

**THE ELDER WITNESS—THE
ADMISSIBILITY OF CLOSED CIRCUIT
TELEVISION TESTIMONY AFTER
MARYLAND V. CRAIG**

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The growth of the U.S. elderly population has led to increased debate over many policies and programs affecting older Americans. Mr. Beckett and Mr. Stennett extend this debate into the area of criminal procedure, where the Confrontation Clause and current rules of evidence may require elderly or disabled witnesses to risk their personal health in order to testify in criminal proceedings. The authors suggest that to secure the testimony of the elderly witness, under circumstances designed to protect the constitutional rights of the criminal defendant, the elderly or disabled witness should be able to testify via closed-circuit television from a remote location.

The authors review the constitutional considerations and criminal and civil rules of procedure that shape the American trial testimony process. The authors evaluate whether, under the current set of laws and rules, an elderly witness would be

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permitted to testify other than in-person, or if the Supreme Court decision in Maryland v. Craig opens the door for the elderly witness to testify via closed-circuit television. Finally, the authors propose that a rule of criminal procedure should be adopted expressly authorizing the use of closed-circuit televised testimony by the elderly or disabled where the procedure does not otherwise undermine the confrontation rights of a criminal defendant. This proposed rule affords and anticipates equal access by criminal defendants to such elder witnesses.

I. Introduction

What is happening to the world of criminal procedure? Americans are subjected to the spectacle of the public sale of videotapes of their President, William Jefferson Clinton, testifying before a grand jury—testimony given to a grand jury via closed-circuit television. What will the tradition-laden trial purists think? Was the President disabled? Did a matter of national security keep him away from the federal courthouse in Washington, D. C., where the grand jury was sitting? If this process is good enough for the President, can it be good enough for an elderly crime victim or an elderly eyewitness, disabled, fearful, and in poor health?

Imagine the following scenario. A person has committed a heinous crime, for example, murder or sexual assault. The police have apprehended a suspect and the state's attorney is prepared to prosecute. The State is confident in the chances for a conviction because it has an eyewitness who saw the crime occur and can positively identify the defendant as the perpetrator. The witness is willing to testify; however, the trip to the courthouse would be an onerous experience due to the witness's age and/or disability. The witness could be declared unavailable¹ and deposed, but depositions are used rarely in criminal cases and live testimony is considered much more effective in convincing a jury. Moreover, the situation is complicated by the defendant's confrontation rights.² Without the key

1. See FED. R. EVID. 804(a)(4). "Unavailable" for purposes of this article means that a witness is "unable to be present or to testify at [a] hearing because of . . . then existing physical or mental illness or infirmity."

2. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

witness's live testimony, the State feels it has no case and refuses to prosecute.

An equally compelling scenario can be presented also. A fatal shooting occurs at a park in a high crime area. An elderly gentleman who lives adjacent to the park observes two individuals rapidly departing the area. He is in poor health with high blood pressure, diabetes, and cannot walk unaided. His pretrial statements disclose that the defendant is not one of the two arguable shooting suspects. Defense counsel desperately needs this witness's testimony to effectively represent his client, but the old gentleman's family, backed by his doctor, refuses to allow the man to travel. The appearance in court will harm the man, who cannot withstand the pressure of the courtroom scene.

Although these situations are certainly not the norm, they may be more common than what one would first guess. Crimes against the elderly have been increasing in the past few years, thus the hypothetical key witness above could also be a victim.³ There is certainly nothing unusual in having the elder neighbor watching the youngsters at the park from his front porch. The steadily increasing percentage of the U.S. population considered elderly,⁴ commonly known as the "greying" of America, also contributes to the chances that the above hypothetical situations become a reality. Although it is true that some elderly persons are able to travel to the courthouse to testify, a reality of aging includes the decline in physical capabilities. As America greys, a greater number of suspects may not be tried or they may be acquitted due to the inability or unwillingness of elderly persons to testify. Unfortunately, the possibility exists that an

3. Many recent criminal statutes make it an aggravating circumstance to commit a crime against an elder or physically handicapped victim. For example, 720 ILL. COMP. STAT. 5/12-4(b)(10) and (14) (1993 & Supp. 1999), an Illinois criminal statute, defines the crime of aggravated battery to include conduct where the defendant commits a battery upon a victim over 60 years of age or upon a victim who is physically handicapped.

4. See Statistical Abstract of the United States, 1996, Chart No. 17, Resident Population Projections by Age and Sex: 1996 to 2050.

YEAR	55-64	65-74	75-84	85+
2000	8.7	6.6	4.5	1.6
2005	10.4	6.4	4.5	1.7
2010	11.9	7.1	4.3	1.9
2020	12.9	9.7	4.8	2.0
2050	10.8	8.8	6.6	4.6

innocent defendant will be convicted because the elder witness cannot travel to the courthouse.

A solution to this problem emerged with the principles recognized by the Supreme Court decision in *Maryland v. Craig*.⁵ This decision allowed child sexual abuse victims to testify by closed-circuit television in certain circumstances without violating the defendant's confrontation rights.⁶ Allowing the elderly or disabled person to testify by closed-circuit television in a convenient location would allow real-time testimony, as opposed to a cold deposition, and would allow the witness to avoid the rigors of travel.

This article will first trace the purpose and evolution of the Confrontation Clause. It will then discuss the effects of the Supreme Court's decisions in *Coy v. Iowa*⁷ and *Maryland v. Craig*.⁸ It will discuss how these cases opened the door to allowing the elderly and/or disabled to testify by remote closed-circuit television. Finally, this article will propose a rule regarding televised testimony of elder and disabled witnesses. This rule, constitutionally "good" for the government "goose" is equally constitutionally "good" for the defendant "gander."

II. Background

The Confrontation Clause is found in Amendment VI of the U.S. Constitution. The amendment reads in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."⁹ This amendment applies equally to both state and federal courts because the Confrontation Clause has been held applicable to the states via the Fourteenth Amendment of the U.S. Constitution.¹⁰ The right of the accused to confront the witnesses against him or her extends back farther than the U.S. Constitution. As

5. 497 U.S. 836 (1990).

6. *See id.* at 855 (holding that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.").

7. 487 U.S. 1012 (1988).

8. 497 U.S. 836.

