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Comment

MARYLAND'S CHILD ABUSE TESTIMONY STATUTE: IS PROTECTING THE CHILD WITNESS CONSTITUTIONAL?

INTRODUCTION

In recent years, awareness of and concern over child abuse, particularly child sexual abuse, has escalated greatly. Contemporary empirical estimates and well-publicized, sensational trials have shocked many citizens and lawmakers into a cry for reform to end what many see as a growing epidemic.1

In 1985, the Maryland legislature passed section 9-102 of the Maryland Courts & Judicial Proceedings Article, which permits an alleged child abuse victim in certain circumstances to testify via one-way closed-circuit television at the trial of an accused child abuser.2 The statute attempts to stop ongoing child abuse and to deter future abuse by facilitating the prosecution of child abusers. While pursuing this laudable goal, the statute raises the issue of the sixth amendment right of a criminal defendant "to be confronted with witnesses against him."3

On January 16, 1990, the United States Supreme Court agreed to hear *Maryland v. Craig,*4 a case likely to test the constitutionality of the Maryland child abuse testimony statute. This decision will have critical ramifications for many other states with similar statutes that allow child abuse victims to testify out of the presence of the alleged abuser.5 This Comment argues that section 9-102, as enacted by the Maryland legislature and interpreted by the Maryland courts, fully complies with the letter and spirit of recognized Supreme Court exceptions to the confrontation clause of the federal constitution; the statute, therefore, should withstand constitutional scrutiny when the Supreme Court examines it. To support this thesis, Part I

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1. See National Study of the Incidence and Severity of Child Abuse and Neglect, U.S. DEPT. OF HEALTH & HUMAN SERVICES, Pub. No. (GDHS) 81-30325 (1981). There are over one million reports of child abuse each year according to this study. Id. at 11.
3. U.S. Const. amend. VI. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him . . . ."
5. See infra note 83.
outlines the general background and historical development of the confrontation clause; Part II discusses the recognized exceptions to the confrontation clause; Part III analyzes the Supreme Court’s review of statutory protections afforded child abuse victims during testimony; Part IV examines the statutory child abuse testimony exceptions to the confrontation clause that have been enacted by several states and reviewed by their judiciaries; and Part V highlights section 9-102, Maryland’s statutory child abuse testimony exception, and its potential to pass muster under the federal constitution.

I. HISTORY AND DEVELOPMENT OF CONFRONTATION CLAUSE

As Justice Harlan frankly expressed in California v. Green,6 “the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.”7 Notwithstanding Justice Harlan’s cautionary view, commentators and scholars have attempted to trace the genesis and development of the confrontation clause.8

Sir Walter Raleigh’s trial in 1603 for political treason is an early example of criminal process without the right to confrontation that may have influenced the sixth amendment framers.9 An alleged co-conspirator implicated Raleigh in a confession elicited under torture, but later repudiated the confession in a letter to Raleigh.10 At trial, Raleigh demanded that the affiant be brought before him to be questioned, relying upon England’s early laws of confrontation and cross-examination.11 The court, however, denied the request because it would be “inconvenient” in a case of treason.12 Raleigh subsequently was convicted and fifteen years later executed.13

7. Id. at 173-74 (Harlan, J., concurring).
8. Justice Scalia recently found a progenitor of the confrontation clause in Roman law, as written in the New Testament of the Acts. Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988). “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 . . . .” Acts 25:16. Justice Scalia also cited a forerunner of the confrontation clause in William Shakespeare’s Richard II. Coy, 108 S. Ct. at 2800. “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .” Richard II, act 1, sc. 1; see also 5 WIGMORE ON EVIDENCE § 1395, at 150 (Chadbourn rev. 1974).
10. Pollitt, supra note 9, at 388.
11. Id.
12. Id. at 389.
13. Id.
The English common law did not accept the political prisoner's right to confrontation until the early 1600s. The legal difficulties of John Lilburne, a Quaker preacher, are illustrative of this development.\textsuperscript{14} Lilburne led a group of religious and political dissenters against Charles I and the Anglican Church.\textsuperscript{15} His accusers alleged that he violated the system which prevented heresy when he imported books that attacked the bishops.\textsuperscript{16} When questioned at trial, Lilburne refused to answer until he could confront his accusers.\textsuperscript{17} The court denied the request and jailed him.\textsuperscript{18} Three years later, however, Parliament freed Lilburne after it declared his sentence illegal.\textsuperscript{19} Indeed, when Lilburne was arrested again and charged with treason in 1649, the court granted his request to confront and cross-examine the adverse witnesses.\textsuperscript{20}

In America, several of the newly formed states recognized in their constitutions the common-law right to confront accusers.\textsuperscript{21} The United States Constitution, by contrast, did not mention explicitly a right to confrontation in criminal trials.\textsuperscript{22} The states increasingly protested the lack of this procedural safeguard in the federal constitution.\textsuperscript{23} In 1791, the First Congress adopted the Bill of Rights,\textsuperscript{24} which included in the sixth amendment the present-day confrontation clause.\textsuperscript{25} Nevertheless, as Justice Harlan commented,

\begin{quote}
[\textit{t}he\textit{ Congressmen who drafted the Bill of Rights amendments were primarily concerned with the political consequences of the new clauses and paid scant attention to the definition and meaning of particular guarantees. Thus, the Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights...} \textsuperscript{26}
\end{quote}

The vague history of the confrontation clause accentuates to-
day's controversy over the recognized exceptions and special situations that appear to conflict with the confrontation clause's clear language. Thus, Maryland's decision to permit a child abuse victim to testify via one-way closed-circuit television rather than in the presence of the accused brings section 9-102 to the forefront of constitutional debate.

