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**CHILD TESTIMONY VIA TWO-WAY CLOSED CIRCUIT  
TELEVISION: A NEW PERSPECTIVE ON *MARYLAND V. CRAIG* IN  
*UNITED STATES V. TURNING BEAR* AND *UNITED STATES V.*  
*BORDEAUX***

*Aaron Harmon*<sup>1</sup>

*For Confrontation Clause purposes, child testimony by two-way closed circuit television is substantively different from one-way closed circuit television. Two-way closed circuit testimony is preferable because it more closely approximates face-to-face confrontation. The Supreme Court's case-specific holding in Maryland v. Craig was directed at one-way closed circuit testimony. As such, the Eighth Circuit was mistaken in conflating the two forms of testimony when it relied on Craig to overturn both United States v. Turning Bear and United States v. Bordeaux, and was similarly mistaken in holding that § 3509 of the Child Victims' and Witnesses' Rights statute was unconstitutional to the extent it conflicted with Craig.*

**I. INTRODUCTION**

A child sits nervously at a table in a conference room. In front of her is a video camera, and to the left of the camera sits a television screen. Across the table from the child sit two attorneys. The defense attorney is wearing a headset with a microphone. In a courtroom down the hall, the jury, judge, and defendant are all watching an identically sized television screen. In front of the defendant is a video camera. Like the defense attorney, the defendant is also wearing a headset and microphone. As the prosecuting attorney questions the child, the defendant closely watches the screen, occasionally whispering into his headset. Back

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<sup>1</sup> J.D. Candidate, University of North Carolina School of Law, 2007. Special thanks to Professor Richard Myers for his helpful comments and guidance, and to Judge James A. Wynn, Jr. of the North Carolina Court of Appeals for introducing me to this topic.

in the room with the child, the defense attorney nods and writes something on his legal pad. Glancing occasionally at the defendant's face on the television screen, the child answers softly, her facial expressions and mannerisms as plainly visible to those in the courtroom as the defendant's are to the child.

When a child witness testifies via two-way closed circuit television, the child can see the defendant and the defendant can see the child. Everyone present in the courtroom is able to observe the child's mannerisms and other behaviors, and can draw conclusions as to whether or not he or she is telling the truth. The defendant can communicate freely with his or her attorney, and the child is able to testify out of the presence of the defendant, which provides a less threatening environment than being in close proximity to his or her alleged abuser. The mediated nature of the interaction reduces the pressure on the child, who is already in a traumatic situation, without undermining the defendant's right to confront and cross-examine his or her accuser. As a result, the child is given the opportunity to communicate more freely without sacrificing either the reliability of his or her testimony or the jury's ability to observe her.<sup>2</sup>

The Sixth Amendment of the Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."<sup>3</sup> Although the right to confrontation is a cornerstone of due process in criminal trials, the requirement of actual face-to-face confrontation has in some cases been relaxed due to overriding policy reasons.<sup>4</sup> One such policy rationale involves testimony by

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<sup>2</sup>See Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1018 (2003) ("To be sure, *Craig* does not, as some commentators have complained, deal away the criminal defendant's rights under the Confrontation Clause. Most of the elements needed for assuring the reliability of the evidence—testimony under oath, cross-examination, and examination of the witness's demeanor—are preserved.[footnote omitted.] Only face-to-face confrontation is compromised, and this compromise is not made easily.").

<sup>3</sup>U.S. CONST. amend. VI.

<sup>4</sup>See Richard Bialczak & Dorothy Wong, *Fourth Annual Review of Gender and Sexuality Law: Violence Law Chapter: Evidentiary Matters in Sexual Offense Cases*, 4 GEO. J. GENDER & L. 525, 560 (2002).

child victims in abuse cases, where there exists a particularly strong interest in minimizing trauma to the alleged victim.<sup>5</sup>

In 1990, the Supreme Court addressed concerns over closed circuit testimony in *Maryland v. Craig*.<sup>6</sup> Their holding was two-fold. First, in a more general holding (which had been originally articulated in *Coy v. Iowa*<sup>7</sup>), the Court found that a defendant's "right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."<sup>8</sup> Second, in a case-specific holding, the Court found that a child witness may testify via one-way closed circuit television provided it was necessary to protect his or her welfare, that the presence of the defendant (as opposed to the courtroom atmosphere generally) would traumatize the child, and that the impact of emotional distress on the child would be more than *de minimis*.<sup>9</sup>

In 2004, Eighth Circuit Court of Appeals applied the more specific holding of *Craig* to two-way closed circuit testimony in *United States v. Turning Bear*.<sup>10</sup> In March 2005, the Eighth Circuit extended the holding of *Turning Bear* in *United States v. Bordeaux*.<sup>11</sup> The *Bordeaux* court found the trial court had made insufficient findings of fact to show that the child witness was

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<sup>5</sup>See Bialczak & Wong, *supra* note 4, at 559–60; Katherine M. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 472 (2004).

<sup>6</sup>497 U.S. 836 (1990).

<sup>7</sup>487 U.S. 1012 (1988).

<sup>8</sup>*Craig*, 497 U.S. at 850. See also *Coy*, 487 U.S. at 1021; *id.* at 1025 (O'Connor, J., concurring); *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), *overruled by* *Crawford v. Washington*, 541 U.S. 36 (2004); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>9</sup>*Craig*, 497 U.S. at 855–56. The Court provided no guidance on what degree of emotional distress is required to satisfy the *de minimis* standard. However, the possibility that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate" was held to be sufficient. *Id.*

<sup>10</sup>357 F.3d 730 (8th Cir. 2004).

