OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARYLAND, Petitioner V. SANDRA ANN CRAIG

CASE NO: 89-478

PLACE: Washington, D.C.

DATE: April 18, 1990

PAGES: 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

MARYLAND,

Petitioner

v. : No. 89-478

SANDRA ANN CRAIG

Washington, D.C.

Wednesday, April 18, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

J. JOSEPH CURRAN, JR., ESQ., Attorney General of Maryland, Baltimore, Maryland, on behalf of the Petitioner.

WILLIAM H. MURPHY, JR., ESQ., Baltimore, Maryland, on behalf of the Respondent.

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PROCEEDINGS

(10:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-478, Maryland against Sandra Ann Craig.

General Curran.

ORAL ARGUMENT OF J. JOSEPH CURRAN, JR.

ON BEHALF OF THE PETITIONER

MR. CURRAN: Mr. Chief Justice, and may it please the Court.

The issue before the Court this morning is: Was Sandra Craig denied her right of confrontation when our trial judge allowed four child victim witnesses, aged four, five and six, to testify at the trial by way of a one-way closed circuit television, a procedure that had been authorized by the Maryland statute?

Or was the right to confront satisfied because the children, who were determined to be functionally unavailable, testified under oath, were the subject of unrestricted cross-examination and were able to be seen by the judge and the jury on the monitors as to their credibility and reliability?

Permit me, if I might, share with you the facts in our case.

In the fall of 1986 Mrs. Craig was charged with

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several counts -- several instances of sexual and physical child abuse. Prior to the trial, in March of 1987, the trial court held a two-day motion hearing on whether or not the section of our statute should be implemented permitting the use of the one-way closed circuit television.

At that two-day hearing, five separate experts were called who testified in child-specific detail as to their recommendations and their opinions as to whether the children would be able to testify in the presence of the defendant, or whether they would be better able to testify out of the presence of the defendant, by way of our procedure.

QUESTION: But each -- each psychiatrist just testified about a single child or --

MR. CURRAN: No, Justice, there were five different experts. And I might add there were psychologists, child therapists --

QUESTION: But did they all testify about all the children?

MR. CURRAN: No, sir, only those children that they had under therapy for several weeks -- several months.

QUESTION: So it sounds like there was only one -- one expert for each child, is that it?

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MR. CURRAN: Well, in truth, one expert had three children.

QUESTION: Okay.

MR. CURRAN: Another had two. And the others had, as I recall, one each.

QUESTION: All right. Thank you.

MR. CURRAN: But no one had -- had everyone.

QUESTION: General Curran, I thought that the -- the trial court finding was made in accordance with the language of the statute in Maryland, that the testimony of each of the children in a courtroom would result in the child suffering serious emotional distress, and that the children could not reasonably communicate in a courtroom?

Now that was the finding that was made?

MR. CURRAN: That is correct, Justice O'Connor.

QUESTION: All right. Now, is -- is it necessary that the focus be on whether the children could testify in the presence of the defendant?

MR. CURRAN: In truth, Justice O'Connor, if you will review the joint appendix, you will find that each of the five experts, when testifying about their respective child patient, testified with specificity that it was the presence of Mrs. Craig that they were seriously emotionally distressed by.

QUESTION: Well, that may well be, but was that

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the finding of the trial court?

MR. CURRAN: The trial court, Justice, as you rightly observe, did in fact track the exact words of the statute --

QUESTION: Yes.

MR. CURRAN: -- and found that the children testifying in the courtroom were deemed by (inaudible) to be seriously emotionally distressed.

QUESTION: There may well have been evidence in the record that would have permitted the trial judge to make a different finding, but it's not the finding the trial judge made, is it?

MR. CURRAN: I conclude you are right, Justice O'Connor. But I want to emphasize --

QUESTION: Does that mean we must affirm the judgment?

MR. CURRAN: No, but I -- yes. No -- no, I don't want to affirm the judgment. No, excuse me.

(Laughter.)

MR. CURRAN: I want to invite you to review the entire testimony of all of the experts, both on direct and cross --

QUESTION: Well, but you don't want us to make that finding, that the trial court should have made, do you?