II. EXCEPTIONS TO CONFRONTATION

"[G]eneral rules of law . . . must occasionally give way to considerations of public policy and the necessities of the case."27 Accordingly, "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."28 Armed with these principles, the Supreme Court has pronounced a number of exceptions to the confrontation clause that are concurrent exceptions to the hearsay rule.29

a. The Dying Declaration.—In Mattox v. United States,30 the Supreme Court stated that dying declarations traditionally have been admitted into evidence as an exception to the confrontation clause even though such statements often are made out of the presence of the accused and the jury, and without benefit of cross-examination.31 The Mattox Court held that the admission of dying declarations into evidence not only is a necessity because of the declarant's subsequent demise, but also is required "to prevent a manifest failure of justice."32 The rationale for the approval of this exception was: "[W]hy would the dead man have voluntarily chosen

29. The Supreme Court, however, has noted that the two are not one and the same: While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions . . . . Our decisions have never established such a congruence . . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.
Green, 399 U.S. at 155-56 (footnote omitted). Indeed, the Green Court upheld the prosecution's introduction of a witness's prior inconsistent statement that neither was made under oath nor subjected to cross-examination. Id. at 170. In contrast, the federal rules of evidence require that only prior inconsistent statements made under oath be admissible. Fed. R. Evid. 801(d)(1)(A); see, e.g., Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C.L. Rev. 1, 4-5 & nn.15-18 (1987).
30. 156 U.S. 237 (1895).
31. Id. at 243-44.
32. Id. at 244.
to go to his Maker with a lie on his lips?"\textsuperscript{33}

\textit{b. Preliminary Hearing Testimony.—}In \textit{California v. Green},\textsuperscript{34} the Supreme Court recognized two additional exceptions to the confrontation clause. In \textit{Green}, a witness made an out-of-court statement adverse to the defendant at a preliminary hearing.\textsuperscript{35} At trial, this witness claimed a lapse of memory when confronted with the preliminary hearing transcript.\textsuperscript{36} To refresh the witness’s recollection, the prosecution introduced the preliminary hearing testimony, which the trial judge admitted, and read it in part to the jury.\textsuperscript{37} On review, the Supreme Court determined that the admission was valid as an exception to the confrontation clause.\textsuperscript{38} In so doing, the Court established two new exceptions to a defendant’s right of confrontation.\textsuperscript{39}

First, the Court held that “the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.”\textsuperscript{40} Although out-of-court statements generally lack the protections provided by compliance with the confrontation clause, a declarant who subsequently testifies at trial permits his or her prior inconsistent out-of-court statements “for all practical purposes [to] regain[] most of the lost protections.”\textsuperscript{41}

\textsuperscript{33} Goldman, \textit{supra} note 29, at 1; \textit{see also} Mattox v. United States, 156 U.S. 237, 244 (1895).

\textsuperscript{34} 399 U.S. 149 (1970).

\textsuperscript{35} \textit{Id.} at 151.

\textsuperscript{36} \textit{Id.} at 151-52.

\textsuperscript{37} \textit{Id.} at 152.

\textsuperscript{38} \textit{Id.} at 154-55.

\textsuperscript{39} \textit{Id.} at 164-65.

\textsuperscript{40} \textit{Id.} at 158.

\textsuperscript{41} \textit{Id.} The “protections” of confrontation are: (1) the witness testifies under oath; (2) the witness is cross-examined; and (3) the jury observes the demeanor of the witness. \textit{Id.}

When a witness’s prior inconsistent out-of-court statement is admitted as evidence, the oath requirement is met because the witness must explain, under penalty of perjury, his or her controverted stories. \textit{Id.} at 158-59. A defendant’s inability to cross-examine a witness’s prior out-of-court statement also is cured if at trial the defendant “is assured of full and effective cross-examination . . . .” \textit{Id.} at 159. The primary danger of delayed cross-examination is that a witness will fortify a false story. The danger, however, is minimized when the witness changes the story so that the new testimony effectively repudiates the prior statement. \textit{Id.} Likewise, the jury generally does not observe a witness’s prior statement; because the witness is before the jury, however, he or she ultimately must explain the two conflicting statements. The result is that the jury is likely to “sharply focus[ ] on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story.” \textit{Id.} at 160.
The Green Court went even further by recognizing a second exception. Specifically, the Court held that a declarant's preliminary hearing statement is admissible at trial even if the declarant is unavailable to testify when the "statement at the preliminary hearing . . . [was] given under circumstances closely approximating those that surround the typical trial."\(^{42}\) Accordingly, a declarant's preliminary hearing statement is admissible at the later trial if the declarant is an unavailable witness and if at the preliminary hearing: (1) the declarant was under oath;\(^{43}\) (2) the defendant was represented by counsel;\(^{44}\) (3) the defendant had "every opportunity to cross-examine"\(^{45}\) the declarant; and (4) the hearing took place before a judge and was recorded.\(^{46}\)

c. "Necessity" and "Indicia of Reliability."—Drawing upon the above exceptions, the Supreme Court in Ohio v. Roberts\(^{47}\) laid down the two essential components of confrontation clause exceptions: "necessity"\(^{48}\) and "indicia of reliability."\(^{49}\) In Roberts, the issue was whether an unavailable witness's preliminary hearing statements were admissible as evidence at trial.\(^{50}\) The Court upheld the admission of the statements into evidence, finding that the prosecution had satisfied both the necessity and reliability requirements necessary for a confrontation clause exception.\(^{51}\) In so holding, the Court effectively extended Green and established a two-prong test to determine whether preliminary hearing statements are confronta-