9. U.S. CONST. amend. VI.

10. *See Roberts v. Russell*, 392 U.S. 293, 294 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

Justice Scalia noted in *Coy v. Iowa*,¹¹ the right of the criminal defendant to confront the witnesses against him has roots which may be traced back to the origins of Western legal culture.¹² Justice Scalia observed that this right arguably existed in England even before the right to a trial by jury.¹³ He even traced the right to confrontation as existing under Roman law.¹⁴ Justice Harlan perhaps best expressed the long history of the right to confrontation when he commented that the Confrontation Clause of the Sixth Amendment “comes to us on faded parchment.”¹⁵

A. Protections Afforded by the Confrontation Clause

In light of this long history of a right to confront witnesses, what exactly does this right secure for the criminal defendant? An early Supreme Court case described the purpose of the Confrontation Clause:

The primary object of the [Confrontation Clause] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.¹⁶

Although none of the rights described above have been interpreted to be absolute, the Confrontation Clause does secure significant rights for the criminal defendant.¹⁷ These rights include,

11. 487 U.S. 1012.

12. *See id.* at 1015.

13. *See id.* at 1016 (citing Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-87 (1959)).

14. *See id.* Justice Scalia observes that “[t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: ‘It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.’” *Id.* at 1015-16 (citing *Acts* 25:16).

15. *California v. Green*, 399 U.S. 149 (1970) (Harlan, J., concurring).

16. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

17. A criminal defendant has the right under the Confrontation Clause to be present during every aspect of his or her trial; however, the defendant may waive or forfeit that right by absenting himself or herself after the trial has begun. *See Diaz v. United States*, 223 U.S. 442 (1912). The defendant may also act in a manner so disruptive that the trial cannot be conducted in the defendant’s presence. *See Illinois v. Allen*, 397 U.S. 337 (1970). The Confrontation Clause also secures the right to cross-examine the witnesses brought against him or her, the

but are not limited to, preventing a codefendant's confession from being admitted during a joint trial¹⁸ and barring the introduction of a transcript of prior proceedings in certain instances.¹⁹ In a long series of opinions, the Supreme Court's ultimate interpretation of the protection afforded by the Confrontation Clause is that it guarantees that only reliable evidence is admissible against the criminal defendant.²⁰

The Confrontation Clause, at the very least, secures for the criminal defendant the right to cross-examine the witnesses brought against him.²¹ The right to cross-examination has been interpreted to prevent the admission of a codefendant's confession at a joint trial in which the codefendant did not take the stand.²² In *Bruton v. United States*,²³ a joint trial, the court convicted both Evans and the petitioner, Bruton, of armed postal robbery.²⁴ At their trial, a postal inspector testified that Evans had orally confessed to him, however, the confession also inculpated Bruton.²⁵ The Supreme Court reversed the petitioner's conviction and held that because there was a substantial risk that the jury looked to the incriminating confession to determine the petitioner's guilt, in spite of the trial court's limiting instructions, the admission of the codefendant's confession violated Bruton's right of cross-examination as secured by the Sixth Amendment's Confrontation Clause.²⁶

The Confrontation Clause's protection also has prevented the introduction of the transcript of prior testimony when the State failed

inadmissibility of a codefendant's confession at a joint trial where the codefendant did not take the witness stand, and the inadmissibility of prior testimony when the State failed to make a good faith effort to produce the declarant at trial. See *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

18. See *Bruton*, 391 U.S. 123.

19. See *Barber*, 390 U.S. 719.

20. See *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (stressing the indicia of reliability that hearsay must possess in order to be admissible and comport with the Confrontation Clause and examples of hearsay exceptions which have been held to possess this measure of reliability). See, e.g., *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972) (cross-examined prior testimony); *Pointer*, 380 U.S. at 407 (dying declarations); *Mattox v. United States*, 156 U.S. 237, 243-44 (same); Comment, 30 LA. L. REV. 651, 668 (1970) ("Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions.").

21. See *Pointer*, 380 U.S. 400.

22. See *Bruton*, 391 U.S. 123.

23. *Id.*

24. See *id.* at 124.

25. See *id.*

26. See *id.* at 126.

to make a good faith effort to produce the declarant at trial.²⁷ In *Barber v. Page*,²⁸ the State introduced a transcript of a preliminary hearing in which the defendant's alleged partner-in-crime had given testimony which incriminated the defendant.²⁹ The State asserted at trial that the witness was unavailable because he was outside the jurisdiction of the court.³⁰ The Supreme Court acknowledged that there was generally an exception to the Confrontation Clause where the unavailable witness had given prior testimony and the defendant had an opportunity to cross-examine him.³¹ The Court, however, refused to declare the witness unavailable where the State had not made good faith efforts to retain his presence for trial.³² In *Barber*, the State made no effort to secure the witness's presence.³³ The Court stated that "[t]he right of confrontation may not be dispensed with so lightly."³⁴

In a similar case, the Court further described the meaning and purpose of the Confrontation Clause. In *Ohio v. Roberts*,³⁵ the State also introduced the transcript of testimony from the preliminary hearing.³⁶ Contrary to *Barber v. Page*, the State attempted to secure the presence of the witness by sending five subpoenas for four different trial dates to the witness's mother's house over a period of four months.³⁷ In analyzing the propriety of this conduct in regard to the defendant's confrontation rights, the Court stated that, in this situation, the Confrontation Clause operated in two separate ways.³⁸ First, the Sixth Amendment establishes a rule of necessity stemming from the Framers' preference for face-to-face confrontation.³⁹ The rule of necessity forces the prosecution to demonstrate the unavailability of the declarant whose statement it wishes to use.⁴⁰ If the prosecution meets this hurdle, the trial court may still disallow the hearsay statements if they do not have any "indicia of reliability."⁴¹ This

27. See *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

28. 390 U.S. 719.

29. See *id.* at 720.

30. See *id.*

31. See *id.* at 722.

32. See *id.* at 724-25.

33. See *id.* at 725.

34. *Id.*

35. 448 U.S. 56 (1980).

36. See *id.* at 56.

37. See *id.* at 59.

38. See *id.*

39. See *id.*

40. See *id.*

41. *Id.* at 66.

requirement reflects the Confrontation Clause's purpose of ensuring that only trustworthy evidence is admitted against the defendant. Trustworthiness is usually tested by cross-examination, therefore evidence which is not subject to this litmus test will only be considered admissible if it may be characterized as "reliable" standing alone.⁴²

The Court in *Ohio v. Roberts* found that the witness was unavailable and that the State had made a good faith effort to secure the witness's presence by attempting to serve her multiple times.⁴³ The Court also found that the preliminary testimony had an indicia of reliability because the defendant's counsel had thoroughly questioned the witness using leading questions during the hearing.⁴⁴

As the above discussion demonstrates, the Confrontation Clause secures the right, albeit not an absolute right, to cross-examination. It also manifests the Framers' preference for face-to-face confrontation over testimony by affidavit or deposition. Finally, it also ensures that only evidence which possesses an indicia of reliability will be admissible in court if it was not first tested by confrontation.