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MR. CURRAN: Well, I suggest to you, Justice O'Connor, that the trial judge conclusion was based solely on the testimony of the experts that talked solely about Mrs. Craig, and not about the courtroom.

QUESTION: Now, the court below ordered a new trial. Do you think that the court, under Maryland law, might have sent it back to the trial court to consider whether the trial court would make a different finding?

MR. CURRAN: That is not necessary in our opinion. We -- we believe, and state in our brief, that the court below made a misreading of your decision in Coy, requiring, in their belief, that Coy, before permitting our Section 9102 to be implemented, would require that there be a face-to-face confrontation between the victim and the defendant, either in person or by the two-way television, before you could use that procedure.

We disagree. We -- we believe very strongly that the court below has simply misread your finding in Coy.

QUESTION: Was the defense objection simply to not having the child in the courtroom, or did the defense make the supplemental objection that it wanted the child at least present in the videotaped room -- in the videotaping room?

MR. CURRAN: The defense objection, which was

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continuing, I will tell you, Justice Kennedy, was that the children, out of the presence of the defendant, violated her Sixth Amendment right to confront the accuser.

And our procedure, once the court heard from the expert witnesses, permitted the children to be seen out of the courtroom in the judge's chambers, and I'll just share with you briefly the procedure, in the judge's chambers was the child witness, was the prosecutor, was the defense attorney, who was permitted to do all the cross-examination that was desired, and of course the TV technician person.

Out in the courtroom was the judge, the jury and the defendant with her counsel, and there were the two TV monitors in which the jury and the other spectators and the defendant could see --

QUESTION: But this was presented live to the -- in the courtroom?

MR. CURRAN: Yes, Justice. This was as it happened. It was live as the witness was cross-examined or examined. And there was the audio in which the judge and the jury could hear and could at the same time see the actual presentation.

QUESTION: General Curran, of course it wouldn't matter if it was live or not. I mean, it could have been videotaped. It would have looked exactly the same to the

jury.

MR. CURRAN: Yes, Your Honor.

QUESTION: I mean, you can't tell when you're looking at it. They are really just electronic dots on a -- on a screen.

MR. CURRAN: That's correct.

QUESTION: So it could have been a movie taken two years ago.

MR. CURRAN: It could have been a videotape.

QUESTION: And so when you say live --

MR. CURRAN: Our procedure --

QUESTION: How was the camera set up? Did it do a closeup the way a juror can look at the back and forth between the person answering -- asking the question and the -- and the child giving the answer, to see whether the person is, by gesture, by -- by expression, coaxing the child?

MR. CURRAN: Justice, it was a picture of the child's face and upper body. It did not show the other part of the judge's chambers. Nor did it show the prosecutor or the defendant's attorney.

QUESTION: You couldn't tell what -- what the prosecutor was eliciting from the child by much of the testimony in -- in this case concerning the suggestibility of children, so as -- that that -- the suggestions can be

made by all sorts of subtle manners in -- in the person answering the question? The jury could not observe any of that in this?

MR. CURRAN: The jury only observed on the monitors the child --

QUESTION: Just the face of the child?

MR. CURRAN: -- and heard, Justice Scalia, heard, of course, the questions from Mr. Kolodner or from Kate O'Donnell, the prosecutor who was present.

QUESTION: So it isn't -- how -- what was the punishment for the offense here?

MR. CURRAN: The available punishment was 15 years. The punishment in this case was 10 years.

QUESTION: But for 15 years possible in jail, Mrs. Craig, just on the saying of one -- you say they were not even all psychiatrists. They -- they --

MR. CURRAN: In truth, Justice, none were psychiatrists.

QUESTION: None --

MR. CURRAN: Dr. Sweeney was a licensed psychologist, who had worked for a period of time at the Johns Hopkins division of psychiatry, but she was indeed a psychologist. The others were licensed social workers, and one was a child therapist.

QUESTION: And on the basis of no more than the

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judgment of one licensed social worker, this woman could be sent to jail for 15 years on the basis of testimony of a child that she never even had the opportunity to be in the room with when the child said that testimony, to look at the child or if she wanted to personally conduct cross-examination to ask that child, you know, child, did I really do this to you.

