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Recent Developments: Maryland v. Craig: Maryland Statute Allowing One-Way Closed Circuit Television Testimony of Child Abuse Victims Did Not Violate the Confrontation Clause of the Sixth Amendment

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essary and would not serve any legitimate state interest. *Id.* Moreover, in "dysfunctional" families, where the parents were divorced or the second parent otherwise did not participate in the upbringing of the child, the Court found that the requirement actually disserved the state's interest in protecting and assisting the minor. *Id.* The Court noted that the record revealed the two-parent notification requirement to often result in major trauma to the child as well as the parent, and to violate the privacy of the parent and child even when they suffered no other physical or psychological harm. *Id.* The Court wrote: "The state has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together... [n]or can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court." *Id.* at 2946. The Court found that the separate interest of one parent combined with the minor's privacy interest outweighs the separate interest of the second parent. The Court therefore held the two-parent notification requirement, standing alone, to be unconstitutional. *Id.* at 2947.

The Court concluded, however, that the bypass procedure provided in the statute rendered the entire statute constitutional. *Id.* The Court noted the district court's finding that the bypass procedure produced fear and anxiety among minors and that, of the judges who adjudicated 90% of the bypass petitions in 1981, none identified any positive effects of the law. *Id.* at 2940. However, the Court followed precedent set by earlier cases wherein the Court determined that statutes requiring parental consent to a minor's abortion would be upheld so long as they provided an alternative procedure "whereby a minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Id.* at 2948 (citing *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 467, 491 (1983); *Bellotti v. Baird,* 443 U.S. 622, 643-644 (1979)).

Turning to the constitutionality of the statute's 48-hour waiting period, the Court recognized concerns expressed by the district court that such a waiting requirement might delay the abortion and thereby increase the risk of the abortion procedure, but found the waiting period itself to be reasonable and to impose a minimal burden on the mother's right to decide whether to terminate the pregnancy. The Court stated:

> "The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future."

Id. at 2944.

Through this decision, the Supreme Court has authorized states to impose upon a minor seeking an abortion the additional burden of either notifying both of her parents, regardless of whether one is alienated or disinterested, or obtaining the approval of a judge who has little or no knowledge of her circumstances. In that the Supreme Court has approved the mechanism of a judicial bypass procedure to render an otherwise invalid statute constitutional, one may only speculate as to future unconstitutional statutory obstacles which may be placed in a pregnant minor's path so long as similar judicial alternatives are provided.

— *Rikke Davis*

Maryland v. Craig: MARYLAND STATUTE ALLOWING ONE-WAY CLOSED CIRCUIT TELEVISION TESTIMONY OF CHILD ABUSE VICTIMS DID NOT VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

In *Maryland v. Craig,* 110 S. Ct. 3157 (1990), the United States Supreme Court upheld a Maryland statute providing for one-way closed circuit television testimony by an alleged child abuse victim. The decision overruled the Court of Appeals of Maryland, which held that the State's showing of the necessity to prevent eye-to-eye confrontation was insufficient to invoke the statute's protection.

Sandra Ann Craig was indicted in October, 1986 by a Maryland grand jury on various counts of child and sexual abuse. Six year old Brooke Etze, the named victim in each count had attended a preschool and kindergarten center owned and operated by Craig.

Prior to the case proceeding to trial, state prosecutors attempted to invoke a Maryland statutory procedure that allowed a judge to permit testimony of an alleged child abuse victim by one-way closed circuit television. Section 9-102 of the Courts and Judicial Proceedings Article provided that the trial judge must first "determin[e] that the testimony by the child victim in the courtroom [would] result in the child suffering serious emotional distress such that the child [could not] reasonably communicate." *Id.* at 3161 n.1 (quoting Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989)). Once such a determination was made, the child witness, the state prosecutor, and the defense counsel would proceed to a separate room while the judge, the jury, and the defendant remained in the courtroom. The child witness would then be subject to direct examination by the state's attorney, cross-examination by the defendant's attorney, and any questions the judge might wish to ask the child. The examination would be recorded by a video monitor which simultaneously displays the witness' testimony in the courtroom. According to the procedure, the defendant would remain in communication with his attorney, but not with the child witness. Any objections made by either attorney would be ruled on by the judge in the courtroom.