<sup>11</sup>400 F.3d 548 (8th Cir. 2005) *reh'g en banc denied*, U.S. App. LEXIS 9866 (8th Cir. May 27, 2005).

traumatized specifically by the presence of the defendant, and not by the general atmosphere of the courtroom.<sup>12</sup> Since, according to the *Bordeaux* court, *Craig* provided the appropriate test,<sup>13</sup> the court also held that section 3509(b)(1)(B)(1) of the 1990 Child Victims' and Child Witnesses' Rights statute<sup>14</sup> was unconstitutional to the extent that it allowed a different showing of emotional distress than was required by *Craig*.<sup>15</sup> Section 3509 allows child witnesses to testify using a two-way system if the trial court finds the child witness is unable to testify because of fear, likelihood of emotional trauma, or because the child suffers from a mental or other infirmity.<sup>16</sup>

The Eighth Circuit failed to distinguish between the one-way closed circuit testimony used in *Craig* and the two-way closed circuit testimony used in both *Bordeaux* and *Turning Bear*.<sup>17</sup> Indeed, in *Turning Bear* the Eighth Circuit neglected to even mention that the child had testified via two-way closed circuit television.<sup>18</sup> The *Bordeaux* court did mention the distinction, but dismissed it as trivial.<sup>19</sup> The court found that confrontation via one-way closed circuit television did not differ significantly from a confrontation via two-way closed circuit television because "the 'confrontations' [created by one-way and two-way closed circuit television] are virtual, and not real in the sense that a face-to-face confrontation is real."<sup>20</sup>

For confrontation purposes, however, a two-way closed circuit system is preferable to either one-way testimony or prerecorded video depositions (another form of alternative testimony

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<sup>12</sup> See *Bordeaux*, 400 F.3d at 555.

<sup>13</sup> See *id.* at 553.

<sup>14</sup> 18 U.S.C. § 3509(b)(1)(B)(1) (2000).

<sup>15</sup> See *Bordeaux*, 400 F.3d at 553.

<sup>16</sup> 18 U.S.C. § 3509(b)(1)(B) (2000).

<sup>17</sup> See 400 F.3d at 552; 357 F.3d at 735.

<sup>18</sup> See generally *Turning Bear*, 357 F.3d at 730 (referring to both one-way and two-way systems as "closed-circuit television procedures").

<sup>19</sup> See *Bordeaux*, 400 F.3d at 554.

<sup>20</sup> *Bordeaux*, 400 F.3d at 554.

commonly used with child witnesses).<sup>21</sup> First, and most importantly, since the witness cannot see the accused, one-way testimony lacks visual reciprocity, which is a significant element of face-to-face confrontation.<sup>22</sup> A two-way system, on the other hand, preserves this constitutional guarantee while simultaneously minimizing the traumatic effect on the child due to the presence of a buffer between the child and the accuser.<sup>23</sup> Second, the interaction occurs in real time.<sup>24</sup> While a video deposition involves no confrontation and is recorded prior to trial, two-way closed circuit testimony allows the jury to observe contemporaneous interaction between the child witness and defense counsel.<sup>25</sup> Third, the defendant is able to communicate with his or her attorney through a headset.<sup>26</sup> This enables the defendant to provide input to counsel for purposes of cross-examination, as though they were sitting at the same table. As a result, the adversarial nature of the trial is preserved, and the defense can plan their trial strategy based on what arises during the child's testimony. Furthermore, the defense can object in a timely manner to inappropriate testimony, as attorney and client would if the child actually was testifying in

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<sup>21</sup> See Grearson, *supra* note 5, at 468 ("Federal and state courts most commonly use three types of shielding procedures: screening, videotape, and closed-circuit television.").

<sup>22</sup> *Id.* ("Closed-circuit television can be either one-way (those present in the courtroom can see and hear the child, but the child cannot see or hear the courtroom activity) or two-way (children can see and hear the courtroom proceedings).").

<sup>23</sup> *Id.* at 469 ("The premise of shielding procedures is the notion that courtroom confrontation with the defendant, the alleged perpetrator, may severely traumatize child witnesses.").

<sup>24</sup> *Id.* at 468 ("[C]losed-circuit television instantly transmits the child's out-of-court direct and cross-examinations into the trial proceedings.").

<sup>25</sup> See *United States v. Etimani*, 328 F.3d 493, 499 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003) ("[T]he jury could see [via two-way closed circuit television] that [the child witness] was able to look at the defendant—or not look at him—and could take those observations into account in its assessment of her credibility.").

<sup>26</sup> *Id.* at 487 ("Defense counsel in the witness room wore a headset with a microphone, as did [the defendant] in the courtroom, so that counsel and the defendant could communicate during [the child witness's] testimony.").

the courtroom.<sup>27</sup> For these reasons, two-way closed circuit television provides the best available method for the preservation of a defendant's confrontation rights, and mitigates potential prejudice to the defendant to the fullest possible extent.<sup>28</sup>

Since the three-part criteria put forth in *Craig* was specific to one-way testimony, it should not have controlled the decision in either *Bordeaux* or *Turning Bear*. This Recent Development will make two arguments. First, the broader holding of *Craig* (that the "denial of such confrontation [be] necessary to further an important policy"<sup>29</sup>) is more appropriate for the evaluation of two-way testimony due to both the potential traumatic effects on child witnesses and the State's clear interest in protecting them. Second, because two-way testimony in fact preserves the defendant's right to confrontation, section 3509 of the 1990 Child Victims' and Child Witnesses' Rights statute (allowing the child to testify via two-way closed circuit television based on fear, likelihood of emotional trauma, or mental or other infirmity) is not only constitutional, but presents a preferable method for child testimony in appropriate cases.