On the basis of one licensed social worker, she has been deprived of that?

MR. CURRAN: With all due respect, Justice, the -- the facts will also demonstrate that there was in addition to the child testifying as to what happened to her, there was the testimony of Dr. Charles Shubin, a child clinical pediatrician who documented physical findings of scarring in the private areas of these children, and that was not --

QUESTION: I'm not talking about that evidence. I mean, that's other evidence. We're just talking about the testimony of the child, whether that should have been admissible or whether the woman should have been able to confront the child. That's all we're talking about. You say it was just on the basis of a licensed social worker that said that the child would be too upset?

MR. CURRAN: It was based on the testimony before Judge Kane, the trial judge, that this expert

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witness who he qualified based on weeks -- 20 -- the record will show in some cases 20 therapy visits and in another case 36 visits. So you're not talking about an isolated visit. You're talking about a long continuum of -- of therapy, and they stated in one case the child would regress if has -- have to face this particular defendant after they had taken this therapy.

Bear in mind, Justice, they were four, five and six years of age at the time they were called, and --

QUESTION: I understand that, and that's something of an emotional trauma. But this woman is going to jail for 15 years. I mean, if you -- if you weigh the possible emotional trauma to the child against a 15-year jail sentence, is it -- is it -- is it hard to come -- come to the conclusion which way you should go?

MR. CURRAN: We're asking the Court to determine was the confrontation right that all of us have under the Sixth Amendment, the guarantee of a fair trial, was that satisfied by this procedure, bearing in mind the jury saw the child take the solemn oath, the jury saw and heard the extensive cross-examination, and the jury could assess the child's facial expressions and responses.

So the only thing that was absent was the physical presence of a child sitting in the courtroom several feet away.

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QUESTION: And the presence of the defendant.

MR. CURRAN: And the --

QUESTION: And the ability of counsel -- if the defendant wanted to ask the questions herself to ask the child questions, or counsel to say, you know, there -- there is Mrs. Craig, your mother, did she really do those things.

I find it very difficult to think that that isn't important.

MR. CURRAN: Our position in that regard, Justice Scalia, is that there was this finding based on this testimony that the children were unavailable. They were functionally unavailable as we talked about in the Roberts case, and if there is, in fact, testimony that's unavailable -- and, of course, in our case if the testimony is unavailable, there is no evidence, there is no truth-determining faction or function for the jury to determine, and there's no trial. That's our dilemma.

Absent these procedures where there can be a careful analysis of the expert testimony and if believed -- now bear in mind there was no request to have other experts, I might add, Justice Scalia. There was -- there was our experts -- and the judge was satisfied that, based on the testimony, these children were seriously -- would be seriously emotionally

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distressed such that they could not reasonably communicate -- i.e., unavailable, i.e., no evidence, no truth-seeking determination and no trial in our case.

QUESTION: General Curran, can I ask you a question about the Maryland statute?

MR. CURRAN: I'm sorry. Yes, sir.

QUESTION: If the, as Justice O'Connor pointed out in her question, the test seems to be whether the child could testify in the courtroom rather than in the presence of the defendant, and if there were a finding that the child could not testify in the courtroom and had to testify in a -- over TV, and if the defendant had represented herself rather than having counsel, would the proceeding have gone forward in the -- by television with the defendant confronting the child and doing the cross-examination herself?

MR. CURRAN: Our statute does not permit that, Your Honor. If the defendant chose to represent herself, then we could not use Section 9102, and that's -- that's spelled out in the statute.

QUESTION: I see.

MR. CURRAN: We -- we can only use it when there's counsel involved and only use it when there has been a finding of functional unavailability.

The court verdict was in. Several months later

there was a motion for new trial, at which time this whole issue was argued again before Judge Kane. Judge Kane again had the opportunity to reexamine all of the evidence that had come forward -- the competency hearing that he conducted when he saw the children, all of the expert testimony, the Dr. Shubin testimony, other witnesses who confirmed statements made by the children -- and held that -- in hindsight he reaffirmed his position that the use of the statute in this circumstance was permitted and was appropriate.

