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# A QUESTION OF NECESSITY: THE CONFLICT BETWEEN A DEFENDANT'S RIGHT OF CONFRONTATION AND A STATE'S USE OF CLOSED- CIRCUIT TELEVISION IN CHILD SEXUAL ABUSE CASES

The sixth amendment to the United States Constitution guarantees the right of a criminal defendant to confront adverse witnesses.<sup>1</sup> The United States Supreme Court has held that the confrontation clause of the sixth amendment secures for a criminal defendant the opportunity physically to confront and cross-examine adverse witnesses.<sup>2</sup> The Supreme Court has determined that the confrontation clause functions to promote the reliability of the truth-finding process in criminal trials and, therefore, is vital to the defendant's ability to receive a fair trial.<sup>3</sup> The Court has emphasized that

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1. U.S. CONST. amend. VI. The sixth amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

2. See *Kirby v. United States*, 174 U.S. 47, 55 (1899) (stating that sixth amendment right to confrontation includes the right to physical confrontation and cross-examination). In *Kirby* the United States government charged the defendant, Kirby, with feloniously receiving and possessing stolen postage stamps. *Id.* at 47-49. At Kirby's trial the government, pursuant to a congressional act, presented as evidence the convictions of three individuals whom the state charged with stealing the postage stamps to show that Kirby possessed stolen United States' property. *Id.* at 49. The jury subsequently convicted the defendant. *Id.* at 53.

On appeal the United States Supreme Court in *Kirby* held that the trial court erred in admitting the records of conviction of the principals. *Id.* at 54. The Supreme Court in *Kirby* noted that Kirby did not have the opportunity to participate in the proceedings that resulted in the principals' convictions. *Id.* Accordingly, the *Kirby* Court determined that the act of Congress which provided that the government may use a principal's conviction as conclusive proof that the property at issue was stolen, violated the sixth amendment right to confrontation. *Id.* at 54-64. The Supreme Court in *Kirby* reasoned that the confrontation clause of the sixth amendment entitles the accused physically to confront and cross-examine all witnesses who provide evidence against the accused. *Id.* at 55. The Court explained that because Kirby had neither the opportunity to cross-examine the two principals on the principals' pleas of guilty, nor the opportunity to cross-examine the witnesses who testified for the government at the third principal's trial, the government violated the confrontation clause by submitting the principals' records of conviction as evidence that Kirby received and possessed stolen property. *Id.* at 54-64. Accordingly, the Supreme Court reversed Kirby's conviction. *Id.* at 64; see *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965) (stating that sixth amendment confrontation clause includes right to confrontation and cross-examination). In *Pointer* the United States Supreme Court held that the fourteenth amendment to the United States Constitution made the sixth amendment right to confrontation obligatory on the states. *Id.* at 403; see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (stating that sixth amendment confrontation clause entitles accused physically to confront and cross-examine adverse witnesses); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (same); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973) (same).

3. See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (stating that right to confrontation and cross-examination enables jury to determine truth of witness' testimony).

confrontation and cross-examination ensure the integrity of the jury's factual determinations by enabling the jury to observe a witness's demeanor and, thereby, assess credibility.<sup>4</sup>

Although the Supreme Court has held that the right to confront adverse witnesses is fundamental to criminal due process, the Court also has acknowledged exceptions to a defendant's right of confrontation.<sup>5</sup> For

In *Mattox* a jury in the United States District Court for the District of Kansas convicted the defendant, Mattox, of murder. *Id.* at 237-38. Upon a writ of error, the United States Supreme Court reversed the judgment of the district court and remanded the case for a new trial. *Id.* at 238. At the defendant's second trial the government introduced as evidence the court reporter's notes of the testimony of two government witnesses who testified at the former trial and who since had died. *Id.* The jury subsequently convicted the defendant of murder. *Id.*

On appeal, the Supreme Court of the United States affirmed the defendant's conviction. *Id.* at 250. In *Mattox* the Supreme Court determined that the sixth amendment right to confrontation and cross-examination enables the jury to observe a witness' demeanor and, thereby, determine the credibility of the witness' testimony. *Id.* at 242-43. In holding that the confrontation clause did not prohibit the government's use of the deceased witnesses' prior in court testimony, the *Mattox* Court reasoned that the defendant had the opportunity to confront and cross-examine the deceased witnesses at the defendant's initial trial. *Id.* at 244. Furthermore, the Supreme Court in *Mattox* explained that the confrontation clause should not require that the Court undermine the safety of the public by allowing a defendant to escape prosecution simply due to a witness' death. *Id.* at 243. Because Mattox had the opportunity to confront and cross-examine the deceased witnesses at Mattox's initial trial and, therefore, the jury at the first trial had the opportunity to assess the witnesses' credibility, the *Mattox* Court held that the government's presentation of the deceased witnesses' testimony at the defendant's second trial did not violate the defendant's sixth amendment right to confrontation. *Id.* at 242-44; see *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (noting that confrontation and cross-examination provide jury with means to assess truth of witness' testimony); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (stating that right of confrontation and cross-examination is essential to defendant's ability to receive fair trial); see also *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (stating that confrontation rights promote reliability of truth-finding process in criminal trials); *Lee v. Illinois* 476 U.S. 530, 540 (1986) (same).

4. See *supra* note 3 and accompanying text (discussing Supreme Court cases explaining that confrontation rights provide jury with means to determine truth of witness' testimony).

5. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (stating that right to confrontation and cross-examination are not absolute). In *Chambers v. Mississippi* the State of Mississippi charged the defendant, Chambers, with murder. *Id.* at 287. Prior to Chambers' trial, another individual, Gable McDonald, gave a sworn confession to Chambers' attorneys that he, McDonald, had committed the murder. *Id.* The local police authorities subsequently arrested McDonald. *Id.* at 283. At a preliminary hearing one month later McDonald repudiated his confession to the murder. *Id.* Chambers filed a pretrial motion requesting that the court order McDonald to appear. *Id.* at 291. Chambers also requested that, if the State chose not to call McDonald, the court allow Chambers to call McDonald as an adverse witness. *Id.* The trial court granted Chambers' motion that required McDonald to appear but reserved ruling on Chambers' adverse witness motion. *Id.* At Chambers' trial, the State did not call McDonald to the stand. *Id.* Chambers called McDonald and presented McDonald's sworn confession to the jury. *Id.* Upon cross-examination of McDonald, the State elicited McDonald's repudiation of the confession. *Id.* After the State's cross-examination of McDonald, Chambers renewed the motion to examine McDonald as an adverse witness. *Id.* The trial court, holding that McDonald was not an adverse witness, denied the motion. *Id.* Chambers subsequently sought to introduce the testimony of three witnesses to whom McDonald had confessed to the murder. *Id.* at 292. The State objected to the admission of the three witnesses' testimony on the ground

example, the Supreme Court has held that, although the confrontation clause guarantees a criminal defendant the right physically to face adverse witnesses, a trial court may remove from the courtroom a defendant who engages in disruptive behavior during trial.<sup>6</sup> In addition to holding that a

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that the testimony constituted hearsay evidence. *Id.* at 292-93. The trial court sustained the State's objections. *Id.*

On appeal the Mississippi Supreme Court affirmed the lower court's rulings. *Id.* at 291, 293. In *Chambers* the United States Supreme Court observed that the sixth amendment right to confrontation and cross-examination is essential to due process. *Id.* at 294. The Court, however, also observed that the defendant's rights to confrontation and cross-examination are not absolute and in appropriate cases may bow to other legitimate interests. *Id.* at 295. The *Chambers* Court explained that a state's abrogation or significant impairment of the accused's confrontation rights to further other important interests implicates the accuracy of the truth-determining process and, therefore, requires searching judicial scrutiny into the adequacy of the competing interest. *Id.* The Supreme Court in *Chambers* concluded that the trial court's ruling, which was in accordance with a Mississippi rule that a party may not impeach its own witness and which refused Chambers the opportunity to cross-examine McDonald, violated the defendant's right to cross-examine adverse witnesses. *Id.* at 294-98. The *Chambers* Court reasoned that the Mississippi rule potentially could undermine the accuracy of the truthfinding process and, in Chamber's case, impaired the defendant's ability to defend against the State's charges. *Id.* at 296. Accordingly, the Supreme Court reversed the defendant's conviction. *Id.* at 303; see *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (stating that confrontation clause does not bar introduction of all out of court statements); *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980) (holding that confrontation clause does not prohibit introduction of hearsay evidence under certain circumstances); *Dutton v. Evans*, 400 U.S. 74, 80 (1970) (same); *supra* note 3 (discussing Supreme Court's determination in *Mattox* that government's introduction of deceased witnesses' prior testimony did not violate confrontation clause of sixth amendment).

6. See *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that defendant who engages in disruptive behavior can lose right to be present at trial). In *Allen* the State of Illinois charged the defendant, Allen, with armed robbery. *Id.* At the defendant's trial the defendant behaved in an extremely abusive and disruptive manner. *Id.* at 339-41. Allen argued with the trial judge and continuously interrupted the proceedings. *Id.* Despite a warning from the trial court, the defendant continued to behave disruptively and the court ordered that the trial proceed in the defendant's absence. *Id.* Allen remained out of the courtroom during the State's presentation of its case. *Id.* at 341. Following Allen's assurances that he would not disrupt the trial, the trial court permitted the defendant to be present for the remainder of the trial. *Id.* The jury subsequently convicted the defendant. *Id.* at 338.

The Supreme Court of Illinois affirmed Allen's conviction. *People v. Allen*, 37 Ill. 2d 167, 173, 226 N.E.2d 1, 4 (1967). Alleging that the trial court unconstitutionally had deprived the defendant of the right to remain present throughout the trial, Allen filed a petition for a writ of habeas corpus in federal district court. *Allen v. Illinois*, 397 U.S. 337, 339 (1970). The district court found no constitutional violation and refused to issue the writ. *Id.* The defendant appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. *Illinois v. Allen*, 413 F.2d 232, 235 (7th Cir. 1969). The Seventh Circuit reversed, holding that because Allen's sixth amendment right to be present at trial was absolute, the trial court unconstitutionally removed Allen from the courtroom. *Id.*

On appeal the Supreme Court held that the trial court's expulsion of the defendant from the courtroom did not violate the defendant's constitutional rights. *Allen*, 397 U.S. at 343-47. Although acknowledging that the confrontation clause of the sixth amendment guarantees an accused the right to be present at every stage of trial, the *Allen* Court concluded that the defendant in *Allen* had forfeited the right to be present. *Id.* The Court reasoned that the confrontation clause should not prevent a judge from employing whatever means necessary to

defendant who disrupts courtroom procedure may forfeit the right to confront an adverse witness, the Court also has determined that a court's admission of certain hearsay evidence, such as a co-conspirator's out of court statements, similarly does not violate a defendant's sixth amendment right physically to confront an adverse witness.<sup>7</sup> Recently, in *Coy v.*

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maintain order in the courtroom. *Id.* The *Allen* Court explained that order in the courtroom is vital to the proper administration of justice and, therefore, a trial court constitutionally may remove from the courtroom a defendant whose conduct impairs the progress of a criminal trial. *Id.* at 346. Accordingly, the Supreme Court in *Allen* reversed the decision of the court of appeals. *Id.* at 347.

7. See *Dutton v. Evans*, 400 U.S. 74, 86-90 (1970) (holding that trial court's admission of co-conspirators' out of court statement did not violate defendant's confrontation rights). In *Evans* the State of Georgia charged the defendant, Evans, and two others, Wade Truett and Venson Williams, with the murder of three police officers. *Id.* at 76. A Georgia grand jury indicted Evans and Williams on the murder charges and the State granted Truett immunity from prosecution in return for Truett's testimony. *Id.* At Evans' trial, Truett testified for the prosecution and detailed the circumstances surrounding Evans' and Williams' murder of the three officers. *Id.* at 77. In addition to Truett, nineteen other witnesses, including a man named Shaw, testified for the prosecution. *Id.* Shaw testified that when Williams returned to the penitentiary after arraignment, Shaw had asked Williams how he made out in court. *Id.* Shaw stated that Williams had responded that but for Evans "we wouldn't be in this now." *Id.* Defense counsel objected to the State's introduction of Shaw's testimony on the grounds that the testimony was hearsay and, therefore, violated Evans' confrontation rights. *Id.* at 77-78. The trial court overruled the objection and admitted Shaw's testimony on the basis of a Georgia statute that allowed a court to admit a co-conspirator's extrajudicial statement that a co-conspirator uttered during the stage of a criminal conspiracy when the conspirators are attempting to conceal the conspirators' crime. *Id.* The jury subsequently convicted the defendant. *Id.* at 76.