## II. PLACING *BORDEAUX* IN CONTEXT: A BRIEF HISTORY OF THE CONFRONTATION CLAUSE

### A. *Constitutional Origins and Early Interpretations*

Although not expressly stated, the language of the Sixth Amendment has been widely interpreted to require an actual face-

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<sup>27</sup> *Maryland v. Craig*, 497 U.S. 836, 842 (1990) ("The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.").

<sup>28</sup> Multiple cases have held that two-way systems are superior to one-way systems for capturing the essence of, and preserving the values inherent to, face-to-face confrontation. See generally *United States v. Yates*, 391 F.3d 1182 (11th Cir. 2004), *vacated*, 404 F.3d 1291 (2005); *United States v. Etimani*, 328 F.3d 493, 499 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003); *United States v. Gigante*, 166 F.3d 75, 80–81 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

<sup>29</sup> 497 U.S. at 850 (1990); 487 U.S. at 1021 (1988).

to-face confrontation between defendants and their accusers.<sup>30</sup> Accordingly, allowing a witness to testify outside the presence of the defendant, for any reason, is a technical violation of this constitutional guarantee.<sup>31</sup>

The Supreme Court first interpreted the Confrontation Clause in 1895 in *Mattox v. United States*.<sup>32</sup> In *Mattox*, the Court found two essential elements in the Confrontation Clause: (1) the right of the accused to confront the witness and (2) the right to cross-examination.<sup>33</sup> These safeguards help to ensure the veracity of the witness by allowing the jury to observe his or her demeanor and mannerisms, as well as by forcing the witness to incriminate the accused while in his or her presence.<sup>34</sup> The Court emphasized and extended this interpretation in 1899 in *Kirby v. United States*.<sup>35</sup> In *Kirby*, the Court held that confrontation and cross-examination were “fundamental guarantees of life and liberty.”<sup>36</sup> The requirements established in these early cases have been upheld uniformly throughout subsequent court decisions.<sup>37</sup>

#### B. *Coy v. Iowa: Early Alternative Forms of Testimony*

The Supreme Court addressed the use of alternative forms of testimony for the first time in *Coy v. Iowa*.<sup>38</sup> In *Coy*, the defendant was charged with sexually assaulting two thirteen-year-old girls while they were camping in their backyard next to his house.<sup>39</sup> The girls were permitted to testify with a screen placed between them and the defendant.<sup>40</sup> The Court reversed Coy’s conviction on the

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<sup>30</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–50 (1987); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

<sup>31</sup> See Grearson, *supra* note 5, at 472.

<sup>32</sup> 156 U.S. 237 (1895).

<sup>33</sup> See *id.* at 242–43.

<sup>34</sup> See *id.*

<sup>35</sup> 174 U.S. 47 (1899).

<sup>36</sup> *Id.* at 55.

<sup>37</sup> See *Pointer v. Texas*, 380 U.S. 400, 405 (1965). See also Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig*, 27 ST. MARY’S L.J. 389, 395 (1996).

<sup>38</sup> 487 U.S. 1012 (1988); Kohlmann, *supra* note 37, at 396.

<sup>39</sup> *Coy*, 487 U.S. at 1014.

<sup>40</sup> *Id.*



grounds that the procedure violated the defendant's right to confrontation.<sup>41</sup> Writing for the majority, Justice Scalia emphasized the truth-telling effects of face-to-face confrontation, stating "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly."<sup>42</sup> However, the Court acknowledged that the rights preserved in the Confrontation Clause are not absolute.<sup>43</sup> Although it declined to identify specific exceptions, the Court conceded that exceptions might be justified "when necessary to further an important public policy."<sup>44</sup> In her concurring opinion, Justice O'Connor emphasized this point, stating that confrontation rights "are not absolute but rather 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."<sup>45</sup> This statement was prophetic of her reasoning in the majority opinion in *Maryland v. Craig*.

*C. Maryland v. Craig: One-Way Closed Circuit Testimony for Child Victims*

Two years after deciding *Coy*, the Court again had occasion to evaluate the limits of the Confrontation Clause in the context of child testimony. This time, faced with another set of facts, the Court decided the issue differently. In *Maryland v. Craig*,<sup>46</sup> the defendant was convicted of sexually abusing a six-year-old child.<sup>47</sup> The child testified at trial via one-way closed circuit television, with the jury, judge, and defendant remaining in the courtroom.<sup>48</sup>

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<sup>41</sup> *Id.* at 1022.

<sup>42</sup> *Id.* at 1019.

<sup>43</sup> *Id.* at 1024–25.

<sup>44</sup> *Id.* at 1021.

<sup>45</sup> *Id.* at 1022 (O'Connor, J., concurring).

<sup>46</sup> 497 U.S. 836 (1990).

<sup>47</sup> *Id.* at 840.

<sup>48</sup> *Id.* at 841–42.