In support of its invocation of the statutory procedure, the state's attorney offered expert testimony that Brooke, testifying in Craig's presence, would have suffered the required serious emotional distress such that she could not have reasonably communicated. Craig objected, arguing that the procedure violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial court rejected that challenge, stating that while the procedure took away the physical confrontation between the witness and the accuser, the statute preserves the "essence" of the constitutional right. The procedure allowed the defendant the right to observe, cross-examine, and

have the fact/finder view the demeanor of the witness. *Craig,* 110 S. Ct. at 3161-62. The trial court also found that the evidence presented by the expert sufficiently justified the finding that serious emotional distress impairing the child's ability to testify would have resulted if the child was required to testify in the courtroom. Thus, the trial court allowed Brooke to testify against Craig via one-way closed circuit television. Craig was convicted, and the court of special appeals upheld the conviction. *Id.*

Craig petitioned the Court of Appeals of Maryland, which reversed and remanded for a new trial. Although the court rejected Craig's Confrontation Clause argument, it held that the State made an insufficient showing of the required emotional distress the testifying would have had upon the children, thus failing to satisfy the high threshold required by *Coy v. Iowa,* 487 U.S. 1012 (1988). *Craig,* 110 S. Ct. at 3162. The United States Supreme Court granted certiorari to resolve the Confrontation Clause issues.

The opinion of the Supreme Court initially focused on its holding in *Coy v. Iowa.* The Court stated that while they had held in *Coy* that "'the Confrontation Clause guarantee[d] the defendant a face-to-face meeting with witnesses appearing before the trier of fact[,]'" they had not held that there existed an absolute right to a face-to-face confrontation. *Id.* (quoting *Coy,* 487 U.S. at 1016). The *Coy* Court expressly stated that the question of whether exceptions to the right existed were not addressed in its opinion, but noted that any exceptions "'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.'" *Id.* at 3163 (quoting *Coy,* 487 U.S. at 1021).

The Court stated that "[t]he central concern of the Confrontation Clause [was] to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* Furthermore, the clause's purposes were served by the combined effect of the presence of four essential elements: physical presence of the witness, testimony under oath, cross-examination by the defense, and observation of demeanor by the trier of fact. *Id.* The Court acknowledged that a face-to-face confrontation enhanced the accuracy of evidence by reducing the risk of falsehood or erroneous identification, but recognized that it was not an indispensable element of the right. *Id.* at 3164. If the other elements of the right are satisfied, the Confrontation Clause may be satisfied despite the absence of a face-to-face confrontation. *Id.* In support of its conclusion, the Court looked to the long history of the admission of hearsay statements against the defendant and concluded that to apply the Confrontation Clause literally would abrogate virtually every hearsay exception, a result directly at odds with existing case law. *Id.* at 3165.

The Court, therefore, concluded that while the Confrontation Clause reflected a preference for face-to-face confrontation, it was a preference that "'must occasionally give way to considerations of public policy and the necessities of the case[.]'" *Id.* (quoting *Mattox v. United States,* 156 U.S. 237, 243 (1895)). However, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation [was] necessary to further an important public policy and only where the reliability of the testimony [was] otherwise assured." *Id.* at 3166.

The Court then turned its inquiry to the Maryland statutory procedure at issue. Significantly, they found that the Maryland statute, while denying face-to-face confrontation, preserved the other important elements of the confrontation right. *Id.* Therefore, the Court concluded that the "use of the one-way closed-circuit television procedure, where necessary to further an important state interest, [did] not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 3167.

The Court next proceeded to determine what it thought to be the critical issue in the case, "whether use of the procedure was indeed necessary to further an important state interest." *Id.* The state contended that its important interest was that of protecting alleged victims of child abuse from the traumatic experience of testifying face-to-face against the alleged perpetrator of such abuse, and that the procedure was necessary to further that interest. *Id.*

The Court agreed that this was a sufficiently compelling reason and noted that a majority of states have enacted similar statutes. *Id.* Accordingly, the Court held:

> [I]f 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.

Id. at 3169.

The Court emphasized that a finding of necessity must be made on a case by case basis, based on whether the use of the procedure was necessary to protect the welfare of that particular child. *Id.* The trial court must also find the child witness to be traumatized by the presence of the defendant, not just by the general experience of testifying in a courtroom. *Id.* Finally, the trial court must find that the emotional distress subjected upon the child by the face-to-face confrontation would be more than *de minimis. Id.*

Regarding the opinion of the court of appeals, the Court found that the lower court had imposed unnecessarily strict requirements as a prerequisite to the finding of necessity. *Id.* at 3171. The Court opined that the court of appeals incorrectly interpreted *Coy* to require that the child witness be actually questioned in the defendant's presence, and a determination be made as to "whether a child would suffer 'severe emotional distress' if he or she were to testify by two-way closed circuit television." *Id.* at 3170 (emphasis in original). Conversely, the Court found that testimony of expert witnesses as to the effect on the child would suffice, and that actual observation of the effects of face-to-face confrontation was not necessary. *Id.* at 3171. Thus, because the court of appeals did not base its determination of the absence of necessity on the lower threshold found by the Court in this case, the Court vacated the judgment and remanded the case for further proceedings. *Id.*

Justice Scalia, joined by Justices Bren-

nan, Marshall and Stevens, filed a dissenting opinion and argued that the majority's holding was in direct conflict with the plain meaning of the Confrontation Clause. The dissenters attacked the majority's analogy to the admission of hearsay evidence, noting that the hearsay exceptions generally included a requirement of the unavailability of the declarant, a point which the majority seemed to ignore. *Id.* at 3174 (Scalia, J., dissenting). Concluding, the dissent stated: "The Court today has applied 'interest balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport to our findings." *Id.* at 3176 (Scalia, J., dissenting). "[T]he text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent." *Id.* at 3172 (Scalia, J., dissenting).