B. The Nonliteral Reading of the Confrontation Clause

Even though the protections of the Confrontation Clause secure important rights for the criminal defendant, these rights are not absolute. If the clause were read literally, every statement made by a declarant not present at the trial, would be excluded.⁴⁵ This reading of the clause would eliminate nearly every hearsay exception.⁴⁶ This result has been characterized by the Supreme Court as "long rejected as unintended and too extreme."⁴⁷

42. *See id.* at 57.

43. *See id.* at 75.

44. *See id.* at 70-73.

45. *See id.* at 63.

46. *See id.*

47. *Id.* Even one of the most basic rights of the criminal defendant protected by the Confrontation Clause, the right to be present in the courtroom during all stages of his trial, is not absolute. In *Illinois v. Allen*, the Supreme Court held that the criminal defendant essentially waived his confrontation rights by continually disrupting the trial proceedings. The Court observed that the defendant was repeatedly warned his conduct would result in his removal, that he was not dissuaded by the judge's criminal contempt power, and that he was informed that he could return to the courtroom as soon as he would agree to conduct himself in an appropriate manner. Under these circumstances, the Court held that the defendant lost his right to be present during the trial and that the trial judge

The traditional hearsay exceptions reflect an area where the practicalities of the courtroom take precedent over the Confrontation Clause.⁴⁸ The Supreme Court has held that prior testimony of a declarant may be admitted at trial upon an adequate showing that the declarant is unavailable and that the evidence has an indicia of reliability.⁴⁹ The Court has clarified that *Roberts* does not stand for the proposition that no out-of-court statement may be admitted unless the State demonstrates that the declarant is unavailable.⁵⁰ The requirement of demonstrating that the declarant is unavailable is limited to instances in which the out-of-court statements were made during a prior judicial proceeding.⁵¹ Accordingly, the Court has held that the prosecution does not have to additionally demonstrate the unavailability of a conspirator if the provisions of Federal Rule of Evidence 801(d)(2)(E)⁵² are otherwise met in order to comport with the Confrontation Clause.⁵³

Even if the State does not have to prove that the witness is unavailable, the out-of-court statement must still bear an “indicia of reliability” before it will be admitted in compliance with the Confrontation Clause.⁵⁴ A hearsay statement will meet this requirement if it “falls within a firmly rooted hearsay exception” or where it is supported by “a showing of particularized guarantees of trustworthiness.”⁵⁵

In *Idaho v. Wright*,⁵⁶ the Supreme Court held that the hearsay statements of a child abuse victim should not have been admitted under Idaho’s catchall exception because the exception was neither firmly rooted nor were the statements supported by particularized guarantees of trustworthiness.⁵⁷ Although the testimony in that

properly removed the defendant and continued with the trial. See *Illinois v. Allen*, 397 U.S. 337 (1970).

48. See *Roberts*, 448 U.S. at 66 (wherein the Court states, “It [the Confrontation Clause and the hearsay rules] responds to the need for certainty in the workaday world of conducting criminal trials.”).

49. See *supra* notes 36-45 and accompanying text.

50. See *United States v. Inadi*, 475 U.S. 387, 394 (1986).

51. See *White v. Illinois*, 502 U.S. 346, 354 (1992).

52. FED. R. EVID. 801(d)(2)(E).

53. See *Inadi*, 475 U.S. at 399-400. FED. R. EVID. 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is “a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.” *Id.*

54. See *Idaho v. Wright*, 497 U.S. 805 (1990).

55. *Id.* at 816 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

56. 497 U.S. 805 (1990).

57. See *id.* at 818 (stating that a two-and-a-half-year-old child’s testimony

particular instance was not supported by particularized guarantees of trustworthiness,⁵⁸ the Court did not foreclose the possibility that testimony under the catchall exception would in some circumstances have the requisite reliability.⁵⁹ Whether testimony has the necessary guarantees of trustworthiness should be considered under a totality of the circumstances test,⁶⁰ with the relevant circumstances being those facts which surround the making of the statement and those other facts which make the declarant worthy of belief.⁶¹ The statement will be allowed when the circumstances demonstrate that the reliability test of cross-examination would be of only marginal utility.⁶²

Similarly, in *White v. Illinois*,⁶³ the Supreme Court held that the State did not have to prove the unavailability of the declarant in order to constitutionally admit statements meeting the spontaneous declarations hearsay exception or the exception for statements made for medical treatment.⁶⁴ The Court reaffirmed its reasoning that a “firmly rooted” exception is so trustworthy that subjecting a statement fitting such exceptions to cross-examination would add little to its reliability.⁶⁵ Therefore, when a statement falls within a firmly rooted hearsay exception, the strictures of the Confrontation Clause have been met.⁶⁶

To summarize, the Confrontation Clause’s purpose has been interpreted to signify a preference for face-to-face confrontation and the right to cross-examine witnesses. However, the Confrontation Clause has never been read literally, and the rights the clause protects are not absolute. Evidence not subject to adversarial testing will be admissible only when it is deemed trustworthy enough that such further testing will not add to its reliability. In short, the Confrontation Clause’s core purpose is to ensure the reliability of evidence brought against the criminal defendant.

about lewd conduct violated the Confrontation Clause despite the fact that it was admissible under Idaho’s exception for hearsay having circumstantial guarantees).

58. *See id.* at 827.

59. *See id.* at 819.

60. *See id.*

61. *See id.*

62. *See id.*

63. 502 U.S. 346 (1992).

64. *See id.* at 357.

65. *See id.*

66. *See id.* at 356.

III. Analysis

Two U.S. Supreme Court cases have opened the door to allow the elderly and disabled to testify by closed-circuit television. *Coy v. Iowa*⁶⁷ took a literal approach to the Confrontation Clause; it interpreted the clause to ensure the criminal defendant the right to confront witnesses “face-to-face” at trial.⁶⁸ The Court, however, left open the question whether any exceptions existed to this rule.⁶⁹ Only two years later the Court answered this question in the affirmative with its decision in *Maryland v. Craig*.⁷⁰ This section will outline both the *Coy v. Iowa* and *Maryland v. Craig* decisions. A complete understanding of the underlying reasoning of each case is essential in order to fully realize the circumstances in which testimony by closed-circuit television will be constitutionally permissible.