The defendant was allowed to communicate with her counsel electronically.<sup>49</sup>

Justice O'Connor, writing for the Court, stated that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."<sup>50</sup> The interests protected by the Confrontation Clause include not only the right of the defendant to look upon his or her accuser, but also the right to have his or her accuser: (1) give his or her statement under oath, (2) submit to cross-examination, and (3) be visible to the jury so that they may observe the witness's demeanor and evaluate his or her credibility.<sup>51</sup> Justice O'Connor concluded that "our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."<sup>52</sup> The Court held that an "adequate showing of necessity" was required to justify an alternative form of testimony, and the finding of necessity must be "case-specific."<sup>53</sup> The Court reasoned that Maryland had an important state interest in preserving the physical and psychological well-being of the child witness, and held that the use

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<sup>49</sup> *Id.*; see also Kohlmann, *supra* note 37, at 397–98 (1996) ("While Craig's attorney participated in the direct and cross-examination of the complaining witness, Craig was left to communicate with her lawyer by means of an open telephone line. Craig, in full view and hearing of the jury, had to speak loudly enough for her attorney to hear her voice from a telephone receiver that had been placed on a table in the room in which examination of the witness took place.") (footnote omitted).

<sup>50</sup> *Craig*, 497 U.S. at 845.

<sup>51</sup> *Id.* at 845–46; *California v. Green*, 399 U.S. 149, 158 (1970).

<sup>52</sup> *Craig*, 497 U.S. at 850. See also *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *Id.* at 1025 (O'Connor, J., concurring); *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>53</sup> *Craig*, 497 U.S. at 855.

of one-way closed circuit testimony did not "impinge on the truth-seeking or symbolic purposes of the Confrontation Clause."<sup>54</sup>

The Court set forth three criteria that must be satisfied for an alleged child abuse victim to be allowed to testify via one-way closed circuit television. First, the trial court must determine that the use of one-way closed circuit television is necessary to protect the welfare of the child witness.<sup>55</sup> Second, the trial court must find that the child witness would be traumatized, not by the courtroom generally, but specifically by the defendant.<sup>56</sup> Third, the emotional distress on the child witness must be more than *de minimis*.<sup>57</sup>

It is important to note that the three-part criterion in *Craig* specifies testimony by one-way closed circuit television.<sup>58</sup> Although the Court uses the generic term "special procedure" on two occasions, several considerations support the conclusion that the holding of *Craig* was intentionally limited to one-way closed circuit testimony. First, the permissibility of two-way testimony was not before the Court.<sup>59</sup> The Maryland State Court of Appeals had specifically addressed the question of whether the child should testify by two-way or one-way closed circuit television. It found, based in part on Justice O'Connor's concurring opinion in *Coy*, that two-way systems did not raise a substantial Confrontation Clause problem.<sup>60</sup> Second, the Court held that, although

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<sup>54</sup> *Id.* at 852-53.

<sup>55</sup> *Id.* at 855.

<sup>56</sup> *Id.* at 856.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 852 ("We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause."). See also Grearson, *supra* note 5, at 491 ("Although the *Craig* Court found sufficient reliability in Maryland's one-way closed-circuit procedure, it did not provide a blanket approval of all shielding procedures. The Court has never ruled on the constitutionality of other legislative innovations that permit videotaped or two-way closed-circuit testimony.").

<sup>59</sup> *Id.* at 840 ("This case requires us to decide 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.").

<sup>60</sup> *Craig v. State*, 316 Md. 551, 567 (1989), *vacated by Maryland v. Craig*, 497 U.S. 836 (1990). See also *Coy v. Iowa*, 487 U.S. 1012, 1023 (1988) (O'Connor,

“Maryland’s statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial,” one-way closed circuit testimony “preserves all of the other elements of the confrontation right.”<sup>61</sup> Third, in order to support the Court’s finding that states have an important interest in the psychological and physical well-being of their children, Justice O’Connor referenced the fact that twenty-four states allowed the use of one-way testimony and eight states allowed the use of two-way testimony in such situations.<sup>62</sup> This indicates her awareness of the distinction between the two forms of testimony and that, as such, her use of the term “one-way” in the opinion was deliberate. Fourth, subsequent cases involving two-way closed circuit testimony have distinguished *Craig* on this point.<sup>63</sup> As such, it is reasonable to conclude that the case-specific holding of *Craig* was intentionally limited to one-way closed circuit television.

After *Craig* was decided, Congress passed the Child Victims’ and Witnesses’ Rights statute.<sup>64</sup> The statute provides federal courts with guidelines for determining whether public policy interests are strong enough in a particular case to justify allowing remote testimony.<sup>65</sup> Section 3509(b)(1) deviates from the holding in *Craig* in several important respects. First, it specifies that federal courts must use a two-way closed circuit system rather than a one-way

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J., concurring) (stating that “many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant” and citing to, *inter alia*, a New York statute authorizing two-way closed circuit television).

<sup>61</sup> *Craig*, 497 U.S. at 851. Maryland’s statute explicitly provides for testimony by one-way closed circuit television. *See also Craig*, 316 Md. at 553 (“Designed to facilitate testimony by child witnesses in child abuse (particularly sexual abuse) cases, [MD. CODE ANN. § 9-102 (2004)] authorizes a judge to direct that a child’s testimony be received via one-way closed-circuit television.”).

<sup>62</sup> *Craig*, 497 U.S. at 853–54.

<sup>63</sup> *See United States v. Etimani*, 328 F.3d 493, 499 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003); *United States v. Gigante*, 166 F.3d 75, 80–81 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

<sup>64</sup> 18 U.S.C. § 3509 (2005); *see also Grearson*, *supra* note 5, at 478–79.