Our court of special appeals affirmed that decision. Our court of appeals, our highest court, reversed, and they reversed, Justices, on the basis of, as they read your decision in Coy: "We find that the trial court did not reach that high threshold required by Coy."

And that's where we differ, and that's where we part because we -- we do not believe that this Court established a high threshold requiring that before we could use our section or any of the other states who have joined us can use their respective sessions, they've got to have the face-to-face confrontation between the defendant and the victim or the televised face to face.

I suggest to you, Justices, that that would be illogical to require the very trauma to be experienced that we in Maryland are trying to eliminate, and this is

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what the court, if upheld, would require us in Maryland to do. Try first to see if the young children who are deemed by experts to be potentially seriously emotionally distressed, try first to see if they can confront the defendant. If they are distressed and break down, then go to the two-way television procedure. If they are again distressed and break down, then and finally then, you can use the --

QUESTION: Well, which is it -- which is it -- which is it, just the trauma, or is it, as you suggested a minute ago, the functional unavailability?

MR. CURRAN: It is the plain meaning, Justice White, of the term "serious emotional distress" such that one cannot reasonably communicate. I respectfully suggest that is functional unavailability.

QUESTION: Well, suppose there's plenty of trauma but you could not conclude that there was functional unavailability?

MR. CURRAN: Well, then -- then, as again -- and our statutes quite candidly permit the use of this for any person 17 and under.

QUESTION: Well, what's so unusual -- what's so bad about what the -- your court of appeals did, it said that if you want to -- if you want to avoid having the child testify in the courtroom, you ought to -- you ought

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to test it out -- test them out ahead of time.

MR. CURRAN: Like a dry run.

QUESTION: Well, yeah. It may be -- it may be that there'd be a lot of trauma, but it may be that they could testify.

MR. CURRAN: But, Your Honor, if -- if we are correct --

QUESTION: And all you talked about is that what you're trying to avoid would -- would be -- would happen in the dry run, but you're -- you're really after more than just avoiding trauma.

MR. CURRAN: We don't want to cause the serious emotional distress. We want to protect children --

QUESTION: All right. What if there is a severe emotional distress but, nevertheless, they -- they could testify?

MR. CURRAN: Well, then, if -- if they're severe -- if the experts say there will be serious emotional distress but they will not -- they still will be able to reasonably communicate, well, then, they have to, sadly, go in court.

Actually --

QUESTION: Well, why not -- why not test that out ahead of time?

MR. CURRAN: Because we think it would be

illogical if we're trying to protect children from this serious emotional distress to make them incur the very thing we're trying to protect them from. That's where we differ very strongly with our court of appeals.

QUESTION: I know, but you don't -- you don't want to -- you just seem to me to concede that -- that severe emotional distress would not be enough to excuse the -- to excuse them from testifying in the courtroom.

MR. CURRAN: Serious -- well, our statute, in all candor, Justice White, requires the finding of serious emotional distress such that --

QUESTION: Exactly.

MR. CURRAN: -- they cannot reasonably communicate.

QUESTION: Exactly. So severe emotional distress is not enough. You've got to have functional unavailability.

MR. CURRAN: That would be correct, Justice. You'd have to have the functional unavailability as we talked in, I believe, the Roberts analysis.

QUESTION: Emotional distress actually has nothing to do with it except that that's the reason for the functional disability. It could be some other reason. I mean, we don't protect witnesses from emotional distress. A child is -- is no more emotionally distressed

than a -- than a fully adult rape -- rape victim. Is -- is that the next step that Maryland is going to take, to protect rape victims from emotional distress by also allowing them not to testify and --

MR. CURRAN: That is not a Maryland statute, Justice Scalia. However --

QUESTION: Emotional distress is not the criterion. It's unavailability.

