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CRIMINAL PROCEDURE Trial: Amend Provisions Relating to Closed Circuit Television Testimony of Child Victims of Certain Sexual Offenses

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CRIMINAL PROCEDURE

Trial: Amend Provisions Relating to Closed Circuit Television Testimony of Child Victims of Certain Sexual Offenses

CODE SECTION:	O.C.G.A. § 17-8-55 (amended)
BILL NUMBER:	SB 178
ACT NUMBER:	504
SUMMARY:	The Act provides that a child victim of rape, sodomy, child molestation, cruelty to children, or sexual assault may testify out of court, and such testimony will be broadcast in the courtroom by way of closed circuit television. During testimony, only the judge, attorneys, camera operators, and a representative of the child may be in the room with the child. The Act does not prohibit the presence of both the child and the defendant in the courtroom at the same time for the purpose of identification.
EFFECTIVE DATE:	July 1, 1991

History

Prior Georgia statutory law provided that the testimony of a child witness fourteen years old or younger could be broadcast outside the courtroom to the jury in the jury room.[1] Under this Code section the defendant, judge, attorneys, bailiff, and a guardian or other representative of the child[2] remained in the courtroom with the child witness, and the rest of the courtroom was cleared. Either the State or the defendant could request broadcast of the testimony if the child was a victim of rape,[3] sodomy,[4] aggravated child molestation,[5] or certain acts of cruelty.[6]

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1. O.C.G.A. § 17-8-55 (Supp. 1989).
2. O.C.G.A. § 17-8-55 provides that "a parent, guardian, child psychologist, or other qualified person appointed to represent the interests of the witness" may remain in the courtroom with the witness. *Id.*
3. O.C.G.A. § 16-6-1 (1988).
4. O.C.G.A. § 16-6-2 (1988).
5. O.C.G.A. § 16-6-4 (1988).
6. O.C.G.A. § 16-5-70(b) (1988).

In November 1988, heavy local and national coverage of the trial of Edward R. Dickey, convicted on eight counts of child molestation and sodomy involving his daughters,[7] attracted the attention of legislators to the problem of child witnesses testifying in the presence of the accused.[8] Bills were introduced in the past two years in which the witness would testify outside the presence of the defendant; however, the House Judiciary Committee was concerned with possible constitutional problems, and they stalled in committee.[9]

The Sixth Amendment guarantees the accused in a criminal prosecution the right "to be confronted with the witnesses against him."[10] A recent Supreme Court decision, *Maryland v. Craig*,[11] interprets the confrontation clause in light of child testimony by closed circuit television. In a majority opinion by Justice O'Connor, the Court held that a Maryland statute[12] authorizing testimony of a child outside the courtroom, out of the presence of the defendant and broadcast in the courtroom, was constitutional.[13] The Court found that the word "confront" does not mean only face-to-face confrontation as contemplated in the Sixth Amendment. Competing interests may sometimes override the right to face-to-face confrontation since the confrontation clause must be interpreted in light of "the necessities of trial and the adversary process."[14] The reliability of the testimony was ensured in the statutory procedure by rigorous cross-examination while under oath, and the Court ruled that the psychological well-being of the child would outweigh,

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7. *Father Convicted in Molesting*, N. Y. TIMES, Nov. 8, 1988, at B22. Mr. Dickey received a sentence of life plus 20 years in prison and 120 years on probation. He will be eligible for parole after seven years. It is also stipulated that Mr. Dickey may never again be in the presence of a female eight to 16 years old for more than five minutes without the supervision of an adult other than his wife. The two daughters involved in the trial were 16 and 18 years old. Charges were dropped with respect to a third daughter, 13 years old, so that she would not have to endure the trauma of testifying. Mr. Dickey cross-examined his daughters himself after his wife and one daughter were released from jail for refusing to testify. David Penly, *Dickey Sentence: Life, Plus 20*, ATLANTA CONST., Nov. 11, 1988, at A1; *see also* Connie Green, *Girl, 16, Testifies Against Dad*, ATLANTA CONST., Nov. 1, 1988, at A1; Tracy Thompson, *Sex Abuse Case Spotlights Growing Conflict of Rights*, ATLANTA CONST., Nov. 2, 1988, at A1.

8. Interview with Sen. Sallie Newbill, Senate District No. 56 (Feb. 28, 1991) [hereinafter Newbill Interview]. Interestingly, the Dickey trial, which attracted the attention of legislators, involved children 16 and 18 years of age who were cross-examined by their attacker as an attorney pro se. Green, *supra* note 7. The resulting Act passed by the General Assembly, however, applies only to children 10 and under, and even then, does not apply when the defendant is acting as an attorney pro se.

9. Green, *supra* note 7.

10. U.S. CONST. amend. VI.

11. 110 S.Ct. 3157 (1990).

12. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

13. *Maryland*, 110 S.Ct. at 3166.