<sup>65</sup> *See Grearson*, *supra* note 5, at 478–79.

system.<sup>66</sup> Next, it expands the grounds for allowing a child witness to testify remotely to include, in addition to fear, a substantial likelihood of trauma, mental or other infirmity, or conduct by the defendant or defense counsel that causes the child to be unable to continue testifying.<sup>67</sup> In addition, the presence of the defendant is not required to be the specific and exclusive source of the victim's fear.<sup>68</sup> Lower court decisions have held that the section 3509 grounds for allowing two-way testimony are consistent with what was deemed constitutional in *Craig*.<sup>69</sup>

#### D. *Beyond Craig: Two-Way Closed Circuit Testimony in Gigante and Etimani*

*United States v. Craig* is still the final word from the Supreme Court on alternative forms of testimony. Since *Craig* was decided, other alternative forms of testimony in addition to one-way closed circuit television have been used widely in child abuse cases.<sup>70</sup> Moreover, the use of alternative forms of testimony has been extended outside the context of cases involving children.<sup>71</sup>

In 1999, in *United States v. Gigante*, the Second Circuit distinguished *Craig* when evaluating the use of a two-way system to take testimony from a Mafia informant who could not be present at trial.<sup>72</sup> The informant testified via two-way closed circuit television from a remote location because he was in the final stages

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<sup>66</sup> 18 U.S.C. § 3509(b)(1)(A) (2005) ("In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television.").

<sup>67</sup> See 18 U.S.C. § 3509(b)(1)(B) (2005).

<sup>68</sup> 18 U.S.C. § 3509(b)(1)(B)(1) (2005); see also *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) *reh'g en banc denied*, U.S. App. LEXIS 9866 (8th Cir. May 27, 2005).

<sup>69</sup> *United States v. Garcia*, 7 F.3d 885, 888 (9th Cir. 1993); see also *Etimani*, 328 F.3d 493, 501 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003).

<sup>70</sup> Cathleen J. Cinella, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 152 (1998).

<sup>71</sup> *Id.*

<sup>72</sup> 166 F.3d 75, 79 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

of cancer.<sup>73</sup> The Second Circuit reasoned that the criteria put forth in *Craig* were completely inapplicable to two-way remote testimony because *Craig* was intended to compensate for deficiencies of one-way systems that were absent in two-way systems.<sup>74</sup> The court asserted that “[b]ecause [the trial court] employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case.”<sup>75</sup> The Second Circuit did, however, acknowledge that two-way closed circuit testimony should not be considered interchangeable with in-court testimony, and that actual face-to-face confrontations are still preferable.<sup>76</sup> Although the *Gigante* court did not find *Craig* applicable, its reasoning is consistent with the broader holding of *Craig*, that the exception be made only “when necessary to further an important public policy.”<sup>77</sup>

In 2003, the Ninth Circuit decided *United States v. Etimani*.<sup>78</sup> In *Etimani*, a child witness testified by two-way closed circuit television.<sup>79</sup> The witness and her guardian *ad litem* sat at one end of a table with her guardian *ad litem*, and the defense and prosecuting attorneys sat at the other end of the table.<sup>80</sup> The defendant and defense counsel wore headsets with microphones so they could communicate discreetly during cross-examination.<sup>81</sup> Additionally, the trial court created an extensive record of the placement of the cameras and television monitors, both in the courtroom as well as in the conference room.<sup>82</sup> The Ninth Circuit Court of Appeals held that two-way closed circuit testimony pursuant to 18 U.S.C. § 3509(b)(1) (the same statute declared

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 80–81 (“[T]he Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant.”).

<sup>75</sup> *Id.* at 81.

<sup>76</sup> *Id.*

<sup>77</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

<sup>78</sup> 328 F.3d 493 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003).

<sup>79</sup> *Id.* at 497.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

unconstitutional by the *Bordeaux* Court) was constitutional.<sup>83</sup> The court also stated that the television monitor must be called to the attention of the child and be readily visible to her while testifying, but that it did not have to be directly in front of her.<sup>84</sup> Like *Gigante*, the *Etimani* Court distinguished the holding of *Craig* from the use of two-way closed circuit television, stating that “if *Craig* upheld the constitutionality of one-way television testimony in an appropriate case, then two-way television testimony, a procedure that even more closely simulates in-court testimony, also passes constitutional muster.”<sup>85</sup>

In 2004, the Eleventh Circuit decided *United States v. Yates*<sup>86</sup> the holding in *Gigante* that two-way remote testimony is the constitutional equivalent of face-to-face confrontation.<sup>87</sup> The *Yates* court held that, as established in *Craig*, in order to employ closed circuit technology the prosecution was required to establish that an important state interest was served.<sup>88</sup> In *Yates*, two witnesses located in Australia testified via two-way live videoconference because they were beyond the subpoena powers of the United States Attorney and refused to travel to the United States.<sup>89</sup> The court reasoned that providing the jury with crucial prosecution evidence and a fast resolution to the case were not important public policies sufficient to satisfy the *Craig* rule.<sup>90</sup> However, *Yates* has no precedential value at this time since the court’s decision was vacated in March 2005 after a request for rehearing *en banc* was granted.<sup>91</sup> Thus, the law in the Eleventh Circuit remains uncertain.

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<sup>83</sup> *Id.* at 501.

<sup>84</sup> *Id.* at 495.

<sup>85</sup> *Id.* at 499.

<sup>86</sup> 391 F.3d 1182 (11th Cir.), *vacated*, 404 F.3d 1291 (2005).

<sup>87</sup> *Id.* at 1186.

<sup>88</sup> *Id.* at 1188.

<sup>89</sup> *Id.* at 1184.

<sup>90</sup> *Id.* at 1188.

<sup>91</sup> *United States v. Yates*, 404 F.3d 1291 (11th Cir. 2005).

