.* at 90-93 (Blackmun, J., concurring). Justice Harlan filed an opinion concurring in the result. *Id.* at 93-100 (Harlan, J., concurring in result). Justice Marshall filed a dissenting opinion, joined by Justices Black, Douglas and Brennan. *Id.* at 100-11 (Marshall, J., dissenting).

57. *Evans*, 400 U.S. at 74.

58. *Id.* at 81 (citing Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949)). For the relevant text of the Georgia statute, see *supra* note 56.

59. *Evans*, 400 U.S. at 81.

60. *Id.* at 89. Although the hearsay rules and the confrontation clause stem from the same root, the Supreme Court had never, and did not in *Evans*, equate the two. *Id.* at 86.

61. *Id.* at 88-89. The Court cited *Green* as precedent for the statement that the mission of the confrontation clause was "to advance a practical concern for the accuracy of the truth-determining process in criminal trials." *Id.* at 89 (citing California v. Green, 399 U.S. 149, 162 (1970)).

knowledge on the subject of the statement.[62]

The Court stated that Evans was not deprived of the right to confrontation on the issue of whether Williams actually made the statement related by Shaw in his in-court testimony—a witness who is under oath, who is subject to cross-examination and whose demeanor can be observed by the trier of fact is a reliable witness as to what he or she has heard as well as to what he or she has seen.[63] Rather, the confrontation issue arose because the jury was invited to infer that Williams, in blaming Evans for his predicament, had implicitly identified Evans as the murderer.[64] With this in mind, the Court nevertheless concluded that Evans had not been denied his right to confrontation because Williams' statement did not contain any explicit assertion about past facts and Williams' knowledge of the identity and role of the other participants in the crime had been clearly established.[65]

In *Mancusi v. Stubbs*,[66] the Supreme Court cited the *Barber*, *Green* and *Evans* decisions in addressing the issue of whether prior-recorded testimony of a witness could be admitted when the witness had since removed himself to a foreign country.[67] The *Stubbs* Court noted that the

62. *Id.* at 88-89.

63. *Id.* at 88. The Court concluded that there had been no denial of the right to confrontation because: (1) Evans had exercised his right to confrontation on the question of whether Shaw had heard Williams make the statement to which Shaw testified; (2) Williams' statement did not contain an assertion about past facts and therefore the statement carried with it a warning to the jury against giving this statement undue weight; (3) Williams' personal knowledge of the identity and role of the participants in the crime was established by other testimony and by his conviction; (4) there was no more than a remote chance that Williams' recollection was faulty; (5) the circumstances in which Williams made this statement to Shaw were such that Evan's involvement in the crime was not misrepresented; and (6) the possibility that cross-examination of Williams would show the jury that the statement was unreliable was "wholly unreal." *Id.* at 88-89. In addition, the *Evans* Court evidenced a concern for the danger of a guilty person going free because of "gossamer possibilities of prejudice to a defendant" which could nullify a sentence pronounced by a court of competent jurisdiction. *Id.* at 89-90 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1931)). The Court also noted that Evans had the right to subpoena witnesses, including Evans' accomplice, but Evans' counsel had stated at oral argument that to subpoena the accomplice would not have been in Evans' best interest. *Id.*

64. *Id.*

65. *Id.* at 88.

66. 408 U.S. 204 (1972).

67. *Id.* at 210-13. In 1954, Stubbs was convicted of murder in Tennessee. *Id.* at 207. Nine years later, when Stubbs successfully claimed that he had been denied the effective assistance of counsel, the State of Tennessee elected to retry him. *Id.* at 209. Holm, the prosecution's chief witness in the first trial, had since moved to Sweden and taken up permanent residence there. *Id.* Holm had testified at the first trial that Stubbs had shot him twice in the head and had shot and killed Mrs. Holm. *Id.* at 208. The trial judge allowed Holm's testimony from the earlier trial to be read to the jury and Stubbs was again convicted in 1964. *Id.* at 209. Stubbs was subsequently convicted of a felony in a New York state court and sentenced as a second offender under the laws of New York due to his 1964 murder conviction in Tennessee. *Id.* at 205. Stubbs then sought federal habeas

focus of the Court's concern in cases involving the confrontation clause had been to ensure that there were "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury" in the absence of confrontation with the declarant, and "to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[68] The Court, after examining the circumstances surrounding the unavailability of the witness and the adequacy of the witness' examination at a previous trial, concluded that there had been no constitutional error in permitting the use of the prior-recorded testimony.[69]

Until this point, the Supreme Court had relied on cross-examination at a previous trial or at a preliminary hearing to provide the required indicia of reliability in cases where a witness was later deemed

corpus relief on the grounds that the Tennessee conviction had been obtained in violation of his constitutional right to confront the witnesses against him, and thus the Tennessee conviction could not be used by New York to impose a stiffer sentence. *Id.* The district court denied habeas corpus relief, but the court of appeals reversed the district court's decision. United States *ex rel* Stubbs v. Mancusi, 442 F.2d 561 (2d Cir. 1971). The Supreme Court reversed, holding that: (1) because the prosecution was powerless to compel Holm's presence at Stubb's retrial, the predicate unavailability was sufficiently shown so that a federal court hearing a habeas petition was not warranted in upsetting a state court's determination of the witness' unavailability; and (2) Holm's testimony bore sufficient "indicia of reliability" because it had been given at a felony trial conducted in a court before a jury, and because Stubb's counsel had been afforded the opportunity to cross-examine Holm so as to give the trier of fact a satisfactory basis for evaluating the truth. *Stubbs*, 408 U.S. at 212-16. Justice Rehnquist wrote the majority opinion, in which Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun and Powell joined. *Id.* at 205-16. Justice Marshall filed a dissenting opinion in which Justice Douglas joined. *Id.* at 216-23 (Marshall, J., dissenting).

68. *Stubbs*, 408 U.S. at 213 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970); California v. Green, 399 U.S. 149, 161 (1970)). For a discussion of *Evans* and *Green*, see *supra* notes 52-65 and 45-51, respectively, and accompanying text.

69. *Stubbs*, 408 U.S. at 214-16. The Court held that there had been an adequate opportunity, of which Stubb's counsel had taken full advantage, to cross-examine Holm at the first trial. *Id.* at 216. In addition, because Holm had moved to Sweden after the first trial, the prosecution called Holm's son as a witness at the second trial to testify that his father now resided in Sweden. *Id.* at 209. Based on the son's testimony, the trial court found Holm to be unavailable at the time of the second trial and permitted Holm's prior-recorded testimony to be read to the jury at the second trial. *Id.*

unavailable at trial.[70] A 1980 Supreme Court decision, *Ohio v. Roberts*[71] went a step further. Roberts had a preliminary hearing on charges of check forgery and possession of stolen credit cards belonging to Bernard Isaacs.[72] Isaacs' daughter was called as a witness at the hearing by Robert's appointed counsel and, while she admitted that she had let Roberts use her apartment for several days, she denied that she had given the checks and credit cards to Roberts.[73] Robert's counsel did not ask to have Isaacs' daughter declared a hostile witness or to place her under cross-examination.[74] When Isaacs' daughter failed to appear at trial despite the issuance of five separate subpoenas, the state offered the transcript of her preliminary hearing testimony in rebuttal to testimony by Roberts that Isaacs' daughter had given him her parents' checkbook and credit cards with the understanding that he could use them.[75] The defense objected to the use of the transcript as a violation of the confrontation clause.[76]

The *Roberts* Court held that, while the confrontation clause normally requires a showing of unavailability and adequate indicia of reliability in

70. *See id.* (confrontation clause not violated by admission of *bona fide* unavailable witness' prior-recorded testimony that was subject to opportunity for cross-examination); California v. Green, 399 U.S. 149, 158 (1970) (confrontation clause not violated by admitting declarant's out-of-court statements when declarant testifies at trial and is subject to full cross-examination); Barber v. Page, 390 U.S. 719, 722 (1968) (confrontation clause not violated by situation where witness is unavailable to testify at trial and has given testimony that was subject to cross-examination at prior judicial proceeding against defendant); United States v. Mattox, 156 U.S. 237, 240-44 (1895) (because adequate opportunity for cross-examination existed at first trial, confrontation clause not violated by reading into record of second trial transcript of witness' testimony from first trial when witness died before second trial).

71. 448 U.S. 56 (1980).

72. *Id.* at 58.

73. *Id.*

74. *Id.*

75. *Id.* at 59.