On appeal the Georgia Supreme Court upheld the conviction. *Id.* at 78. Upon a writ of habeas corpus the United States Court of Appeals for the Fifth Circuit set aside Evans' murder conviction. *Evans v. Dutton*, 400 F.2d 826, 827 (5th Cir. 1968). The Fifth Circuit held that the Georgia statute, which allowed a court to admit a co-conspirator's out of court statement that the co-conspirator made when the perpetrators conspired to conceal both the crime and the perpetrators' identity, unconstitutionally infringed on the defendant's confrontation rights. *Id.*

On appeal the United States Supreme Court reversed the decision of the Fifth Circuit. *Dutton v. Evans*, 400 U.S. at 90. The Supreme Court in *Dutton* observed that a confrontation issue arose because the prosecution intended the jury to infer from Shaw's testimony that Williams' statement blaming the defendant for Williams' legal predicament implicitly identified the defendant as the officers' murderer. *Id.* at 88. The *Dutton* Court, nevertheless, determined that the trial court's admission of Shaw's testimony, pursuant to the Georgia statute, did not violate the defendant's sixth amendment right to confront Williams. *Id.* The Supreme Court in *Dutton* explained that the confrontation clause operates to insure the accuracy of the truthfinding process in criminal trials by assuring that the jury has an adequate means for determining the truth of a witness' prior statement. *Id.* at 89. The *Dutton* Court observed that although the defendant did not have the opportunity to cross-examine Williams regarding Williams' statement to Shaw, the defendant did exercise his constitutional right to confront Shaw on whether Shaw actually had heard Williams make the statement to which Shaw testified. *Id.* The Supreme Court in *Dutton* concluded that the confrontation clause considers a witness who is under oath and subject to cross-examination in the jury's presence a reliable informant concerning what the witness has seen and has heard. *Id.* at 88. Furthermore, the *Dutton* Court determined that Williams' statement was reliable because the statement was

Iowa,<sup>8</sup> the Supreme Court indicated in dicta that another exception to a defendant's sixth amendment right physically to confront adverse witnesses may exist if a court makes a case-specific determination that the court needs to protect a particular witness.<sup>9</sup> The Court's dicta in *Coy* suggests the constitutionality of many state statutes that allow a state, upon a trial court's individualized finding that a particular witness requires protective trial procedures, to use closed-circuit television to permit child sexual abuse victims to testify outside of the accused's presence.<sup>10</sup>

In *Coy* the State of Iowa charged the defendant, Coy, with two counts of lascivious acts with a child.<sup>11</sup> Prior to the child victims' trial testimony, the state court approved, pursuant to an Iowa statute, the State's placement of a large screen between the witnesses and the defendant.<sup>12</sup> The screen enabled the defendant to see the witnesses but shielded the defendant from the witnesses' view.<sup>13</sup> Arguing that the procedure violated the defendant's sixth amendment right to confrontation, Coy objected to the State's use of the screen.<sup>14</sup> The trial court rejected Coy's constitutional claim and the jury subsequently convicted the defendant.<sup>15</sup>

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spontaneous and against Williams' penal interests. *Id.* at 89. The Supreme Court in *Dutton* concluded that because the defendant had the opportunity to cross-examine Shaw on the issue of whether Shaw actually heard Williams make the statement, and Williams' statement bore a sufficient indicia of reliability, the trial court's admission of Shaw's testimony, pursuant to the Georgia statute, did not violate the defendant's confrontation rights. *Id.* at 88-89; see *Bourjaily v. United States*, 107 S. Ct. 2775, 2782-83 (1987) (holding that trial court's admission of co-conspirators' out of court statements did not violate defendant's sixth amendment confrontation rights); see also *Ohio v. Roberts*, 448 U.S. 56, 61-77 (1979) (finding that trial court's admission of unavailable witness' preliminary hearing testimony did not violate defendant's confrontation rights).

8. 108 S. Ct. 2798 (1988).

9. *Coy v. Iowa*, 108 S. Ct. 2798, 2802-03 (1988).

10. *Id.*; see *infra* notes 25-36 and accompanying text (discussing that *Coy* decision indicates that statutes which provide for state's use of closed-circuit television may be constitutional).

11. *Coy*, 108 S. Ct. at 2799. In *Coy* the State of Iowa charged the defendant, Coy, with sexually assaulting two thirteen year old girls while the girls were camping in the back yard of a house next door to Coy's. *Id.*

12. *Coy*, 108 S. Ct. at 2799; see IOWA CODE § 910A.14 (1987) (permitting child abuse victims to testify through closed-circuit television or from behind screen). The Iowa statute in *Coy* provided that the trial court, on its motion, or any party's motion could order that a child witness testify by closed-circuit television in a room other than the courtroom or from behind a screen in the courtroom. IOWA CODE § 910A.14(1). The statute further provided that if a child testified in a separate room via closed-circuit television the court could have required that the defendant view the testimony from a room separate from the room in which the child was testifying. *Id.*

13. *Coy*, 108 S. Ct. at 2799.

14. *Id.* In *Coy* the defendant argued that the confrontation clause guarantees a criminal defendant the right to a face-to-face encounter with adverse witnesses and, therefore, the State's use of a screen blocking the defendant from the witnesses' view violated the sixth amendment. *Id.*

15. *Id.* In *Coy* the defendant also argued that the State's use of the screen made the defendant appear guilty and, therefore, violated the due process clause of the fourteenth

On appeal the Iowa Supreme Court affirmed the defendant's conviction.<sup>16</sup> Coy appealed to the United States Supreme Court, which reversed the judgment of the Iowa Court.<sup>17</sup> In holding that the State's placement of a screen between the defendant and witnesses at trial violated the defendant's confrontation rights, the United States Supreme Court in *Coy* stressed that the sixth amendment confrontation clause guarantees a criminal defendant a face-to-face encounter with adverse witnesses.<sup>18</sup> The *Coy* Court explained that the right physically to confront adverse witnesses is fundamental to the defendant's ability to receive a fair trial because a witness who faces the accused is more likely to testify truthfully.<sup>19</sup> The Supreme Court in *Coy*, therefore, determined that a defendant's right physically to confront a witness, much like a defendant's right to cross-examine a witness, insures the integrity of the truthfinding process in criminal trials.<sup>20</sup> Accordingly, the *Coy* Court held that the State's placement of the screen between Coy and the child witnesses, pursuant to the Iowa statute, impermissibly impinged upon the defendant's confrontation rights.<sup>21</sup>

After concluding that the State's use of the screen violated the defendant's right to confront the child witnesses, the Supreme Court in *Coy* rejected the State's claim that the State's interest in protecting the child abuse victims outweighed the defendant's confrontation rights.<sup>22</sup> The *Coy* Court observed that, although sixth amendment confrontation rights have, in appropriate cases, given way to other important interests,<sup>23</sup> the State's interest in protecting child abuse victims could not outweigh the defendant's

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amendment. *Id.*; see U.S. Const. amend. XIV, § 1 (providing that state shall not deprive any person of life, liberty, or property without due process of law). Although the trial court rejected Coy's due process claim, the trial court instructed the jury to draw no inference of guilt from the State's use of the screen. *Coy*, 108 S. Ct. at 2799-800.

16. *Coy*, 108 S. Ct. at 2800. The Iowa Supreme Court in *Coy* rejected the defendant's confrontation argument reasoning that, because the screen did not impair Coy's ability to cross-examine the witnesses, the State's use of the screen did not violate the confrontation clause of the sixth amendment. *Id.*

17. *Id.* at 2800-03.

18. *Id.* at 2800.

19. *Id.* at 2801-02.

20. *Coy*, 108 S. Ct. at 2801-02. In *Coy* the Supreme Court conceded that the confrontation clause does not compel a witness to look at the defendant. *Id.* at 2802. The *Coy* Court observed, however, that, if a witness avoids looking at the defendant, the jury can make an informed assessment of the witness' credibility. *Id.*

21. *Id.* at 2802-03.

22. *Id.*

23. *Id.* The *Coy* court observed that although the Court in previous cases acknowledged that a defendant's confrontation rights have exceptions, the rights in previous cases did not include the explicit right to a face-to-face confrontation, but rather, included rights that the Court found implicit in the confrontation clause, such as the right to cross-examination and the right to exclude out of court statements. *Id.* at 2802; see *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980) (observing that competing interest may outweigh confrontation rights and warrant trial court's admission of unavailable witness' out of court statements); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1972) (noting that right to cross-examine witness may in appropriate cases give way to other interests).

sixth amendment right to a face-to-face encounter with adverse witnesses.<sup>24</sup> The Supreme Court in *Coy* explained that the state's abrogation of the right to face-to-face confrontation required a more particularized showing of necessity than Iowa's broad legislative determination that a particular class of witnesses require protective trial procedures.<sup>25</sup> Because the Iowa statute did not provide that a court make an individualized determination that a particular child witness required protective trial procedures, the Supreme Court in *Coy* held that the state constitutionally could not place a screen between the defendant and the child witnesses.<sup>26</sup>

Concurring in *Coy*, Justice O'Connor stated that in an appropriate case the state's implementation of procedural devices to protect child witnesses might pass constitutional muster.<sup>27</sup> The concurrence in *Coy* noted that numerous state legislatures have enacted statutes that shield child sexual abuse victims from the trauma of in court testimony.<sup>28</sup> Although recognizing

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24. *Coy*, 108 S. Ct. at 2802. The Supreme Court observed that the Iowa statute in *Coy* established a presumption that all child witnesses in sexual abuse cases would suffer trauma if the state required that the child testify in the presence of the accused. *Id.* The *Coy* Court concluded that the Iowa statute's presumption that all child abuse victims require protective trial procedures never could pass constitutional muster. *Id.* The Court reasoned that exceptions to confrontation rights not firmly established in American jurisprudence need something more than a state statute's generalized determination that a particular class of witnesses needs special treatment. *Id.*; see *Bourjaily v. United States*, 107 S. Ct. 2775, 2783 (1987) (finding co-conspirator exception to hearsay rule firmly rooted in jurisprudence). The *Coy* Court concluded that the State's use of a screen to block a defendant from the witnesses' view was not a firmly established exception to confrontation rights and, therefore, the State's use of the screen in *Coy*, pursuant to the Iowa statute's presumption of necessity, could never pass constitutional muster. *Coy*, 108 S. Ct. at 2803. The Supreme Court in *Coy* determined that, if the Court could sustain the State's use of the screen at all, a trial court would have to make an individualized finding that a particular witness required protective trial procedures. *Id.*

25. *Coy*, 108 S. Ct. at 2803.

26. *Id.*; see *supra* note 24 and accompanying text (discussing that Iowa statute's failure to provide that court make case-specific finding that particular witness requires special treatment made statute unconstitutional).

27. *Coy*, 108 S. Ct. at 2803 (O'Connor, J., concurring).

28. *Id.* at 2804; see ALA. CODE § 15-2-3(a) (Supp. 1986) (providing for state's use of one-way closed-circuit television in child abuse cases). A state's use of one-way closed-circuit television enables the witness to testify from a room outside the courtroom. Although individuals seated inside the courtroom can see and hear the witnesses on television monitors, the witness cannot see or hear anyone inside the courtroom. *Id.*; see ARIZ. REV. STAT. ANN. § 13-4253(a) (Supp. 1986) (providing for state's use of one-way closed-circuit television); CAL. PENAL CODE § 1347 (West 1986) (providing for state's use of two-way closed-circuit television in certain child sexual abuse cases). Two-way closed-circuit television enables a child witness to testify in a room separate from the courtroom and transmits the image of those seated inside the courtroom to the child witness. See CONN. GEN. STAT. § 54-86(g) (Supp. 1987) (providing for state's use of one-way closed-circuit television); GA. CODE ANN. § 17-8-55 (Supp. 1987) (same); HAW. SESS. LAWS 279 (providing for state's use of two-way closed-circuit television); IND. CODE ANN. § 35-37-4-8 (Burns 1986) (providing for state's use of one-way closed-circuit television); KAN. STAT. ANN. § 38-1558 (1986) (same); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987) (same); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986) (same); MINN. STAT. ANN. § 595.02 subd. 4 (West Supp. 1987) (same); MISS. CODE ANN. §

that the confrontation clause of the sixth amendment generally requires that a testifying witness face the defendant, the concurrence in *Coy* stressed that the right physically to confront a witness is not absolute.<sup>29</sup> Justice O'Connor, therefore, rejected any part of the majority opinion that might have suggested that no exceptions to the right to face-to-face confrontation exist.<sup>30</sup> Instead, Justice O'Connor maintained that the confrontation clause of the sixth amendment would not prohibit the state's use of a trial procedure that provided for something other than physical confrontation if the state demonstrated that the procedure was necessary to further an important public policy.<sup>31</sup> The *Coy* concurrence, however, agreed with the majority's determination that the state's abrogation of the defendant's right to face-to-face confrontation would require more than the Iowa legislature's generalized finding of necessity.<sup>32</sup> Justice O'Connor concluded that if a trial court made a case-specific finding that a particular witness required protective trial procedures, necessity may render the defendant's right physically to confront a witness subservient to the state's interest in protecting child abuse victims.<sup>33</sup>

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13-1-405 (1986) (same); N.J. REV. STAT. § 2A:84A-32.4 (1985) (same); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1987) (providing for state's use of two-way closed-circuit television); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1987) (providing for state's use of one-way closed-circuit television); PA. STAT. ANN. tit. 42, §§ 5982, 5985 (Purdon 1986) (same); R.I. GEN. LAWS § 11-38-13.2 (Supp. 1986) (same); UTAH CODE ANN. § 77-35-15.5(3) (Supp. 1987) (same); see also ALASKA STAT. § 12.45.047 (1984) (providing for state's use of child witness' videotaped deposition or prior testimony); ARK. STAT. ANN. §§ 45-2035-37 (Supp. 1985) (same); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986) (same); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986) (same); FLA. STAT. § 92.53 (Supp. 1987) (same); MO. REV. STAT. §§ 491.675-690 (1986) (same); MONT. CODE ANN. §§ 46-15-401-03 (1986) (same); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1987) (same); N.M. STAT. ANN. § 30-9-17 (1986) (same); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1984) (same).

29. *Coy*, 108 S. Ct. at 2804-05 (O'Connor, J., concurring). Justice O'Connor, concurring in *Coy*, observed that the Court repeatedly has acknowledged that the confrontation clause reflects a preference for physical confrontation that other competing interests may overcome in appropriate cases. *Id.* at 2804.