14. *Id.*

in narrow circumstances, the right of the accused to confront child witnesses face-to-face.[15] A dissent by Justice Scalia asserted that the word "confront" as used in the confrontation clause can mean only face-to-face confrontation.[16]

With the backing of a Supreme Court decision to clear away fears of constitutional problems, two bills permitting out-of-court testimony by child witnesses were simultaneously introduced[17] in the Senate in the 1991 session, and later merged into SB 178.[18]

SB 178

The Act amends Code section 17-8-55 to provide that a judge in a criminal proceeding for cruelty to children,[19] rape,[20] sodomy,[21] child molestation,[22] or sexual assault of persons in custody[23] may order that the testimony of a child victim be taken outside the courtroom and broadcast by closed circuit television into the courtroom.[24] The child must be ten years old or younger, and the judge must determine that by testifying in the courtroom, the child would suffer such serious emotional distress that she could not communicate reasonably.[25] Only the attorneys, the judge, the camera operators, and, at the discretion of the court, any person whose presence "contributes to the well-being of the child" may be in the room with the child witness.[26] The defendant or her counsel must be notified within twenty-four hours who will represent the prosecution and the child during the testimony.[27] The defendant and the jury remain in the courtroom, but the defendant can communicate electronically with the room where the child is testifying.[28] The defendant would not be permitted to question the child as an attorney pro se outside the courtroom; however, the Act does not prevent the presence of the child witness in the courtroom to identify the defendant.[29]

The age at which a child would be covered under the Act proved to be a battle in getting the Act through both houses. The predecessor

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15. *Id.*
16. *Id.* at 3173.
17. Newbill Interview, *supra* note 8.
18. SB 29, as introduced, 1991 Ga. Gen. Assem.; SB 70, as introduced, 1991 Ga. Gen. Assem.
19. O.C.G.A. § 16-5-70 (1988).
20. O.C.G.A. § 16-6-1 (1988).
21. O.C.G.A. § 16-6-2 (1988).
22. O.C.G.A. § 16-6-4 (1988).
23. O.C.G.A. § 16-6-5.1 (1988).
24. O.C.G.A. § 17-8-55 (Supp. 1991).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

Code section set the age of the child at fourteen or younger,[30] as did SB 29, which was also introduced in the Senate.[31] The Maryland statute, interpreted by the Supreme Court, defines child as one under eighteen years of age,[32] and SB 70, also introduced in the Senate, set the age of the child at seventeen or younger.[33] SB 178 combined aspects of both SB 29 and SB 70, and set the age of the child at fourteen years or younger.[34] Eventually, a floor amendment in the House reduced the age to ten years or younger.[35] Although the Maryland statute that was upheld by the Supreme Court allows for out-of-court testimony of a child under eighteen, the child at issue in the suit was only six.[36]

SB 70 included child victims of statutory rape,[37] and the offense of enticing a child for indecent purposes[38] in addition to the offenses eventually passed in SB 178.[39] In drafting SB 178, the sponsor of the bill suggested that the offenses included in SB 70 had been too broad, and there was concern about getting the bill through the House.[40] Thus, the offenses of statutory rape and enticing a child for indecent purposes are not included in the Act.[41]

The House Judiciary Committee Substitute to SB 178 moved the presence of the judge from the courtroom to the room where the child is testifying.[42] The concern was that there may be intangible body language that would not be picked up by the cameras and needed to be observed by the judge.[43] A twenty-four hour notice provision was also added by the House Judiciary Committee Substitute.[44] The defendant or the defendant's counsel must be provided twenty-four hours notice of the parties representing the child and the parties representing the prosecution during the testimony of the child.[45]

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30. O.C.G.A. § 17-8-55 (Supp. 1989).

31. SB 29, as introduced, 1991 Ga. Gen. Assem. SB 29 was introduced by Sen. Steve Thompson of Senate District No. 33. *Id.*

32. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

33. SB 70, as introduced, 1991 Ga. Gen. Assem. SB 70 was introduced by Sens. Newbill of the 56th district, Thompson of the 33rd, and Langford of the 35th. *Id.*

34. SB 178, as introduced, 1991 Ga. Gen. Assem.

35. SB 178 (FA), 1991 Ga. Gen. Assem. The floor amendment was initiated by Rep. Walker of the House District No. 115. *Id.*

36. Maryland v. Craig, 110 S.Ct. 3157, 3160.

37. O.C.G.A. § 16-6-3 (1988).

38. O.C.G.A. § 16-6-5 (1988).

39. SB 70, as introduced, 1991 Ga. Gen. Assem.

40. Newbill Interview, *supra* note 8.

41. Because consent of the victim is irrelevant in the offenses of statutory rape and enticing a child for indecent purposes, the need to protect the victim from intimidation in the courtroom is not as great. O.C.G.A. §§ 16-6-3, -5; *see also* Drake v. State, 236 S.E.2d 748 (Ga. 1977); Coker v. State, 297 S.E.2d 68 (Ga. Ct. App. 1982).

42. SB 178 (HCS), 1991 Ga. Gen. Assem.

43. Newbill Interview, *supra* note 8.

44. SB 178 (HCS), 1991 Ga. Gen. Assem.

45. *Id.*

The drafting of SB 178 was guided by the Maryland statute[46] that was the subject of the Supreme Court's decision in *Maryland v. Craig*.[47] In an attempt to keep the Act within the purview of the Court's interpretation of the Sixth Amendment's confrontation clause, legislators have adopted much of the language of the Maryland statute.[48]

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46. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).
47. 110 S.Ct. 3157 (1990).
48. Newbill Interview, *supra* note 8.