A. *Coy v. Iowa*

In *Coy v. Iowa*, the criminal defendant was accused of sexually assaulting two thirteen-year-old girls.⁷¹ In accordance with Iowa law, the trial court allowed a screen to be placed between the alleged victims and the defendant as each testified.⁷² The screen allowed the defendant to dimly see each child as she testified, but the child was unable to see the defendant.⁷³ The defendant objected, arguing that the use of the screen violated his right to face-to-face confrontation as guaranteed by the Sixth Amendment.⁷⁴ The Iowa Supreme Court affirmed the defendant’s conviction, finding no Confrontation Clause violation because the defendant’s ability to cross-examine the witnesses had not been impaired.⁷⁵ The U.S. Supreme Court reversed, finding that the screen between the defendant and witnesses did violate the defendant’s right to confrontation as guaranteed by the Sixth Amendment.⁷⁶

67. 487 U.S. 1012 (1988).

68. *See id.* at 1017.

69. *See id.* at 1021.

70. 497 U.S. 836, 855 (1990).

71. *See Coy*, 487 U.S. at 1014.

72. *See id.*

73. *See id.* at 1015.

74. *See id.*

75. *See id.*

76. *See id.* at 1020-21.

Writing for the majority, Justice Scalia stated that “[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.”⁷⁷ He explained that “there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”⁷⁸ Justice Scalia explained that forcing the accuser to appear in the same room with the defendant and repeat the allegations was an important element in the truth-finding process.⁷⁹ Moreover, although the Confrontation Clause cannot force an accuser to look at the defendant, the jury will observe these actions and draw its own conclusions.⁸⁰ “It is always more difficult to tell a lie about a person to his face” than “behind his back.”⁸¹ While reversing the defendant’s conviction on the Confrontation Clause issue, the Court reserved the question of whether any public policy exceptions existed to the rule of face-to-face confrontation.⁸² The Court concluded that “[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.”⁸³

Justice O’Connor wrote a concurring opinion emphasizing the point made by Justice Scalia: exceptions could well exist which would shield child victims from the trauma of testifying in the courtroom.⁸⁴ Justice O’Connor observed, at that time, half of the states had authorized some type of closed-circuit television system to permit children to testify in a separate room.⁸⁵

The reasoning of both the majority and the concurrence in *Coy v. Iowa* are important as two years later the Court once again addressed the question of whether a criminal defendant’s confrontation rights were violated by procedural safeguards designed to protect a child witness from the trauma of testifying in the courtroom in the presence of the defendant.

77. *Id.* at 1017 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)).

78. *Id.* (quoting, in part, *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

79. *See id.* at 1020.

80. *See id.* at 1019.

81. *Id.*

82. *See id.* at 1021.

83. *Id.*

84. *See id.* at 1023-25 (O’Connor, J., and White, J., concurring).

85. *See id.* at 1023.

B. *Maryland v. Craig*

In *Maryland v. Craig*,⁸⁶ the defendant was accused of sexually abusing a six-year-old girl while she attended a kindergarten and prekindergarten center owned by the defendant.⁸⁷ During the trial, the State moved to allow the alleged victim and other children allegedly abused by the defendant to testify via one-way closed-circuit television, as authorized by Maryland statute.⁸⁸ The statutory procedure allowed the child witness and both the prosecutor and defense counsel to withdraw to a separate room where the child would give her testimony.⁸⁹ While the jury, judge, and defendant would remain in the courtroom and could observe the proceedings on a television monitor, the child witness could not observe the courtroom.⁹⁰ The defendant would remain in electronic communication with her attorney, and the judge would hear and rule upon objections as they were made.⁹¹

86. 497 U.S. 836 (1990).

87. *See id.* at 840.

88. *See id.* The Maryland statute provided, in pertinent part, that:

(a)(1) In a case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if: (i) The testimony is taken during the proceeding; and (ii) the judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

The statute provided further that:

Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child. . . . Only the following persons may be in the room with the child when the child testifies by closed circuit television: (i) the prosecuting attorney; (ii) the attorney for the defendant; (iii) the operators of the closed circuit television equipment, and (iv) unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who had dealt with the child in a therapeutic setting concerning the abuse. During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom. The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method. . . . This section may not be interpreted to preclude, for purposes of identification of the defendant, the presence of both the victim and the defendant in the courtroom at the same time.

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

89. *See Craig*, 497 U.S. at 841.

90. *See id.*

91. *See id.* at 842.

Before this procedure could be invoked, the judge was required to make a finding that testifying in open court would be so traumatic to the child that it would “result in the child suffering serious emotional distress such that the child cannot reasonably communicate.”⁹² In support of its motion, the State produced an expert witness who testified to the emotional distress which the alleged child victim and other children alleged to have been abused by the defendant would suffer if they were required to testify.⁹³ The expert testified that, in varying degrees, each child would have difficulty testifying with the defendant present in the courtroom.⁹⁴ According to the expert, the children’s responses would range from high anxiety during testimony to curling up into a ball and becoming nonresponsive.⁹⁵

The defendant objected to the procedure on the basis that it violated her confrontation rights as guaranteed by the Sixth Amendment.⁹⁶ The trial court overruled the objection, finding that although the procedure did deny the defendant the right to face-to-face confrontation, the “essence of the right of confrontation” had been preserved.⁹⁷ The defendant retained “the right to observe, cross-examine, and have the jury view the demeanor of the witness.”⁹⁸ The trial court also made the determination that the Maryland statute was satisfied in that the children would suffer “serious emotional distress” such that they would not be able to reasonably communicate.⁹⁹

On appeal, the Supreme Court held that the Maryland statute, as applied by the trial court, did not violate the defendant’s confrontation rights.¹⁰⁰ Justice O’Connor first acknowledged that two years earlier, in *Coy v. Iowa*, the Court stated that the Confrontation Clause guaranteed the criminal defendant a face-to-face meeting with the witness appearing at trial.¹⁰¹ However, she immediately qualified this by stating that the Court never held this right to be absolute.¹⁰²

92. *Id.* at 843.

93. *See id.* at 842.

94. *See id.*

95. *See id.*

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.* at 842-43.

100. *See id.* at 857.

101. *See id.* at 844.