The opinion of the Supreme Court in *Maryland v. Craig* validates a procedure which will greatly increase the State's ability to successfully prosecute alleged perpetrators of child abuse. Perhaps more importantly, this opinion reveals the willingness of the current Court to look beyond the literal meaning of constitutional guarantees and instead concentrate on the "essence" of the right, thereby preserving the notion of the Constitution as a flexible document.

— *Gregory J. Swain*

Milkovich v. Lorain Journal Co.: OPINIONS ARE NOT PROTECTED BY THE FIRST AMENDMENT AND ARE THEREFORE ACTIONABLE UNDER STATE LIBEL LAW

In *Milkovich v. Lorain Journal Co.,* 110 S. Ct. 2695 (1990) the United States Supreme Court held that statements of opinion are not protected by the first amendment and, therefore, are actionable under state libel law. In holding so, the Court reversed the Ohio Court of Appeals and remanded the case for a determination as to whether the statements were true or false.

Lorain Journal Co. published an article authored by J. Theodore Diadiun (hereinafter "respondents") including incriminating comments about the petitioner, Michael Milkovich, a high school wrestling coach whose team was involved in an altercation following a match. Milkovich and Scott, the school superintendent, testified at the Ohio High School Athletic Association (OHSAA) investigatory hearing and subsequent trial. Both proceedings were discussed in a journal article entitled "Maple beat the law with the 'big lie,'" along with a picture of Diadiun and the words "TD says." Among other phrases, the article contained the following passage: "Anyone who attended the meet... knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 2698. Thus, Milkovich and Scott brought separate defamation actions against the respondents in Ohio State Court. *Id.* at 2699.

Milkovich alleged that the article directly damaged his occupation of coach and teacher by accusing him of committing perjury, and that this constituted libel per se. *Id.* A directed verdict was granted in favor of the respondents on the grounds that there was insufficient evidence to establish "actual malice" as required by *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). *Milkovich,* 110 S. Ct. at 2699. The Ohio Court of Appeals disagreed and the decision was reversed and remanded. *Id.* at 2700.

On remand, the trial court granted the respondent's motion for summary judgment, holding that the article constituted opinion constitutionally protected from a libel action. Alternatively, the court found that Milkovich, as a public figure, failed to make out a prima facie case of actual malice. The court of appeals affirmed. *Id.*

On appeal, the Supreme Court of Ohio found that Milkovich was neither a public figure nor a public official. The court also held that the statements were factual assertions as a matter of law and not constitutionally protected as the opinions of the writer. *Id.*

Two years later, the Ohio Supreme Court reversed its position in Scott's defamation action, finding that the column was constitutionally protected opinion. *Id.* The *Scott* court, in ascertaining whether the column was fact or opinion under the totality of the circumstances, applied the four factor analysis established by the Court of Appeals for the District of Columbia in *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985). *Milkovich,* 110 S. Ct. at 2700. Those factors were "(1) 'the specific language used;' (2) 'whether the statement is verifiable;' (3) 'the general context of the statement;' and (4) 'the broader context in which the statement appeared.'" *Id.* (quoting *Scott v. News-Herald,* 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986)).

Although the *Scott* court determined that the first two factors indicated that the statements at issue were assertions of fact, the court held that based on the third and fourth factors the article was opinion as a matter of law. *Id.* With respect to the third, "general context of the statement," factor, "the large caption 'TD says'... would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.* (quoting *Scott,* 25 Ohio St. 3d at 252, 496 N.E.2d at 707). With respect to the fourth factor, the "broader context in which the statement appeared," the court reasoned that because the article appeared on a sports page — 'a traditional haven for cajoling, invective, and hyperbole,' that article would probably be construed as opinion. *Id.* at 2701 (quoting *Scott,* 25 Ohio St. 3d at 253-54, 496 N.E.2d at 708). As a result of the *Scott* decision, the Ohio Court of Appeals upheld a summary judgment against Milkovich. *Id.* An appeal to the Supreme Court of Ohio was dismissed for want of a substantial constitutional question, and the United States Supreme Court granted certiorari to consider the Ohio court's recognition of a constitutionally required opinion exception under the first amendment.

The Supreme Court began its analysis by discussing the development of defamation law under the common law. The Court first stressed the importance of allowing a person to vindicate his good name while affording redress for harm caused by defamatory statements. *Id.* at 2702.

At common law, a defamed private figure needed only to prove a false publication which subjected him to "hatred, contempt, or ridicule." *Id.* (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 370 (1974) (White, J., dissenting)). The distinction between fact and