\(^{42}\) Id. at 165.
\(^{43}\) Id.
\(^{44}\) Id.
\(^{45}\) Id. In his dissent, Justice Brennan noted that this language suggests that "the mere opportunity for face-to-face encounter" satisfies the confrontation clause. Id. at 200 n.8 (Brennan, J., dissenting). The Court in Ohio v. Roberts, 448 U.S. 56 (1980), addressed this point and questioned whether "the opportunity to cross-examine at the preliminary hearing—even absent actual cross-examination—satisfies the Confrontation Clause." Id. at 70 (emphasis in original). The Court, however, left the question unanswered. Id.
\(^{46}\) Green, 399 U.S. at 165. In Green, the declarant later testified at trial. Id. at 151. Therefore, the second exception was not applicable to the facts in Green. This suggests that the Court's language concerning the second exception merely was dicta. The Court in Ohio v. Roberts, 448 U.S. 56 (1980), however, established that its recognition of the second exception "was not an alternative holding, and certainly was not dictum." Id. at 69 n.10. The Court so held because the "asserted forgetfulness" of the declarant/witness in Green necessitated the use of both exceptions. Id.
\(^{47}\) 448 U.S. 56 (1980).
\(^{48}\) Id. at 65; see also Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972).
\(^{49}\) 448 U.S. at 65-66 (citing Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).
\(^{50}\) Id. at 58.
\(^{51}\) Id. at 74-75.
tion clause exceptions.\footnote{Id. at 67-77.}

As to the necessity requirement, the Roberts Court held that the prosecution may circumvent the confrontation clause’s “preference for face-to-face accusation”\footnote{Id. at 65.} if it demonstrates that the out-of-court statement is the sole source of the information because the declarant is unavailable for trial.\footnote{Id. at 74-75.} When the Court applied this principle to the facts in Roberts, it found that the prosecution had attempted to locate the preliminary hearing declarant for trial, but without success.\footnote{Id. at 75-77.} Therefore, the prosecution had met the necessity requirement.\footnote{Id. at 77.}

Once the prosecution successfully demonstrates that the declarant is unavailable, it then must show that the out-of-court statement has adequate indicia of reliability.\footnote{Id. at 65-66.} This may be inferred when “the evidence falls within a firmly rooted hearsay exception.”\footnote{Id. at 66.} Without an applicable hearsay exception, the evidence is not admissible unless it contains a “particularized guarantee of trustworthiness.”\footnote{Id. (footnote omitted).}

Because the preliminary hearing declarant was questioned extensively in Roberts, the Court held that her statements carried adequate indicia of reliability.\footnote{In Roberts, the defendant called the declarant to testify at a preliminary hearing. 448 U.S. at 58. There, defense counsel was unsuccessful in eliciting from the declarant information that exonerated the defendant of forgery. \textit{Id.} Defense counsel, however, did not request that the declarant be deemed a hostile witness nor did he request that the declarant be subject to cross-examination. \textit{Id.} The prosecution did not question the declarant. \textit{Id.} Thus, a literal cross-examination never occurred. Inasmuch as the declarant was unavailable to testify at trial, the Court held that the trial court properly admitted the declarant’s preliminary hearing statements because the statements were “‘given under circumstances closely approximating . . . the typical trial.’” \textit{Id.} at 69-70 (quoting California v. Green, 399 U.S. 149, 165 (1970)). As to the apparent absence of cross-examination, the Court found that defense counsel’s exhaustive questioning of the declarant “clearly partook of cross-examination as a matter of form.” \textit{Id.} at 70 (emphasis added). Defense counsel’s numerous leading questions and challenges to the declarant’s statements convinced the Court that de facto cross-examination indeed had occurred. In so holding, the Court side-stepped whether “the mere opportunity to cross-examine” rendered the prior testimony admissible. \textit{Id.; see supra notes 45-46.}}

The exceptions described above demonstrate the confrontation clause’s flexibility. Rather than interpreting the clause rigidly and literally, the Court in certain circumstances permits exceptions to
"further[] the 'Confrontation Clause's very mission' which is to 'adv-
ance the "accuracy of the truth determining process in criminal
trials."' "61

III. SUPREME COURT REVIEW OF PROTECTIONS FOR CHILD ABUSE VICTIMS DURING TESTIMONY

The Supreme Court in *Coy v. Iowa*62 addressed whether a state's attempt to shield a child sexual assault victim from visual contact with the accused during the victim's testimony conflicts with the confrontation clause.63 In *Coy*, the defendant was arrested and charged with the sexual assault of two thirteen-year-old girls.64 At trial, the State moved pursuant to Iowa Code section 910A.14 to allow one of the alleged victims to testify against the defendant either via closed-circuit television or behind a large screen in the courtroom.65 The trial court judge allowed a screen to be placed between the young witness and the defendant during the witness's testimony.66 The screen enabled the defendant to "dimly . . . perceive the witness[,]" but the witness could not see the defendant.67 The defendant vigorously argued that the use of the screen violated his confrontation rights; the trial court rejected the argument.68 The defendant appealed his conviction to the Iowa Supreme Court, which affirmed.69 On further appeal, the Supreme Court granted certiorari.70

The Court reversed the decision, finding that the use of the screen violated Coy's right to confrontation.71 Writing for the majority, Justice Scalia began his analysis by enunciating that confrontation clause rights are not absolute; they sometimes must give way to other important interests.72 He noted that the Court in the past had recognized exceptions to such rights primarily because they