102. *See id.*

She referred to the question expressly left open in *Coy*: whether any exception existed to the defendant's right to face-to-face confrontation.¹⁰³ Justice O'Connor repeated the language in *Coy* that an exception "would surely be allowed only when necessary to further an important public policy"—i.e., only upon a showing of something more than the generalized, 'legislatively imposed presumption of trauma' underlying the statute at issue in that case."¹⁰⁴ She concluded that because the trial court made individualized findings that the children would be too traumatized to testify, the question reserved in *Coy* must be decided.¹⁰⁵

In resolving that question, Justice O'Connor stressed that the central purpose of the Confrontation Clause was to ensure that only reliable evidence would be admitted against the criminal defendant.¹⁰⁶ The reliability of evidence was ensured by subjecting it to the adversarial process.¹⁰⁷ Although face-to-face examination was an element of the adversarial process, it was not the end-all and be-all of the right to confrontation.¹⁰⁸ The Confrontation Clause also ensures that the witness be forced to give his statements under oath,¹⁰⁹ be subject to cross-examination,¹¹⁰ and have the jury observe his actions and demeanor while giving testimony.¹¹¹ These elements combined ensure the reliability of testimonial evidence admitted against the criminal defendant.¹¹²

Justice O'Connor recognized that face-to-face confrontation enhances the accuracy of the truth-finding process as discussed in *Coy*.¹¹³ Unlike *Coy*, she concluded that the Court now realized that face-to-face confrontation "is not the sine qua non of the confrontation right."¹¹⁴ In support of this proposition, she stated that the Court did not require face-to-face confrontation in every instance in which

103. *See id.*

104. *Id.* at 845 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

105. *See id.* at 845.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 846. Cross-examination as described by Justice White as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting WIGMORE ON EVIDENCE, 5 WIGMORE 1367) (internal quotation marks omitted).

110. *See id.* at 846.

111. *See id.*

112. *See id.*

113. *See id.*

114. *Id.* at 847.

testimony is admitted against the criminal defendant.¹¹⁵ She cited the numerous hearsay exceptions that allow admission of testimony when the declarant does not take the witness stand that do not violate the Confrontation Clause.¹¹⁶ Relying upon the Court's hearsay cases, Justice O'Connor concluded that:

the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who undoubtedly is as much a "witness against" a defendant as one who actually testifies at trial.¹¹⁷

Accordingly, she inferred that the Court's precedents only established a "preference" for face-to-face confrontation and not that it was an "indispensable element" of the right to confrontation.¹¹⁸ Yet Justice O'Connor reaffirmed *Coy* by stating that the element of face-to-face confrontation would only be dismissed when necessary to further an important public policy and the reliability of the testimony is otherwise assured.¹¹⁹

In applying the above test to the procedure used at the trial court,¹²⁰ Justice O'Connor found that the reliability of the child witness's testimony had been adequately ensured by the Maryland procedures.¹²¹ She found that all other elements of confrontation: oath, cross-examination, and the opportunity for the jury to examine the witness's demeanor, had been preserved by the use of closed-circuit television.¹²² Even though the physical, face-to-face element was missing, the remaining elements were adequate to ensure that the testimony was reliable and subject to adversarial testing equivalent to that of live, in-person testimony.¹²³

The only remaining question for the Court was whether the use of the procedure was necessary to further an important state interest.¹²⁴ Justice O'Connor stated that the Court had recognized in prior decisions that a State's interest in protecting minor abuse victims

115. *See id.* at 847-48.

116. *See id.* at 848.

117. *Id.* at 849.

118. *See id.*

119. *See id.* at 850.

120. *See id.* at 837.

121. *See id.* at 851.

122. *See id.* at 851-52.

123. *See id.* at 851.

124. *See id.* at 852.

from further trauma and embarrassment was a compelling interest.¹²⁵ Therefore, she concluded that a State's interest in "the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."¹²⁶ She stated that the fact that a majority of states had enacted a method to allow minor abuse victims to testify via closed-circuit television¹²⁷ attested to the widespread belief that the States' interest in protecting child victims was an important public policy.¹²⁸ Because the Court found that this procedure was in furtherance of an important public policy, the Court held:

if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.¹²⁹

The Court next addressed when an "adequate showing of necessity" can be made. Justice O'Connor stressed that the finding of necessity by the trial court must be made on a case-by-case basis.¹³⁰ "The trial court must hear evidence and determine whether the use of one-way, the closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."¹³¹ A finding that the child would be traumatized by testifying in court, however, is insufficient.¹³² The trial court must find that the child would be traumatized by being forced to testify *in the presence of the defendant*.¹³³ The finding must be that the trauma would be more than *de minimis*.¹³⁴ Mere nervousness or reluctance to testify will not suffice.¹³⁵ Justice O'Connor found that because the Maryland statute required a finding of "serious emotional distress such that the child cannot reasonably communicate," it was well within constitutional

125. *See id.*

126. *Id.* at 853.

127. *See id.*

128. *See id.*

129. *Id.* at 855.

130. *See id.*

131. *Id.*

132. *See id.* at 856.

133. *See id.*

134. *See id.*

135. *See id.*

strictures.¹³⁶ In sum, Justice O'Connor concluded that:

where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.¹³⁷

Because the witnesses at trial have been subject to oath and cross-examination, and the jury had the opportunity to observe their demeanor, the Supreme Court concluded that, to the extent a finding of necessity had been made, the admission of the children's testimony by closed-circuit television did not violate the Confrontation Clause.¹³⁸

Finally, Justice O'Connor turned to whether an adequate showing of necessity had been made by the State to justify the use of the closed-circuit television procedure. The Maryland Court of Appeals had found that a sufficient finding of necessity was not made because the trial judge had neither explored less restrictive alternatives nor had observed the child witnesses in the presence of the defendant.¹³⁹ Justice O'Connor firmly rejected "any such categorical evidentiary prerequisites for the use of the one-way television procedure."¹⁴⁰ Although she observed that such requirements could strengthen the grounds for finding the protective measures necessary,¹⁴¹ she stated that so long as the trial court makes a case-specific finding of necessity, the Confrontation Clause would not prohibit the use of closed-circuit television.¹⁴²

After *Maryland v. Craig*,¹⁴³ a two-pronged test must be met in order for a child victim to testify against a criminal defendant via closed-circuit television. First, the proposed procedure must ensure that the testimony to be received is otherwise reliable.¹⁴⁴ This prong may be met by providing that all the other core elements of the Confrontation Clause—oath, cross-examination, and the jury

136. *Id.* (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989)).

137. *Id.* at 857.

138. *See id.*

139. *See id.* at 859-60.

140. *Id.* at 860.

141. *See id.* at 1025.

142. *See id.*

143. 497 U.S. 836.

144. *See id.* at 851.

observing the witness's demeanor—will be met.¹⁴⁵ Second, the proposed procedure must be necessary to further an important public policy.¹⁴⁶ The importance of protecting child abuse victims has already been established as an important public policy by the Supreme Court in *Maryland v. Craig*.¹⁴⁷ This leaves only the finding of necessity. A finding that the presence of the defendant would cause the victim trauma must be made on a case-by-case basis.¹⁴⁸ The Supreme Court did not, however, identify either a lower limit of trauma which would satisfy a finding of necessity¹⁴⁹ or specify specific evidentiary inquiries which must be made.¹⁵⁰ These tasks have been left to the lower courts.

