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Recent Developments: Craig v. State: The Court of Appeals Redefines When an Abused Child Is Considered Sufficiently Unavailable to Testify and Allows for the Taking of Testimony by Closed-Circuit Television

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Florida Supreme Court. Because the encounter took place in the cramped confines of a bus, Bostick argued that the police presence was much more intimidating than it would be in another setting. *Bostick*, 111 S. Ct. at 2386. Reversing the lower courts' decision, the Florida Supreme Court held that a seizure resulted when the police officers randomly boarded the bus and without articulable suspicion, asked for the passengers' consent to search their luggage. *Id.* at 2385 (citing 554 So. 2d at 1154 (Fla. 1989)). The court reasoned that a seizure occurred because a reasonable passenger "would not have felt free to leave the bus to avoid questioning by the police." *Id.* The court thus adopted a per se rule that bus searches were unconstitutional. The United States Supreme Court granted certiorari to decide whether the Florida per se rule was compatible with Fourth Amendment jurisprudence.

In addressing the issue of whether a police encounter of this nature constituted a "seizure" within the Fourth Amendment, the Supreme Court outlined established case law which demonstrated that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick*, 111 S. Ct. at 2386. The Court stated that "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Id.* (citing *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991)).

The Court then rejected Bostick's claim that his case was different because it took place in the cramped quarters of a bus. The Court reasoned that Bostick's movements were confined not because police conduct was "coercive," but because

he was a passenger on a bus that was scheduled to depart. *Id.* at 2387. Because a person traveling on a bus has no desire to leave, the presence of the police was not an accurate measurement of the coerciveness of the encounter. *Id.*

The Court then cited *INS v. Delgado*, 466 U.S. 210 (1984), which it found to be dispositive of the issue. In *Delgado*, the Court held that a seizure had not occurred when workers were questioned in their workplace and were not free to leave without being questioned. *Id.* (citing *Delgado*, 466 U.S. at 218). The Court observed that the officers' conduct provided the workers with no reason to believe that they would be detained if they refused to answer any questions. *Id.* The *Delgado* Court emphasized that the workers' ability to leave was not restricted by the police officers, but by voluntary obligations to their employers. *Id.*

The Court stated that Bostick's case was analytically indistinguishable from *Delgado*. *Id.* Like the workers in *Delgado*, the Court reasoned that Bostick's movement was restricted by a factor independent of the police conduct. *Id.* Therefore, according to the Court, the "free to leave" analysis used by the Florida Supreme Court was not the correct inquiry. *Id.* The Court held instead that the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* The location of the encounter is only one of the factors to be considered in determining whether a seizure had occurred. *Id.*

In observing that its opinion is consistent with prior decisions, the Court noted that it has previously stated that "the crucial test is whether, taking into account all of the circumstances surrounding the encoun-

ter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). Consequently, the Court held that it was not per se unconstitutional for police officers to board buses and randomly request passengers' consent to search their luggage. *Id.* at 2389. In light of its decision, the Court remanded the case to the Florida courts to determine whether a seizure took place.

Although the Supreme Court claimed that no new ground was broken by its decision, it is now clear that police officers may pursue drug interdiction efforts on buses. Prior Court decisions have allowed police officers to question individuals in such places as the workplace, in airport lobbies, and on city streets. The reasoning in *Florida v. Bostick* indicates that individuals will no longer be immune from police questioning in many other public places. The Court's decision has sent a message that police may question individuals anywhere they please so long as the encounter is not coercive.

- Will Jacobi

Craig v. State: THE COURT OF APPEALS REDEFINES WHEN AN ABUSED CHILD IS CONSIDERED SUFFICIENTLY UNAVAILABLE TO TESTIFY AND ALLOWS FOR THE TAKING OF TESTIMONY BY CLOSED-CIRCUIT TELEVISION.

In a case of constitutional import, the Court of Appeals of Maryland clarified when it is appropriate for a trial court judge to order the testimony of a child abuse victim to be taken outside the courtroom

through closed-circuit television. In *Craig v. State*, 588 A.2d 328 (Md. 1991), the court established flexible guidelines for judges to follow when confronted with the invocation of Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989), which permits child abuse victims to testify through closed-circuit television.