MR. CURRAN: The criteria, is there a compelling public policy? And we argue, and I hope that the Court will agree, there is this compelling public policy not only in Maryland but indeed across this country, that children can be, as the Court has in the past in other cases dealing with the disposition of -- distributing of pornography, child labor laws, juvenile court systems, we always tend to support and protect children differently from -- from adults, because an adult can -- an adult -- with all due respect, an adult rape victim who may be traumatized by this experience I believe is better equipped to understand that in that courtroom setting that individual who did that bad thing cannot attack her.

We had testimony from these experts, one in particular, that asked the police, please keep this person away from me. They -- they were in fear. Read that -- they were in fear for their lives, the lives of their

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parents. They were told never to tell, and when you tell this to a person who is four years of age and five years of age, that makes an indelible imprint and thus we believe there is a difference. Now, if --

QUESTION: Well, General Curran, I suppose it's possible that a rape victim, as Justice Scalia mentions, or even a victim of some Mafia-type crime, and an adult, could be so terrified to testify that it would be -- perhaps the same finding could be made. Would you think a state could, under those circumstances, adopt a similar rule?

MR. CURRAN: Justice O'Connor, we don't --

QUESTION: Or an elderly crime victim.

MR. CURRAN: Or perhaps a retarded person. I -- I know what -- where you're heading, and I would be sympathetic with that, but that is not now a demonstrated --

QUESTION: I'm just asking you whether you think the confrontation clause would preclude a state rule to protect such adult witnesses?

MR. CURRAN: I believe the state, Maryland in our child case by our statute, or any other state who ever attempts to have something other than the preferable face to face, must demonstrate by testimony, reliability, and they must demonstrate the unavailability of that

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particular person, and if they're unavailable --

QUESTION: The functional --

MR. CURRAN: Functional unavailability --

QUESTION: -- unavailable?

MR. CURRAN: -- in our case, or functionally unavailability in the -- in the case of the rape victim or the elderly person. Yes, Justice, I would think it would be appropriate to -- if there is a demonstrated, compelling public policy.

Now, of course, in our case we say we can document our compelling public policy, and I would invite, insofar as the truthfulness of the children, I would invite for your review the American Psychological Association amicus which was kind enough to be delivered and which takes neither side, but it spells out very clearly what these experts find to be the difficulties suffered by children in a stressful situation.

QUESTION: Mr. Attorney General, does your test -- your evidence from these experts, their testimony, did they say that it was impossible for this child to testify? I didn't see that word any place.

MR. CURRAN: I -- Justice, I don't recall the word "impossible." I --

QUESTION: Well, weren't you obliged to go that far --

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MR. CURRAN: They --

QUESTION: -- before you put somebody in jail for 15 years?

MR. CURRAN: Well --

QUESTION: You talk about the trauma for the child. 15 years in prison, there's a little bit of trauma, too.

MR. CURRAN: I understand, Justice.

QUESTION: But of course a child scarred for life is a lot longer than 15 years.

MR. CURRAN: I agree, Justice. The testament of these experts talked about, they would curl up and would not talk, so I -- that would be -- in fact that was the main witness would -- so that would be -- although they didn't use the word "impossible," if one would curl up and not talk. With Jesse Smith, another youngster, similar types of words.

QUESTION: But they never made any effort to find out.

MR. CURRAN: They never preliminarily put them in a room with the defendant and physically saw that they would decompensate. No, they did not.

QUESTION: Do you need the word "preliminarily" in there? They never did it.

MR. CURRAN: No sir, they did not. They did

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not --

QUESTION: So you don't need the word "preliminarily."

MR. CURRAN: Well, by that -- I'm sorry, Justice. Before they used 9102, they did not, as our court of appeals suggests Coy required, they did not require the victim to confront, face to face --

QUESTION: What would you do with an adult with a mental age of five?