After *Maryland v. Craig*, Congress and the state legislatures enacted child witness protection legislation that incorporated the approved dimensions of constitutional protection under the Confrontation Clause.¹⁵¹ The principles underlying *Craig* have also

145. *See id.*

146. *See id.*

147. *See id.* at 853-60.

148. *See id.* at 855.

149. *See id.* at 860.

150. *See id.*

151. Congress responded to the Supreme Court's decision in *Maryland v. Craig* by adding a section describing the rights of child victims' and child witnesses' rights to the United States Code of Criminal Procedure. This section allows a child to testify by two-way closed-circuit television if the court finds that the child is unable to testify in open court, in the presence of the defendant because:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by the defendant or defense counsel causes the child to be unable to continue testifying.

18 U.S.C.A. § 3509(b) (West 1990).

The federal statute actually provides greater protection for a criminal defendant's confrontation rights in that it only allows testimony by two-way closed-circuit television, which provides a monitor for the child witness to view the court just as the court may view the child victim. On the other hand, *Maryland v. Craig* would allow child testimony to be taken by one-way closed-circuit television which would give even greater insulation to the child from the pressures of the courtroom because the child does not view the courtroom with one-way closed-circuit television.

States that have adopted legislation are: ALA. CODE § 15-25-3 (1995); ALASKA STAT. § 12.45.046 (1998); ARIZ. REV. STAT. ANN. § 13-4253 (1989); ARK. CODE ANN. § 16-43-1001 (Supp. 1997); CAL. PENAL CODE § 1347 (West Supp. 1999); COLO. REV. STAT. § 18-3-413.5 (1998); CONN. GEN. STAT. § 54-86g (1994); DEL. CODE ANN. tit. 11, § 3514 (1995); FLA. STAT. ANN. § 92.54 (1999); GA. CODE ANN. § 17-8-55 (Supp. 1996); HAW. REV. STAT. § 801 D-7 (Supp. 1997); IDAHO CODE § 19-3024A (1997); 725 ILL. COMP. STAT. 5/106B-5 (Supp. 1999); IND. CODE § 35-37-4-8 (1998); IOWA CODE ANN. § 915.38 (West Supp. 1999); KAN. STAT. ANN. § 22-3434 (1995); KY. REV.

been offered in support of similar doctrines to permit other child witnesses and adult rape victims to testify by closed-circuit television.¹⁵²

IV. The Elder or Disabled Witness

With the significant increase in the elder American population, the demand for testimony by closed-circuit television for elder witnesses will also significantly increase. For example, the elderly make up a disproportionately high percentage of criminal fraud victims, and it is natural to predict that there will be increasing numbers of fraud cases in which elder witness testimony will be more common.¹⁵³ With age, however, come the rigors of the elderly. A criminal trial could be delayed or even dismissed due to the difficulties an elderly witness may face in traveling to the courthouse.

STAT. ANN. § 421.350 (Michie 1992 & Supp. 1998); LA. REV. STAT. ANN. § 15:283 (1992); MD. ANN. CODE art. 27, § 774 (1996 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 278, § 16D (1998); MICH. COMP. LAWS ANN. § 660.2163a (Supp. 1999); MINN. STAT. ANN. § 595.02 subd. 4 (1988 & Supp. 1999); MISS. CODE ANN. § 13-1-405 (Supp. 1996); N.J. STAT. ANN. § 2A:84A-32.4 (1994); N.Y. CRIM. PRO. LAW § 65.10 (McKinney 1992); OHIO REV. CODE ANN. § 2937.11 (West 1997); OKLA. STAT. ANN. tit. 22, § 753 (West 1992); OR. REV. STAT. § 40.460(24) (1997); 42 PA. CONS. STAT. ANN. § 5985 (West 1984 & Supp. 1999); R.I. GEN. LAWS § 11-37-13.2 (1994); S.D. CODIFIED LAWS § 26-8A-30 (1999); TENN. CODE ANN. § 24-7-120 (Supp. 1998); TEX. CODE CRIM. P. ANN. art. 38.071 (Supp. 1999); UTAH R. CRIM. P. 15.5; VT. R. EVID. 807; VA. CODE ANN. § 18.2-67.9 (1996); WASH. REV. CODE ANN. § 9A.44.150 (1998); WIS. STAT. ANN. § 972.11 (1998).

152. This article is not the first to recognize the possible protections which could be afforded by expanding the reasoning of *Maryland v. Craig* beyond children. Writing for the *Indiana Law Journal*, Ms. Lisa Thielmeyer advocated that adult rape victims should be permitted to testify by closed-circuit television. Just as allowing children to testify via closed-circuit television is used to protect them from additional trauma, Ms. Thielmeyer argued that these same goals would be served by allowing adult rape victims to testify via closed-circuit television. She pointed out the highly traumatic nature of rape and the need to protect the adult rape victim from additional trauma. She stated that although most closed-circuit testimony by children is governed by statute, an adult rape victim could be allowed to testify via the unavailability exception to the hearsay rule. If the witness is shown to be so traumatized by testifying in court that his or her testimony will be useless, he or she should be effectively unavailable and testimony should be allowed under the former testimony exception. Because the former testimony exception is a "firmly rooted" hearsay exception, Ms. Thielmeyer concludes that the reliability of the testimony should be presumed under *Ohio v. Roberts*. See Lisa Hamilton Thielmeyer, Note, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?* 67 IND. L. J. 797 (1992).

153. See Richard A. Starnes, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 202 (1996).

This situation could be solved by allowing the elderly or disabled to testify using closed-circuit television from a convenient location.

Allowing the elderly witness to testify outside the courtroom raises concerns about whether the process violates the defendant's confrontation rights as guaranteed by the Sixth Amendment of the U.S. Constitution. Whether a violation has occurred and what steps or findings a court must make in order to protect the rights of the criminal defendant is dependant on the situation in which testimony via closed-circuit television is being used and for what purpose. There are actually two situations in which closed-circuit television would be necessary for an elderly witness: (1) where they are physically unable to travel to the courthouse and testify in person; or (2) where they are unable to testify in the presence of the defendant due to fear or intimidation.