Sandra Ann Craig was indicted on six counts stemming from the alleged sexual assault of a six year old child. Prior to trial in the Circuit Court for Howard County, the state invoked Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989). Despite Craig's Sixth Amendment confrontation-based objections, the child witnesses were permitted to testify via one-way, closed-circuit television. Craig was subsequently convicted on all six counts. *Craig*, 588 A.2d at 330. After affirmance by the Court of Special Appeals of Maryland, the court of appeals reversed. On appeal to the Supreme Court of the United States, the Court reversed the court of appeals and remanded the case for reconsideration. *Id.*

Upon reconsideration, the court of appeals quoted the Supreme Court at length, holding that the trial judge's use of closed-circuit television was inappropriate without a "case specific finding of necessity." *Id.* at 331 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1025 (1988)). The court first reasoned that the Sixth Amendment's Confrontation Clause did not prohibit a witness from testifying outside of the defendant's physical presence where closed-circuit television was used. Specifically, the "degree of necessity that supports [the] use of a procedure . . . that would otherwise not satisfy the confrontation requirements" was a showing of witness unavailability. *Id.* at 333.

Furthermore, the court of ap-

peals followed its ruling in *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987), which stated that a child witness who suffered serious emotional distress was sufficiently unavailable to satisfy the relinquishment of the defendant's Sixth Amendment right to confront a witness testifying against him or her. *Id.* at 333. The court, however, held that the finding of unavailability must be based upon a "particularized examination of all circumstances concerning the impact of public testimony in the presence of the defendant upon the emotional health of the child." *Id.* (citing *Wildermuth*, 530 A.2d at 289)). The court's holding established that the use of such a drastic procedure must be preceded by the judge "mak[ing] a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress . . ." *Id.* at 331 (quoting *Maryland v. Craig*, 110 S. Ct 3157, 3170 (1990) (citing *Craig v. State*, 560 A.2d 1120, 1127 (Md. 1989) (Craig I))) (emphasis in original).

The court reasoned that the pressure of such a confrontation burdened the child with severe emotional stress and fear, thus inhibiting the child's ability to communicate. *Id.* at 333. The court, however, stressed the importance that the finding of unavailability be based on the impact of the public testimony on that particular child, as opposed to children in general. Despite the Supreme Court's holding that the trial judge could base his invocation of section 9-102 solely on the findings of an expert, the Court of Appeals of Maryland stated that, "expert testimony may not be necessary to establish the necessary predicate to invoke § 9-102." *Craig*, 588 A.2d at 335 (quoting

Wildermuth, 530 A.2d at 275).

To avoid confusion, the court of appeals established specific guidelines for trial court judges to follow when confronted with a prosecutor's motion to have a child testify through closed-circuit television. *See* Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989). First and foremost, "[t]he trial judge shall make a case-specific finding of necessity . . ." *Craig*, 588 A.2d at 335. Next, the availability of the child shall be addressed, with special consideration given to the child's ability to testify in the presence of the accused. Ordinarily, this shall be determined by the "judge personally observing and interviewing the child," however, such interaction "under § 9-102 . . . should be the rule rather than the exception." *Craig*, 588 A.2d at 335-36. Additionally, the judge may decide whether or not the defendant may be present during questioning. *Id.* The judge then shall decide on the necessity of expert testimony. However, the court of appeals firmly believed that the trial court judge was capable of making the decision on his or her own, and only need consider the use of expert testimony. Finally, the judge shall have full control over "the means by which the procedure shall be effected . . ." *Id.* at 336. The court added that the prudent judge should consider the "reasonable availability of measures which would be the least restrictive of the right of confrontation, yet serve the purpose of § 9-102 . . ." *Id.*

The companion case of *Gilbert v. State*, 588 A.2d 328 (Md. 1991), similarly depicted an adult accused of child abuse. Like *Craig*, the state sought to invoke section 9-102. *Gilbert* objected, and after much debate, the judge decided to interview the child in his chambers, joined by both counsel and the ste-

nographer, but not by the defendant. The child was openly frightened of the defendant, therefore, the judge concluded that the child was not emotionally prepared to testify in open court before the defendant. Accordingly, the judge decided that a two-way television should be used in such a way that both the child and the defendant could see one another without actual confrontation. Gilbert's motion for a new trial was denied and he received a fifteen year prison sentence. *Craig*, 588 A.2d at 336. Gilbert appealed, but before the court of special appeals had an opportunity to decide the case, the court of appeals issued a writ of certiorari. *Id.* at 337.