76. *Id.* The trial court admitted the transcript into evidence and Roberts was convicted. *Id.* at 60. The Ohio Court of Appeals reversed the conviction on the basis that the state had failed to make a showing of a "good faith effort" to secure the daughter's attendance; the reversal was affirmed by the Ohio Supreme Court, although on different grounds. State v. Roberts, 55 Ohio St. 2d 191, 199, 378 N.E.2d 492, 497 (1978). The Ohio Supreme Court held that the state court of appeals erred in concluding that the daughter was not unavailable. *Id.* at 194-95, 378 N.E.2d at 495. Nonetheless, because the daughter had not been cross-examined at the preliminary hearing and was absent at trial, the Ohio Supreme Court held that the introduction of the transcript of her testimony violated Robert's right to confrontation. *Id.* at 195-99, 378 N.E.2d at 496-97. The United States Supreme Court granted certiorari. Ohio v. Roberts, 441 U.S. 904 (1979). Upon consideration of the case, Justice Blackmun wrote the majority opinion, which was joined by Chief Justice Burger and Justices Stewart, White, Powell and Rehnquist. Ohio v. Roberts, 448 U.S. 56, 58-77 (1980). Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Stevens. *Id.* at 72-82 (Brennan, J., dissenting).

the testimony by cross-examination or by employment of an established hearsay exception, the reliability of the previous testimony of a declarant can be *inferred* in the absence of cross-examination if defense counsel had the opportunity to test the witness' testimony with the *equivalent* of cross-examination.[77] The *Roberts* Court did point out, however, that the Supreme Court in the past had emphasized a *preference* for face-to-face confrontation at trial under the confrontation clause and that the right to cross-examination is a primary interest secured by the clause.[78]

The *Roberts* Court stated that, while the absence of confrontation may be important enough to call into question the integrity of the fact-finding process, competing interests may warrant dispensing with confrontation at trial.[79] Addressing the interconnection of the purposes of hearsay rules and the confrontation clause, and viewing itself as gradually building upon past decisions and responding to changing conditions and competing interests, the *Roberts* Court laid out a two-pronged test to restrict the admissibility of out-of-court statements.[80] The first prong, in deference to the constitutional preference for face-to-face confrontation, is a rule of necessity in which the prosecution must demonstrate the unavailability of the declarant whose statement is to be used against the defendant.[81] The second prong, which comes into operation only after the witness has been shown to be unavailable, requires that there be adequate indicia of reliability surrounding the hearsay statement, in consideration of the confrontation clause's purpose to ensure accuracy by testing the evidence and in response to the need for certainty in conducting criminal trials.[82] Therefore, under *Roberts*, when the prosecution wishes to introduce statements of a declarant who will not be

77. *Roberts*, 448 U.S. at 66, 70-73. The Court held that the fact that Mrs. Isaacs did not know the location of her daughter, and the fact that five subpoenas were served but were ineffective to compel her daughter's presence, were sufficient for a showing of unavailability. *Id.* at 76. The Court also held that Roberts' counsel had the opportunity to question the witness at the preliminary hearing and such questioning comported with the principal purpose of cross-examination—to challenge the witness' belief that he was telling the truth, the witness' perceptions of the matters related and the witness' conveyance of the meaning intended. *Id.* at 71. According to the Court the questioning, despite its characterization, complied with the purposes behind the confrontation clause no less than formal cross-examination and the questioning was therefore the equivalent of cross-examination. *Id.* For a discussion of the purposes behind the confrontation clause outlined in California v. Green, 399 U.S. 149 (1970), see *supra* notes 45-51 and accompanying text.

78. *Roberts*, 448 U.S. at 63 (citing *Green*, 399 U.S. at 156-57).

79. *Id.* at 64. The Court gave as examples the "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Id.*

80. *Id.* at 64-65.

81. *Id.* at 66.

82. *Id.* at 65. According to the *Roberts* Court, the indicia of reliability requirement can be met by virtue of the fact that certain hearsay exceptions are on such solid foundations that the admission of evidence falling within these exceptions comports with the substance and meaning of the right to confrontation. *Id.*

present at trial, the confrontation clause will normally require a showing that the declarant is unavailable and that his statement bears adequate indicia of reliability.[83]

The *Roberts* decision addressed the confrontation clause concerns for any situation in which a witness is physically unavailable and therefore unable to confront the defendant at trial. *Roberts*, however, did not address the situation in which a witness is physically available in the courtroom but unable to meet the defendant face-to-face. This is precisely the situation the Court faced in *Coy v. Iowa*.[84]

3. Coy v. Iowa: *A Step in the Other Direction*

In 1985, the Iowa legislature enacted a statute permitting child witnesses to testify via closed circuit television or from behind a screen.[85] The issue before the Court in *Coy* was whether such a screen placed between a defendant and a child witness at the defendant's trial for sexual assault against that child witness violated the defendant's right to confrontation under the sixth amendment.[86]

Justice Scalia, writing for the majority, noted that most of the Court's decisions on the confrontation clause have involved the admissibility of out-of-court statements or restrictions on the scope of cross-

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at 66. For a discussion of the Court's definition of "indicia of reliability," see *supra* notes 61-63 and accompanying text.

83. *Roberts*, 448 U.S. at 66.

84. 487 U.S. 1012 (1988).

85. *Id.* at 1014-15. The statute read in pertinent part:

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

IOWA CODE § 910A.14 (Supp. 1987).

86. *Coy*, 487 U.S. at 1014. The Iowa statute, in giving the court the authority to place a screen between the defendant and the child witness during the child's testimony, or to have the child witness testify via closed circuit television, was intended to protect child abuse victims. *Id.* Coy was charged with the sexual assault of two 13 year-old girls. *Id.* At trial, the court granted the State's motion to have a screen placed between Coy and the two girls during their testimony. *Id.* The screen blocked the witnesses' view of Coy, but allowed Coy to see them dimly and to hear them. *Id.* at 1014-15. The trial court rejected Coy's argument that this procedure violated his sixth amendment right to confrontation, but did instruct the jury to draw no inference of guilt from the placement of the screen. *Id.* at 1015. Coy was convicted and his conviction was affirmed by the Iowa Supreme Court. State v. Iowa, 397 N.W.2d 730 (Iowa 1986). The Iowa Supreme Court rejected Coy's confrontation clause argument on the ground that, because the screen procedure did not impair Coy's ability to cross-examine the witnesses, there was no confrontation clause violation. *Id.* at 734-35.

examination.[87] Justice Scalia gave a reason for this focus:

> [It is not] that these elements are the essence of the Clause's protection—but rather, quite to the contrary, that there is at least some room for doubt . . . as to the extent to which the Clause includes those elements, whereas . . . it confers at least "a right to meet face to face all those who appear and give evidence at trial."[88]

Justice Scalia emphatically stated that the Supreme Court has never doubted that the confrontation clause guarantees a defendant the right to confront the witnesses against him face-to-face before the trier of fact.[89] According to Justice Scalia, this guarantee of face-to-face contact between the defendant and the witness fosters a perception and reality of fairness in the judicial system because of the difficulty in telling a lie to someone's face.[90] From this perception of fairness, Justice Scalia concluded that the right to face-to-face confrontation serves much the

87. *Coy*, 487 U.S. at 1016. Justice O'Connor wrote a concurring opinion in which Justice White joined. *Id.* at 1022 (O'Connor, J., concurring). Justice Blackmun authored a dissent, joined by Chief Justice Rehnquist. *Id.* at 1025-35 (Blackmun, J., dissenting). Justice Kennedy did not take part in the decision. *Id.* at 1022.

88. *Id.* at 1016 (quoting California v. Green, 399 U.S. 149, 175 (1970)).

89. *Id.* The Court, in holding that there has never been any doubt of the guarantee of a face-to-face meeting with witnesses appearing before the trier of fact, cited as authority: (1) a dissenting opinion in Kentucky v. Stincer, 482 U.S. 730, 748-50 (1987) (Marshall, J., dissenting); (2) two turn of the century cases, Kirby v. United States, 174 U.S. 47, 55 (1899) (Court, in dealing with admissibility of prior convictions of co-defendants to prove element of offense, stated that fact that can be primarily established only by witness cannot be proved except by witnesses who confront defendant at trial) and Dowdell v. United States, 221 U.S. 325, 330 (1911) (Court described provision of Philippine Bill of Rights as substantially same as sixth amendment and interpreted provision to provide accused with right to be tried, for facts provable by witnesses, only by witnesses who meet defendant face-to-face at trial); (3) one recent and well-known confrontation clause case, California v. Green, 399 U.S. 149, 157 (1970) (Court described literal right to confront witness at trial as core value furthered by confrontation clause); and (4) a recent plurality opinion, Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (confrontation clause provides criminal defendant with two types of protection: right to physically face witnesses against him and right to conduct cross-examination).

Contrary to the *Coy* Court's view, however, the *Green* decision did not stand for the proposition that the confrontation clause guarantees a face-to-face meeting, but rather outlined the three-pronged purpose of the right to confrontation. *See Green*, 399 U.S. at 158. In addition, the *Coy* Court ignored the analysis in *Roberts* that suggested an evolution of the meaning of the confrontation clause through case law and changing conditions. For a discussion of the *Roberts* analysis, see *supra* notes 71-83 and accompanying text.

90. *Coy*, 487 U.S. at 1017-19. According to the Court, the historical perception of fairness in the right to confrontation lies in the belief that it is more difficult to tell a lie to someone's face than behind their back. *Id.* at 1019. While the confrontation clause cannot force a witness to look directly at the defendant, a jury can draw its own conclusions about a witness who looks away. *Id.*

same purpose as a less explicit component of the confrontation clause—the right to cross-examination—as both ensure integrity in the factfinding process.[91]

The Court then addressed the question of whether Coy's right to confrontation had been violated, and concluded that a screen designed to enable witnesses to avoid viewing the accused as they gave their testimony was an "obvious [and] damaging violation" of the accused's right to face-to-face confrontation.[92] Justice Scalia did recognize that the rights conferred by confrontation are not absolute and may give way to other important interests; however, he drew a distinction between the rights conferred by the confrontation clause that are seen as implicit (i.e. right to cross-examination, right to face-to-face confrontation *other than* at trial and right to exclude out-of-court statements) and the right to face-to-face confrontation at trial, which is narrowly and explicitly set forth in the clause.[93] While stating that the implicit rights are clearly subject to exception and may give way to other important interests, Justice Scalia merely alluded to the possibility and left open the question of whether any exceptions would exist to the explicit right to face-to-face confrontation at trial.[94] Justice Scalia noted that "whatever they [the exceptions] may be, they would surely be allowed only when necessary to further an important public policy."[95]

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91. *Id.* at 1019-20 (citing Kentucky v. Stincer, 482 U.S. 730, 736 (1987)). According to Justice Scalia, although a face-to-face confrontation with the defendant may upset a truthful rape victim or abused child, that confrontation may also "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 1020. Justice Scalia, however, cited no authority, legal or scientific, to bolster this statement.