MR. CURRAN: Well, that's a very compelling scenario, and it's not, of course, covered by our particular case. But again, I would invite that there may well be other instances, based on the Roberts suggestion, that if you find what is a functional unavailability, if we're looking for truth -- and that's really what we're trying -- the Sixth Amendment guarantees a fair trial to the defendant, and indeed a fair trial to the state. If we're looking for truth, we've got to get the evidence in, and that's why we've permitted any number of times --

QUESTION: Well, but we're not looking for truth at any cost. We exclude a whole lot of things because the chances are it's true, but it's just not close enough to be true that we'll keep it out. I mean, it -- isn't the first rule of our criminal trials, like the Hippocratic Oath, first do no harm? Don't put away for 15 years

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someone who doesn't belong there? And you don't take chances as to whether --

MR. CURRAN: Yes, Justice, but we are permitting hearsay to come in if it is firmly rooted in our jurisprudence or if you can demonstrate to the satisfaction of the trier of the fact that there is a source of truthfulness, and we believe --

QUESTION: But isn't the best way for the trier of fact to look at the witness and look at the witness' reaction to the questions and the questioner's attitudes, the expressions of the questioners, and to see the way the witness interacts with the defendant that is supposed to have done this harm to the witness? Isn't that the most effective way to -- to determine the truth?

MR. CURRAN: I concede see that is the most effective way, and I concede that's the preferable, but for the four- or five-year-old child who simply can't do that. Absent their testimony --

QUESTION: It's still the most effective if the child in fact weighs it and says, hi, mommy. Then you know that the child -- all of this has been suggested. Wouldn't that be enormously effective in the trial, if the child comes into the courtroom and says, hi, mommy? There's not even been an opportunity for that in this trial, just on the basis of a social worker who says no,

the child would curl up into a ball. You want to put away somebody for 15 years on -- on that prediction?

MR. CURRAN: No, Justice, what we -- we want the child to be able to tell her story and for the jury to hear the truth of what happened, and if the only way she can do that is by being permitted in a narrow sense just to be in another room, under oath, cross-examination and the jury sees her, that's far preferable than permitting in some hearsay testimony where there is none of those.

If there are no other questions, I'd like to reserve my time, sir.

QUESTION: Very well, General Curran.

Mr. Murphy, we'll hear now from you.

ORAL ARGUMENT OF WILLIAM H. MURPHY, JR.

ON BEHALF OF THE RESPONDENT

MR. MURPHY: Mr. Justice, and may it please the Court:

This is a case where we have the possibility of either good trauma or bad trauma. Let me explain, if I may. Bad trauma would come if the child had been abused and the defendant were guilty. Good trauma would come if the defendant were innocent and the child were prevaricating, fantasizing or being coached.

Query: Can we dispense with good trauma on the testimony of an unlicensed social worker such that there

is no possibility that the presence of Mrs. Craig could have caused that child to jump in her lap or to say, Ms. Craig, I'm sorry, I know you didn't do anything, or to have a demeanor such that in her presence the jury would have said not guilty, we don't believe the child.

It is too much of a price to pay that what my brother concedes is the most important part of the fact-finding process, face-to-face confrontation, be stripped away on the theoretical possibility (a) that a child could not testify, and (b) on the undemonstrated fact that that is so.

QUESTION: Mr. Murphy, what -- what do you think the Sixth Amendment confrontation clause requires in a case like this where you've got small children as witnesses?

MR. MURPHY: It depends on what the beginning assumption is for the process.

QUESTION: Well, I'm asking you what you think our law requires.

MR. MURPHY: If the defendant is innocent, for example, it requires the absolute face-to-face confrontation to help bring that out.

QUESTION: Well -- where we're talking about a confrontation clause requirement in the context of a trial where the defendant is, of course, attended by the

presumption of innocence.

Will you tell me what you think the requirements of the confrontation clause are in a situation like this?

MR. MURPHY: Number one, the proximity of the witness to the defendant. This is especially true when there is a close relationship with the defendant and the witness.

QUESTION: You mean proximity in the courtroom?

MR. MURPHY: Yes. In other words, there to be some actual face-to-face opportunity between the witness and the defendant.

QUESTION: Can that never be dispensed with?

MR. MURPHY: I don't believe so, no.

QUESTION: So you don't agree, then, with the Maryland Court of Appeals in this case?

MR. MURPHY: No, I don't, not that part of what they said. There's much that they said that I agree with, but not that part.