The defendant claimed that the trial judge erred in permitting the section 9-102 procedure without first examining the child victim testifying in the presence of the defendant. *Id.* at 338. Nevertheless, the court of appeals upheld the trial court judge's findings, basing its decision on two rationales: (1) the trial court judge did not have the guidance of *Craig I* nor *Maryland v. Craig*, which favors the initial interview in front of the defendant; and (2) the court ruled that it was within the trial court judge's discretion whether or not to allow the defendant to be present. *Id.* at 338-39.

In summary, Gilbert's case was decided differently than *Craig's* due to the trial court judge's personal examination of the child prior to her testifying. The judge made a case-specific finding, and concluded that the child was unable to testify in open court without subjecting herself to serious emotional trauma. *Id.* at 339.

Craig and *Gilbert* established a set of guidelines, not a rigid formula, for trial court judges to follow in child abuse cases. The ruling in *Craig* leaves a tremendous amount

of discretion in the hands of the trial court judge. *Gilbert* indicates that so long as the trial judge makes an individualized evaluation of the child's emotional health, his or her decision to implement section 9-102 will be upheld. These cases demonstrate an effort to provide further guidelines in child abuse cases, and in so doing, the court of appeals has pushed the right of confrontation to its constitutional limits in an all out effort to protect abused children.

- Andrew S. Kasmer

Board of Oklahoma City v. Dowell: FEDERAL COURT SUPERVISION OF PREVIOUSLY SEGREGATED SCHOOLS MAY BE TERMINATED IF SUBSTANTIAL COMPLIANCE WITH DESEGREGATION OBJECTIVES HAS BEEN ATTAINED

In *Board of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991), the United States Supreme Court promulgated a standard for dissolving desegregation decrees. Specifically, the Court ruled that a federal district court may lift a desegregation decree if a school district can show that it has complied with the decree in good faith and that vestiges of past discrimination have been eliminated to the extent practicable. If a decree is to be terminated or dissolved, the parties are entitled to a detailed statement to that effect from the court.

In 1972, the Board of Education of Oklahoma City was ordered to adopt a court-supervised desegregation plan involving busing. This plan was designed to integrate the schools in its district and end de jure segregation. After complying with the desegregation decree for five years, the Board moved in 1977 to end court supervision of the plan. After finding that the Board had

substantially complied with the constitutional requirements and that lack of court supervision would not be detrimental to the unitary system the Board had achieved, the district court terminated its jurisdiction in the case.

In 1984, the Board adopted the Student Reassignment Plan (SRP). This plan was designed to alleviate greater burdens placed on black children caused by demographic changes in the area that resulted in longer busing routes. In 1985, the respondents, black students and their parents, asked the district court to reopen the case, contending that the school district had not achieved "unitary" status and that SRP was a return to segregation. *Id.* at 634. The district court refused to reopen the case, holding that its 1977 finding that the school system was "unitary" was res judicata and that the school system had remained unitary. *Id.* The Court of Appeals for the Tenth Circuit reversed, and held that the 1977 order did not terminate the original injunction. *Id.*

The court of appeals remanded the case for the district court to determine if the injunction should be lifted or modified. On remand, the district court vacated the injunction because it found that the previously ordered desegregation plan was unworkable due to demographic changes, the school district had maintained its unitary status, and that the SRP was not designed with discriminatory intent. *Id.* at 634-35.

The Court of Appeals again reversed. *Id.* at 635. Relying on *United States v. Swift*, 286 U.S. 106 (1932), the court ruled that the injunction should remain in effect until the school district could show that its existence was causing a "grievous wrong evoked by new and unforeseen conditions." *Dowell*, 111 S. Ct. at 635 (quoting *Swift*, 286