92. *Id.* at 1019-22. According to the *Coy* Court, the State suggested that the necessity of protecting sexual abuse victims outweighed the defendant's confrontation interest. *Id.* at 1020. The Court stated, however, that while the use of the screen achieved the State's objective of enabling the witness to avoid viewing the defendant while giving testimony, it was not an interest important enough to outweigh the "right to a face-to-face encounter." *Id.*

93. *Id.* Justice Scalia listed the right to cross-examine, the right to exclude out-of-court statements and the asserted right to face-to-face confrontation at a point in the proceedings other than trial as examples of rights that are "reasonably implicit" in the confrontation clause but are "not the right narrowly and explicitly set forth in the Clause"; these rights may therefore may give way to other important interests. *Id.*

94. *Id.* at 1021.

95. *Id.* Justice O'Connor, in a concurrence joined by Justice White, agreed that Coy's right to confrontation was violated in this case, but wrote separately to emphasize her view that confrontation rights are "not absolute," and "may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." *Id.* at 1022 (O'Connor, J., concurring). Justice O'Connor cited the difficulties in detecting and prosecuting child abuse as a legitimate reason for innovative procedural steps taken by the states to shield child victims. *Id.* at 1022-23 (O'Connor, J., concurring). According to Justice O'Connor, the violation here was the "generalized legislative finding of necessity." *Id.* at 1025 (O'Connor, J., concurring). If, however, "a court makes a

The State, in *Coy*, had maintained that this necessity of furthering an important public policy was established by the Iowa statute which created a "legislatively imposed presumption of trauma" on the child victim.[96] This, according to a majority of the Court, was not enough. Under the majority's analysis, something more than this generalized finding of legislatively presumed trauma to the witness would be necessary to establish an exception to the literal right to confront witnesses at trial.[97] Because there was no finding that these particular witnesses needed special protection, the Court held that Coy's conviction could not be sustained.[98]

Justice Blackmun dissented.[99] He did not agree that the Iowa procedure offended the confrontation clause because, in his opinion, the "preference" for face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[100] He offered the proposition that "[t]he prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered."[101] According to Justice Blackmun, "the fear and trauma associated with a child's testimony in front of the defendant" could have other serious results.[102] In addition to "caus[ing] psychological injury to the child, . . . it may so overwhelm the

case-specific finding of necessity, . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* (O'Connor, J., concurring).

96. *Id.* (O'Connor, J., concurring).

97. *Id.* (O'Connor, J., concurring). According to Justice Scalia, past Supreme Court cases indicated that, even for exceptions to the implicit rights conferred by the confrontation clause, something more than generalized findings are needed. *Id.* at 1021.

98. *Id.* The Court thus reversed the judgment of the Iowa Supreme Court and remanded the case. *Id.*

99. *Id.* at 1027-35 (Blackmun, J., dissenting).

100. *Id.* at 1027, 1031 (Blackmun, J., dissenting). Justice Blackmun, for the first time in any confrontation clause analysis, introduced scientific studies as support for a position. He first described the state interest as one of "considerable importance," citing statistics on the number of reported incidents of child maltreatment and the percentage of those cases involving allegations of child sexual abuse. *Id.* at 1031 (Blackmun, J., dissenting). "Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from .67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse." *Id.* (Blackmun, J., dissenting) (citing AMERICAN ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 3, 18 (1987)).

101. *Id.* (Blackmun, J., dissenting). Justice Blackmun cited research indicating that testimony in court by children could be responsible for "increased behavioral disturbance in children." *Id.* at 1032 (Blackmun, J., dissenting) (quoting Goodman et al., *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, in THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN?, ISSUES IN CRIMINOLOGICAL AND LEGAL PSYCHOLOGY No. 13, 46, 52 (British Psychological Soc'y 1988)).

102. *Id.* (Blackmun, J., dissenting).

child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself."[103]

Justice Blackmun also reached an issue not discussed in the majority opinion—whether the "use of the screening device was 'inherently prejudicial.' "[104] Justice Blackmun, however, summarily dismissed this possibility, stating that "[u]nlike clothing the defendant in prison garb, or having the defendant shackled and gagged, using the screening device did not 'brand [appellant] . . . with an unmistakable mark of guilt.' "[105] According to Justice Blackmun, without any scientific support however, a screen was not the sort of thing that would be associated with someone who is convicted and it was therefore unlikely that "the use of the screen had a subconscious effect on the jury's attitude toward appellant."[106]

III. DISCUSSION

It is against this background that *Maryland v. Craig*[107] came before the Supreme Court. The issue before the *Craig* Court was "whether the confrontation clause of the Sixth Amendment 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."[108]

In 1985, the Maryland General Assembly enacted section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Code (Section 9-102).[109] Designed to facilitate testimony by child witnesses in

103. *Id.* (Blackmun, J., dissenting). Justice Blackmun noted that "some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective measures." *Id.* n.5 (Blackmun, J., dissenting) (citing State v. Sheppard, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984); Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131 (1981)).

104. *Id.* at 1034 (Blackmun, J., dissenting).

105. *Id.* at 1034-35 (Blackmun, J., dissenting) (citations omitted).

106. *Id.* at 1035 (Blackmun, J., dissenting). In addition, Justice Blackmun noted that a jury instruction had been given on this topic; he therefore "doubt[ed] that the jury—which we must assume to have been intelligent and capable of following instructions—drew an improper inference from the screen . . . ." *Id.* (Blackmun, J., dissenting).

107. 110 S. Ct. 3157 (1990).

108. *Id.* at 3160.

109. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989). Section 9-102 provides:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a 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.

child abuse cases, the statute authorizes a judge to direct that a child's testimony be received via one-way closed circuit television.[110] In 1987, Sandra Ann Craig, owner and operator of a kindergarten and pre-kindergarten school, was convicted of various sexual offenses, assault, battery and abuse of students enrolled in her school at a trial in which the allegedly abused children were permitted to testify through closed circuit television under Section 9-102.[111]

On appeal, Craig claimed, among other things, that the procedure authorized by the Maryland statute violated her constitutional right to confrontation.[112] The Court of Special Appeals of Maryland rejected Craig's confrontation clause argument on the basis that the right to face-to-face confrontation, although fundamental, is not absolute and must occasionally give way to "considerations of public policy and the necessities of the case."[113]

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(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.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Id.

110. As of January 1, 1989, 41 states had sought to protect child witnesses through statutory measures. Craig v. State, 316 Md. 551, 553 n.1, 560 A.2d 1120, 1121 n.1 (1989), *vacated*, 110 S. Ct. 3157 (1990).

111. Craig v. State, 76 Md. App. 250, 257, 544 A.2d 784, 787 (1988), *rev'd*, 316 Md. 551, 560 A.2d 1120 (1989), *vacated*, 110 S. Ct. 3157 (1990).

112. *Id.* at 275, 544 A.2d at 796. For the text of the Maryland statute, see *supra* note 109.

113. *Craig*, 76 Md. App. at 282, 544 A.2d at 800 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)). The court based its decision on an analysis of two cases. The first of these cases was Wildemuth v. State, 310 Md. 496, 530 A.2d 275 (1987), in which the Maryland Court of Appeals considered whether the procedure authorized by § 9-102 contravened a defendant's right to confrontation in the context of the requirements laid out in *Roberts*. The *Wildemuth* court found that the statute satisfied the necessity and reliability prongs of *Roberts*. *Id.* at 514-25, 530 A.2d at 284-89. The necessity prong was met by a finding that a child would suffer serious emotional distress in open court; the reliability prong was met by a finding that the statute preserves most of the aspects of

The Maryland Court of Appeals granted the writ of certiorari and reversed and remanded the case.[114] It rejected the argument that the right to confrontation categorically requires a physical, face-to-face encounter between the defendant and witness.[115] The court held, however, that this right can be abridged only when there has been a finding by the presiding judge: (1) through an examination of the child witness in the presence of the defendant, that the child witness is unable as a result of severe emotional distress to testify in the presence of the accused; and (2) of the proper procedure to employ so that the right to confrontation is curtailed to the minimum extent possible.[116]

The United States Supreme Court vacated the judgment of the Maryland Court of Appeals and remanded the case,[117] holding that as long as 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 the receipt of testimony by a child wit-

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confrontation that enhance the reliability of testimony. *Id.* The second case considered was *Coy v. Iowa*, in which the United States Supreme Court held that, while not absolute, confrontation clause rights would give way only when necessary to further an important public policy. 487 U.S. 1012, 1020 (1988). For a discussion of *Coy*, see *supra* notes 84-106 and accompanying text.

114. Craig v. State, 316 Md. 551, 560 A.2d 1120 (1989), *vacated*, 110 S. Ct. 3157 (1990). The state supreme court reversed the lower court on the grounds that the showing made by the state was insufficient to reach the high threshold of necessity required by *Coy* before § 9-102 could be invoked. *Id.* at 554-55, 560 A.2d at 1121. For the text of § 9-102, see *supra* note 109.

115. *Craig*, 316 Md. at 562, 560 A.2d at 1125.