30. *Id.* In *Coy* Justice O'Connor maintained that although a particular trial procedure may violate the confrontation clause's literal meaning, which guarantees a criminal defendant a physical confrontation with adverse witnesses, the Court automatically should not consider the procedure unconstitutional. *Id.* at 2804-05. O'Connor observed that many Supreme Court cases that approved of the prosecution's use of hearsay evidence implicated the defendant's literal right to a face-to-face encounter with adverse witnesses. *Id.* O'Connor explained that, arguably, the confrontation clause's literal guarantee of a physical confrontation could bar the state's use of any extra-judicial statement when the declarant is unavailable to testify at trial and, yet, the Court consistently has held that a trial court's admission of some hearsay statements does not violate the defendant's confrontation rights. *Id.* at 2805. Accordingly, Justice O'Connor concluded in *Coy* that exceptions to confrontation rights may include not only a state's introduction of certain hearsay statements but also the state's use of certain protective trial procedures that abrogate an accused's literal right to a face-to-face encounter with adverse witnesses. *Id.* at 2804-05.

31. *Id.* at 2805.

32. *Id.*

33. *Id.* In *Coy* Justice O'Connor maintained that a defendant's sixth amendment right

The Supreme Court's decision in *Coy*, and Justice O'Connor's concurrence in *Coy* suggest that state statutes which provide for the state's use of protective trial procedures in child sexual abuse cases might pass constitutional muster if the statutes provide for an individualized finding of necessity.<sup>34</sup> More particularly, the *Coy* decision leaves open the possibility that the sixth amendment confrontation clause would not prohibit the state from employing trial procedures that would shield a child witness from the trauma of testifying in the presence of the accused.<sup>35</sup> If a state makes an adequate showing that protective trial procedures are necessary to further an important public policy, the *Coy* decision indicates that a state's abrogation of a defendant's right to face-to-face confrontation with adverse witnesses would not violate the sixth amendment.<sup>36</sup>

As Justice O'Connor noted in *Coy*, many state legislatures have enacted statutes to respond to the special needs of child victims in sexual abuse cases.<sup>37</sup> One group of statutes, for example, permits a state to present a child witness's testimony through one-way closed-circuit television.<sup>38</sup> Moreover, some statutes which provide for closed-circuit television also provide that a child witness may testify via one-way closed-circuit television outside the physical presence of the defendant.<sup>39</sup> Accordingly, although the defendant is able to see and hear the witness, the witness testifies from a room outside the courtroom and is not able to see or hear the defendant.<sup>40</sup> In

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to a face-to-face confrontation with adverse witness may give way to a state's interest in protecting child witnesses in sexual abuse cases. *Id.* O'Connor observed that a number of state statutes provide for an individualized determination that a particular child witness requires protective trial procedures and, therefore, should survive constitutional scrutiny. *Id.*; see FLA. STAT. ANN. § 92.54(4) (West Supp. 1987) (requiring that court find substantial likelihood that child witness, by testifying in open court or in presence of accused, will suffer trauma); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1987) (requiring that court find by clear and convincing evidence that child witness, by testifying without protective trial procedures, will suffer harm).

34. See *Coy*, 108 S. Ct. at 2803-05 (indicating that state constitutionally may use protective trial procedures in child sexual abuse cases); see *supra* notes 25-33 and *infra* notes 35-36 and accompanying text (discussing *Coy*'s majority and concurring opinions, which suggest that case-specific finding of necessity of protective trial procedures in sexual abuse cases might constitute constitutionally permissible grounds for state's abrogation of confrontation rights).

35. See *Coy*, 108 S. Ct. at 2803 (indicating that state's use of protective trial procedures upon individualized determination that witness requires special treatment might survive constitutional scrutiny); see also *id.* at 2803-04 (O'Connor, J., concurring) (same).

36. See *Coy*, 108 S. Ct. at 2803-05 (indicating that state's abrogation of defendant's confrontation rights upon case-specific finding of necessity would be constitutional).

37. *Coy*, 108 S. Ct. at 2804-05 (O'Connor, J., concurring); see *supra* notes 28 and 33 (citing state statutes that provide for protective trial procedures in child sexual abuse cases).

38. See *supra* note 28 (citing state statutes providing for state's use of one-way closed-circuit television).

39. See, e.g., ARIZ. REV. STAT. ANN. § 13-4253(A) (Supp. 1986); (providing that child witness shall testify outside presence of defendant); CONN. GEN. STAT. § 54-86g(a) (Supp. 1987) (same); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b)(2) (Supp. 1986) (same).

40. See, e.g., ARIZ. REV. STAT. ANN. § 13-4253(A) (Supp. 1986) (providing that court shall ensure that defendant can see and hear witness but that witness cannot see or hear defendant); KY. REV. STAT. ANN. § 421.350(3) (Baldwin 1986) (same); LA. REV. STAT. ANN. § 15:283(B) (West Supp. 1987) (same).

*Craig v. State*<sup>41</sup> the Maryland Court of Special Appeals considered whether the State's presentation, pursuant to a Maryland statute, of a child abuse victim's testimony via one-way closed-circuit television violated the accused's sixth amendment right of confrontation.<sup>42</sup>

In *Craig* the State of Maryland charged the defendant, Craig, with six counts of child sexual abuse.<sup>43</sup> Prior to the defendant's trial, the State moved, pursuant to a Maryland statute, to present the testimony of the victim and several other children who the state alleged the defendant abused through one-way closed-circuit television.<sup>44</sup> The Maryland statute provided that the state could present a child victim's testimony by means of closed-circuit television if the trial judge determined that the child's in court testimony would result in the child's suffering serious emotional distress to such an extent that the child could not reasonably communicate.<sup>45</sup> Applying the Maryland statute, the trial judge granted the State's motion and the child witnesses testified from the judge's chambers via closed-circuit television.<sup>46</sup> While the prosecuting attorney, defense counsel, and the video technician were present in the judge's chambers with the witness, the trial judge, the defendant, and the jury viewed the witness' testimony from the courtroom.<sup>47</sup> A private telephone line provided two-way communication between Craig and counsel.<sup>48</sup> At the conclusion of Craig's trial the jury convicted the defendant on all charges.<sup>49</sup>

Arguing that the State's use of the closed-circuit television violated the defendant's sixth amendment confrontation rights, Craig appealed to the

41. 76 Md. App. 250, 544 A.2d 784 (Md. Ct. Spec. App. 1988), *rev'd*, 316 Md. 551, 560 A.2d 1129 (Md. 1989).

42. *Craig v. State*, 76 Md. App. 250, 274-87, 544 A.2d 784, 796-803 (Md. Ct. Spec. App. 1988), *rev'd.*, \_\_\_ Md. \_\_\_, 560 A.2d 1120 (Md. 1989).

43. *Id.* at 255. In *Craig* the defendant, Sandra Craig, owned and operated a kindergarten and pre-kindergarten school in Howard County, Maryland. *Id.* at 254. The alleged victim of the defendant's sexual abuse, Brooke Etze, attended the defendant's school for approximately two years when Etze was between the ages of four and six years old. *Id.* The victim subsequently recounted a number of incidents in which Craig physically and sexually abused the victim. *Id.* A medical examination of the victim revealed abnormal physical injuries to the victim's sexual organs. *Id.* at 255. As a result of the victim's disclosures and medical examination, the State of Maryland charged the defendant with first degree sexual offense, second degree sexual offense, child abuse, perverted sexual practice, common law assault, and common law battery. *Id.*

44. *Id.* at 156; *see* MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(i)-(ii) (Supp. 1986) (authorizing state's use of one-way closed-circuit television in child sexual abuse case when victim, by testifying in courtroom, will suffer emotional distress to extent that victim cannot reasonably communicate).

45. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(ii) (Supp. 1986).

46. *Craig*, 76 Md. App. at 257.

47. *Id.*; *see* MD. CTS. & JUD. PROC. CODE ANN.

§ 9-102(b)(1)(i)-(iv) (Supp. 1986) (requiring that defendant, judge, and jury remain in courtroom during child witness' testimony from judge's chambers).

48. *Craig*, 76 Md. App. at 281; *see* MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b)(3) (Supp. 1986) (requiring that defendant have two-way telephone communication with defense counsel during child witness' testimony from judge's chambers).

49. *Craig*, 76 Md. App. at 257.

Maryland Court of Special Appeals.<sup>50</sup> On appeal the court in *Craig* considered whether the State's use of the one-way closed-circuit television, pursuant to the Maryland statute, unconstitutionally impinged upon the defendant's right of confrontation.<sup>51</sup> The *Craig* court observed that in *Coy v. Iowa* the Supreme Court did not hold that a defendant's right to face-to-face confrontation was without exception.<sup>52</sup> Agreeing with Justice O'Connor's concurring opinion in *Coy*, the *Craig* court determined that the right to a physical confrontation with adverse witnesses is not absolute.<sup>53</sup> The *Craig* court reasoned that in appropriate cases confrontation rights must give way to other important interests.<sup>54</sup> Furthermore, the court observed that the

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50. *Id.*

51. *Id.* at 274-87; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986) (authorizing state's use of closed-circuit television in child sexual abuse cases if child witness, by testifying in courtroom, will suffer emotional distress to extent that witness will be unable reasonably to communicate).

52. *Craig*, 76 Md. App. at 280. In *Craig* the Maryland appellate court noted that the Supreme Court in *Coy* did not determine whether any important public policies might justify a state's abridgement of the accused's right to a face-to-face encounter with adverse witness. *Id.*; see *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (noting that Court did not determine in *Coy* whether defendant's sixth amendment right to physical confrontation has any exceptions).

53. *Craig*, 76 Md. App. at 280-82; see *Coy*, 108 S. Ct. at 2803-05 (O'Connor, J., concurring) (concluding that defendant's right to face-to-face confrontation with adverse witness is not absolute); *supra* notes 27-37 and accompanying text (discussing Justice O'Connor's conclusion in *Coy* that defendant's right to physical confrontation may give way to other important interests).

54. *Craig*, 76 Md. App. at 280-82. In *Craig* the Maryland Court of Special Appeals relied in part on the Maryland Court of Appeals' decision in *Wildermuth v. State* to conclude that a defendant's right to face-to-face confrontation is not absolute. *Id.*; see *Wildermuth v. State*, 310 Md. 496, 513, 530 A.2d 275, 283-84 (Md. 1987) (holding that defendant's sixth amendment right to face-to-face confrontation is not absolute). In *Wildermuth*, a Maryland jury convicted the defendant, Wildermuth, of child sexual abuse. *Id.* at 500. Pursuant to a Maryland statute, the trial court permitted the state's use of closed-circuit television to present the child victim's testimony, after the trial court determined that the victim, by testifying in open court or in the presence of the accused, would suffer serious emotional distress. *Id.* at 500-02; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986) (providing for state's use of closed-circuit television to present alleged child abuse victim's testimony).

On a writ of certiorari to the Maryland Court of Appeals the defendant argued that the state's use of the closed-circuit television, pursuant to the Maryland statute violated the defendant's sixth amendment right to confront adverse witnesses. *Wildermuth*, 310 Md. at 501. The Maryland Court of Appeals in *Wildermuth* rejected the defendant's claim that the Maryland statute violated the sixth amendment. *Id.* at 501, 513-25. The *Wildermuth* court reasoned that the state's interest in protecting child abuse victims from the trauma of in court testimony and the state's interest in securing a child abuse victim's testimony at trial outweigh a defendant's right to a face-to-face encounter with adverse witnesses. *Id.* at 516-20. Furthermore, the *Wildermuth* court determined that the Maryland statute that authorized the state's use of closed-circuit television preserved the confrontation clause's interest in the integrity of the truthfinding process in criminal trials. *Id.* at 515. The *Wildermuth* court noted that the Maryland statute provided for most of the confrontation components that enhance the reliability of a witness' testimony. *Id.* The court in *Wildermuth* explained that under the Maryland statute the witness is under oath, subject to cross-examination, and within the view of judge and jury during the witness' testimony. *Id.* Accordingly, the *Wildermuth* court held that the Maryland statute that provided for the state's use of closed-circuit television did not violate a defendant's sixth amendment confrontation rights. *Id.* at 520.

Supreme Court has permitted a prosecuting attorney's use of extrajudicial declarations based on exceptions to the rule against hearsay.<sup>55</sup> The court in *Craig* determined that because exceptions to the hearsay rule implicate a defendant's right to a face-to-face encounter with adverse witnesses, the Supreme Court implicitly has acknowledged exceptions to the right of physical confrontation.<sup>56</sup> Accordingly, the *Craig* court held that a defendant's right to face-to-face confrontation may, in certain circumstances, give way to a state legislature's consideration of an important public policy.<sup>57</sup>

Having found that a defendant's right to physical confrontation is not absolute, the court in *Craig* considered whether the State's use of the closed-circuit television was necessary to further an important public policy.<sup>58</sup> The Maryland appellate court in *Craig* determined that cases involving a prosecutor's use of hearsay evidence provide the proper analytical framework by which the *Craig* court should consider the constitutionality of the State's use of the closed-circuit television.<sup>59</sup> The *Craig* court, therefore, required

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55. *Craig*, 76 Md. App. at 281-84.

56. *Id.* In *Craig*, the Maryland Court of Special Appeals noted that Supreme Court cases upholding a trial court's admission of extra-judicial statements allow the prosecution to present evidence without the accused having an opportunity physically to confront the declarant at trial. *Id.*; see *supra* note 7 and accompanying text (discussing Supreme Court cases that upheld trial court's admission of hearsay evidence). Accordingly, the *Craig* court determined that the right to a face-to-face encounter with adverse witnesses is not absolute. *Craig*, 76 Md. App. at 282.

57. *Craig*, 76 Md. App. at 282-83.

58. *Id.* at 283-87.