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63. *Id.* at 2802.
64. *Id.* at 2799.
65. *Id.* For the text of the Iowa statute, see *infra* note 114.
67. *Id.*
68. *Id.* at 2799-2800. The defendant also argued that the use of the screen violated his due process rights because it would make him appear guilty, thus eroding a presumption of his innocence. The court rejected this argument as well. *Id.*
69. *Id.* at 2800.
70. *Id.*
71. *Id.* at 2803.
72. *Id.* at 2802.
were "reasonably implicit" rights rather than the right "narrowly and explicitly set forth in the Clause . . . ." To hold that the Court must account for other important interests when it determines what rights reasonably are implicit in the clause, Justice Scalia reasoned, is different than holding that the Court can identify exceptions, based on other important interests, to the narrow and explicit right defined by the clause: "a right to meet face to face all those who appear and give evidence at trial." Notwithstanding this harsh rebuke, Justice Scalia conceded that future exceptions may be recognized, but "would . . . be allowed only when necessary to further an important public policy." More importantly, the protective procedure utilized in Coy was not a firmly rooted exception to the confrontation clause, so "something more than the type of generalized finding underlying such a statute [was] needed . . . ." Because the trial judge in Coy did not make the "individualized finding[,] that the[ ] particular witnesses needed special protection," the Court rejected the screening procedure. In so holding, Justice Scalia hinted that a child abuse testimony exception to the confrontation clause might be possible if the exception were based on individualized findings.

Justice O'Connor's concurrence in Coy went even further by addressing directly the various state child abuse testimony exceptions, particularly the use of closed-circuit television: "[T]hose rights [of confrontation] are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." Justice O'Connor recognized that one-half of the states permit the use of one- or two-way closed-circuit television in child abuse cases. Furthermore, Justice O'Connor emphasized that Coy did not "necessarily doom[ ] . . . ef-

73. Id. The implicit rights of the confrontation clause are: (1) the right to cross-examine; (2) the right to exclude out-of-court statements; and (3) the right to face-to-face confrontation at some point during the judicial process other than at trial. Id. at 2802-03.
74. Id. at 2803 (quoting California v. Green, 399 U.S. 149, 175 (1944) (Harlan, J., concurring) (emphasis added)).
75. Id.
76. Id.
77. Id.
78. Id. at 2802-03.
79. Id. at 2803.
80. Id. (O'Connor, J., concurring).
81. Id. at 2804. For those states that have enacted various child abuse testimony exceptions, see infra note 83.
forts by state legislatures to protect child witnesses.”

IV. STATE CHILD ABUSE TESTIMONY EXCEPTIONS

The increased concern over widespread child abuse in combination with the Supreme Court’s determinations that the confrontation clause is not absolute has opened the door to child abuse testimony exceptions. Thus, many states have attempted to legislate a confrontation clause exception in child abuse cases.

The Maryland statute is a leading example of such legislation.

82. 108 S. Ct. at 2804 (O’Connor, J., concurring).

Additionally, six states have enacted statutes which permit child abuse testimony via two-way closed-circuit television: CAL. PENAL CODE § 1347 (West Supp. 1989); IDAHO CODE § 19-3024A (Supp. 1989); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1989); OHIO REV. CODE ANN. § 2907.41(c) (Anderson 1987); VA. CODE ANN. § 63.1-248.13:1 (Supp. 1989); and VT. R. EVID. § 807(c), (e).

In 1985, the Maryland legislature enacted section 9-102 of the Maryland Courts & Judicial Proceedings Article, which permits child abuse victims in certain circumstances to testify via one-way closed-circuit television at the trial court's discretion. Section 9-102 authorizes closed-circuit testimony only when the judge determines that a child witness would suffer "serious emotional distress such that the child cannot reasonably communicate." If a child testifies under section 9-102, he or she is physically attended only by the prosecutor, the defense counsel, a support person for the child, and any technicians needed for the closed-circuit equipment. The judge and the defendant remain in the courtroom with the jury and may communicate with persons in the room with the child "by any appropriate electronic method." Numerous other states have legislated similar measures to protect child abuse victims who testify at trial.

a. One-way closed-circuit television.—New Jersey also enacted a statute in 1985 that authorizes testimony via closed-circuit television by a child abuse victim sixteen years or younger. The defense at-
torney is present with the child during the child's testimony. If the defendant is not present in the room with the child witness, the defendant may confer with counsel "by a separate audio system."  

The New Jersey Superior Court reviewed this procedure in State v. Crandall. At trial, the child abuse victim testified via closed-circuit television pursuant to the statute. Crandall appealed his conviction, arguing that the statute violated his confrontation rights under the Supreme Court's decision in Coy. The Superior Court disagreed. The court held that, unlike the statute in Coy, New Jersey's statute permits testimony by closed-circuit television only when a trial judge makes the specific finding that a child witness will suffer severe emotional or mental distress if forced to testify before the accused. The Superior Court, however, found that the trial judge made no such finding in Crandall, and remanded the case for

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a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or child abuse, or in any action alleging an abused or neglected child . . . the court may . . . order the taking of the testimony of a witness on closed circuit television at the trial, out of the view of the jury, defendant, or spectators . . . .
b. An order under this section may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order shall be specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings . . . .
d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.


Notably, even before the legislature enacted this statute the New Jersey Superior Court held that testimony by a child abuse victim via video equipment is constitutional because such a procedure met all the requirements set out in Roberts. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984). In Sheppard, the New Jersey Superior Court found that cross-examination is more essential to meet confrontation clause requirements than simple eye-to-eye contact between defendant and witness. Id. at 432-35, 484 A.2d at 1343-44. The court held that a trial judge confronted with a real possibility of severe psychological harm to a child witness may find that a child's testimony via electronic means "enhances the quality of a child victim's testimony, [and] serves the essential demand for truth while satisfying the constitutional mandate," Id. at 435, 484 A.2d at 1344.