Number two --

QUESTION: Your -- your position is that if one of these child witnesses has been put through the procedure stated by the Maryland Court of Appeals and is given a trial run in the presence of the defendant, the witness is functionally unable to testify, that's -- that's the end of the case, that that witness will not be

heard from?

MR. MURPHY: Your Honor --

QUESTION: Is that your position?

MR. MURPHY: Yes, it is, and I will explain why.

We could not tell from the test developed by the Maryland statute or the procedure followed by the trial judge pretrial the basis for that trauma. That trauma may very well, as the state suggests, be from the fact of abuse. On the other hand, it could be because that child was so chastened by the presence of the defendant that she was not willing to give false testimony in the defendant's presence.

And if it is the latter, a socially desirable result has been reached. If it is the former, a socially undesirable result has been reached. But all constitutional rights have costs, and this is a cost, lest we throw out the good with the bad.

We take the position that there was much more to the right of confrontation than was permitted in this case. For example, the jury was not permitted, because of the way that the cameras were focused on the child, to see whether or not the child was looking to the prosecutor for guidance as to how to answer a particular question or whether or not the --

QUESTION: Well, were any objections made by the

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defense counsel to any action by the prosecutor when the witness was questioned? Is there anything in the record to reflect that the defense counsel said now, Your Honor, I object, the prosecutor is nodding the head to indicate what the child should answer? Was there anything like that?

MR. MURPHY: No, Your Honor, I don't believe any such objections were made.

QUESTION: No.

MR. MURPHY: But on the other hand, it would not have been counsel's right to object if the child looked at the prosecutor subtlely or if the prosecutor --

QUESTION: Well, the counsel could surely object if the prosecutor were by conduct trying to indicate to the child how the child should respond.

MR. MURPHY: On the other hand, though, Your Honor, if the child were reacting to the accused's presence, that full reaction would be present in front of the fact-finder. There was no opportunity in this kind of encounter for the child to react, nor was the judge there. Many children will respond truthfully when they see the black robe. They have an equal terror, as I feel, when they confront the judiciary --

(Laughter.)

MR. MURPHY: -- and this may have

prophylactically caused the child to change her entire testimony. That was gone.

QUESTION: Did the child see the judge before the videotaping began?

MR. MURPHY: The record is not clear about that. The record is clear that the child was brought to the -- and this came out in the motion for new trial -- the child was brought to the courtroom to have a look around, a procedure which I think is good but no substitute for having to determine then and there in the presence of a black robe how to talk, what to say, whether to lie, whether not to lie.

QUESTION: Let me just clarify one thing. Under the statute, the judge is not in the room with the witness, is he?

MR. MURPHY: Absolutely not.

QUESTION: So the judge wouldn't be able to observe what exactly or how the prosecutor was behaving?

MR. MURPHY: That is correct, nor would the jury, nor would co-counsel sitting next to Ms. Craig, nor would Ms. Craig.

QUESTION: How -- how under that procedure would the judge rule on an objection such as Justice O'Connor has suggested? Say he objected to nodding his head. What would -- how would the judge rule on it?

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MR. MURPHY: That's an -- that's an excellent question, Your Honor, because he would not be able to rule. He would not know firsthand the facts.

QUESTION: Say the prosecutor denied that he did it. How would the judge know?

MR. MURPHY: That's right. And, of course, if the cameraman were a pro-prosecution person, he'd corroborate the prosecutor.

And so there would be no way, Justice O'Connor, that if counsel made an objection that the trial judge would be able to accurately rule on firsthand knowledge.

QUESTION: Were there other people in the court -- in -- in the room with the child when she testified who can themselves testify if it became necessary --

MR. MURPHY: In this case, no.

QUESTION: -- because this is certainly off on a strange tack now that's far removed from the issue here, isn't it?

MR. MURPHY: Well, Your Honor, I think it's integrally related to the issue, and that is whether or not any balancing, in fact, occurred when this child was put in a separate room away from the court, away from the jury, away from the defendant.

QUESTION: Well, assuming that a trial court is

able to make a specific, a case-specific finding that the child witness cannot testify in the presence of the defendant, how is the truth-seeking function impeded there?