A. Physical Inability

One instance in which an elderly individual will not be able to testify is due to a physical limitation. Traveling to the courthouse to testify can simply be too onerous a task. Allowing the elderly witness to testify via closed-circuit television from a more convenient location, whether from his or her home or even a hospital, would allow the case to proceed against the criminal defendant. This process, however, would *not* be permitted under the reasoning of *Maryland v. Craig* and would be a violation of the defendant's confrontation rights. In *Craig*, the Supreme Court made clear that in order to allow testimony by closed-circuit television, the trial court must make a case-specific finding that the procedure was necessary.¹⁵⁴ To satisfy this threshold, the court must conclude that the witness would be traumatized by testifying in the presence of the defendant.¹⁵⁵ The Supreme Court stated that the trauma must stem from the presence of the defendant and not merely the courtroom generally.¹⁵⁶ Therefore, an elderly witness that is not traumatized testifying in the presence of the defendant, but is physically unable to be present at trial, will not fall under the exception afforded by *Maryland v. Craig*.

154. See *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

155. See *id.* at 856.3

156. See *id.*

Even though an elderly person who is physically unable to travel to the courtroom will not be allowed to testify by closed-circuit television under *Maryland v. Craig*, he or she may be able to utilize exceptions to the hearsay rule to testify via closed-circuit television without violating the criminal defendant's confrontation rights. In *United States v. Gigante*,¹⁵⁷ a U.S. district court allowed a chief witness for a federal RICO case to testify by closed-circuit television because he was too ill to testify in court and the taking of his deposition would reveal his location and jeopardize his safety.¹⁵⁸ In allowing such testimony, the court noted the amendment to Rule 43 of the Federal Rules of Civil Procedure, which specifically allowed the use of televised testimony.¹⁵⁹ The court took guidance from Rule 43 because, in matters which the Rules of Criminal Procedure do not address, a criminal court may "draw from and mirror a practice that is sanctioned by the Federal Rules of Civil Procedure."¹⁶⁰ The court also relied upon Rule 2 of the Federal Rules of Criminal Procedure which requires the district court to construe the rules to provide "fairness in administration and the elimination of unjustifiable expense and delay."¹⁶¹ The court reasoned that allowing televised testimony in exceptional cases would be necessary to advance the rule's policy.¹⁶²

In holding that the criminal defendant's constitutional rights would not be violated by the procedure, the *Gigante* court required that the witness be able to see the defendant during testimony and that the jury, court, and counsel should simultaneously be able to see both the witness and defendant.¹⁶³ Moreover, the court stated that one of the defendant's attorneys could be present at the site from which the witness would be testifying.¹⁶⁴

Rule 804 of the Federal Rules of Evidence may provide courts with another option for permitting televised testimony by a physically infirm elderly witness. Rule 804 gives exceptions to the hearsay

157. 971 F. Supp. 755 (E.D.N.Y. 1997).

158. *See id.* at 756.

159. *See id.* at 757-58; FED. R. CIV. P. 43 (The rule now permits "for good cause shown in compelling circumstances and upon appropriate safe-guards, . . . presentation of testimony in open court by contemporaneous transmission from a different source.").

160. *Id.*

161. FED. R. CRIM. P. 2.

162. *See id.* at 758.

163. *See id.* at 759.

164. *See id.* at 759-60.

prohibition for a declarant who is unavailable.¹⁶⁵ One of the rule's definitions of unavailability labels a witness as unavailable if he or she is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."¹⁶⁶ Assuming that the court finds that the witness is unavailable, the court could allow the closed-circuit testimony under Rule 807, the catchall provision.¹⁶⁷ Rule 807 is not one of the traditional exceptions to hearsay as described in *Ohio v. Roberts*.¹⁶⁸ The court, therefore, must ensure that statements have sufficient indicia of reliability to protect the defendant's right to confrontation. Utilizing the oath, making certain that the witness can see the defendant and the courtroom, giving the defendant's attorney the opportunity to cross-examine the witness, and allowing the jury to view both the defendant and the witness simultaneously, should provide the required indicia of reliability.¹⁶⁹

B. Inability to Testify in the Presence of the Defendant

The second situation in which an elderly person would need to testify via closed-circuit television is when he or she will be traumatized by testifying in open court in the presence of the criminal defendant. This situation will most likely arise in instances of elder abuse, an increasing problem in this country.¹⁷⁰ Elder abuse is not limited to children who abuse their elderly parents but also extends to elderly nursing home residents.¹⁷¹ One major concern is that an increasing number of jobs as caregivers for the elderly are being filled by individuals with serious criminal histories.¹⁷² Moreover, if the

165. See FED. R. EVID. 804.

166. FED. R. EVID. 804(a)(4).

167. See FED. R. EVID. 807. Where a declarant is unavailable under Federal Rule of Evidence 804(a), but Rule 804(b) is not applicable, Rule 807 permits admissibility with pre-trial disclosure of the intent to offer the evidence, provided there are "equivalent circumstantial guarantees of trustworthiness." This rule was previously codified as Federal Rule 804(b)(5).

168. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

169. See *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).

170. See Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 *ELDER L.J.* 169-71 (1995) (discussing the growing problems of noninstitutional abuse).

171. See Michael Moss, *Nursing Homes Get Punished by Irate Jurors*, *WALL ST. J.*, Mar. 6, 1998, at B1.

172. See Michael Moss, *Many Elders Receive Care at Criminals' Hands*, *WALL ST. J.*, Mar. 18, 1998, at B1.

number of civil verdicts awarded against nursing homes is any indication of abuse, that number has more than doubled from eleven in 1996 to twenty-seven in 1998.¹⁷³ Although this raw number sounds small, the dollars attached to such verdicts are not. A record verdict for the industry of \$95.1 million was awarded against a nursing home chain stemming from the injuries to a California patient.¹⁷⁴ Moreover, the crimes against nursing home residents, especially rape, go severely underreported due to fear of retribution.¹⁷⁵

If an elderly person is being abused, especially with threats of retribution and intimidation, the requirements of *Maryland v. Craig* could well be satisfied, and allowing the elder's testimony by closed-circuit television will not violate the criminal defendant's confrontation rights. *Craig* first requires that closed-circuit testimony be "otherwise reliable."¹⁷⁶ This can be met by providing that the other core requirements of the Confrontation Clause—oath, cross-examination, and observation of the witness's demeanor—are satisfied.¹⁷⁷ *Craig* also requires that the procedure must be necessary to further an important public policy.¹⁷⁸ Few would dispute that protecting the elderly from abuse is an important public policy. In order for the procedure to be considered necessary, *Craig* requires a case-specific finding that the witness will be traumatized by the presence of the defendant.¹⁷⁹ An elderly person who has suffered abuse at the hands of the defendant would easily support such a finding. Such trauma is easy to imagine if the elderly person has been continually threatened or intimidated. This fear can be especially acute if the elderly individual would be forced to submit to the defendant's care or control if the case against the accused were to fail. *Craig*, however, only addresses the confrontation requirements.¹⁸⁰ To prevail over a hearsay objection, a court would most likely have to find that the declarant was mentally unavailable¹⁸¹ and that the proposed testimony would fall within Rule 807's catchall provision.¹⁸²