59. *Id.* at 282-84. In *Craig* the Maryland Court of Special Appeals relied on the Maryland Court of Appeals' decision in *Wildermuth v. State* to conclude that the court should examine the confrontation issue in light of cases involving hearsay evidence. *Id.* 282-83; see *Wildermuth v. State*, 310 Md. 496, 514-20 (1987) (finding that cases involving court's admission of hearsay evidence provide proper analytical framework for appellate court's consideration of constitutionality of closed-circuit television statute); *supra* note 54 and accompanying text (discussing Maryland Court of Appeals' decision in *Wildermuth*). In *Wildermuth* the Maryland Court of Appeals relied on the Supreme Court's decision in *Ohio v. Roberts* to resolve whether the Maryland statute that authorized the State's use of closed-circuit television violated the sixth amendment confrontation clause. *Wildermuth*, 310 Md. at 514-20; see *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (finding that State's use of hearsay evidence was constitutional). The *Wildermuth* court observed that in *Roberts* the prosecution sought to introduce an unavailable witness' preliminary hearing testimony. *Wildermuth*, 310 Md. at 514. *Roberts*, 448 U.S. at 59. The *Wildermuth* court noted that the Supreme Court in *Roberts* determined that the State's use of hearsay evidence would be constitutional if the State demonstrated that the witness was unavailable for trial and the out of court statement was reliable. *Wildermuth*, 310 Md. at 514-15; see *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that hearsay evidence is admissible if party offering extra-judicial statement can demonstrate that witness is unavailable and that statement is reliable). Accordingly, in considering whether the Maryland statute was constitutional, the *Wildermuth* court determined that the Maryland statute would have to provide that the state could use closed-circuit television only if the state could show that without closed-circuit television the witness would be unavailable to testify at trial and that the witness' testimony via closed-circuit television would be reliable. *Id.* at 515. The *Wildermuth* court concluded that the Maryland statute provided for the state's use of closed-circuit television only if the witness was unavailable. *Id.* at 519. The *Wildermuth* court reasoned that the

that the State demonstrate, first, that absent the State's use of protective trial procedures the witnesses would have been unavailable to testify and, second, that the witnesses' televised testimony was reliable.<sup>60</sup> In considering whether the State in *Craig* demonstrated unavailability, the Maryland appellate court determined that if the State showed that a child witness would suffer severe emotional distress and would be unable to communicate in court, the State's showing would be tantamount to a showing of unavailability.<sup>61</sup> Accordingly, the *Craig* court determined that if the trauma of in court testimony rendered a child victim unable to communicate, the State's interest in prosecuting the accused would necessitate the State's use of closed-circuit television.<sup>62</sup> The *Craig* court, however, observed the Supreme Court's mandate in *Coy* that a court must make a case-specific finding of necessity before a court may abrogate a defendant's confrontation rights.<sup>63</sup> In light of expert testimony that indicated that each of the child witnesses in *Craig* would suffer emotional trauma and, thereby, have difficulty communicating if the State compelled the witnesses to testify in court, the *Craig* court determined that the trial judge had made a case-specific finding of necessity.<sup>64</sup> Furthermore, the *Craig* court determined that the State had shown that the child witnesses' testimony via one-way closed circuit television was reliable.<sup>65</sup> The *Craig* court reasoned that the Maryland statute that

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Maryland statute authorized the state's use of closed-circuit television only if the state could demonstrate that the child witness, by testifying in open court, would suffer such emotional distress that the witness would not be able to communicate. *Id.*; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1985) (authorizing state's use of closed-circuit television if child witness, by testifying in court, would suffer emotional distress to extent that witness would not be able to reasonably communicate). The *Wildermuth* court determined that the state's demonstration that the child witness would suffer such distress that the witness would not be able to communicate at trial was tantamount to the state's showing of unavailability. *Wildermuth*, 310 Md. at 519; see *supra* note 54 (discussing *Wildermuth* court's conclusion that witness's testimony via closed-circuit television was reliable). Accordingly, in *Wildermuth* the Maryland Court of Appeals held that the Maryland statute that provided for the state's use of closed-circuit television did not violate the sixth amendment confrontation clause. *Wildermuth*, 310 Md. at 520.

60. *Craig*, 76 Md. App. at 283-87.

61. *Id.* at 283-84. The *Craig* court relied on the Maryland Court of Appeals' holding in *Wildermuth* to conclude that a trial court's finding that a child witness would be unable to communicate in open court is tantamount to a finding of unavailability. *Id.*; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1986) (providing for state's use of closed-circuit television if state demonstrates that child witness will be unable to communicate in court); *supra* note 59 (discussing *Wildermuth* court's finding that state's showing that child witness will be unable to communicate at trial was tantamount to showing of unavailability).

62. *Craig*, 76 Md. App. at 283.

63. *Id.* at 283-84; see *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (noting that if right to physical confrontation has any exceptions, trial court must make individualized finding of necessity).

64. *Craig*, 76 Md. App. at 285-87.

65. *Id.* at 287. In *Craig* the Maryland Court of Special Appeals relied on the Maryland Court of Appeals' decision in *Wildermuth* to determine that a child witness' testimony via closed-circuit television is reliable. See *supra* note 54 (discussing *Wildermuth* court's conclusion that testimony through closed-circuit television is reliable).

authorized the State's use of closed-circuit television provided for most aspects of the confrontation rights that enhance the reliability of a witness' testimony.<sup>66</sup> Because the State demonstrated that without protective trial procedures the child witnesses would be unavailable to testify, and that the witnesses' testimony was reliable, the Maryland appellate court in *Craig* held that the State's use of closed-circuit television, pursuant to the Maryland statute, did not violate the defendant's right to confront adverse witnesses.<sup>67</sup> The *Craig* court, therefore, affirmed the defendant's conviction and the defendant appealed to the Maryland Court of Appeals.<sup>68</sup>

On appeal the Maryland Court of Appeals held that the Maryland statute authorizing the State's use of closed-circuit television in certain child abuse cases facially was constitutional.<sup>69</sup> The Maryland Court of Appeals reasoned that the Supreme Court's decision in *Coy v. Iowa* implicitly acknowledged that a state may implement protective trial procedures that abrogate a defendant's right to a face-to-face encounter with adverse witnesses if the state's use of the protective procedures is necessary to further an important public policy.<sup>70</sup> In *Craig* the Maryland Court of Appeals

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66. *Craig*, 76 Md. App. at 287; see *supra* note 54 (discussing Maryland Court of Appeals' conclusion in *Wildermuth* that closed-circuit television preserves reliability of witness' testimony).

67. *Craig*, 76 Md. App. at 285-87.

68. *Id.* at 298, *rev'd*, 316 Md. 458, —, 560 A.2d 1120, 1122 (Md. 1989).

69. *Craig v. State*, 316 Md. 551, —, 560 A.2d 1120, 1121 (Md. 1989); see MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986) (providing for state's use of closed-circuit television to present alleged child abuse victim's testimony).

70. *Id.* at —, 560 A.2d at 1124-25. In *Craig* the Maryland Court of Appeals concluded that the *Coy* decision did not hold that a defendant's right to a face-to-face encounter with adverse witnesses is absolute. *Id.* at —, 560 A.2d at 1121, 1124; see *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (noting that Court in *Coy* was not determining whether defendant's sixth amendment right to physical confrontation has any exceptions). Moreover, in *Craig* the Maryland Court of Appeals observed that Justice O'Connor, concurring in *Coy*, expressly concluded that a defendant's right to physical confrontation may give way to compelling state interests. *Craig*, 316 Md. at —, 560 A.2d at 1124-25; see *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring) (concluding that defendant's right to face-to-face confrontation is not absolute); *supra* notes 27-37 and accompanying text (discussing Justice O'Connor's conclusion in *Coy* that defendant's right to physical confrontation may give way to countervailing interests). The state court of appeals in *Craig* also observed that, although the majority opinion in *Coy* strenuously attacked the dissent, the majority did not take issue with Justice O'Connor's concurrence and, therefore, implicitly adopted O'Connor's opinion that a defendant's confrontation rights are not absolute. *Craig*, 316 Md. at —, 560 A.2d at 1125; see *Coy*, 108 S. Ct. at 2801 n.2 (asserting impropriety of dissenting opinion in *Coy*); *id.* at 2805 (O'Connor, J., concurring) (concluding that defendant's right to physical confrontation is not absolute); see also *Craig v. State*, 76 Md. App. 250, 279-80, 544 A.2d 784, 798 (Md. Ct. Spec. App. 1988) (noting that majority opinion in *Coy* attempted to rebut dissent but did not attempt to rebut concurrence). Accordingly, in *Craig* the Maryland Court of Appeals determined that *Coy* did not preclude, in appropriate circumstances, a state's use of certain trial procedures that effectively abrogate the defendant's constitutional right to a face-to-face encounter with adverse witnesses. *Craig*, 316 Md. at —, 560 A.2d at 1125; see *Coy*, 108 S. Ct. at 2803 (noting that Court was not holding that defendant's right to physical confrontation is without exceptions); see also *id.* at 2805 (O'Connor, J., concurring) (concluding that defendant's right

concluded that the State's interest in presenting an otherwise unavailable child witness' testimony constituted an important public policy.<sup>71</sup> Moreover, the court of appeals observed that the Maryland statute required that a trial court make a case-specific determination that without the state's use of one-way closed-circuit television a particular child witness would be unavailable to testify in court.<sup>72</sup> Accordingly, because the Maryland statute authorizing the State's use of closed-circuit television provided for an individualized determination of necessity, the state court of appeals in *Craig* held that the statute facially was constitutional.<sup>73</sup>

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to face-to-face confrontation with adverse witness may give way to countervailing interests).

In addition to finding that the *Coy* decision did not prohibit a state's use of protective trial procedures that supplant physical confrontation, the Maryland Court of Appeals in *Craig* relied on its earlier decision in *Wildermuth v. State* to conclude that a defendant's confrontation rights are not absolute. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1121, 1125-26; see *Wildermuth v. State*, 310 Md. 496, 513, 530 A.2d 275, 283-84 (Md. 1987) (holding that defendant's right to face-to-face confrontation is not absolute); *supra* note 54 (discussing Maryland Court of Appeals' decision in *Wildermuth* that defendant's right to physical confrontation is not absolute). Furthermore, in *Craig* the Maryland Court of Appeals observed that several other state courts had concluded that in appropriate circumstances a state may abrogate a defendant's right to a face to-face encounter with adverse witnesses. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1125; see, e.g., *State v. Thomas*, 150 Wis. 2d 374, \_\_\_\_, 442 N.W.2d 10, 13 (Wis. 1989) (holding that defendant's right to face-to-face confrontation has exceptions); *Brady v. State*, 540 N.E.2d 69, 65 (Ind. Ct. App. 1989) (finding that compelling interests may override defendant's right to face-to-face confrontation); *State v. Bonello*, 310 Conn. 51, \_\_\_\_, 554 A.2d 277, 281 (Conn. 1989), *cert. denied*, 109 S. Ct. 2103 (1989) (holding that defendant's right to face-to-face confrontation is not absolute).

71. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1121, 1125-26. The Maryland Court of Appeals in *Craig* relied on its earlier decision in *Wildermuth v. State* to conclude that the state's interest in presenting the testimony of an otherwise unavailable witness' testimony constitutes the important public policy necessary to override a defendant's constitutional right to physical confrontation. *Id.*; see *Wildermuth v. State*, 310 Md. 496, 518-20, 530 A.2d 275, 286-87 (Md. 1987) (holding that state's interest in presenting testimony of otherwise unavailable child witness is sufficiently compelling to justify state's use of trial procedures that abrogate defendant's confrontation rights); *supra* note 54 (discussing Maryland Court of Appeals' holding in *Wildermuth* that state's interest in presenting otherwise unavailable witness' testimony may outweigh defendant's right to physical confrontation). Moreover, the *Craig* court of appeals relied on its earlier decision in *Wildermuth v. State* to conclude that under the Maryland statute, a child witness' testimony through one-way closed circuit television preserves most of the truth-enhancing aspects of the confrontation right and, therefore, is reliable. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1125-26; see *Wildermuth*, 310 Md. at 515 (holding that Maryland statute authorizing state's use of closed-circuit television preserves reliability of witness' testimony); *supra* note 54 (discussing *Wildermuth* court's conclusion that testimony through closed-circuit television is reliable).

72. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1121; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(2)(ii) (Supp. 1986) (providing for state's use of closed-circuit television upon trial court's case-specific finding that procedure is necessary to present otherwise unavailable child witness' testimony); see also *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (noting that if any exceptions to defendant's right to physical confrontation exist, court must make individualized determination that exception is necessary to further important public policy); *id.* at 2805 (O'Connor, J., concurring) (concluding that state may abrogate defendant's right to face-to-face encounter with adverse witnesses upon case-specific finding of necessity).

73. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1121; see *supra* notes 69-72 and accompanying

Having found that the Maryland statute was constitutional, the state court of appeals in *Craig* next considered whether the trial court properly allowed the State to invoke the statute and present the child witnesses' testimony via closed-circuit television.<sup>74</sup> In holding that the State's use of closed-circuit television in *Craig* violated the defendant's confrontation rights, the Maryland Court of Appeals reasoned that the trial court failed to determine whether the State's use of protective trial procedures was necessary.<sup>75</sup> The state court of appeals explained that, under the Maryland statute, the state can demonstrate necessity only by showing that a face-to-face encounter with the defendant will cause a child witness to suffer such severe emotional distress that the child will be unavailable to testify at trial.<sup>76</sup> The Maryland Court of Appeals reasoned that, unless the defendant's presence is the operative condition rendering a child witness unavailable to testify, the state's separation of the defendant and the child during the child's testimony is unnecessary and, therefore, constitutionally impermissible.<sup>77</sup> In *Craig* the state court of appeals observed that the trial court

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text (discussing Maryland Court of Appeals' holding in *Craig* that statute authorizing state's use of closed-circuit television is constitutional).

74. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1122-29.

75. *Id.* at \_\_\_\_\_, 560 A.2d 1121, 1125-26.