91. Id.
93. Id. at 128, 555 A.2d at 37.
94. Id. at 129, 555 A.2d at 38. For a discussion of Coy, see supra text accompanying notes 62-82.
95. Crandall, 231 N.J. Super. at 130-31, 555 A.2d at 38; see supra note 89.
further consideration of the issue.\footnote{96}

\textit{b. Two-way closed-circuit television.}—In 1985, the California legislature enacted Penal Code section 1347, which authorizes the courts to televise into the courtroom via two-way closed-circuit television the testimony of an alleged child abuse victim ten years old or younger.\footnote{97} The trial judge may invoke this procedure only when the judge finds a child to be unavailable as a witness.\footnote{98} A child witness is unavailable to testify only if: (1) the child or his or her family members were threatened with serious bodily harm if the child testified;\footnote{99} (2) a firearm or other deadly weapon was used during the commission of the crime;\footnote{100} (3) great bodily harm was inflicted on the child during the crime;\footnote{101} or (4) the defendant or defense counsel acted in such a way at the hearing or trial to cause the child to be unable to testify.\footnote{102} Only a nonuniformed bailiff and perhaps a representative appointed by the court are to be physically present with the child during testimony.\footnote{103} The judge, the jury, the defendant, and the attorneys all are out of the child’s presence.\footnote{104} Finally, the defense counsel cross-examines the child by electronic means.\footnote{105}

c. \textit{Videotaped deposition.}—A Wisconsin statute permits the videotaped deposition of an alleged child abuse victim under twelve years of age to be introduced at trial in lieu of the child’s in-court testimony.\footnote{106} The defendant’s role in the videotaping procedure, however, is unclear from the language of the statute.\footnote{107} The Supreme

\footnote{96. 231 N.J. Super. at 131-34, 555 A.2d at 39-40.}

\footnote{97. \textit{CAL. PENAL CODE} § 1347 (West Supp. 1989). The California statute is particularly noteworthy because it clearly interprets the \textit{Roberts} requirement of necessity or unreliability as the result of a witness’s physical or psychological condition. \textit{See infra} text accompanying notes 99-102.}

\footnote{98. \textit{CAL. PENAL CODE} § 1347(b)(2) (West Supp. 1989).}

\footnote{99. \textit{Id.} § 1347(b)(2)(A).}

\footnote{100. \textit{Id.} § 1347(b)(2)(B).}

\footnote{101. \textit{Id.} § 1347(b)(2)(C).}

\footnote{102. \textit{Id.} § 1347(b)(2)(D).}

\footnote{103. \textit{Id.} § 1347(e).}

\footnote{104. \textit{Id.} § 1347(b).}

\footnote{105. \textit{Id.} § 1347(h).}

\footnote{106. The Wisconsin statute provides in pertinent part:}

\footnote{(7)(a) In any criminal prosecution . . . any party may move the court to order the taking of a videotaped deposition of a child who has been or is likely to be called as a witness. Upon notice and hearing, the court may issue an order for such a deposition if the trial or hearing in which the child may be called will commence:}

\footnote{1. Prior to the child’s 12th birthday . . . .}

\footnote{\textit{WIS. STAT. ANN.} § 967.04. (West 1985 & Supp. 1989).}

\footnote{107. The statute ambiguously orders the trial court to “[p]ermit the defendant to be}
Court of Wisconsin recently examined these statutory procedures in *State v. Thomas.* In *Thomas,* the defendant was convicted of sexually assaulting an eight-year-old child. At a preliminary hearing, the child testified with great difficulty in the defendant's presence. The trial judge, therefore, granted the State's motion to depose the child on videotape. The defendant was present at the deposition, but a screen was placed between him and the child. On appeal, Wisconsin's Supreme Court upheld the videotaping and screening procedures because the trial judge demonstrated "findings appropriate to the particular witness and the particular circumstances that support the necessity of a special procedure . . . ."

**d. Miscellaneous protective procedures.**—Iowa's statute is even broader. Under section 910A.14 of the Iowa Code, a trial court may permit a child abuse victim to testify outside of the courtroom via one-way closed-circuit television. The court, however, may allow the defendant to remain in an adjacent room behind a screen or a mirror where the defendant can see the child testify.

The Supreme Court of Iowa revisited section 910A.14 in *In re J.D.S.* In *J.D.S.,* a juvenile court found a sixteen-year-old guilty of

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108. 150 Wis. 2d 374, 442 N.W.2d 10 (1989).
109. Id. at 382, 442 N.W.2d at 14.
110. Id. at 382-83, 442 N.W.2d at 14-15.
111. Id. at 386, 442 N.W.2d at 16.
112. Id. at 389, 442 N.W.2d at 17.
113. Id. at 387, 442 N.W.2d at 16.
114. The Iowa statute provides in pertinent part:
1. A court may . . . order that the testimony of a child . . . be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence . . . would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.

The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. . . .

115. *Id.*
116. *Id.*
sexually abusing a four-year-old boy. On appeal, the juvenile challenged the procedure whereby the lower court took the victim’s testimony while the accused was in an adjoining room equipped with a one-way mirror. The Iowa Supreme Court held that the procedure did not violate the juvenile’s confrontation rights because of the important public policy in protecting child abuse victims and because the juvenile court made the individualized finding that the four-year-old would be “traumatized” if forced to testify in open court before the accused.

The above are but a few examples of state legislation that provide for a child abuse testimony exception to the confrontation clause. These statutes reflect an attempt to provide protection to child abuse victims during criminal trials as well as an attempt to ease the state’s burden in prosecuting child abuse offenders. Maryland’s statute has language and goals similar to those of other state statutes. As Part V will demonstrate, however, the Maryland Court of Appeals has enhanced the constitutional validity of section 9-102 by explicitly restricting its use.