173. See Moss, *supra* note 171.

174. See *id.*

175. See *id.*

176. See *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).

177. See *id.*

178. See *id.* at 851.

179. See *id.* at 855-56.

180. See *id.* at 836.

181. See FED. R. EVID. 804.

182. See FED. R. EVID. 807.

C. Witnesses for Both the Government and the Criminal Defendant

The defendant's confrontation rights must also be balanced with society's interest in a fair trial.¹⁸³ This theme is often expressed by prosecutors in jury selection, and thus it may be assumed that when a criminal defense attorney wants to call an elderly or disabled witness to testify by some means other than live-in-court, there will be a prosecution objection. What support exists in case law for that proposition?

Federal Rule of Criminal Procedure 15(a) provides in pertinent part:

[W]henver due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . .¹⁸⁴

This statute is sometimes used by the government in criminal trials to obtain and admit the testimony of disabled or foreign witnesses.¹⁸⁵ Used in combination with Federal Rule of Evidence 804, this rule permits witnesses who are unavailable to testify at the time of trial to testify nevertheless. The use of the Federal Rule of Criminal Procedure 15(a) deposition technique is not for discovery and must be used with caution to protect from abuse.¹⁸⁶ However, it has been held erroneous to deny a defendant in a criminal case the opportunity to take depositions pursuant to the rule and to deny admission evidence obtained from the procedure.¹⁸⁷

183. See *Craig*, 497 U.S. at 849.

184. FED. R. CRIM. P. 15(a).

185. See *United States v. Donaldson*, 978 F.2d 381, 391-94 (7th Cir. 1992) (describing a situation where a material witness who had just given birth was permitted to give videotaped testimony); see also *United States v. Medjuck*, 916 F.3d 916 (9th Cir. 1998) (describing a case in which a material Canadian witness properly testified by videotape pursuant to Federal Rule of Criminal Procedure 15 where the witness was beyond the subpoena power of the court and thus was unavailable).

186. See *United States v. Kelley*, 36 F.3d 1118 (D.C. Cir. 1994) (stating that the district court did not abuse its discretion by denying a Rule 15 motion to take depositions as the purpose of the rule is preservation of testimony rather than pre-trial discovery).

187. See *United States v. Ramos*, 45 F.3d 1519, 1523-24 (11th Cir. 1995) (it is reversible error to deny defendant's Rule 15 motion to take deposition of material witness); see also *United States v. Sanchez-Lima*, 161 F.3d 545 (9th Cir. 1998) (concluding that sworn videotaped depositions of deported aliens met Rule 15 requirements and should have been admitted).

Linked as it is with Federal Rule of Evidence 804, the criminal evidence deposition procedure offers a realistic opportunity for the codification or development of a rule that would permit the testimony of elder or disabled witnesses via closed-circuit television. Such closed-circuit television testimony has occurred with some frequency when arranged by the prosecution, but the practice of deeming witnesses unavailable for purposes of Federal Rule of Criminal Procedure 15(a) suggests a modern rule of criminal procedure that would permit an “unavailable” elder or disabled witness to testify for either the prosecution or defense via closed-circuit television. Such a rule would require case-specific findings that due to age, illness, or infirmity, a witness is unavailable to testify live and in court for trial. Upon motion of either party, or even the witness himself, the court could, after making the necessary findings of unavailability and materiality, order live testimony by closed-circuit television with reciprocal broadcast so that the witness can see the court, jury, and parties, who in turn could likewise see the witness. This procedure is preferable to the videotaped testimony of the witness, and this latter procedure would be used only upon a good cause showing of the reasons for denying the closed-circuit request.¹⁸⁸

V. A Proposed Rule

And so a new rule is proposed—one that is intended to make participation by the elder or disabled witness meaningful, healthy, and convenient. Once adopted, trial technology and adverse argument may temper its application, but not its goals:

Elder or Disabled Witness. Upon application of any party, including a subpoenaed witness, in any pending criminal case, the court may grant permission to present the testimony by closed-circuit television, of any elder or disabled witness who, by reason of age, illness, infirmity, physical handicap, or other medical condition, is unable to appear in the courtroom during a scheduled trial. The court shall conduct a hearing on such an application and determine its merits on the basis of any relevant evidence, including the sworn averments of the witness and professional reports of experts regarding the condition of the witness. In any motion under this rule, the court shall be advised

188. See *People v. Burton*, 556 N.W.2d 201 (Mich. Ct. App. 1996) (adult sexual assault victim who suffered from learning disabilities and would be traumatized in presence of defendant was properly permitted to testify by closed-circuit television).

how the technical arrangements for said testimony shall be made, and if deemed satisfactory to the court, such additional procedures shall be adopted to assure the reliability of said testimony, including the full and fair opportunity for cross-examination of said witness. The court shall in its discretion, allocate the cost of said testimony.

VI. Conclusion

Testimony by closed-circuit television should be a viable alternative for courts when working with elderly witnesses. It should be available if the witness is physically unable to appear in court due to physical infirmity through exceptions to the hearsay rule, by reference to Rule 43 of the Federal Rules of Civil Procedure and pursuant to the policy underlying Rule 2 of the Federal Rules of Criminal Procedure. Testimony by closed-circuit television should also be available to elderly witnesses, who are psychologically unavailable due to the defendant's presence in the courtroom, pursuant to the Supreme Court's decision in *Maryland v. Craig*, or to testify for the defendant when the same compelling factors which permit a finding of "unavailability" exist. As America "greys," technological advances should be utilized to address the changing needs of the population. While these advances are tempered by the Confrontation Clause's requirement that all evidence entered against a criminal defendant be reliable, the application of this modern technology for the defendant's benefit as well, will assure that the fair trial will be a "real" trial and not a trial in "virtual reality."¹⁸⁹

189. See *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38, 41 (D. Mass. 1998). "Put in more modern parlance, I, though an avid supporter of the 'Courtroom of the Future' with a courtroom equipped with every manner and means of high tech accoutrements, believe that we should be cautious about the technology lest we begin to practice 'virtual justice.'" *Id.*