### III. *TURNING BEAR* AND *BORDEAUX*: INTERPRETATION OR MISINTERPRETATION OF *CRAIG*?

In 2004, the Eighth Circuit decided *United States v. Turning Bear*.<sup>92</sup> In *Turning Bear*, a child witness testified via two-way closed circuit television after the trial court found that she was unable to testify because of fear of the courtroom, the prosecuting attorney, and the defendant.<sup>93</sup> The Court of Appeals opinion, written by Judge Morris Sheppard Arnold (who also, coincidentally, authored the subsequent *Bordeaux* opinion), made no mention that a two-way system was used, nor that the trial court had, as in *Bordeaux*, made witness impact findings on the record consistent with 18 U.S.C. § 3509(b)(1)(B)(1).<sup>94</sup> The court instead based its decision on the trial court's failure to make the case-specific findings outlined in *Craig*, regardless of the statutory requirements.<sup>95</sup>

The analytical deficiencies in *Turning Bear* became apparent in *Bordeaux* because the appellant in *Bordeaux* affirmatively argued that *Craig* did not apply to two-way systems.<sup>96</sup> The Eighth Circuit reversed the trial court, holding that the failure to make *Craig*-specific findings was dispositive. Additionally, the court claimed that, in *Turning Bear*, it had declared 18 U.S.C. § 3509(b)(1)(B)(1) unconstitutional to the extent it conflicted with *Craig*.<sup>97</sup> This was not the case the *Turning Bear* opinion made no mention of either two-way closed circuit television or 18 U.S.C. § 3509.<sup>98</sup> However, *Bordeaux* held otherwise, stating that *Turning Bear* "involved a factual situation identical to this one: a child witness testified by two-way closed circuit television pursuant to § 3509" and that the *Turning Bear* court had "concluded that § 3509 was

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<sup>92</sup> 357 F.3d 730 (8th Cir. 2004).

<sup>93</sup> *Id.* at 735.

<sup>94</sup> See generally *Turning Bear*, 357 F.3d 730.

<sup>95</sup> *Id.* at 737.

<sup>96</sup> *United States v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005) *reh'g en banc denied*, U.S. App. LEXIS 9866 (8th Cir. May 27, 2005).

<sup>97</sup> *Id.* at 553, 555.

<sup>98</sup> See generally 357 F.3d 730.



unconstitutional to the extent that it requires a different showing of fear from what *Craig* requires.”<sup>99</sup> Neither of these principles can be found anywhere in the *Turning Bear* opinion, which is ironic because the central theme in both *Turning Bear* and *Bordeaux* is the importance of exacting judicial specificity.<sup>100</sup>

The government’s primary argument in *Bordeaux* was that *Craig* was inapposite because it specifically applied to one-way closed circuit television.<sup>101</sup> Instead, the government urged the court to adopt the reasoning of *Gigante*, which had found testimony by two-way closed circuit television to be the constitutional equivalent of face-to-face confrontation.<sup>102</sup> If the court found *Craig* to be inapplicable, there was no bar to upholding the constitutionality of § 3509 and, in turn, the trial court’s findings.<sup>103</sup> This line of reasoning did not persuade the court, which chose instead to follow the precedent established in *Turning Bear*, stating “[i]n *Turning Bear* we decided that *Craig* controlled two-way systems as well as one-way systems, and we are bound by that result.”<sup>104</sup>

After tying its hands with *stare decisis*, the court stated in dicta that even if *Turning Bear* did not compel its decision, it would still have held that *Craig* governed on the grounds that testimony via two-way closed circuit television was not the constitutional equivalent of a face-to-face confrontation.<sup>105</sup> Two-way systems, the court concluded, are not significantly different from one-way systems,<sup>106</sup> because in both cases the confrontations are “virtual, and not real.”<sup>107</sup> According to the court, a confrontation satisfies the Confrontation Clause if it is likely to make the witness tell the truth.<sup>108</sup> The primary deficiency in virtual confrontation is that it

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<sup>99</sup> *Id.* at 553.

<sup>100</sup> *See generally Bordeaux*, 400 F.3d 548; *Turning Bear*, 357 F.3d 730.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* at 553–54.

<sup>104</sup> *Id.* at 554.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

may not provide the same truth-inducing effect as “an unmediated gaze across the courtroom.”<sup>109</sup> In the court’s view, both one-way and two-way closed circuit television are equally deficient in this regard.<sup>110</sup> As such, even if it were assumed for the sake of argument that a two-way system could capture the essence of face-to-face confrontation, logistical issues (such as the size of the monitor, positioning of the monitor, and the location of the cameras, for example) would “render the theoretical promise of the two-way system practically unattainable.”<sup>111</sup> Therefore, the Eighth Circuit announced that it joined the Eleventh Circuit in rejecting *Gigante*’s holding that two-way systems were constitutional.<sup>112</sup> As stated above, the Eleventh Circuit vacated the *Yates* decision three weeks after *Bordeaux* was filed, leaving the Eighth Circuit the lone advocate of this view.<sup>113</sup>

#### IV. VIRTUAL CONFRONTATION—A NEW APPROACH TO APPLYING *CRAIG*

In *Bordeaux*, the Eighth Circuit rejected *Gigante*’s holding that a two-way system, in itself, satisfies the right to confrontation.<sup>114</sup> It argued that even the *Gigante* court had acknowledged the limits of two-way closed circuit testimony when it stated that “[c]losed circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.”<sup>115</sup>

The Eighth Circuit failed to recognize that the *Gigante* court did not advocate indiscriminate use of two-way testimony in trials.<sup>116</sup> To the contrary, the *Gigante* court found that two-way

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<sup>109</sup> *Id.*

<sup>110</sup> *See id.*

<sup>111</sup> *Id.* at 555.