116. *Id.* at 566-67, 560 A.2d at 1127-28. The court analyzed *Coy* and concluded that a general statutory inquiry into a child's inability to testify in court is too broad to satisfy the necessity requirement. *Id.* at 564, 560 A.2d at 1126. Instead, the trial judge must ask whether the child is unavailable to testify *in the presence of the accused. Id.*

The court specifically held that, in the face of a confrontation challenge, § 9-102 cannot be invoked unless the child witness is questioned in the presence of the defendant and is found by a judge presiding at this procedure to be unable to reasonably communicate because of serious emotional distress as a result of the defendant's presence. *Id.* at 566-67, 560 A.2d at 1127. If a finding of serious emotional distress is made, measures to protect the child witness must then be tailored so that the right to confrontation is infringed upon as little as possible. *Id.* at 567, 560 A.2d at 1128. According to the court, while § 9-102 is the limit to which a court can go to protect a child witness, it is not the exclusive means of protection. *Id.* For example, if a child would not be traumatized by the use of a *two-way* closed circuit television, that technology should be used. *Id.*

The Maryland court therefore found that, because the testimony was not sharply focused on the effect of the defendant's presence on the child witness, the finding of necessity required to invoke § 9-102 procedures and thereby limit the defendant's right to confrontation was not sufficiently shown. *Id.*

117. Maryland v. Craig, 110 S. Ct. 3157, 3171 (1990). Justice O'Connor authored the majority opinion which was joined by Chief Justice Rehnquist and Justices Blackmun, White and Kennedy. *Id.* at 3160-71. Justice Scalia filed a dissent in which Justices Brennan, Marshall and Stevens joined. *Id.* at 3171-76 (Scalia, J., dissenting).

ness in a child abuse case.[118]

Justice O'Connor, writing for the majority, expounded on her *Coy* concurrence by stating that, although the *Coy* majority had observed that the confrontation clause guarantees a defendant a face-to-face meeting with witnesses who appear before the trier of fact, the Supreme Court had never held that the confrontation clause guarantees criminal defendants an *absolute* right to a face-to-face confrontation with witnesses at trial.[119] Justice O'Connor noted that *Coy* expressly left open the question of whether there were any exceptions to the literal interpretation of the confrontation clause.[120] In *Coy*, the Court had held that a generalized showing of a legislative presumption of trauma to the child witness was not sufficient to constitute an exception; there must be an individualized finding that the child witness needed special protection.[121] In *Craig*, the trial court had made individualized findings that each of the children testifying needed the special protection provided by the statute.[122] In fact, the State introduced expert testimony that the children who would be testifying would suffer serious emotional distress that would render them unable to reasonably communicate if they were required to testify in the courtroom.[123]

The *Craig* Court viewed the central purpose of the confrontation clause as ensuring the reliability of the evidence "by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[124] Justice O'Connor recognized that face-to-face confrontation

118. *Id.* at 3169. The Court, in this decision, deliberately refrained from establishing, as a matter of federal constitutional law, evidentiary prerequisites for the use of a one-way television procedure. *Id.* at 3171. While the Court felt that the evidentiary prerequisites established by the Maryland Court of Appeals (personal observation by the presiding judge of the child witness in the presence of the defendant and exploration of less restrictive alternatives to the one-way closed circuit television procedure) would help to present a stronger case for the use of protective measures, they were not *required*. *Id.* Instead, the Court held that a case-specific finding of necessity, demonstrating that the child witness will suffer serious emotional distress such that the child cannot reasonably communicate, is sufficient. *Id.* The Court opined that this finding could be supported, for example, by the testimony of an expert witness. *Id.*

119. *Id.* at 3162-63. Justice O'Connor stated that the *Coy* interpretation was derived from the literal text of the confrontation clause and the Court's understanding of the clause's historical roots. *Id.* at 3162.

120. *Id.* For a discussion of the distinction between the literal and implicit components of the confrontation clause, see *supra* note 93 and accompanying text.

121. Coy v. Iowa, 487 U.S. 1012, 1021 (1988). For a discussion of *Coy*, see *supra* notes 84-106 and accompanying text.

122. *Craig*, 110 S. Ct. at 3163.

123. *Id.* at 3171.

124. *Id.* at 3163. The Court cited *Mattox*, *Green* and *Evans* for the proposition that it is the effect of the elements of confrontation (physical presence, oath, cross-examination and observation of demeanor by the trier of fact) that serves the purposes of the confrontation clause by ensuring that the evidence presented at trial is reliable and is subjected to the adversarial testing that is

enhances fact-finding, may reduce the risk that a witness will wrongfully implicate an innocent person, and serves a strong symbolic purpose by requiring a witness to testify in the defendant's presence. Nevertheless, she opined that the right to confrontation is generally satisfied when the defense is given a full and fair opportunity to cross-examine the witness and the trier of fact has the opportunity to observe the witness' demeanor.[125]

According to the *Craig* majority, the Supreme Court has never insisted on an actual face-to-face confrontation at trial in all cases in which testimony is introduced against a defendant.[126] The Court stated that, given the existing hearsay exceptions, the word "confront" in the confrontation clause of the sixth amendment cannot mean only face-to-face confrontation; to hold to such a literal definition would be to prohibit the admission of any accusatory hearsay statement made by an absent declarant.[127] Instead, the Court emphasized that there are certain circumstances in which competing interests may warrant dispensing with confrontation at trial.[128] The Court held that the right to confrontation may not be easily dismissed, however, because precedent established that the strictures of the right to confrontation may be satisfied only where the denial of face-to-face confrontation is necessary to further an important public policy and the reliability of the evidence is assured.[129] Justice O'Connor stated that, while the Maryland procedure did dispense with a literal face-to-face confrontation, it retained all of the other elements of the confrontation right.[130] Justice O'Connor concluded, therefore, that the use of a one-way closed circuit television procedure for the reception of a child witness' testimony encroaches on neither the fact-finding nor symbolic purposes of the confrontation clause.[131]

Once Justice O'Connor found that the procedure did not *per se* vio-

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expected in Anglo-American criminal proceedings. *Id.* at 3163-64 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970); California v. Green, 399 U.S. 149, 158 (1970); Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

125. *Id.* at 3164.

126. *Id.* The Court indicated that it had repeatedly allowed admission of certain hearsay statements where necessary, despite the accused's inability to confront the declarant at trial. *Id.*

127. *Id.* at 3165.

128. *Id.*

129. *Id.* at 3166.

130. *Id.* The Court noted that the closed circuit television procedure provided for the receipt of the testimony of the witness under oath, the opportunity for contemporaneous cross-examination by the defendant and the opportunity for the trier of fact to observe the demeanor of the witness (although on a television screen). *Id.* Although, according to the Court, certain subtle effects of face-to-face confrontation may produce heightened reliability, the presence of the other elements of confrontation ensures that the testimony received by one-way closed circuit television is reliable and subject to full testing in an adversary proceeding. *Id.*

131. *Id.* at 3167.

late the purposes of the confrontation clause, she next turned to the "critical inquiry . . . [of] whether use of the procedure is necessary to further an important state interest."[132] The State contended that it had a substantial interest in protecting children, allegedly the victims of child abuse, from the trauma of testifying in the presence of the alleged abuser.[133] Noting that it had previously recognized a state's interest in the protection of minor victims of sex crimes from further trauma as a compelling interest, the *Craig* majority held that if a state makes an adequate and individualized showing of necessity, the state interest in protecting victims of child abuse from further trauma is sufficiently important to justify the use of a trial procedure that allows the child witness to testify in the absence of a face-to-face confrontation with the accused.[134] Justice O'Connor buttressed this conclusion by referring to "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."[135] In addition, the majority opinion again referred to scientific studies in noting that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal."[136]

The Court cautioned that the finding by the trial court must be case-specific.[137] The trial court must hear evidence to determine whether the use of the procedure is necessary to protect the welfare of the particular child witness and must also find that the trauma to the child witness would be caused by the defendant and not by the courtroom or a general fear of testifying.[138] Finally, the trial court must also

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132. *Id.*

133. *Id.* The Court indicated that the importance of this public policy was reflected by the number of states that have enacted statutes to protect child witnesses from testifying in the presence of the defendant in child abuse cases. *Id.* at 3167-68. At the time of *Craig*, 37 states permitted the use of videotaped testimony, 24 states permitted the use of closed circuit television testimony and eight states permitted the use of a two-way system which allowed the child witness to see the courtroom and the defendant and allowed the judge and the jury to see the child during his or her testimony. *Id.*

134. *Id.* at 3167, 3169 (citing New York v. Ferber, 458 U.S. 747, 756-57 (1982); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

135. *Id.* at 3168 (citing Brief for *Amicus Curiae* American Psychological Ass'n in Support of Neither Party at 7-13, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478); G. Goodman, *The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court*, Final Report to the National Institute of Justice, U.S. Dep't of Justice (1989)).

136. *Id.* at 3169 (citing Brief for *Amicus Curiae* American Psychological Ass'n at 18-24, *Craig* (No. 89-478); Goodman & Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 203-04 (1985); Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 813-20 (1987)).