76. *Id.* at \_\_\_\_\_, 560 A.2d 1126-27. In *Craig* the state court of appeals observed that the Maryland statute authorized the state's use of closed-circuit television if the state demonstrated that testimony by a child witness "in the courtroom" would cause the child to suffer severe emotional distress and, therefore, be unavailable to testify at trial. *Id.* at \_\_\_\_\_, 560 A.2d at 1126; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(2)(ii) (providing for state's use of closed-circuit television if, by testifying "in the courtroom," child witness will suffer emotional distress to extent that child will be unable to communicate at trial). The state court of appeals, therefore, acknowledged in *Craig* that the Maryland statute expressly did not require that the defendant's presence be the primary cause of a child witness' emotional distress and resulting unavailability in order for the state to invoke the state. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1126-27. Nevertheless, in *Craig* the Maryland Court of Appeals construed the statute to require that a face-to-face encounter with the defendant be the operative condition rendering a child witness unavailable to testify and, therefore, necessitating the state's use of one-way closed-circuit television. *Id.*

77. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1126-28. In finding that the state may not invoke the Maryland statute unless the state demonstrates that the defendant's presence will be the primary cause of a child witness' emotional distress, the Maryland Court of Appeals in *Craig* emphasized the importance of the right to physical confrontation. *Id.* at \_\_\_\_\_, 560 A.2d at 1125-27; see also *id.* at \_\_\_\_\_, 560 A.2d at 1126 (noting that in *Coy* Supreme Court emphasized importance of defendant's right to physical confrontation); *Coy v. Iowa*, 108 S. Ct. 2798, 2801-02 (1988) (emphasizing importance of sixth amendment right of confrontation). Moreover, the *Craig* court of appeals reiterated that the state may abridge a defendant's right to physical confrontation only upon a case-specific finding of necessity. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1126. Accordingly, in *Craig* the court of appeals concluded that the state's demonstration that a child witness would be unable to testify in open court or in the presence of strangers would not support a case-specific finding of necessity. *Id.* The state court of appeals explained that the state can not demonstrate that it is necessary to prevent a defendant from facing a testifying witness unless the state can demonstrate that a face-to-face encounter with the defendant will cause the witness to be unable to communicate in court. *Id.* at \_\_\_\_\_, 560 A.2d at 1126-27. In *Craig* the Maryland Court of Appeals observed that other state

specifically did not find that a face-to-face encounter with the defendant would have caused the child witnesses to suffer severe emotional distress and, therefore, be unavailable to testify at trial.<sup>78</sup> Instead, the Maryland Court of Appeals noted, the trial court in *Craig* authorized the State's use of closed-circuit television on the basis of expert testimony that indicated that the prospect simply of testifying in open court would cause the child witnesses to suffer emotional distress.<sup>79</sup> In *Craig*, therefore, the Maryland

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courts had reached similar conclusions. *Id.* at \_\_\_\_\_, 560 A.2d at 1127; see *State v. Jarzbek*, 210 Conn. 396, \_\_\_\_\_, 554 A.2d 1094, 1095 (Conn. 1989) (holding that state may not abridge defendant's right to physical confrontation unless state demonstrates that defendant's presence would so intimidate alleged child abuse victim that child's testimony would be untrustworthy); *State v. Crandell*, 231 N.J. Super. 124, \_\_\_\_\_, 555 A.2d 35, 39 (N.J. Super. Ct. App. Div. 1989) (holding that trial court may not allow state's use of closed-circuit television unless trial court finds that presence of defendant will cause alleged child abuse victim to suffer severe emotional distress); *State v. Vincent*, 159 Ariz. 418, \_\_\_\_\_, 768 P.2d 150, 152, 163-64 (Ariz. 1988) (holding that trial court may not authorize state to abrogate defendant's right to physical confrontation unless state demonstrates that face-to-face encounter with defendant will cause child witness to suffer emotional trauma to extent that child will be unable to communicate in court). In *Craig*, therefore, the state court of appeals held that to invoke the Maryland statute and use one-way closed-circuit television the state must show that the defendant's presence will be the cause of a child witness' emotional distress and resulting unavailability. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1127.

78. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1128-29. The Maryland Court of Appeals in *Craig* noted that the trial judge did not question any of the child witnesses himself and did not observe how the child witnesses behaved in the defendant's presence. *Id.* Accordingly, the *Craig* court of appeals concluded that the states' use of closed-circuit television was unnecessary to procure the child witnesses' testimony. *Id.*

79. *Id.* In *Craig* the Maryland Court of Appeals delineated the procedures a trial court must follow before authorizing the state's use of closed-circuit television. *Id.* at \_\_\_\_\_, 560 A.2d 1127-28. To invoke the Maryland statute, the court of appeals held, the state initially must question the child witness in the defendant's presence. *Id.* at \_\_\_\_\_, 560 A.2d at 1127. The *Craig* court of appeals explained that if the state questions the child witness in the defendant's presence the trial judge will be able to determine whether the defendant's presence has a traumatizing effect on the child. *Id.* Thereafter, the state court of appeals continued, the trial judge must consider whether any alternatives to the state's use of one-way closed-circuit television are feasible. *Id.* at \_\_\_\_\_, 560 A.2d at 1128. The state court of appeals explained that, in light of the importance of the confrontation right, the Maryland statute cannot be the exclusive measure of witness protection but, instead, must be the last resort. *Id.* The *Craig* court of appeals, therefore, determined that if a child witness would be able to testify via two-way closed-circuit television, the trial court should authorize that procedure. *Id.* The *Craig* court of appeals reasoned that two-way closed-circuit television is preferable because the defendant can see the testifying witness and, more importantly, the witness can see the defendant. *Id.*; see *supra* note 28 (describing two-way closed-circuit television). In *Craig* the court of appeals concluded that if the trial judge determines that neither two-way closed-circuit television nor any other alternative procedure will enable the child witness to testify, the trial court may authorize the state to invoke the Maryland statute and use one-way closed-circuit television. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1128.

Although finding that expert testimony may support a trial judge's conclusion that the state's use of one-way closed-circuit television is necessary, the state court of appeals held that the expert testimony in *Craig* was insufficient to support the state's invocation of the Maryland statute. *Id.* at \_\_\_\_\_, 560 A.2d at 1128-29. Instead, the court of appeals observed, in *Craig* the expert witnesses testified that the child witnesses would have difficulty facing, not only

Court of Appeals held that because the trial court failed to determine that the State's use of closed-circuit television was necessary, the State violated the defendant's constitutional right to physical confrontation.<sup>80</sup> Accordingly, the Maryland Court of Appeals reversed the defendant's conviction.<sup>81</sup>

Although the Maryland Court of Appeals in *Craig* determined that in certain child abuse cases the state may abrogate a defendant's right to a face-to-face encounter with adverse witnesses, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Bergstrom*<sup>82</sup> concluded that the Commonwealth constitutionally may not record a witness' testimony outside the physical presence of the defendant.<sup>83</sup> In *Bergstrom* a Massachusetts grand jury indicted the defendant for rape and for indecent assault and battery on the defendant's two minor daughters.<sup>84</sup> Prior to Bergstrom's trial the Commonwealth moved, pursuant to a Massachusetts statute, to present the child victims' testimony via one-way closed-circuit television.<sup>85</sup> The Massachusetts statute provided that the Commonwealth could present a child witness' testimony through closed-circuit television if the trial court found by a preponderance of the evidence that the child witness would suffer trauma from testifying in open court or from testifying in the presence of the accused.<sup>86</sup> Under the Massachusetts statute a child witness may testify outside the presence of the accused if a face-to-face encounter with the defendant would cause the child emotional harm.<sup>87</sup> If, however, a child witness would suffer emotional trauma solely by reason of testifying in open court, not by reason of the defendant's presence, the statute required that the defendant be present during the child's testimony.<sup>88</sup> Pursuant to the Commonwealth statute, the trial judge conducted an evidentiary hearing

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the defendant, but also a courtroom of strangers. *Id.* The Maryland Court of Appeals concluded that the trial judge specifically did not find, and could not have found on the basis of the evidence before the judge, that the defendant's presence would have been the primary cause for the child witnesses to suffer emotional distress and as a result be unavailable to testify at trial. *Id.* Moreover, the *Craig* court of appeals noted that although the trial judge properly may have found that the State's use of closed-circuit television was necessary if the judge either had questioned the child witnesses himself or personally had observed the effect of the defendant's presence on child witness' behavior, the judge had done neither. *Id.*; see *supra* note 78 and accompanying text (noting that trial court in *Craig* failed to question or observe child witnesses before authorizing State's use of closed-circuit television). Accordingly, in *Craig* the court of appeals held that the trial judge improperly allowed the State to invoke the Maryland statute and abridge the defendant's confrontation rights. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1129.

80. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1129.

81. *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1129.

82. 402 Mass. 534, 524 N.E.2d 366 (Mass. 1988).

83. *Commonwealth v. Bergstrom*, 402 Mass. 534, \_\_\_\_, 524 N.E.2d 366, 367-78 (Mass. 1988).

84. *Id.* at \_\_\_\_, 524 N.E.2d at 367.

85. *Id.*; see MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1987) (authorizing Commonwealth's use of closed-circuit television to present child abuse victim's testimony).

86. MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1987).

87. *Id.* at § 16D(1)(b)(1).

88. *Id.* at § 16D(1)(b)(3).

to determine the possibility of the child witnesses suffering psychological trauma.<sup>89</sup> The trial judge found that the Commonwealth, in accordance with the Massachusetts statute, had established that the child witnesses would suffer psychological trauma if the Commonwealth forced the witnesses to testify in the presence of the defendant.<sup>90</sup> The trial judge, therefore, granted the Commonwealth's motion to present the children's testimony outside the defendant's presence through one-way closed-circuit television.<sup>91</sup> At Bergstrom's trial both child witnesses gave their testimony in a room separate from the courtroom.<sup>92</sup> The judge, prosecutor, and defense attorney were present in the room with the children.<sup>93</sup> The defendant and the jury, however, observed the witnesses' testimony on television monitors inside the courtroom.<sup>94</sup> Bergstrom was able to communicate with defense counsel throughout the children's testimony.<sup>95</sup> At the conclusion of the trial the jury convicted the defendant on all counts and the defendant appealed the conviction to the Supreme Judicial Court of Massachusetts.<sup>96</sup>

On appeal Bergstrom argued that the Commonwealth's use of the televised testimony, pursuant to the Massachusetts statute, violated the defendant's right to confrontation under the sixth amendment to the United States Constitution and under article 12 of the Massachusetts Declaration of Rights.<sup>97</sup> The Massachusetts Supreme Court held that the Commonwealth's use of the closed-circuit television violated the defendant's confrontation rights under the Massachusetts constitution and the court, therefore, reversed Bergstrom's conviction.<sup>98</sup> The *Bergstrom* court reasoned that because the literal language of article 12 guarantees an accused the right to face-to-face confrontation with adverse witnesses, the Commonwealth's use of the closed-circuit television impermissibly impinged upon the defendant's confrontation rights.<sup>99</sup> Although acknowledging that under either the federal

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89. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 369; see MASS. GEN. LAWS ANN. ch. 278, § 16D(1)(b)(1) (West Supp. 1987) (requiring that trial court find by preponderance of evidence that child witness, by testifying in open court or in presence of accused, will suffer harm).

90. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 367, 369. At the evidentiary hearing in *Bergstrom* the Commonwealth offered expert testimony to show that the child witnesses would suffer psychological trauma if the Commonwealth required the witnesses to testify in open court or in the presence of the accused. *Id.* at \_\_\_\_\_, 524 N.E.2d at 369.

91. *Id.* at \_\_\_\_\_, 524 N.E.2d at 367, 370.

92. *Id.* at \_\_\_\_\_, 524 N.E.2d at 370; see MASS. GEN. LAW ANN. ch. 278, § 16D(1)(b)(4) (West Supp. 1987) (providing that child witness testify via closed-circuit television from setting outside courtroom).

93. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 370; see MASS. GEN. LAWS ANN. ch. 278, § 16D(1)(a)(3) (West Supp. 1987) (providing for trial judge's and opposing counsel's presence in room with child testifying through closed-circuit television).

94. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 370.

95. *Id.*

96. *Id.* at \_\_\_\_\_, 524 N.E.2d at 367.

97. *Id.* at \_\_\_\_\_, 524 N.E.2d at 370.

98. *Id.* at \_\_\_\_\_, 524 N.E.2d at 371-75.

99. *Id.* In *Bergstrom* the Massachusetts court observed that the literal language of article

constitution or the Massachusetts constitution the right of confrontation is not without exception, the *Bergstrom* court observed that exceptions to a defendant's right to a face-to-face encounter with adverse witnesses are not crime specific.<sup>100</sup> The court in *Bergstrom* determined that the Massachusetts statute impermissibly created an exception to a defendant's confrontation rights by distinguishing between child abuse victims and other classes of witnesses.<sup>101</sup> The right of confrontation under article 12, the *Bergstrom* court explained, applies impartially to all classes of defendants and to all categories of crimes.<sup>102</sup> The *Bergstrom* court, therefore, concluded that the Massachusetts legislature could not, consistently with a defendant's right of confrontation, distinguish between child witnesses in sexual abuse cases and any other class of witnesses.<sup>103</sup> Finding that the Commonwealth constitutionally could not abrogate a defendant's right to a face-to-face encounter with adverse witnesses, the *Bergstrom* court held that the Massachusetts statute authorizing the Commonwealth's use of one-way closed-circuit television in child sexual abuse cases violated article 12 of the Massachusetts constitution.<sup>104</sup>

Furthermore, although the *Bergstrom* court did not hold that the Commonwealth never could record a witness' testimony outside the presence of the jury, the court found that the Commonwealth's use of the closed-circuit television in *Bergstrom* was unconstitutional on two additional grounds.<sup>105</sup> The *Bergstrom* court observed that the closed-circuit television

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12 of the Massachusetts constitution guarantees a criminal defendant the right physically to confront adverse witnesses. *Id.* at \_\_\_\_\_, 524 N.E.2d at 371. Although acknowledging that under both the federal constitution and Commonwealth constitution a defendant's confrontation rights are not absolute, the *Bergstrom* court noted that the right to physical confrontation is paramount except in limited circumstances. *Id.* at \_\_\_\_\_, 524 N.E.2d at 373. The *Bergstrom* court, however, emphasized that the court never had permitted the Commonwealth to present an available witness to testify outside the defendant's presence. *Id.* Furthermore, the court in *Bergstrom* observed that article 12 of the Massachusetts constitution guarantees confrontation rights to all criminal defendants and does not discriminate against certain classes of defendants or categories of crimes. *Id.* at \_\_\_\_\_, 524 N.E.2d at 374. Accordingly, the *Bergstrom* court concluded that the Massachusetts legislature could not provide that in certain cases of child abuse, the Commonwealth may abrogate a defendant's right to a face-to-face encounter with adverse witnesses. *Id.* In *Bergstrom*, therefore, the court concluded that the Massachusetts statute that authorized the Commonwealth's use of closed-circuit television in child sexual abuse cases violated article 12 of the Massachusetts constitution. *Id.* Accordingly, the *Bergstrom* court reversed the defendant's conviction. *Id.* at \_\_\_\_\_, 524 N.E.2d at 378.