<sup>112</sup> *See id.*

<sup>113</sup> *United States v. Yates*, 404 F.3d 1291 (11th Cir. 2005).

<sup>114</sup> 400 F.3d 548, 553 (8th Cir. 2005).

<sup>115</sup> *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

<sup>116</sup> *See Bordeaux*, 400 F.3d at 553.

closed circuit testimony better preserved the defendant's right to confrontation than a deposition of the witness pursuant to Rule 15 of the Federal Rules of Criminal Procedure—the other option open to the trial court at that time.<sup>117</sup> To justify a Rule 15 deposition, a finding of “exceptional circumstances” is required.<sup>118</sup> As such, although the *Gigante* court declined to apply the “important public policy” interest standard established in *Craig*,<sup>119</sup> it still required a heightened evidentiary threshold to justify the use of two-way closed circuit testimony.<sup>120</sup> Additionally, even though it rejected the reasoning in *Gigante*, the *Yates* opinion (with which the Eighth Circuit had expressly aligned its decision) similarly acknowledged that an important public policy consideration must be present to justify tampering with a defendant's right to confrontation.<sup>121</sup> Recognition that alternative forms of testimony should only be used to further important public policy interests, coupled with the fact that the finding of necessity in *Craig* was limited to one-way closed circuit television, implies that the standards set forth in § 3509 constitute public policy interests sufficient to satisfy *Craig*'s broader “adequate showing of necessity” standard.

The crucial question in *Bordeaux* is not whether *Craig* applies. Rather, the more pressing inquiry involves determining which of the *Craig* standards should be used—the three-part test for one-way closed circuit testimony in child cases, or the more general “adequate showing of necessity” to further an “important public policy” standard. If the latter, then both *Bordeaux* and *Turning Bear* were wrongly decided and § 3509 should have controlled whether the trial judge's findings demonstrated an “adequate showing of necessity.”<sup>122</sup>

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<sup>117</sup> *Gigante*, 166 F.3d at 81 (“We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of *Gigante*'s confrontation rights than would have been provided by a Rule 15 deposition.”).

<sup>118</sup> *Id.*; see also Fed R. Crim. P. 15 (2005).

<sup>119</sup> See *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

<sup>120</sup> See *Gigante*, 166 F.3d at 81.

<sup>121</sup> *United States v. Yates*, 391 F.3d 1182, 1187 (11th Cir. 2004), *vacated*, 404 F.3d 1291 (2005) (“[T]he prosecutor's need for the testimony in order to make a case and expeditiously resolve it are not public policies that are important enough to outweigh a defendant's right to confront an accuser face-to-face.”).

<sup>122</sup> See *Craig*, 497 U.S. at 855.

There is strong support for this conclusion. First, *Craig* was limited to child witness cases involving one-way closed circuit testimony. Second, § 3509 specifically applies to testimony by two-way closed circuit television, and allows the child to testify out of the presence of the defendant for reasons other than those articulated in *Craig*. Third, both *Gigante* and *Yates* support the conclusion that two-way closed circuit testimony is more appropriately governed by the “important public policy” or “state interest” standard.<sup>123</sup> Finally, the Supreme Court acknowledged in *Craig* that preserving the psychological and physical well-being of children—which was the overriding purpose of the Child Victims’ and Child Witnesses’ Rights statute which constitutes an “important public policy.”<sup>124</sup>

In sum, the Eighth Circuit mistakenly conflated one-way closed circuit television with two-way closed circuit television. First, in *Turning Bear*, the court failed to acknowledge the distinction. Second, in *Bordeaux*, when the distinction became important, the court glossed over its previous omission, bootstrapped itself into the same conclusion using *stare decisis*, and then advanced a weak alternative holding that downplayed the significant differences between one-way and two-way closed circuit testimony. Third, the Eighth Circuit was mistaken in both *Turning Bear* and *Bordeaux* when it held that § 3509 was unconstitutional to the extent it conflicts with *Craig* because, while *Craig* addresses one-way systems and § 3509 requires two-way systems, there is no actual conflict present. Two-way systems are best governed by the broader holdings of *Craig* and *Coy*, that the deprivation of face-to-face confrontation is justified if there is “an adequate showing of necessity” and the exception furthers an

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<sup>123</sup> The *Gigante* court articulated the standard applied in its case as “exceptional circumstances,” which is arguably a lower threshold than that established in *Craig* and *Coy*. 166 F.3d at 81.

<sup>124</sup> See *Craig*, 497 U.S. at 853 (“We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court. That a significant majority of States have enacted giving testimony in child abuse cases attests to the widespread belief in importance of such a policy.”).

“important public policy.” The important public policy in these cases has already been acknowledged by both the Court in *Craig* and by Congress, which enacted the Child Victims’ and Witnesses’ Rights statute to guide federal courts in the application of alternative testimony technology.

The Child Victims’ and Witnesses’ Rights statute should govern the “adequate showing of necessity” for several reasons. It best preserves the emotional and physical well-being of child witnesses by providing a broader base of exceptions (fear, substantial likelihood of trauma, mental or other infirmity, or conduct by the defendant or defense counsel that causes the child to be unable to continue testifying)<sup>125</sup> than *Craig*’s case-specific holding (that the child witness would be traumatized, not by the courtroom generally, but by the defendant).<sup>126</sup> In addition, the use of a two-way system mitigates potential prejudice to the fullest extent possible. Two-way closed circuit television is the most effective available technology for preserving a defendant’s right to confront his or her accuser, and is surpassed only by actual face-to-face confrontation. While there may be some merit to Justice Scalia’s observation in *Coy* that the truth inducing effect of face-to-face confrontation is lost when the witness testifies outside of the presence of the defendant,<sup>127</sup> this consideration is inapplicable in the context of remote child testimony. The stress factors that Justice Scalia argues contribute to the truth-telling impulse also are precisely the sources of trauma that justify using alternative forms of testimony in the first place.<sup>128</sup> Further, in some cases, the emotional distress caused by face-to-face testimony in the courtroom may actually undermine the goals of the Confrontation Clause by paralyzing the child and preventing full and truthful

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<sup>125</sup> See 18 U.S.C. § 3509(b)(1)(B) (2005).