V. COURT OF APPEALS REVIEW OF SECTION 9-102

This Comment argues that section 9-102 is yet another exception to the confrontation clause that should be recognized by the Supreme Court. The premise of this argument is that section 9-102 falls within the boundaries set by previously recognized exceptions and by Supreme Court and Maryland case law; thus, the statute should satisfy the strict constitutional requirements of the confrontation clause.

a. Wildermuth v. State.—The Maryland Court of Appeals first considered section 9-102 in Wildermuth v. State, in which the two appellants, Richard Wildermuth and James McKoy, were convicted.

118. 436 N.W.2d at 343. Even though juvenile delinquency proceedings are non-criminal in nature, juveniles still are entitled to the right of confrontation. Id. at 344.
119. Id.
120. Id. at 347.
121. Id. at 346. The court held that this factor distinguished J.D.S from Coy. Unlike Coy, the trial judge in J.D.S made the particularized finding that the screening procedure was necessary to protect the four-year-old witness from trauma caused by confrontation with the accused. Id. The trial court thus satisfied the Coy requirement of “individualized findings.” Id. at 345 (citing Coy, 108 S. Ct. at 2803).
122. 310 Md. 496, 530 A.2d 275 (1987). Appellants had appealed to the Court of Special Appeals. The Court of Appeals, however, granted certiorari while the case still was pending in the lower court because of the public importance of the issues involved. Id. at 501 n.1, 530 A.2d at 277 n.1.
of child abuse.\textsuperscript{123} Both Wildermuth and McKoy argued that the victims’ testimony via closed-circuit television, pursuant to section 9-102, violated their right to confrontation guaranteed by both the federal\textsuperscript{124} and the Maryland constitutions.\textsuperscript{125} At the outset, the Court of Appeals rejected the defendants’ contention that section 9-102 was unconstitutional;\textsuperscript{126} the court, however, outlined the circumstances in which section 9-102 could be invoked.\textsuperscript{127} When it reviewed Wildermuth’s case,\textsuperscript{128} the court found that the requirements set out in section 9-102 were not satisfied.\textsuperscript{129}

The chief witness against Wildermuth was his nine-year-old daughter.\textsuperscript{130} When the trial began, the assistant state’s attorney moved to invoke section 9-102 to allow the child to testify out of Wildermuth’s presence.\textsuperscript{131} To support the motion, the prosecutor called two expert witnesses who stated that it would be difficult for the child to testify if Wildermuth were present and that she could be traumatized if forced to do so.\textsuperscript{132} The experts reached this conclusion because it was their opinion that most nine-year-olds would have difficulty testifying in court under similar circumstances.\textsuperscript{133} Based on the experts’ testimony, the trial judge granted the State’s motion, and permitted the child to testify via one-way closed-circuit television.\textsuperscript{134} Wildermuth ultimately was convicted.\textsuperscript{135}

The Court of Appeals reversed Wildermuth’s conviction, find-

\textsuperscript{123} Id. at 500, 530 A.2d at 277.
\textsuperscript{124} Id. at 501, 530 A.2d at 277. The confrontation clause of the sixth amendment applies to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 403-05 (1965).
\textsuperscript{125} Wildermuth, 310 Md. at 501, 530 A.2d at 277. Article 21 of the Maryland Declaration of Rights provides in pertinent part: “That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . .” Md. Const. Decl. of Rts. art. 21.
\textsuperscript{126} Wildermuth, 310 Md. at 501, 530 A.2d at 277.
\textsuperscript{127} Id. at 501-02, 530 A.2d at 277-78.
\textsuperscript{128} The Court of Appeals affirmed McKoy’s conviction, finding that the trial court had applied § 9-102 correctly in his case. Id. at 501, 530 A.2d at 277. This Comment will not examine McKoy’s case to facilitate a comparison of the Court of Appeals’ analysis of the incorrect procedure utilized in Wildermuth’s case with the Supreme Court cases previously discussed.
\textsuperscript{129} Id. The Court of Appeals reversed and remanded Wildermuth’s case for a new trial. Id.
\textsuperscript{130} Id. at 502, 530 A.2d at 278.
\textsuperscript{131} Id. at 521, 530 A.2d at 287.
\textsuperscript{132} Id. at 521-23, 530 A.2d at 287-88.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 523, 530 A.2d at 288. The trial judge concluded that the child is reticent and unable to verbalize in certain situations. And I think both witnesses have indicated that she would be under serious emotional distress were she required to testify in open court in front of the jury and her
ing error in the trial judge's use of section 9-102.\textsuperscript{136} Although \textit{Wildermuth} was decided before \textit{Coy},\textsuperscript{137} the court utilized the two \textit{Roberts} prerequisites of necessity and reliability to analyze section 9-102.\textsuperscript{138} Applying the reliability requirement, the court found no conflict between \textit{Roberts} and section 9-102 because "[t]he only reliability function not substantially provided by one-way closed-circuit television is that derived from the witness's view of the accused."\textsuperscript{139} With regard to the necessity requirement, however, the court disagreed with the trial judge that witness unavailability could be found so easily.\textsuperscript{140} Rather, the court found that the experts' testimony which the