100. *Id.* at \_\_\_\_\_, 524 N.E.2d 374.

101. *Id.*; see *supra* note 99 (discussing *Bergstrom* court's conclusion that article 12 of Massachusetts constitution applies indiscriminately to all classes of defendants and to all categories of crimes).

102. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 374.

103. *Id.*

104. *Id.* Although holding that the Massachusetts statute violated article 12 of the Massachusetts constitution, the *Bergstrom* court recognized that the court's article 12 analysis essentially was identical to a sixth amendment analysis under the federal constitution. *Id.* at \_\_\_\_\_, 524 N.E.2d 371-73.

105. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 375-78.

transmission at Bergstrom's trial distorted sight and sound and, thereby, failed to provide the jury with an adequate means by which to observe the witnesses' demeanor.<sup>106</sup> The *Bergstrom* court, therefore, determined that the technical inadequacies of the closed-circuit transmission in *Bergstrom* undermined the integrity of the jury's factual determinations.<sup>107</sup> Moreover, the *Bergstrom* court determined that, absent compelling circumstances, the confrontation clause requires that a jury personally view a witness' testimony.<sup>108</sup> Accordingly, the Massachusetts court in *Bergstrom* concluded that the Commonwealth would have to show by more than a preponderance of the evidence that the Commonwealth's recording of a witness testimony outside the presence of the jury is necessary to protect a child witness' emotional well-being.<sup>109</sup> The *Bergstrom* court reasoned that the Commonwealth's presentation of a witness' testimony outside the presence of the jury via closed-circuit television requires the Commonwealth to demonstrate a compelling need for the protective trial procedures.<sup>110</sup> The *Bergstrom* court concluded that the Commonwealth's showing beyond a reasonable doubt that a particular witness would suffer severe emotional trauma upon testifying in the presence of the jury would constitute a compelling need for the Commonwealth's use of closed-circuit television.<sup>111</sup> Having found that the Commonwealth's use of closed-circuit television to record the witnesses' testimony outside the defendant's presence violated the defendant's right to confrontation, the *Bergstrom* court reversed the defendant's conviction.<sup>112</sup>

The statutes at issue in *Craig* and *Bergstrom* are representative of a number of state statutes that provide for an exception in certain child sexual abuse cases to a defendant's right physically to confront adverse witnesses.<sup>113</sup> Some of the statutes provide for a state's use of one-way closed-circuit television to shield a child witness from the trauma of testifying in open court or in the presence of the accused.<sup>114</sup> Furthermore, a number of state

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106. *Id.* at \_\_\_\_\_, 524 N.E.2d at 376.

107. *Id.*

108. *Id.* In *Bergstrom* the Supreme Judicial Court of Massachusetts concluded that, absent compelling circumstances, the jury personally should observe a witness' demeanor. *Id.* The *Bergstrom* Court determined that a television transmission does not afford a jury the equivalent of a personal observation of a witness' demeanor while the witness testifies and, therefore, does not adequately serve the confrontation clause's interest in enhancing the jury's truthfinding function. *Id.*; see *supra* notes 3-4 and accompanying text (noting that confrontation rights assure reliability of truthfinding process in criminal trials).

109. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 376.

110. *Id.*

111. *Id.*

112. *Id.* at \_\_\_\_\_, 524 N.E.2d at 374, 378.

113. See *supra* note 28 and accompanying text (citing state statutes which provide for states' presentation of child abuse victim's testimony through closed-circuit television).

114. See, e.g., GA. CODE ANN. § 17-8-55 (Supp. 1987) (providing for state's use of closed-circuit television to protect child abuse victim from emotional distress accompanying testimony in open court); IND. CODE ANN. § 35-37-4-8 (Burns 1986) (same); MINN. STATE ANN. § 595.02, subd. 4 (West Supp. 1987) (providing for state's use of closed-circuit television if court determines that child witness, by testifying in presence of defendant, will suffer psychological

statutes, like the Maryland statute in *Craig* and the Massachusetts statute in *Bergstrom*, require that a trial court make a case-specific finding that a particular witness requires the state's use of closed-circuit television to present the witness' testimony.<sup>115</sup> If a statute requires that a state demonstrate that protective trial procedures are necessary to present the testimony of an alleged child abuse victim, the Supreme Court's dicta in *Coy v. Iowa* suggests that the Court will find the statute constitutionally permissible.<sup>116</sup> As Justice O'Connor observed in *Coy*, however, the Court's primary focus will be on whether a state has made a constitutionally sufficient showing of necessity to justify the state's deprivation of a defendant's right to physical confrontation.<sup>117</sup>

In light of *Coy's* dicta, the Maryland Court of Appeals in *Craig v. State* properly concluded that the to the Maryland statute providing for the state's use of closed-circuit television facially was constitutional.<sup>118</sup> Although in *Coy v. Iowa* the Supreme Court determined that the state's use of a screen to block the accused from the witness' view was a blatant violation of the defendant's sixth amendment right of confrontation, the Court did not hold that the right to a face-to-face encounter with adverse witnesses is absolute.<sup>119</sup> Instead, both the majority and concurring opinions in *Coy* indicate that in appropriate cases a state's implementation of certain protective trial procedures, which effectively abrogate a defendant's right to physical confrontation, may pass constitutional muster.<sup>120</sup> The *Coy* decision suggests that, if a statute requires that a trial court must make a case-specific finding that certain trial procedures are necessary to present a particular child witness testimony, the state's use of such procedures would

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trauma that renders child unavailable to testify); Miss. CODE ANN. § 13-1-405 (1986) (authorizing state's use of closed-circuit television if defendant's presence will cause child witness to suffer emotional or mental distress).

115. See FLA. STAT. ANN. § 92.54 (West Supp. 1987) (authorizing state's use of closed-circuit television if judge determines that substantial likelihood exists that child victim, by testifying in open-court, will suffer emotional harm); GA. CODE ANN. § 17-8-55 (Supp. 1987) (same); IND. CODE ANN. § 35-37-4-8 (Burns 1986) (authorizing state's use of closed-circuit television if trial court finds that child witness, by testifying in court, likely will suffer trauma).

116. See *Coy*, 108 S. Ct. 2798, 2803 (1988) (indicating that state's use of protective trial procedures upon case-specific finding of necessity would be constitutional); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 25-37 and accompanying text (discussing that state statutes which provide for case-specific finding of necessity are constitutional).

117. See *Coy*, 108 S. Ct. at 2805 (stating that Court will focus on whether state has demonstrated that abrogation of defendant's right to physical confrontation is necessary).

118. *Craig*, 316 Md. 551, —, 560 A.2d 1120, 1121-29 (Md. 1989); see also *Craig*, 76 Md. App. 251, 283-87 (Md. Ct. Spec. App. 1988) (finding Maryland statute authorizing state's use of one-way closed-circuit television constitutional).

119. See *Coy*, 108 S. Ct. at 2803 (suggesting that defendant's right to physical confrontation may have exceptions); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 25-36 and accompanying text (discussing that Supreme Court in *Coy* did not hold that defendant's right to physical confrontation has no exceptions).

120. See *Coy*, 108 S. Ct. at 2803 (indicating that important public policy may outweigh defendant's right to physical confrontation); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 25, 27-36 (same).

not violate the defendant's confrontation rights.<sup>121</sup> In accordance with *Coy* the Maryland statute at issue in *Craig* provided that a trial court make an individualized determination that a particular child witness requires protective trial procedures.<sup>122</sup> In *Craig* the state court of appeals correctly determined that under the Maryland statute the state's showing that a child witness would be unable to testify in the presence of the defendant would be tantamount to a showing of unavailability.<sup>123</sup> Furthermore, the *Craig* court of appeals properly found that the state's interest in presenting the testimony of an otherwise unavailable witness constitutes the important public policy necessary to justify the state's abridgement of a defendant's confrontation rights.<sup>124</sup> The Supreme Court in *Coy* did not consider whether a state's interest in procuring an otherwise unavailable witness' trial testimony could justify the state's abrogation of a defendant's right to face adverse witnesses.<sup>125</sup> In holding that the Iowa statute violated the defendant's

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121. See *Coy*, 108 S. Ct. at 2803 (indicating that court constitutionally may abrogate defendant's confrontation rights if court makes case-specific finding that state's abrogation of defendant's confrontation rights is necessary to protect particular witness); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 34-36 and accompanying text (discussing that state's abridgement of defendant's confrontation rights upon trial court's case-specific finding of necessity is constitutional).

122. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1121; see MD. CTS. & JUD. PROC. CODE ANN., § 9-102(a)(2)(ii) (Supp. 1986) (requiring that trial court make case-specific finding that state's use of one-way closed-circuit television is necessary).

123. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1125-26; see MD. CTS. & JUD. PROC. CODE ANN., § 9-102(a)(2)(ii) (Supp. 1985) (authorizing state's use of one-way closed-circuit television if child witness will suffer serious emotional distress and, therefore, be unable to communicate in court); *supra* note 71 and accompanying text (discussing state court of appeals' decision in *Craig* that Maryland statute authorized states use of closed-circuit television if procedure is necessary to present otherwise unavailable witness' testimony); *Craig*, \_\_\_\_\_, Md. at \_\_\_\_\_, 560 A.2d at 1125-26 (relying on court of appeals' earlier decision in *Wildermuth v. State* to conclude that Maryland statute authorizes state's use of one-way closed-circuit television upon finding of witness unavailability); *Wildermuth v. State*, 310 Md. 496, 515, 530 A.2d 275, 285-86 (Md. 1987) (holding that Maryland statute authorizes state's use of one-way closed-circuit television upon case-specific finding of witness unavailability); *supra* notes 54 & 59 (discussing Maryland Court of Appeals' decision in *Wildermuth*); see also *Craig*, 76 Md. App. 250, 283-84, 544 A.2d 784, 800 (Md. Ct. Spec. App. 1988) (holding that Maryland statute authorizes state's use of one-way closed-circuit television upon case-specific finding of witness unavailability); *supra* notes 54-61 and accompanying text (discussing Court of Special Appeals' holding in *Craig* that state may invoke Maryland statute upon case-specific finding of witness unavailability).

124. *Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1121; see *id.* (relying on Maryland Court of Appeals' earlier decision in *Wildermuth v. State* to conclude that state's interest in presenting testimony of otherwise unavailable child witness may outweigh defendant's right to physical confrontation); *Wildermuth*, 310 Md. at 516-20 (holding that state's interest in procuring alleged child abuse victim's trial testimony outweighs defendant's right to face-to-face encounter with adverse witnesses); *supra* notes 54 & 59 (discussing Maryland Court of Appeals' decision in *Wildermuth*); see also *Craig*, 76 Md. App. at 283 (finding that state's interest in presenting testimony of otherwise unavailable child witness outweighs defendant's confrontation rights).

125. See *Coy*, 108 S. Ct. 2798, 2799-803 (1988) (considering whether state's interest in protecting alleged child abuse victims emotional well-being constitutes important public policy,

confrontation rights, the Supreme Court emphasized that the right to physical confrontation is important because physical confrontation enhances the truthfinding process in criminal trials.<sup>126</sup> As the *Craig* court reasoned, however, if a face-to-face encounter with the defendant will cause a child witness to suffer such severe emotional distress that the child will be unable to testify at trial, the defendant's right to physical confrontation will undermine the integrity of the truthfinding process.<sup>127</sup> Accordingly, the

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but not considering state's interest in presenting testimony of otherwise unavailable child witness); *id.* at 2803-05 (O'Connor, J., concurring) (same); *see also supra* notes 27-37 and accompanying text (discussing that *Coy* decision suggests that state's interest in protecting alleged child abuse victims from emotional harm may override defendant's right to physical confrontation).

126. *Coy*, 108 S. Ct. at 2801-03; *see supra* notes 18-26 and accompanying text (discussing Supreme Court's emphasis in *Coy* on importance of defendant's right of confrontation to reliability of factfinding process in criminal trials).

127. *See Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1125-26 (finding that child witness' inability to testify in presence of defendant may undermine truth-seeking function of trial); *see also Wildermuth v. State*, 320 Md. 496, 516-20, 520 A.2d 275, 284-87 (Md. 1987) (holding that state's interest in presenting otherwise unavailable witness' testimony justifies state's infringement of defendant's confrontation rights).