137. *Id.*

138. *Id.*

determine that the trauma that would be suffered by the child is "more than *de minimis*."[139]

Justice Scalia, authoring the dissent in *Craig*, felt that the majority had bowed to public opinion and had categorically failed to protect a guarantee of the Constitution.[140] Justice Scalia, citing his majority opinion in *Coy*, stated that a defendant's constitutional right to confrontation means exactly what it says—the right to meet the witnesses face-to-face.[141] Justice Scalia did not agree with the majority's claim that the interpretation of the confrontation clause in *Craig* was consistent with past cases which have held that other sixth amendment rights must be interpreted in light of the necessities of trial and the adversary process.[142] Instead, Justice Scalia drew a distinction between "the necessities of trial and the adversary process"—which encompassed the manner of arranging a face-to-face confrontation, and the case at bar—which dealt with whether the confrontation took place at all.[143] According to Justice Scalia, the necessities of a trial and the adversary process may limit the manner in which sixth amendment rights may be exercised, but may not limit the scope of the essential sixth amendment guarantee of the right to confront.[144]

Justice Scalia, mustering scientific evidence of his own, also disagreed with the crux of the majority's test, which required unavailability only in the sense that the child witness is unable to testify in the defendant's presence.[145] In discussing the balancing of interests in protecting child victims from the emotional trauma of testifying against the harms

139. *Id.* The Court did not specify the minimum showing of emotional distress required and did not specifically discuss whether the Maryland statute, requiring "serious emotional distress such that the child cannot reasonably communicate," sufficed to meet the standards of the confrontation clause. *Id.*

140. *Id.* at 3171 (Scalia, J., dissenting). Justice Scalia stated that the purpose of the sixth amendment right to confrontation 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." *Id.* (Scalia, J., dissenting).

141. *Id.* at 3172 (Scalia, J., dissenting) (citing Coy v. Iowa, 487 U.S. 1012, 1016 (1988)).

142. *Id.* (Scalia, J., dissenting). Justice Scalia admitted that necessities of trial may limit the *manner* in which sixth amendment rights may be exercised and may also limit an expansive view of the scope of sixth amendment guarantees. *Id.* at 3173 (Scalia, J., dissenting). He remained adamant, however, that "to confront plainly means to encounter face-to-face" and, in that context, the necessities of trial and the adversary process are irrelevant. *Id.* (Scalia, J., dissenting).

143. *Id.* (Scalia, J., dissenting).

144. *Id.* (Scalia, J., dissenting).

145. *Id.* at 3174-75 (Scalia, J., dissenting). Justice Scalia stated that unavailability, in the sense of a child's trauma, could not possibly be the relevant sense, opining that a child's unwillingness to testify in the presence of a defendant could not be a valid excuse under the confrontation clause. *Id.* (Scalia, J., dissenting). According to Justice Scalia, the objective of the clause is "to place the witness under the sometimes hostile glare of the defendant." *Id.* (Scalia, J., dissenting).

in admitting a new class of evidence, Justice Scalia noted 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."[146] While conceding that the majority had convincingly proved that the Maryland statute not only served a valid interest, but also gave the defendant *virtually* everything the confrontation clause guarantees, Justice Scalia found a difference between "virtually constitutional" and "actually constitutional," and therefore found the Maryland procedure to be a violation of the sixth amendment right to confrontation.[147]

IV. ANALYSIS

In light of the past decisions of the Supreme Court on the purposes and boundaries of the confrontation clause, *Maryland v. Craig* adequately protects the right of the accused to confront the witnesses against him. The *Craig* holding fits within the protection deemed to be essential in each of the Supreme Court cases previously discussed.

A. Mattox *and the "Substance of Confrontation"*

The holding in *Mattox v. United States*,[148] the first Supreme Court case to address the issue of the confrontation clause and witness unavailability, was narrow.[149] If the accused previously had the opportunity to confront the witness against him, for example in a previous trial or hearing, the confrontation clause would not prohibit the use of the sworn testimony of that witness at a subsequent trial where the witness was unavailable due to his death.[150] The *Mattox* Court based its holding on three factors: (1) there was no hardship placed on the defendant in allowing the witness' prior testimony to be read into evidence at trial because the defendant had previously had the opportunity to cross-examine the witness under oath; (2) a trier of fact had the opportunity previously to observe the demeanor of the witness; and (3) the exception to confrontation at trial was due to the necessities of the case.[151]

146. *Id.* at 3175 (Scalia, J., dissenting) (citing Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in CHILDREN'S EYEWITNESS MEMORY (S. Ceci, M. Toglia & D. Ross eds. 1987); Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 230-33 (1987); Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 708-11 (1987)).

147. *Id.* at 3176 (Scalia, J., dissenting). According to Justice Scalia, the majority holding guarantees everything *except* confrontation. *Id.* (Scalia, J., dissenting).

148. 156 U.S. 237 (1895).

149. For a discussion of *Mattox*, see *supra* notes 23-33 and accompanying text.

150. *Mattox*, 156 U.S. at 244.

151. *Id.* at 242-44.

The closed circuit television procedure used in *Craig* for the receipt of testimony easily complies with each of these factors. The defendant has the opportunity to cross-examine the child witness under oath at trial; the jury has the opportunity to observe the demeanor of the child witness; and the procedure is allowed only in conjunction with a case-specific finding of necessity by the trial judge. The procedure held to be constitutional in *Craig*—a judicial finding of witness unavailability due to particularized trauma as a result of being in the same room as the defendant, coupled with the witness' sworn testimony and the opportunity for cross-examination and observation of the witness—therefore satisfies the substance of the right to confrontation emphasized in *Mattox*.[152]

B. Pointer *and the Equation of Confrontation with Cross-Examination*

Pointer v. Texas,[153] while referring separately to the "right of confrontation" and the "right of cross-examination," emphasized that the main purpose of the confrontation rule is to ensure that the accused has an opportunity to cross-examine the witnesses against him.[154] No other purposes were ever mentioned. The *Pointer* Court held that a defendant's right to confrontation was violated when a witness' prior statement, which had not been taken under circumstances in which the defendant had a full or fair opportunity to cross-examine that witness, was admitted as evidence at trial.[155] The implication from the *Pointer* holding is that, where a witness makes a statement and the defendant had a full opportunity for cross-examination, the defendant has not been denied the right to confrontation. The closed circuit television procedure authorized by the Maryland legislature provided for adequate cross-examination of the child witness. This inescapably leads to the conclusion that, because this procedure provided the defendant with a full and fair opportunity to cross-examine the child witness, the defendant was not denied the right to confrontation under the *Pointer* analysis.

C. Green *and the Purposes of Confrontation*

In *California v. Green*,[156] the Court outlined the purposes to be

152. *Craig*, 110 S. Ct. at 3163.

153. 380 U.S. 400 (1965).

154. *Id.* at 404-07. The *Pointer* Court noted that the right to cross-examination is included in the defendant's right to confront the witnesses against him. *Id.* at 404. The Court discussed the value of cross-examination in bringing out the truth at trial, referring to Wigmore and state and English cases which, according to the Court, consistently emphasized the necessity of cross-examination at criminal trials. *Id.* (citations omitted). In addition, the Court, citing *Mattox*, stated that a major rationale underlying the confrontation clause was to give the accused an opportunity to cross-examine the witnesses against him. *Id.* at 406-07 (citing Mattox v. United States, 156 U.S. 237, 240-44 (1895)). For a complete discussion of *Pointer*, see *supra* notes 34-39 and accompanying text.

155. *Id.* at 404-06.

156. 399 U.S. 145 (1970).

served by the confrontation clause: (1) requiring the witness to give his or her statement under oath; (2) forcing the witness to submit to cross-examination; and (3) permitting the jury to observe the demeanor of the witness.[157] The procedure authorized by the Maryland legislature and utilized in *Craig* satisfies each of these purposes. The child witnesses gave their statements under oath and were subject to full cross-examination by the defendant's attorney.[158] Moreover, the jury observed the demeanor of the child witnesses via closed circuit television.[159] Thus, under the *Green* analysis, there is no diminution of protection by not having the defendant face-to-face with the child.

D. Roberts, *the Unavailability of the Witness and Sufficiency of Indicia of Reliability*

In *Ohio v. Roberts*,[160] the Court focused on the unavailability of the witness and the sufficiency of the indicia of reliability regarding testimony introduced at trial.[161]

1. *Availability of the Witness*

There are two approaches that can be taken to the interpretation of "availability" of a witness. The first approach regards "availability" as meaning availability for cross-examination at trial.[162] *Craig* fully satisfies the strictures of this approach because the child witnesses were available for full cross-examination by the defense at trial.[163]

The second approach defines "availability" to mean physical availa-

157. *Id.* at 158. For a complete discussion of *Green*, see *supra* notes 45-51 and accompanying text.

158. *Craig*, 110 S. Ct. at 3170.

159. *Id.*

160. 448 U.S. 56 (1980).

161. *Id.* at 65. For a discussion of *Roberts*, see *supra* notes 71-83 and accompanying text.

162. This interpretation, focusing on the benefits of cross-examination, is supported by the *Mattox*, *Green* and *Evans* decisions. *Mattox* allowed use of testimony from a prior trial. Mattox v. United States, 156 U.S. 237, 244 (1895). Because the first trial afforded full opportunity for cross-examination of that testimony, a transcript of that testimony can be admitted at a later trial "simply from the necessities of the case, and to prevent a manifest failure of justice." *Id.* at 243-44. For a discussion of *Mattox*, see *supra* notes 23-33 and accompanying text. *Green* upheld a modification of the California evidence laws which permitted admission of a declarant's out-of-court statements provided that the declarant was testifying as a witness at trial and was subject to full cross-examination. California v. Green, 399 U.S. 149, 164 (1970). For a discussion of *Green*, see *supra* notes 45-51 and accompanying text. *Evans* upheld a state hearsay exception allowing admission of a hearsay statement made during the concealment phase of a conspiracy because the witness who heard the statement and who will testify is subject to full cross-examination at trial. Dutton v. Evans, 400 U.S. 74, 88-89 (1970). For a discussion of *Evans*, see *supra* notes 52-65 and accompanying text.