\begin{itemize}
  \item father and assorted other court personnel and would not be able to communicate.
  \item \textit{Id.} at 522-23, 530 A.2d at 288.
  \item \textsuperscript{135} \textit{Id.} at 500, 530 A.2d at 277.
  \item \textsuperscript{136} \textit{Id.} at 501, 530 A.2d at 277.
  \item \textsuperscript{137} Nevertheless, as in \textit{Coy}, the Court of Appeals in \textit{Wildermuth} reversed Wildermuth's conviction because the trial judge made no individualized finding as to the child witness's ability to testify. \textit{Id.} at 524-25, 530 A.2d at 289. Indeed, the importance \textit{Coy} subsequently placed on the individualized finding of a child's need for protection from testifying in open court, 108 S. Ct. 2798, 2803 (1988), lends credence to \textit{Wildermuth}'s \S 9-102 requirement that there be an individualized judicial determination that a child be emotionally "unavailable." 310 Md. at 520, 530 A.2d at 287; see also Md. Cts. & Jud. Proc. Code Ann. \S 9-103.1(c)(2)(i)(4) (1989).
  \item \textsuperscript{138} \textit{Wildermuth}, 310 Md. at 514-15, 550 A.2d at 284. There is some evidence that United States v. \textit{Inadi}, 475 U.S. 387 (1986), may limit the applicability of the \textit{Roberts} "necessity and indicia of reliability" test. The \textit{Inadi} Court found that the admission of a co-conspirator's out-of-court statement is held to a different standard than that set out in \textit{Roberts}, particularly as to the necessity prong. \textit{Id.} at 392-94. The Court explained that a showing of "necessity" or "unavailability" does not apply to co-conspirator statements for two reasons. First, "former testimony often is only a weaker substitute for live testimony." \textit{Id.} at 394. In contrast, co-conspirator statements are spoken while the conspiracy is in progress; therefore, "such statements provide evidence of the conspiracy's context that cannot be replicated . . . ." \textit{Id.} at 395. Second, because the co-conspirators are initially partners in crime, their positions change radically as they become criminal defendants, "each with information potentially damaging to the other." \textit{Id.} Thus, a co-conspirator's out-of-court statement is preferable to in-court testimony because the former portrays a more complete and accurate picture of the conspiracy. \textit{Id.} at 395-96. Accordingly, the \textit{Roberts} requirement of "unavailability" of a declarant does not apply when the declarant is a co-conspirator. \textit{Id.} at 400.
  \item \textit{Inadi} may have ramifications that extend beyond simple clarification of the co-conspirator statement as a confrontation clause exception. When the \textit{Inadi} Court explained why a preliminary showing of necessity is not required to admit co-conspirator statements into evidence, it stated that "\textit{Roberts} should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining . . . . [namely,] testimony from a prior judicial proceeding in place of live testimony at trial." \textit{Id.} at 392-93. Thus, it seemingly may be argued after \textit{Inadi} that the \textit{Roberts} test applies solely to those cases in which the admissibility of the \textit{preliminary hearing testimony} of an unavailable witness is at issue.
  \item \textsuperscript{139} \textit{Wildermuth}, 310 Md. at 516, 530 A.2d at 285.
  \item \textsuperscript{140} \textit{Id.} at 523, 530 A.2d at 288.
\end{itemize}
State used to invoke section 9-102 "related chiefly to young children in general . . .". In contrast, Roberts' unavailability requires "a specific demonstration that the particular child witness concerned crosses the high statutory threshold." That is, the trial judge must determine whether the child would suffer "serious emotional distress" and be unable to "reasonably communicate if required to testify in open court and face-to-face with the accused." The child cannot be compared to other children, but must be examined individually. Such a stringent standard rids section 9-102 of any presumption that child abuse victims may testify routinely via one-way closed-circuit television. By setting a high threshold for section 9-102, the Court of Appeals reiterated our judicial system's preference for face-to-face contact between the accuser and the accused.

b. Craig v. State.—Recently, the Maryland courts revisited section 9-102 and Wildermuth in light of Coy. In Craig v. State, the defendant, who owned and operated a preschool, was charged with sexually abusing several of her students. At trial, the state moved to have the young witnesses testify via one-way closed-circuit television, pursuant to section 9-102. The trial judge granted the motion and the children testified by closed-circuit television. Craig subsequently was convicted.

On appeal, Craig contended that section 9-102 was unconstitutional in light of the Supreme Court decision in Coy. The Court of Special Appeals affirmed the conviction, holding that Coy only strengthened the validity of section 9-102. Specifically, the court found that the trial judge's particularized finding of the children's psychological unavailability satisfied the requirement of both Roberts and Coy. Moreover, section 9-102 did indeed "further an impor-

141. Id.
142. Id. at 523, 530 A.2d at 288-89.
143. Id. at 523-24, 530 A.2d at 288-89.
144. Id.
147. Id. at 255, 544 A.2d at 786. Craig was charged with: (1) first degree sexual offense; (2) second degree sexual offense; (3) child abuse; (4) unnatural and perverted sexual practice; (5) common law assault; and (6) common law battery. Id.
148. Id. at 256, 544 A.2d at 787.
149. Id. at 257, 544 A.2d at 787.
150. Id. at 275, 544 A.2d at 796.
151. Id. at 280-81, 544 A.2d at 798-99.
152. Id. at 284-87, 544 A.2d at 800-02.
tant public policy." Accordingly, the court found that the particular facts and the application of section 9-102 in Craig satisfied all mandates set down in Wildermuth and Coy.

Craig appealed again and the Court of Appeals granted certiorari. Upon review, the court recognized that Craig presented a different challenge to section 9-102 than that made in Wildermuth, namely that "nothing less than a physical, face-to-face courtroom encounter between witness and accuser can ever satisfy the constitutional rights of confrontation." The Court of Appeals strongly disagreed with this argument and affirmed the Court of Special Appeals' finding that section 9-102 is indeed constitutional. The court, however, proceeded to hold that even though there are exceptions to the confrontation clause, these exceptions, including section 9-102, may be invoked only in the narrowest of circumstances. In reversing Craig's conviction, the Court of Appeals ruled that the trial court did not meet the "high threshold required ... before section 9-102 may be invoked."

The court explained that its apparently inconsistent holdings in Wildermuth and Craig were due to the intervening Supreme Court decision in Coy. Although Coy held that a defendant's right to confront accusers is not absolute, the case strongly reiterated the right to face-to-face confrontation. Accordingly, the Court of Appeals re-examined Wildermuth to rectify any language made inconsistent by its decision in Craig.