Like the Maryland Court of Appeals in *Craig*, the Supreme Court of Connecticut in *State v. Bonello* concluded that a child witness' inability to testify in the presence of the accused would implicate the reliability of the truthfinding process in a criminal trial. *State v. Bonello*, 210 Conn. 51, \_\_\_\_\_, 554 A.2d 277, 281-82 (Conn. 1989), *cert. denied*, 109 S. Ct. 2103 (1989). In *Bonello* the State of Connecticut charged the defendant with sexual assault in the first and second degree and risk of injury to a minor. *Id.* at \_\_\_\_\_, 554 A.2d at 278. The charges against the defendant arose from allegations that the defendant, Bonello, sexually abused a five year old child. *Id.* Prior to the defendant's trial, the State moved to videotape the alleged victim's testimony outside the defendant's physical presence. *Id.* at \_\_\_\_\_, 554 A.2d at 279. Although a Connecticut statute now authorizes the State in appropriate circumstances to present a child abuse victim's videotaped deposition at trial, the statute was not in effect at the time of Bonello's trial. *Id.* at \_\_\_\_\_, 554 A.2d 283 n.5; *see* CONN. GEN. STAT. §54-86g (Supp. 1987) (providing for State's use of videotaped testimony in certain child sexual abuse cases). In a pretrial hearing on the State's motion the State presented the testimony of a social worker and a psychiatrist to demonstrate that the intimidating presence of the defendant would undermine the reliability of the alleged victim's testimony. *Bonello*, 210 Conn. at \_\_\_\_\_, 554 A.2d at 179. At the pretrial hearing the social worker testified that the defendant's presence would intimidate the victim, and that the defendant's absence would lead to more accurate testimony from the victim. *Id.* at \_\_\_\_\_, 554 A.2d at 283. The psychiatrist testified at the pretrial hearing that the defendant's presence would embarrass and intimidate the victim, and that the videotape procedures would enable the victim to testify more clearly and accurately. *Id.* at \_\_\_\_\_, 554 A.2d at 283-84. Finding that the defendant's presence would be detrimental to both the child victim's emotional well-being and ability to testify accurately, the trial court granted the State's motion to videotape the victim's testimony. *Id.* at \_\_\_\_\_, 554 A.2d at 284. The trial court reasoned that the State had proven by clear and convincing evidence that the State's need to videotape the child victim's testimony was compelling. *Id.* Prior to trial the State recorded the victim's testimony in a room outside of the courtroom and outside of the defendant's presence. *Id.* at \_\_\_\_\_, 554 A.2d at 279.

On appeal to the Supreme Court of Connecticut, the court in *Bonello* held that a defendant's right to physical confrontation is not absolute. *Id.* at \_\_\_\_\_, 554 A.2d at 281. Instead, the *Bonello* court concluded that in *Coy v. Iowa* the Supreme Court indicated that a state may use protective trial procedures that abrogate a defendant's right to face adverse

Maryland Court of Appeals in *Craig* correctly concluded that Coy's emphasis on the truthfinding process in criminal trials suggests that a state's interest in presenting the testimony of an otherwise unavailable child witness constitutes the important public policy necessary to override a defendant's right to physical confrontation.<sup>128</sup> Because the state statute at issue in *Craig* required that a trial court make a case-specific finding that the state's use of one-way closed-circuit television was necessary, the Maryland Court of Appeals correctly held that the statute was constitutional.<sup>129</sup>

In *Craig*, however, the court of appeals also properly concluded that the trial court erroneously allowed the State to invoke the Maryland statute

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witnesses upon a case-specific finding that the state's use of such procedures is necessary to further an important public policy. *Id.*; see *Coy v. Iowa*, 108 S. Ct. 2798, 2801-03 (1988) (indicating that state constitutionally may abridge defendant's confrontation rights upon case-specific finding of necessity); *id.* at 2803-05 (O'Connor, J., concurring) (same). In *Bonello*, therefore, the Connecticut Supreme Court considered whether the state's interest in preserving the accuracy and trustworthiness of the alleged child abuse victim's testimony constituted the important public policy necessary to override the defendant's confrontation rights. *Bonello*, 210 Conn. at \_\_\_\_, 554 A.2d at 182-82. The *Bonello* court concluded that the *Coy* decision indicated that the state's interest in the reliability of the child witness' testimony outweighed the defendant's right to physical confrontation. *Id.* The *Bonello* court reasoned that in *Coy* the Supreme Court emphasized that the right to physical confrontation is important because physical confrontation enhances the truthfinding process in criminal trials. *Id.*; see *Coy*, 108 S. Ct. at 2801-03 (emphasizing importance of confrontation rights to accurate factfinding at criminal trials). In *Bonello*, however, the state supreme court determined that if the defendant's presence will be detrimental to a child witness' ability to testify accurately, the defendant's presence will undermine the truthfinding process. *Bonello*, 210 Conn. at \_\_\_\_, 554 A.2d at 281-82. The Connecticut Supreme Court, therefore, concluded that, under *Coy v. Iowa*, the state's interest in preserving the accuracy of the child witness' testimony outweighed the defendant's right to physical confrontation. *Id.* Accordingly, the *Bonello* court held that the State did not violate the defendant's confrontation rights by videotaping the alleged victim's testimony outside the presence of the defendant. *Id.*; see *Coy*, 108 S. Ct. at 2801-03 (indicating that state's interest in presenting accurate testimony overrides defendant's confrontation rights).

128. See *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1125-26 (holding that state's interest in procuring child witness' testimony overrides defendant's right to physical confrontation); *Coy*, 108 S. Ct. at 2801-03 (indicating that state's interest in procuring testimony of otherwise unavailable witness is important public policy and may override defendant's right to physical confrontation); *supra* notes 125-27 and accompanying text (discussing that *Craig* court of appeals properly held that state's interest in presenting testimony of otherwise unavailable witness outweighed defendant's interest in right to physical confrontation).

129. See *Craig*, 326 Md. at \_\_\_\_, 560 A.2d at 1121 (holding that Maryland statute authorizing state's use of one-way closed-circuit television is constitutional); *supra* notes 122-28 and accompanying text (discussing propriety of Maryland Court of Appeals' holding in *Craig* that statute providing for state's use of one-way closed-circuit television is constitutional); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(2)(ii) (Supp. 1986) (providing for state's use of one-way closed-circuit television upon trial court's case-specific finding of necessity); *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (indicating that if statute providing for protective trial procedures requires that court make case-specific finding that state's abridgement of defendant's confrontation rights is necessary, statute is constitutional); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 35-36 and accompanying text (discussing that state constitutionally may abrogate defendant's right to physical confrontation upon case-specific finding of necessity).

and present the child witnesses' testimony through one-way closed-circuit television.<sup>130</sup> The court of appeals correctly observed that, under the Maryland statute, the state's separation of the defendant from a child witness during the child's testimony is necessary only if a face-to-face encounter with the defendant will cause the child to suffer severe emotional distress to the extent that the child will be unavailable to testify at trial.<sup>131</sup> As the court of appeals apparently reasoned, the state has no legitimate reason to separate a defendant from a testifying witness if the defendant's presence has no traumatizing effect on the witness.<sup>132</sup> Accordingly, because the State in *Craig* failed to show that the defendant's presence would cause the child witnesses to suffer such severe emotional distress that the witnesses would be unavailable to testify, the Maryland Court of Appeals properly held that the State's use of one-way closed-circuit television was unnecessary and, therefore, violated the defendant's confrontation rights.<sup>133</sup>

In contrast to the Maryland Court of Appeals' determination in *Craig* that a defendant's right to physical confrontation may give way to countervailing interests, the Supreme Judicial Court of Massachusetts concluded in *Bergstrom* that under the Massachusetts constitution the Commonwealth never may utilize protective trial procedures that provide for a witness' presentation of testimony outside the physical presence of the defendant.<sup>134</sup> Unlike the court in *Craig*, the court in *Bergstrom* found that the legislature

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130. See *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1128-29 (holding that state's use of one-way closed-circuit television in *Craig* violated defendant's confrontation rights); *supra* notes 74-80 and accompanying text (discussing Maryland Court of Appeals' decision in *Craig* that trial court improperly allowed state to invoke Maryland statute and present child witness' testimony via closed-circuit television).

131. See *Craig*, 326 Md. at \_\_\_\_, 560 A.2d at 1126-27 (holding that state may invoke statute authorizing state's use of closed-circuit television only if defendant's presence will cause child witness to suffer emotional distress and, consequently, be unavailable to testify); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986) (authorizing state to use closed-circuit television if, by testifying in the courtroom, child witness will be unable to communicate); *supra* notes 76-77 and accompanying text (discussing *Craig* Court of Appeals' interpretation of statute authorizing state's use of closed-circuit television).

132. See *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1126-27 (holding that defendant's presence must be operative condition causing child witness' unavailability); *supra* notes 76-77 and accompanying text (discussing Maryland Court of Appeals' holding in *Craig* that state may use closed-circuit television only if defendant's presence is primary cause of witness' unavailability); *supra* note 77 (citing state cases holding that state may not use protective trial procedure that abridge defendant's right to face adverse witness unless defendant's presence has traumatizing effect on witness).

133. See *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1127-29 (holding that in *Craig* state's use of one-way closed-circuit television violated defendant's right of confrontation); *supra* notes 76-80 and accompanying text (discussing Maryland Court of Appeals' holding in *Craig* that state's use of closed-circuit television unconstitutionally impinged upon defendant's confrontation rights).

134. See *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 283-87 (holding that defendant's confrontation rights are not absolute); *Bergstrom*, 402 Mass. 534, \_\_\_\_, 524 N.E.2d 366, 371-74 (Mass. 1988) (holding that state never may use closed-circuit television to record witness' testimony outside defendant's presence).

could not abrogate a defendant's right to physical confrontation by determining that a certain class of witnesses, child abuse victims, deserve special treatment.<sup>135</sup> The *Bergstrom* court apparently concluded that the Commonwealth's interest in protecting child abuse victims did not constitute the important state interest necessary to override a defendant's right under the Massachusetts constitution to a face-to-face encounter with adverse witnesses.<sup>136</sup>

Although the Massachusetts court's decision in *Bergstrom* conflicts with the Maryland Court of Appeals' decision in *Craig*, the two cases differ in one significant respect.<sup>137</sup> The state statute at issue in *Craig* provided for the State's use of closed-circuit television upon the State's demonstration that absent protective trial procedures a child witness will suffer severe emotional trauma and, therefore, be unable to communicate at trial.<sup>138</sup> In *Craig* the Maryland Court of Appeals determined that the State's showing that a child witness would be unable to testify in court tantamount to the State's demonstration of unavailability and, therefore, would necessitate the State's use of closed-circuit television.<sup>139</sup> The Commonwealth statute at issue in *Bergstrom*, however, authorized the Commonwealth to record a child witness' testimony outside the presence of the defendant if a face-to-face

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135. *Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 374.

136. *See id.* at \_\_\_\_\_, 524 N.E.2d at 373-74 (indicating that defendant's interest in physically confronting adverse witnesses outweighs state's interest in protecting child witnesses' emotional well-being). In *Bergstrom* the Massachusetts Appellate Court determined that, although a defendant's confrontation rights are not absolute, a defendant's right physically to confront witnesses is paramount except in limited circumstances. *Id.* Accordingly, in concluding that the Commonwealth's use of closed-circuit television, pursuant to the Massachusetts statute, violated the defendant's confrontation rights, the *Bergstrom* court determined that the Commonwealth's interest in protecting the child witnesses from emotional harm did not present a circumstance in which the Commonwealth constitutionally could abrogate a defendant's right physically to confront witnesses. *Id.* The *Bergstrom* court, therefore, implicitly held that the Commonwealth's interest in protecting a child witness' emotional well-being does not outweigh a defendant's right to a face-to-face encounter with adverse witnesses. *Id.*

137. *See Bergstrom*, 402 Mass. at \_\_\_\_\_, 524 N.E.2d at 374 (holding that Massachusetts statute that authorized commonwealth's use of closed-circuit television unconstitutionally distinguished between child abuse victims and other classes of witnesses); *compare Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1125-26 (holding that Maryland statute that authorized state's use of closed-circuit television in certain child abuse cases was constitutional).

138. *See MD. CTS. & JUD. PROC. CODE ANN.* § 9-102(a)(1)(ii) (Supp. 1986) (providing that state may use closed-circuit television if trial court finds that child witness will be unable to communicate in court).

139. *See Craig*, 316 Md. at \_\_\_\_\_, 560 A.2d at 1125-26 (holding that state's demonstration that child witness will be unable to communicate in court tantamount to showing of unavailability and, thereby, necessitating state's use of closed-circuit television); *id.* (relying on Maryland Court of Appeals' holding in *Wildermuth v. State* to conclude that statute authorizes state's use of closed-circuit television upon case-specific finding of witness' unavailability); *Wildermuth v. State*, 310 Md. at 515, 530 A.2d 284 (holding that Maryland statutes allows state to present otherwise unavailable witness' testimony via closed-circuit television); *supra* notes 70-73 (discussing *Craig* court of appeals' decision that Maryland statute provides for state's use of closed-circuit television upon case-specific finding that without state's use of closed-circuit television child witness will be unavailable to testify).

encounter with the defendant would cause the child emotional harm.<sup>140</sup> Unlike the Maryland statute in *Craig*, therefore, the Massachusetts statute in *Bergstrom* provided for the Commonwealth's use of one-way closed-circuit television solely to further the Commonwealth's interest in protecting an alleged child abuse victim's emotional well-being.<sup>141</sup> Accordingly, although the *Craig* court determined that the State's interest in presenting an otherwise unavailable witness' testimony outweighed the defendant's right physically to confront adverse witnesses, the *Bergstrom* court concluded that the Commonwealth's interest in protecting a child witness from the emotional harm accompanying a face-to-face encounter with the defendant did not outweigh the defendant's right to physical confrontation.<sup>142</sup>

Although the Massachusetts court decided *Bergstrom* prior to the Supreme Court's holding in *Coy v. Iowa*, *Coy* does not compel the *Bergstrom* court's conclusions.<sup>143</sup> Nothing in the *Coy* decision indicates that a state's

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140. See MASS. GEN. LAWS ANN. ch. 278, § 16D(1)(b)(1) (West Supp. 1987) (providing for commonwealth's use of closed-circuit television if trial court finds that child witness may suffer emotional trauma resulting from in court testimony); see also *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 373-74 (concluding that Massachusetts statute authorizing commonwealth's use of closed-circuit television violated defendant's confrontation rights); *supra* notes 102-08, 134-36 and accompanying text (discussing *Bergstrom* court's conclusion that Commonwealth's use of closed-circuit television, pursuant to the Massachusetts statute, violated the defendant's confrontation rights).