163. *Craig*, 110 S. Ct. at 3170.

bility in the courtroom.[164] Under this second approach, the child witnesses in *Craig* were not available as they were not physically present in the courtroom. Exceptions to the right to confrontation, however, have been allowed in situations where the witness is unavailable and when "necessary to further an important public policy."[165] The Supreme Court has recognized the safeguard of the physical and psychological well-being of minor children as a compelling state interest justifying an exception,[166] and these child witnesses could hence be said to be "psychologically unavailable."[167]

Is this finding of "psychological unavailability" necessary in sexual abuse cases for the protection of child witnesses from emotional trauma and distress? Studies examining the reactions of child witnesses to courtroom testimony in sexual abuse cases tend to indicate immediate and lasting harm to the children.[168] A 1969 study of nearly 200 child sexual assault cases in New York indicated that the criminal trial process

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164. This is the interpretation offered by Justice Scalia in Coy v. Iowa, 487 U.S. 1012 (1988). In fact, Justice Scalia would go even further. In *Coy*, the witness was actually in the courtroom, but was shielded from the defendant. *Id.* at 1015. This, however, was not sufficient in *Coy*. Justice Scalia, writing for the majority, was adamant about the defendant's literal right to confront a witness at the time of trial. *Id.* at 1017. For a discussion of *Coy*, see *supra* notes 84-106 and accompanying text.

The Oregon legislature has also taken this view of availability, including the Oregon closed circuit television testimony provision as an exception to the hearsay rule. The Oregon statute provides:

> Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding in which a child under 10 years of age at the time of trial may be called as a witness to testify concerning an act of sexual conduct performed with or on the child by another, the testimony of the child taken by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the court room by closed circuit television or other audiovisual means. Testimony will be allowed as provided in this subsection only if the court finds that there is a substantial likelihood, established by expert testimony, that the child will suffer severe emotional or psychological harm if required to testify in open court.

OR. REV. STAT. § 40.460(24) (1989).

165. *Coy*, 487 U.S. at 1021.

166. *See id.* at 1022-23 (O'Connor, J., concurring) (strictures of confrontation clause may give way to compelling state interest of protecting child witnesses); Globe Newspaper v. Superior Court, 457 U.S. 596, 607-08 (1982) (protection of minor victims of sex crimes from further trauma and embarrassment is compelling interest, but not one which can justify mandatory closure of trial to public).

167. Professor Jacqueline Parker argues that "if unavailability is the essence of the sixth amendment right of confrontation, creating a new category of unavailability (psychological unavailability), for which the legislature finds compelling policy reasons in light of the emotional vulnerability of child witnesses, will obviously not violate the Confrontation Clause." Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 701 (1982).

168. For a discussion of these studies, see *infra* note 169-74 and accompanying text.

was stressful for children and their families.[169] Another research project concluded that cross-examination, a core element of the right to confront, is frequently difficult for child witnesses.[170] In further support of "psychological unavailability" of child witnesses, a preliminary research study in 1984 showed that child victims may suffer from posttraumatic stress disorders and the presence of the defendant in the courtroom, among other factors, may cause further stress to the already traumatized child.[171] A later study in the same area "indicate[d] that at least for a subset of children—those who testified multiple times, who lacked maternal support, whose cases lacked corroborative evidence, and who were most frightened of the defendant—testifying is associated with continued disturbance [of the child witness]."[172]

Not all researchers have come to this conclusion, however. Another study researched whether sexual abuse investigation and the subsequent litigation process helped or further victimized children.[173] The conclusion drawn here was that the data did not "support the idea that the interview and litigation process was necessarily 'harmful' to children."[174]

Many psychologists believe that face-to-face confrontation of the child-witness with the defendant is specifically responsible for the higher level of trauma experienced by some child victims.[175] One reason for this belief is that child witnesses have, in research studies, expressed a

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169. V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969) (available through Children's Division, American Humane Ass'n, Denver, Colo.).

170. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 131-35 (1984). A defense attorney's duty is to impeach the child's testimony, but in this process, the child witness may be intimidated, embarrassed or humiliated. *Id.*

171. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. SOC. ISSUES 157, 167 (1984).

172. Goodman, Jones, Pyle-Taub, England, Port, Rudy & Prado-Estrada, *Children in Court: The Emotional Effects of Criminal Involvement* 8 (paper presented at 97th American Psychological Ass'n Convention, New Orleans, La., Aug. 1989) [hereinafter Goodman, *Children in Court*].

173. Tedesco & Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE AND NEGLECT 267, 270-71 (1987).

174. *Id.* According to the authors of this study, "[a] greater percentage of the victims rated the legal process as helpful than rated it harmful." *Id.* A cautionary note was also sounded by these authors, however, in their finding that "when children were required to testify in court, they more often viewed the process as harmful." *Id.*

175. Tedesco & Schnell, *supra* note 173, at 271 (while sexual abuse investigation and litigation process might help child victims more often than not, "when children were required to testify in court, they more often viewed the process as harmful"); Goodman, *Children in Court, supra* note 172, at 6 (one area in which children were negative, both before and after testifying, "was having to face the defendant").

specific fear of a face-to-face meeting with the defendant.[176] This fear suggests a higher trauma level for the child witness who is forced into close proximity with the defendant in the courtroom.

Not all victims of child sexual abuse, however, are traumatically affected by a face-to-face meeting with the defendant. One study found that "the experience of testifying in court can have a therapeutic effect for the child victim."[177] This is why a case-specific finding of necessity for the one-way closed circuit television procedure is essential. The American Psychological Association, in its amicus brief in *Craig*, suggested that there "are factors which may be evaluated on an individual basis to determine the necessity of protecting a child witness by using procedures that limit a defendant's right to a literal face-to-face confrontation with prosecution witnesses."[178] These factors include whether the child had maternal support when the abuse was disclosed, the severity of the abuse and whether there is corroborative evidence of it, the child's level of fear of the defendant and the age of the child.[179] Along these lines, however, one researcher has concluded that, while some factors affecting a child witness' responses, such as maternal support and corroborating evidence of the abuse, are not directly related to courtroom procedures, a factor which is directly related—the child's fear of the defendant—appears to have the most significant effect on the child witness.[180]

In *Craig*, there was a legislative requirement that the trial judge make a case-specific finding of necessity before allowing the use of the Maryland closed circuit television procedure.[181] This being the case, those child witnesses who are found by the trial court to need special protection could be viewed as psychologically unavailable and their testimony could therefore be tested for adequate indicia of reliability under the second prong of the *Roberts* test.

2. *Indicia of Reliability*

The more difficult issue under the *Roberts* test is whether testimony

176. *See* Tedesco & Schnell, *supra* note 173, at 271; Goodman, *Children in Court*, *supra* note 172, at 6.

177. Berliner & Barbieri, *supra* note 170, at 135 ("some children report feeling empowered by their participation in the process"); *see also* Tedesco & Schnell, *supra* note 173, at 268, 270 (not all children will perceive courtroom procedures as harmful). *But cf.* Goodman, *Children in Court*, *supra* note 172, at 6 (in this study, "when children emerged from testifying they were generally more positive about their experiences than they were before they entered the courtroom;" however, "[t]he one area in which they stayed quite negative [] was having to face the defendant").

178. Brief for *Amicus Curiae* American Psychological Ass'n in Support of Neither Party at 12, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478).

179. *Id.* at 11-12.

180. Goodman, *Children in Court*, *supra* note 172, at 9.

181. *Craig*, 110 S. Ct. at 3169.

received under the Maryland procedure bears adequate indicia of reliability. According to the Court in *Mancusi v. Stubbs*,[182] the presence of sufficient indicia of reliability determines whether a statement may be placed before a jury in the absence of confrontation and whether the trier of fact has a satisfactory basis for evaluating the truth of the statements made by the witness.[183] The *Craig* Court, although recognizing "the many subtle effects face-to-face confrontation may have on an adversarial criminal proceeding," did not address the issue of whether the fact that a jury sees a witness' testimony on television could change the reliability of that testimony.[184]

a. Is televised testimony of a child witness less trustworthy?

One underlying premise of the confrontation clause is that it is more difficult for a witness to lie when that witness is testifying in the presence of the defendant.[185] A traumatized child witness, however, could very well either refuse or be physically unable to testify in the presence of the defendant.[186] The courtroom setting or the defendant's presence in the same room may have a direct impact on a child's ability to testify accurately.[187] Research has also shown that children more

182. 408 U.S. 204 (1972).

183. *Id.* at 213. Disagreement exists among legal commentators as to whether testimony via closed circuit television should be treated as hearsay. *See* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 649-59 (1985) (child's statement via closed circuit television may not meet strict requirements of traditional hearsay exception and such testimony should be treated as special hearsay exception); Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 MIAMI L. REV. 19, 47-48 (1985) (testimony of child sexual abuse victim through closed circuit television should be treated as traditional hearsay for constitutional purposes).

184. *Craig*, 110 S. Ct. at 3166. The Court stated that "the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* Other courts and commentators, however, have raised concerns with respect to the reliability of this type of testimony. For a discussion of these concerns, see *infra* notes 185-201 and accompanying text.

185. *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (always more difficult to lie to a person "to his face" than "behind his back").