The Craig court interpreted Coy to place an even higher threshold on section 9-102 than that previously set in Wildermuth. Specifically, a child witness is unavailable under section 9-102 only because of his or her "inability to testify in the presence of the accused."

153. Id. at 283, 544 A.2d at 800. That policy, declared the Court of Special Appeals, is two-fold: (1) if a child by testifying is so traumatized as to not be able to communicate, "the truth of the matter might never be revealed ... and a dangerous person might be turned loose to continue his or her predation ... upon the same helpless victim;" and (2) to protect children generally from traumatic events. Id.
154. Id. at 287, 544 A.2d at 802.
157. Id. at 554, 560 A.2d at 1121.
158. Id.
159. Id. at 562, 560 A.2d at 1125.
160. Id. at 554-55, 560 A.2d at 1121. The Court of Appeals ordered the case to be remanded for a new trial. Id. at 571, 560 A.2d at 1129.
161. Id. at 556, 560 A.2d at 1122.
163. 316 Md. at 562, 560 A.2d at 1125.
164. Id. at 564, 560 A.2d at 1126 (footnote omitted).
A child witness no longer may be deemed unavailable due to fear of the courtroom or people.\(^{165}\) The court so held to comply with the Coy Court's reluctance to unduly narrow the right to confrontation or to create exceptions to it.\(^{166}\)

The Craig court established a two-prong test that a trial judge must apply to invoke section 9-102.\(^{167}\) First, the trial judge preliminarily must question the prospective child witness in the defendant's presence to determine whether the child would "be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant."\(^{168}\) Second, if the trial judge concludes that the child would be unable to testify before the defendant, the judge must attempt to utilize a less protective method of testimony that permits both the child to testify and the defendant to "confront" his or her accuser before invoking section 9-102.\(^{169}\) If no other means of testimony will achieve these two goals, then the judge may implement section 9-102 as "the ultimate" and "the farthest the court can go."\(^{170}\)

Applying the new test to the facts in Craig, the court found that the trial judge did not satisfy the prerequisites to section 9-102.\(^{171}\) Because the judge failed to question the child witnesses personally or to observe them in the defendant's presence, the judge was unable to make the necessary determination under section 9-102 that the children could not testify.\(^{172}\) Although experts testified at trial

\(^{165}\) Id. Undoubtedly a child may become emotionally unavailable to testify because of fear of a courtroom filled with strangers. This dilemma, however, does not fall within the ambit of confrontation analysis because it is not caused by the defendant's presence. Id. at 564 n.9, 560 A.2d at 1126 n.9. The Court of Appeals suggested that in such situations remedial measures other than one-way closed-circuit testimony may suffice, i.e., closing off the trial to the public and press. Id.

\(^{166}\) Id. at 562, 560 A.2d at 1125.

\(^{167}\) Id. at 566-68, 560 A.2d at 1127-28.

\(^{168}\) Id. at 566-67, 560 A.2d at 1127. This test does not eliminate expert testimony entirely. A trial judge's personal observations may "be bolstered by expert testimony bearing on the particular child's inability to testify in the presence of the defendant." Id. at 567, 560 A.2d at 1127-28.

\(^{169}\) Id. at 567-68, 560 A.2d at 1128. The court cited "testimony via two-way television in a room separate from the courtroom" as a particular method by which to limit a defendant's confrontation rights as little as possible. Id. at 567, 560 A.2d at 1128. In future trials, judges must implement this or some other procedure, see supra note 165, before they invoke § 9-102. Section 9-102 eventually may become obsolete under this preliminary procedural requirement.

\(^{170}\) Craig, 316 Md. at 567-68, 560 A.2d at 1128.

\(^{171}\) Id. at 570-71, 560 A.2d at 1129.

\(^{172}\) Id. at 568-70, 560 A.2d at 1128-29. The trial judge did question the children; he did so only to determine their competency as witnesses, however. The trial record disclosed that the judge did not "probe areas pertinent to a § 9-102 finding." Id. at 568 n.11, 560 A.2d at 1128 n.11.
that the children would have great difficulty testifying before the defendant, the experts further stated that the children might be intimidated into silence by the general courtroom atmosphere, i.e., "a courtroom of strangers" and "talking in front of people." Thus, the Craig court believed that the trial judge decided to permit testimony under section 9-102 based on both the children's fear of the defendant and their fear of the courtroom, thereby failing to "sharply focus on the effect of the defendant's presence on the child witnesses . . ." as required by section 9-102.

CONCLUSION

Section 9-102 clearly is a viable exception to the confrontation clause in light of the Court of Appeals' decision in Wildermuth and Craig. When the procedure set out in Craig is followed closely, section 9-102 satisfies the "necessity" or "unavailability" criterion required by Roberts and alluded to in Coy. Section 9-102 also satisfies the second Roberts element of reliability because the child witness is: (1) under oath; (2) open to full cross-examination by defense counsel present with the child; and, (3) before a judicial proceeding that is equipped to provide records of the proceeding. In addition, the jury or the judge may observe freely the demeanor of the child witness during testimony to determine "whether he is worthy of belief." The defendant also may observe the testimony and may communicate with his or her attorney by an "appropriate electronic method."

The only component of the right to confrontation absent from the long list of elements encompassed by section 9-102 is that of the child witness seeing the defendant. Precedent from both the Supreme Court and the Maryland Court of Appeals indicates that this component is expendable if section 9-102 fulfills "a compelling state interest" in discovering and prosecuting child abuse.

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173. Id. at 569, 560 A.2d at 1129.
174. Id.