141. *Id.*; compare MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1986) (providing for state's use of closed circuit television if state demonstrates that child witness will be unable to communicate in court and, therefore, unavailable to testify at trial) with MASS. GEN. LAWS ANN. ch. 278, § 16D(1)(b)(1) (West Supp. 1987) (providing for commonwealth's use of closed-circuit television if commonwealth demonstrates that child witness will suffer emotional trauma from in court testimony).

142. Compare *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1125-26 (holding that state's interest presenting otherwise unavailable witness' testimony may justify state's use of closed-circuit television) with *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 373-74 (holding that Commonwealth's interest in protecting child witness' emotional health did not justify Commonwealth's use of closed-circuit television). Because the *Bergstrom* court found that the Commonwealth ordinarily may not abrogate a defendant's right to physical confrontation unless the Commonwealth can demonstrate that a witness is unavailable to testify at trial, arguably, the *Bergstrom* court would have upheld the Massachusetts statute if the statute, like the Maryland statute in *Craig*, had required that the Commonwealth demonstrate that the child witnesses would have been unable to communicate in court. *Id.*; see MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1986) (providing that state may use closed-circuit television if state demonstrates that child witness will be unable to testify in court). The *Bergstrom* court, like the *Craig* court of appeals, might have considered the Commonwealth's showing that the child witness would be unable to testify in court tantamount to a showing of unavailability. See *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 373 (observing that commonwealth may abrogate defendant's confrontation rights if commonwealth can demonstrate that witness is unavailable to testify at trial); *Craig*, 316 Md. at \_\_\_\_, 560 A.2d at 1125-26 (finding state's showing that child witness would be unable to communicate at trial tantamount to showing of unavailability).

143. See *Coy*, 108 S. Ct. 2798, 2803-05 (1988) (indicating that statutes which authorize state's use of closed-circuit television may pass constitutional muster); *Bergstrom*, 402 Mass. \_\_\_\_, 524 N.E.2d 3663, 372-74 (Mass. 1988) (finding that Massachusetts statute in *Bergstrom*

interest in protecting child sexual abuse victims from emotional harm would constitute insufficient grounds for the State's infringement of a defendant's right to physical confrontation with adverse witnesses.<sup>144</sup> Instead, *Coy* indicates that a state statute that authorizes a state's use of closed-circuit television to present a witness's testimony would pass constitutional muster if the statute requires that a trial court make a case-specific finding that the protective trial procedures are necessary to further an important state interest.<sup>145</sup> Moreover, Justice O'Connor, concurring in *Coy*, specifically noted that a state's interest in protecting an alleged child abuse victim's emotional well-being would constitute the sort of important state interest necessary to override a defendant's right to physical confrontation.<sup>146</sup> The *Coy* decision, therefore, does not implicate the constitutionality of a statute that provides for the state's use of one-way closed-circuit television if the statute requires that the state demonstrate that the state's presentation of televised testimony is necessary to protect a particular child witness from the emotional or psychological trauma accompanying a physical encounter with the defendant.<sup>147</sup>

In accordance with the Supreme Court's subsequent decision in *Coy*, the Massachusetts statute at issue in *Bergstrom* provided for the Commonwealth's use of closed-circuit television only upon a trial court's case-specific finding of necessity.<sup>148</sup> The Massachusetts statute authorized the state to record a child witness' testimony outside the presence of the defendant only if a face-to-face encounter with the defendant would cause the child to suffer emotional trauma.<sup>149</sup> Moreover, the Massachusetts statute expressly prohibited the Commonwealth from recording a child witness' testimony

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violated defendant's confrontation rights); *supra* notes 35-36 and accompanying text (discussing that Supreme Court in *Coy* suggests that state constitutionally may use protective trial procedures in appropriate cases).

144. *See Coy*, 108 S. Ct. at 2805 (observing that majority decision in *Coy* did not determine that state's interest in protecting child abuse victims never could outweigh defendant's right physically to confront adverse witnesses); *id.* at 2803-05 (same).

145. *See id.* (indicating that statute which authorizes state's use of protective trial procedures upon trial court's individualized determination of necessity would be constitutional); *supra* notes 35-36 and accompanying text (discussing *Coy* decision, which suggests that state's use of protective trial procedures may in appropriate cases survive constitutional scrutiny).

146. *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring); *see supra* notes 27-33 and accompanying text (discussing Justice O'Connor's concurring opinion in *Coy*).

147. *See Coy*, 108 S. Ct. at 2803 (indicating that state constitutionally may use protective trial procedures that abrogate accused's confrontation rights if state demonstrates that protective trial procedures are necessary to protect witness from emotional harm); *supra* notes 35-36 and accompanying text (discussing that state constitutionally may use protective trial procedures upon case-specific finding that protective trial procedures are necessary to protect child witness).

148. *See MASS. GEN. LAWS ANN.* ch. 278, § 16D(1)(b)(1) (West Supp. 1987) (requiring that trial court make case-specific finding that commonwealth's use of closed-circuit television is necessary to protect child witness from emotional harm); *Coy*, 108 S. Ct. at 2801-03 (indicating that state constitutionally may abrogate defendant's confrontation rights upon case-specific finding of necessity); *id.* at 2803-05 (O'Connor, J., concurring) (same).

149. *See MASS. GEN. LAWS ANN.* ch. 278, § 16D(1)(b)(1) (authorizing Commonwealth's use of one-way closed-circuit television if defendant's presence will traumatize child witness).

outside the presence of the defendant unless the defendant's presence would be the operative condition causing the child to suffer emotional trauma.<sup>150</sup> Accordingly, the Supreme Court's decision in *Coy* does not compel the *Bergstrom* court's conclusion that the Massachusetts statute was unconstitutional.<sup>151</sup> Furthermore, the Commonwealth's use of closed-circuit television in *Bergstrom* did not unconstitutionally impinge upon the defendant's confrontation rights.<sup>152</sup> Pursuant to the Massachusetts statute and in accordance with *Coy*, the trial court in *Bergstrom* determined that a face-to-face encounter with the defendant would cause the child witnesses to suffer emotional harm.<sup>153</sup> Accordingly, in *Bergstrom* the trial court made a case-specific finding that the Commonwealth's use of closed-circuit television to record the child witnesses' testimony outside the presence of the defendant was necessary, and, therefore, constitutionally permissible.<sup>154</sup>

In *Coy v. Iowa* the Supreme Court of the United States held that the State's placement of a screen between the defendant and the child witnesses to block the defendant from the witnesses' view violated the confrontation clause of the sixth amendment.<sup>155</sup> Although holding that the Iowa statute that authorized the State's use of the screen was an obvious violation of the defendant's sixth amendment right to a face-to-face confrontation with adverse witnesses, the Supreme Court in *Coy* did not foreclose the possibility that a statute which provides for a state's use of certain procedural devices to shield a child witness from emotional trauma or to present an otherwise unavailable witness' testimony may pass constitutional muster.<sup>156</sup> Instead,

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150. *Id.* at § 16D(1)(b)(3).

151. *See Coy*, 108 S. Ct. 2798, 2803 (1988) (indicating that state's use of protective trial procedures upon case-specific finding of necessity would be constitutional); *id.* at 2803-05 (O'Connor, J., concurring) (same); *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 373-74 (holding that Commonwealth's use of closed-circuit television, pursuant to Massachusetts statute, violated the defendant's confrontation rights); *supra* notes 35-36, 119-122 and accompanying text (discussing that states constitutionally may use one-way closed-circuit television in appropriate cases).

152. *See Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 373-74 (holding that state's use of one-way closed-circuit television violated defendant's confrontation rights); *supra* notes 98-104, 148-151 and accompanying text (discussing *Bergstrom* court's conclusion that Commonwealth's use of closed-circuit television was unconstitutional).

153. *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 369; *see MASS. GEN. LAWS ANN.* ch. 278, § 16D(1)(b)(1)-(3) (West Supp. 1987) (authorizing Commonwealth to record child witness' testimony outside defendant's presence if defendant's presence will traumatize child).

154. *Bergstrom*, 402 Mass. at \_\_\_\_, 524 N.E.2d at 369; *see Coy*, 108 S. Ct. 2798, 2803 (indicating that state may abrogate defendant's right to physical confrontation upon case-specific finding of necessity); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 35-36, 119-122 and accompanying text (discussing that state may abridge confrontation rights upon case-specific finding of necessity).

155. *Coy*, 108 S. Ct. 2798, 2802-03 (1988); *see supra* notes 17-26 and accompanying text (discussing Supreme Court's decision in *Coy*).

156. *Coy*, 108 S. Ct. at 2802-03; *see id.* at 2803-05 (O'Connor, J., concurring) (noting that *Coy* majority did not foreclose state's use of protective trial procedures in appropriate cases); *supra* notes 35-36, 119-122 and accompanying text (discussing that *Coy* decision did not foreclose state's use of protective trial procedures in appropriate cases).

the *Coy* decision suggests that, if a statute that allows the state to present a witness' testimony via closed-circuit television requires that a trial court make an individualized determination that a particular witness requires protective trial procedures, a state constitutionally may abrogate a defendant's right to a physical confrontation with adverse witnesses.<sup>157</sup> Accordingly, the Maryland Court of Appeals in *Craig v. State* correctly held that the Maryland statute that authorized the State's use of closed-circuit television to present the child witness' testimony was constitutional.<sup>158</sup> In *Craig*, however, the Maryland Court of Appeals correctly concluded that the State failed to demonstrate that a face-to-face encounter with the defendant would have caused the child witnesses such severe emotional distress that the children would have been unavailable to testify at trial.<sup>159</sup> Accordingly, because in *Craig* the State failed to demonstrate that it was necessary to record the child witnesses' testimony outside the presence of the defendant via closed-circuit television, the court of appeals properly held that the trial court erroneously allowed the State to invoke the Maryland statute and abrogate the defendant's right to physical confrontation.<sup>160</sup> In *Commonwealth v. Bergstrom* the Supreme Judicial Court of Massachusetts held that because the Commonwealth's interest in protecting alleged child abuse victims from emotional harm did not outweigh a defendant's right physically to confront adverse witnesses, the Massachusetts statute that authorized the Commonwealth to record the child witnesses' testimony outside the presence of the accused was unconstitutional.<sup>161</sup> The Supreme Court's decision in *Coy* does not compel the *Bergstrom* Court's conclusion.<sup>162</sup> Instead, the *Coy* holding suggests that, should a statute require that a trial court make an

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157. See *Coy*, 108 S. Ct. at 2803 (indicating that Court would uphold constitutionality of statute that provides for state's use of protective trial procedures if statute requires case-specific finding of necessity); *supra* notes 35-36, 119-122 and accompanying text (discussing *Coy* decision, which suggests that statute requiring case-specific finding of necessity would be constitutional).

158. See *Craig*, 316 Md. 551, —, 560 A.2d 1120, 1121 (1988) (holding that Maryland statute authorizing state's use of closed-circuit television in certain child sexual abuse cases is constitutional); *supra* notes 123-129 and accompanying text (discussing propriety of *Craig* court of appeals' conclusion that Maryland statute was constitutional).

159. *Craig*, 316 Md. at —, 560 A.2d at 1127-29 (holding that state's use of closed-circuit television violated defendant's confrontation rights); *supra* notes 74-80, 130-33 and accompanying text (discussing court of appeals' decision in *Craig* that state's use of closed-circuit television was unconstitutional).

160. *Craig*, 316 Md. at —, 560 A.2d at 1127-29 (holding that trial court improperly allowed state to invoke Maryland statute and present witnesses' testimony via closed-circuit television); see *supra* notes 74-80, 130-133 and accompanying text (discussing *Craig* court of appeals' decision that trial court erroneously allowed state to present witnesses' testimony through one-way closed-circuit television).

161. *Bergstrom*, 402 Mass. 534, —, 524 N.E.2d 366, 373-74 (Mass. 1988).

162. See *Coy*, 108 S. Ct. 2798, 2801-03 (1988) (indicating that state's interest in protecting child abuse victims from emotional harm may override defendant's confrontation rights); *id.* at 3803-05 (O'Connor, J., concurring) (same); *supra* notes 35-36, 119-122, 143-147 and accompanying text (discussing that state's interest in protecting child abuse victims' emotional well-being may outweigh defendant's confrontation rights).

individualized determination that a child witness' emotional well-being or availability to testify necessitates the state's use of one-way closed-circuit television, the statute will be constitutional.<sup>163</sup> Accordingly, state statutes that authorize a state to record an alleged child abuse victim's testimony outside the presence of the defendant upon a case-specific finding of necessity should survive scrutiny under the confrontation clause of the sixth amendment.<sup>164</sup>

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163. See *Coy*, 108 S. Ct. at 2803 (suggesting that statute which provides for case-specific finding that state's use of protective trial procedures is necessary would be constitutional); *id.* at 2803-05 (O'Connor, J., concurring) (same); *supra* notes 35-36, 119-122 and accompanying text (discussing that state statutes which provide for individualized determination that protective trial procedures are necessary are constitutional).

164. See *supra* notes 35-36, 119-22 and accompanying text (discussing that statutes which provide for state's use of closed-circuit television upon case-specific finding that child victim, by testifying in open court, will suffer emotional or psychological harm would pass constitutional muster).