186. Brief for *Amicus Curiae* American Psychological Ass'n in Support of Neither Party at 18-19, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478). The brief cited People v. Cintron, 75 N.Y.2d 249, 255-57, 552 N.Y.S.2d 68, 72-73, 551 N.E.2d 561, 565-66 (1990), as an example of the behavior of a "distressed child victim" witness (child reluctant to take stand in defendant's presence and while child was generally responsive to questions after defendant was removed from courtroom, her responses were physical and not verbal). Brief for American Psychological Ass'n at 17 n.39, *Craig* (No. 89-478).

187. Brief for American Psychological Ass'n at 18-21, *Craig* (No. 89-478). The impact of a courtroom setting on children is demonstrated by a 1987 study at the University of Michigan Law School. Note, *Videotaping Children's Testimony:*

often refuse to identify a defendant when he is physically present than when his picture is used in a photo lineup.[188] Several studies indicate that the absence of a face-to-face meeting between the child witness and the defendant does not appear to increase the possibility of the child making a mistake in identification.[189]

In addition, other research has shown that children, when they are apprehensive, may not tell all they know about an event.[190] One reason for this, according to researchers, could be because the children have been told to keep quiet about the event.[191] Also, children testifying in a courtroom setting are more likely to claim they do not know information when they do and somewhat more likely to be less accurate in the information they recall than children testifying in a small private room with-

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An Empirical View, 85 MICH. L. REV. 809 (1987). The hypothesis for the study was that if "children were questioned in a small setting by only one unfamiliar person, they could recount a greater amount of accurate information that they had witnessed on a videotape than if they were questioned in a typical courtroom setting." *Id.* at 814. One half of the children in the study testified in a small room with one-way mirrors. *Id.* The other children testified in a courtroom setting. *Id.* The results indicated that the children in the small room performed better than those in the courtroom setting. The authors concluded that their study did support the original hypothesis—"current courtroom procedures militate against eliciting complete testimony from children." *Id.* at 816. For a more detailed discussion of this study, see *infra* note 192 and accompanying text.

188. Brief for American Psychological Ass'n at 19-20, *Craig* (No. 89-478) (citing Dent, *Stress as a Factor Influencing Person Recognition in Identification Parades*, 30 BULL. OF BRIT. PSYCHOLOGICAL SOC'Y 339 (1977); Peters, *The Effects of Event-Stress and Stress During Lineup Identification on Eyewitness Accuracy in Children, in D. Peters, Chair, Children's Eyewitness Testimony* (paper presented to American Psychology-Law Society Meeting, Miami, Fla. (1988))).

189. *Id.*

190. *See* Bottoms, Goodman, Schwartz-Kenny, Sachsenmaier & Thomas, *Keeping Secret: Implications for Children's Testimony* (1990) (paper presented at American Psychology-Law Society Meeting, Williamsburg, Va. (March, 1990)) (on file with *Villanova Law Review*). This study examined the testimony of children regarding events they had been instructed to keep secret. *Id.* at 2. In the study, each child and his or her mother were put in a room alone and the mother played with, broke and hid a toy. *Id.* at 5. One group of children were told by their mothers to keep these facts secret. *Id.* The children in the control group were not given that instruction. *Id.* The study revealed that older children (six-year-olds as opposed to four-year-olds) generally "kept" the secret when questioned, not by actively lying, but rather by omitting information. *Id.* at 9. Additionally, it did not make a difference if the interview for the six year-olds was leading or non-leading—the children were equally likely to keep the secret. *Id.* Most interesting perhaps, only one child out of 49 (both age groups) freely revealed without questioning that his or her mother broke and hid the toy, regardless of whether or not that child was given the secret instruction. *Id.* The authors suggest that this could be because the mother hid the toy and the children themselves inferred that this should be kept secret. *Id.* at 7.

191. *Id.* at 10. The authors suggest that, where a child delays in disclosing a crime or in omitting information about an event, the "child may be responding quite understandably to pressure from a trusted person to keep the event a secret." *Id.*

out the defendant present.[192] From these studies it appears that, not only is the child victim's televised testimony *not* likely to be less reliable than the child's in-court testimony, but also that the televised testimony is likely to be *more* trustworthy due to the absence of confrontation with the defendant and use of a non-courtroom setting for the child's testimony.

b. Is the jury's perception of the demeanor of the child witness altered by observing the child on television rather than in person?

There is some question as to whether a jury's perception of a witness could be affected by viewing that witness on television, as opposed to live in the courtroom.[193] The provisional answer, at least at this time, seems to be that there is not a significant difference in terms of jury perception in viewing live or televised testimony. Not only is there research suggesting that jurors cannot detect deception in witnesses with any high degree of proficiency,[194] but other evidence to date also indi-

192. Note, *Videotaping Children's Testimony: An Empirical View*, *supra* note 187, at 813-17. In this study, the children watched, on videotape, a mock father-daughter confrontation. *Id.* at 814. The researchers then tested the ability of these children to recall this event. *Id.* Half of the children testified in a small room; the other half testified in a courtroom setting. *Id.* The study tested both free recall, looking for "central items, irrelevant details, and inaccuracies," and responses to specific questions. *Id.* The study showed that "compared to children in a courtroom, children in a small room tend to (1) relate more central items in free recall; (2) answer specific questions correctly more often; and (3) say 'I don't know' or give no answer when asked specific questions significantly less often." *Id.* at 815 (footnotes omitted).

193. One study done in 1977 for the Federal Judicial Center looked at the impact of televised testimony in the courts. G. COLEMAN, THE IMPACT OF VIDEO USE ON COURT FUNCTION: A SUMMARY OF CURRENT RESEARCH AND PRACTICE (1977) (Federal Judicial Center publication No. FRC-R-77-9). The study recognized that the disadvantages of closed circuit television for the presentation of testimony could include "the effect that removal from the courtroom might have on witness veracity, the effect of psychological distance created by the physical separation of jurors and witness, and the possible distorting effects of the medium on the information communicated." *Id.* at 19. The study also reported a suggestion that "when testimony is presented via videotape, the witness dominates the screen, and therefore, his testimony and demeanor assume relatively greater importance in relation to the appearance or theatrics of the attorney." *Id.* (citing McCrystal *et al, First Videotape Trial: Experiment in Ohio*, 26 DEFENSE L.J. 276 (1972)). In 1977, there were no studies "available to indicate whether the presentation of testimony via CCTV has the same impact on trial participants and outcome as does testimony represented by an individual who appears personally in the courtroom." *Id.* Fourteen years later, there is still very little research available on this subject.

194. *See* G. MILLER & N. FONTES, VIDEOTAPE ON TRIAL—A VIEW FROM THE JURY BOX (1979).

> [T]he two studies indicate that accuracy in detecting deception was not significantly affected by the mode of presenting testimony; in fact, we stressed that high levels of nonverbal information may actually hamper attempts to assess witness veracity. By far the most interesting result

cates that there is either (1) not a significant difference in viewing testimony on television versus viewing it in person,[195] or (2) a lack of conclusive data showing the impact of television viewing of witnesses on a jury.[196] It is also submitted that closed circuit television testimony may even aid, rather than hurt, a defendant, as an in-court appearance by a child victim may have a greater emotional impact on the jury than a televised image. The courts should, however, be aware of any possible impact of televised testimony on a jury, especially in areas where the court can control the setting and minimize any artificial impact on the jury's perception of the witness' demeanor (e.g. the lighting and placement of the witness).[197]

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was the relatively low level of accuracy across all presentation modes, a finding which suggests that jurors are probably not notably effective in determining whether a witness is testifying truthfully.

Id. at 205.

195. In doing research on the effects of videotape evidence on juror perceptions, Gerald Miller and Norman Fontes found that "the findings from the studies discussed fail to indicate that the use of videotaped trial materials produces any deleterious effects on the juror response." *Id.* at 217; *see also* Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCHIATRY 655 (1965) (emotions, judgement, attention, memory capacity and conduct can be directly observed by the jury on television as well as in person).

There are state decisions in accord. In People v. Moran, 39 Cal. App. 3d 398, 405, 114 Cal. Rptr. 413, 417 (1974), the videotape of a witness' preliminary hearing was introduced at trial. The court rejected the defendant's confrontation clause challenge, stating: "Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury. Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function." *Id.* at 410, 114 Cal. Rptr. at 420; *see also* State v. Sheppard, 197 N.J. Super. 411, 432, 484 A.2d 1330, 1343 (1984) (use of videotaped testimony of 10 year old victim in child abuse trial satisfied confrontation clause requirements since defendant, judge and jury could see victim and there was adequate opportunity for cross-examination).

196. Miller, *The Effects of Videotape Testimony in Jury Trials: Studies on Juror Decision Making, Information Retention and Emotional Arousal*, 1975 B.Y.U. L. REV. 331, 343. While some empirical evidence suggests that televised testimony does not have a negative effect on the ability of jurors to determine the credibility of witnesses, the researchers express concern about the validity of the experimental procedures and would like more research done before implementation becomes widespread. *Id.* The internal logic of this experimental study and the problems it presented were discussed in Bermant, *Critique—Data in Search of Theory in Search of Policy: Behavioral Responses to Videotape in the Courtroom*, 1975 B.Y.U. L. REV. 467, 471.

197. Lighting, for example, can affect a viewer's perceptions. "[W]e might falsify the appearance of a subject, according to how we light it. We can exaggerate or suppress its characteristics, imply the presence of features that do not exist. We can confuse the observer so that he cannot interpret accurately what he thinks he sees before him." G. MILLERSON, THE TECHNIQUE OF LIGHTING FOR TELEVISION AND MOTION PICTURES 64 (1st ed. 1972).