<sup>126</sup> See *Craig*, 497 U.S. at 856.

<sup>127</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

<sup>128</sup> Compare *Coy*, 487 U.S. at 1019 (“The face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.”), with *id.* at 1032 (Blackmun, J., dissenting) (stating that face-to-face confrontation “may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.”).

testimony.<sup>129</sup> Finally, the reliability of the witness's testimony is otherwise assured because the other interests inherent in the right of confrontation are preserved: the witness is required to testify under oath and be subjected to cross-examination, under conditions where the jury can observe him or her and evaluate his or her credibility.<sup>130</sup>

## V. CONCLUSION

It is both reasonable and desirable to confine the three-part test in *Craig* to one-way systems, and to embrace its broader holding of "adequate showing of necessity" to further "important public policy interests" for two-way systems. Such a perspective harmonizes *Craig* with both § 3509 as well as the jurisprudence that has evolved to specifically address two-way systems. Eventually, the Supreme Court should provide more definitive guidance in this area to eliminate existing ambiguity.

However, in the wake of *Crawford v. Washington*,<sup>131</sup> and with both recent and prospective changes in the composition of the Supreme Court,<sup>132</sup> it is perhaps overly optimistic to expect a more

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<sup>129</sup> *Craig*, 497 U.S. at 857 (1990); *Coy*, 487 U.S. at 1032 (Blackmun, J., dissenting).

<sup>130</sup> See *Craig*, 497 U.S. at 845-46.

<sup>131</sup> *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). *Crawford* held there is a constitutionally guaranteed right to confront witnesses, and that out of court statements intended for use as evidence require the witness to be available for cross-examination. See *id.* at 63 ("The [Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."). Even though the element of cross-examination is preserved by two-way testimony, actual face-to-face confrontation is not, which raises the question of whether *Craig* would survive a Confrontation Clause challenge under *Crawford*.

<sup>132</sup> See Marc Sandalow, *Both Sides Prepare for Fight Over Alito*, S.F. CHRONICLE, Nov. 1, 2005, at A1. ("The nomination [of Judge Samuel Alito, Jr.] takes on added significance because Alito would replace Justice Sandra Day O'Connor, who is regarded as the court's pivotal swing vote, often providing the deciding balance to the conservative or liberal side. While replacing the late

expansive exception to the Confrontation Clause.<sup>133</sup> On the contrary, there is a danger that the Court, in light of these recent developments, will affirm the rigid requirement of confrontation in *Crawford* and may, as a result, lose sight of the important policy concerns that prompted exceptions for child witness testimony in the first place. Given the possibility of a substantial ideological shift in the Roberts Court, the future of *Craig* itself is unclear, as is the permissibility of alternative forms of testimony for child witnesses in general.<sup>134</sup>

On the other hand, there is widespread recognition of the important interests underlying the child witness testimony exception.<sup>135</sup> In light of these concerns, the Court in the future should clarify and bring the exception for child witnesses into closer alignment with actual face-to-face confrontation by upholding the constitutionality of two-way closed circuit testimony

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Chief Justice William Rehnquist with a conservative such as Roberts was not expected to shift the court's ideological balance, replacing O'Connor with Alito would likely fulfill Bush's campaign promise to move the court decidedly to the right."). See also Scott Shepard, *Roberts Foes, Supporters Square Off; As Hearings Near, Groups Trade Shots*, ATLANTA JOURNAL-CONSTITUTION, Aug. 25, 2005, at 7A. ("Referring to one of the most conservative justices, [Ralph] Neas [president of People for the American Way] said Roberts was 'an Antonin Scalia in sheep's clothing' and if confirmed would 'dramatically shift' the court's ideological balance 'to the far right for decades to come.'").

<sup>133</sup> See Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 CRIM. JUST. 24, 35 (Summer 2005) ("So far, there has been no direct judicial attack on *Craig* even though *Crawford* clearly has a vision of the Confrontation Clause that rejects the type of balancing approach that *Craig* applied.").

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 32-33 ("Child abuse cases are often difficult for prosecutors to win because the abuse takes place in secret, there is typically no physical evidence of abuse in molestation cases not involving penetration, and even rape may not provide physical evidence because the crime is often reported well after it occurred, and children heal quickly. The fact that children disclose in stages also increases the likelihood of inconsistencies in the child's testimony. In addition, questioning by a family member, doctor, psychologist, or police officer may be perceived as leading, producing unreliable answers. Like domestic violence victims, children often recant. Thus, the testimony of young children is viewed more skeptically by jurors than that of adults, because of concerns over suggestibility, manipulation, coaching, or confusing fact with fantasy.").

in child abuse cases, a preferred option because it best protects the interests of both the victim and the accused.<sup>136</sup>

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<sup>136</sup> See *id.* at 35 (“Crawford is like the elephant in the room—counsel can’t tiptoe around it, making believe it is not there. Yet, until the Court gives more direction as to Crawford’s contours, the case law will continue to produce inconsistent results . . .”).