Several courts have noted that there may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortions and exclusions of evidence. *See, e.g.*, Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 786, 208 Cal. Rptr. 273, 278 (1984). For example, the camera lens angle chosen can make a witness look small and weak,

c. Is there a risk of the jury giving undue weight to the procedure employed in deciding guilt or innocence?

There are also some questions as to what, if any, undue weight jury members could place on the fact that the child witness has been placed in a different room to testify.[198] Does the use of a closed circuit television brand a defendant with a mark of guilt in the minds of a jury? Justice Blackmun, in his *Coy v. Iowa* dissent, summarily dismissed this idea, rejecting the defendant's claim that the screening device placed between the defendant and the child witness was inherently prejudicial because it suggested to the jury that the defendant was guilty.[199] Justice Blackmun stated that a screen, unlike prison garb, was not the "sort of trapping

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or large and strong, and lighting can alter demeanor. *Id.* at 786, 208 Cal. Rptr. at 278-79. Off-camera evidence is necessarily excluded while the focus is on a different part of the body. *Id.* It is also possible that the credibility of a witness whose testimony is presented via closed circuit television may be enhanced by a phenomenon known as "status-conferral." *Id.* at 786, 208 Cal. Rptr. at 279. It is recognized that the media bestows prestige and enhances authority of an individual by legitimizing his status. *Id.*

Regardless of these differences, videotape testimony has been held to be constitutionally adequate for demeanor purposes by courts in at least three other states. The New Jersey Superior Court, for example, has allowed the use of videotape depositions as evidence in criminal trials:

> [I]t is apparent to this court from the demonstration of the equipment to be used in this matter and the expert testimony that the use of a videotaped presentation has the capacity to present clear, accurate, and evidentially appropriate transmissions of images and sounds to defendant, the judge, the jury, and the public.

State v. Sheppard, 197 N.J. Super. 411, 431, 484 A.2d 1330, 1342 (N.J. Sup. Ct. App. Div. 1984). Similarly, the Kentucky Supreme Court has stated:

> Confrontation does not require live presentation of evidence to the trier of fact. A photographic or electronic presentation is not perfect as a substitute for live testimony, but it will suffice. Video tape cannot be any less helpful in enabling a jury to assess credibility than a bare transcript read by the prosecutor.

Commonwealth v. Willis, 716 S.W.2d 224, 230 (Ky. 1986); *see also* People v. Moran, 39 Cal. App. 3d 398, 410, 114 Cal. Rptr. 413, 420 (1974) (although televised testimony differs from live testimony, process does not significantly affect flow of information to jury; video tape is sufficiently similar to live testimony to permit jury to properly perform its functions).

198. This question was raised in Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). The *Hochheiser* court acknowledged that closed circuit television testimony "may affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence." *Id.* at 787, 208 Cal. Rptr. at 279; *see also* Estelle v. Williams, 425 U.S. 501, 511 (1976) (although state cannot compel accused to stand trial in prison garb, failure to make objection at trial negates possibility of unconstitutional compulsion or prejudice); Estes v. Texas, 381 U.S. 532, 544-45 (1965) (televising criminal trial in which there was widespread public interest inherently unfair as infringement of defendant's fundamental right to fair trial because of potential impact notoriety of televised proceedings would have on jurors).

199. Coy v. Iowa, 487 U.S. 1012, 1034-35 (1988) (Blackmun, J., dissenting).

that is generally associated with those who have been convicted."[200] Concededly, the court should, however, take care to instruct the jury that no significance should be attached to the use of the closed circuit television procedure.[201]

Based on current information, therefore, televising the child witness' testimony should not make a significant difference in the reliability of that testimony. Two of the traditional "indicia of reliability"—under oath and cross-examination—are not affected by the medium used. In addition, televised testimony seems to afford the jury a satisfactory basis for evaluating the truth of the witness' statements. Under the *Roberts* test, even if child witnesses are held to be "unavailable," the televised testimony does indeed have sufficient, and perhaps even greater, indicia of reliability to fall under a confrontation clause exception.

E. Coy *and "Eyeball-to-Eyeball" Confrontation*

Coy v. Iowa[202] seemed to halt a long progression of cases in which the Court had evaluated the purposes of the right to confrontation and found them to be essentially to promote the accuracy and reliability of evidence at trial. *Coy* instead relied on a literal interpretation of the word "confront," but pointed to no clear or recent precedent in establishing this interpretation.[203] The *Coy* majority did note, however, that

200. *Id.* at 1035 (Blackmun, J., dissenting) (citations omitted).

201. *See id.* (Blackmun, J., dissenting). Justice Blackmun, in his dissent, emphasized that the trial court had instructed the jury to draw no inference from the presence of the screen separating the witness from the defendant. *Id.* at 1034-35 (Blackmun, J., dissenting).

202. 487 U.S. 1012 (1988).

203. Justice Scalia in *Coy* cited the Latin roots of the word "confront," Shakespeare, the Bible and President Eisenhower for support in discussing the importance of face-to-face confrontation. *Id.* at 1015-18. According to Justice Scalia:

> There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."

Id. at 1015-16 (quoting *Acts* 25:16).

> "[C]onfront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ."

Id. at 1016 (quoting W. SHAKESPEARE, RICHARD II, act 1, sc. 1).

> What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his home town of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone

attempting to protect child witnesses at trial through this type of courtroom procedure presented a confrontation problem different from any addressed by past cases.[204] The Court also acknowledged, albeit with no further explanation, that there could be exceptions to the literal right to confront.[205]

A major flaw in the Iowa procedure, according to the *Coy* Court, was the legislative presumption of trauma to the child.[206] Significantly though, the *Coy* majority left open the possibility, a possibility which Justice O'Connor's concurrence openly embraced, that the combination of an individualized finding of trauma to the child witness and a compelling state interest in the protection of child victims *could* together qualify as grounds for such an exception to the confrontation clause.[207] It is submitted that *Craig* is merely that possibility made reality.

IV. CONCLUSION

The Supreme Court in past years struggled with the protections that should be afforded under the confrontation clause. In this struggle, the Court has examined the particular situation, the changing times and circumstances and the purposes to be served by the right to confront. Upon this examination, the Court has sometimes allowed a refinement or change in courtroom procedures so that our adversary system of criminal justice can take full advantage of the benefits of the times, circumstances and situation. Throughout this struggle, the Supreme Court has never held that the Constitution demands an absolute right to face-to-face confrontation as the only means to protect the accused's right to confront the witnesses against him.

The Supreme Court, in *Snyder v. Massachusetts*,[208] had viewed the right to confrontation as a common law right with recognized, but nonstatic, exceptions; the exceptions could change or even enlarge as long

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dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Id. at 1017-18 (quoting press release of remarks given by President Eisenhower to B'nai B'rith Anti-Defamation League, Nov. 23, 1953).

204. *Id.* at 1020. The Court noted that while the "implicit rights" conferred in the confrontation clause—the right to cross-examine, the right to exclude out-of-court statements, the right to face-to-face confrontation in the proceedings other than at trial—may give way to other important interests, the right addressed in *Coy* was the "right narrowly and explicitly set forth in the Clause . . . ." *Id.*

205. *Id.* at 1020-21. "Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.' " *Id.* at 1021 (quoting Bourjaily v. United States, 483 U.S. 171, 183 (1987)).

206. *Id.* at 1020-21.

207. *Id.* at 1022 (O'Connor, J., concurring).

208. 291 U.S. 97 (1933).

as there was no material departure from the rationale of the general rule.[209] In decisions prior to *Coy* and *Craig*, the Court had dealt with situations in which a witness whose statement was used at trial was *physically* unavailable to testify in court. In *Coy* and *Craig*, the child witness was physically available to testify and did testify, but either was not in the same room as the defendant, or was shielded from the sight of the defendant in the courtroom.[210] This is a change which does enlarge the confrontation right exceptions, yet does not strain the rationale of the rule.

As Justice Brennan stated in his dissent in *Michael H. v. Gerald D.*,[211] the Constitution is a "living charter"; it is not a "stagnant, archaic, hidebound document," but is rather a fluid instrument that recognizes that times change.[212] The Supreme Court has demonstrated its adherence to this precept in the confrontation clause cases which have explored the protection afforded criminal defendants. While procedures are allowed to change, the rights that the clause ensures for a defendant cannot be diminished.[213]

The *Craig* decision is a valid extension of already-existing exceptions to the face-to-face confrontation requirement for witnesses at a criminal trial. Justice Scalia, in his dissent in *Craig*, recognized that the Maryland procedure serves a valid interest and that the accused is given virtually everything guaranteed by the confrontation clause, except face-to-face confrontation.[214] The extension to the face-to-face confrontation exceptions permitted in *Craig* allows state legislatures to protect individual child abuse victims testifying at trial from further trauma where necessary, while still ensuring that the fundamental rights of criminal defendants are protected in the full manner intended by the Framers of our Constitution.

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209. *Id.* at 107.

210. *Coy*, 487 U.S. at 1014-15; *Craig*, 110 S. Ct. at 3158-59.

211. 491 U.S. 110 (1989).

212. *Id.* at 141 (Brennan, J., dissenting).

213. The rights ensured by the confrontation clause are the right to have the witness testify under oath, the right to cross-examine the witness and the right to have the jury observe the demeanor of the witness.

214. *Craig*, 110 S. Ct. at 3176 (Scalia, J., dissenting).