MR. MURPHY: If the defendant is innocent and the presence of the child could have -- or rather, the presence of the defendant before the child could have provoked the kind of response consistent with innocence, the truth-seeking function of the trial has been ruined.

It's like going into exploratory surgery, if it pleases the Court.

QUESTION: Well, if the evidence, for example, shows that the child witness' testimony might be more reliable in the absence of the defendant's immediate presence and there is, after all, the right of cross-examination, which we have always thought was crucial in terms of reaching the truth, the witness is still under oath, the jury and the defendant still see the witness in a very direct way on the screen.

Now, under those circumstances isn't it -- isn't the truth-seeking function still attained?

MR. MURPHY: If I can make an analogy, Justice O'Connor, we're about to have exploratory surgery. We know there's a tumor. We don't know where it is, how it's implicated with other organs or veins. And before the

surgery someone takes one of my surgical instruments away. He takes the clamp. I might be able to say in advance, if I knew everything that was going to happen, that that clamp wouldn't be necessary. But if I were in the middle of the trial or that surgery and I needed that clamp and I didn't have it, that patient would bleed to death.

Ms. Craig didn't have the clamp, and we can't say that had she had the clamp the result would have been the same.

QUESTION: Well, you're proceeding on the assumption that veracity, credibility is always better tested with the child witness when that child witness is in a big courtroom facing the defendant and the judge. And I think you're correct that that is the thrust of our jurisprudence.

But is there any modern studies which bear you out or which discuss this? I -- I should think that some trial attorneys would find it much easier to cross-examine a -- to cross-examine the child in an environment where very few people are present and where just the camera is present.

MR. MURPHY: If that were so --

QUESTION: Have there been any studies on that?

MR. MURPHY: There have been conflicting studies about the impact of child testimony. Unfortunately, these

studies are flawed the way that the state's argument is flawed. They all proceed from the assumption of guilt, and no one has studied the impact of good trauma, that is, the trauma that comes from activating the child's conscience when an innocent person is involved.

And so -- and to answer the second part of your question, I would think that whether or not it would be advantageous to a cross-examiner would be the judgment of the defense lawyer rather than the judgment of the court.

In this case Ms. Craig's lawyer adjudged that it was not to his advantage. He did not want this procedure, and he objected to it fully and completely all the way down the line.

And so what we have here is --

QUESTION: Well, of course, you're asking us to make an assumption that in all or most cases the truth-seeking function is better served -- and I'm just pointing out that I -- I don't believe there is -- that's necessarily borne out by modern scholarship with respect to videotape.

MR. MURPHY: Well --

QUESTION: I agree that the thrust of the jurisprudence in on your side.

MR. MURPHY: The -- the question remains, then, are we experimenting at the expense of Ms. Craig's rights,

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given that there is no authority in support of the experiment, and if we were to find authority later which said it was a bad experiment, what happens to Mrs. Craig?

And so, again, all of these discussions and questions are flawed because they are based on the assumption of guilt and that guilt caused trauma. But what about the trauma that the defendant who is innocent ought to have the right to inflict because he is innocent, the trauma that causes the child to back away from previous out-of-court statements or direct testimony?

QUESTION: Well, of course, again, there's an assumption that trauma will bring out -- bring out the truth. It may be that -- that trauma will reinforce the child in -- in a fabrication. I -- I know of no evidence for one proposition over the other.

MR. MURPHY: Your Honor, I believe we can look at 200 years of jurisprudence where, on occasion, things like that have happened.

I agree that we cannot predict in a given case what will happen. I agree that a social worker without a license cannot predict whether a child can testify or not or the impact of that trauma.

It is because we cannot predict that this is a bad experiment. What if we made the prediction and in the courtroom where there was a chance to confront there was

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recantation, despite our prediction? That 15-year sentence would be gone. Justice would have been done. The truth-seeking function of the courtroom would have been served.

It is not served when we made an assumption of guilt, and we make an assumption of trauma based on guilt because we defeat the purpose of having a trial. The trial is to winnow the innocent from the guilty.

QUESTION: Mr. Murphy, we don't really know that even adults appear to testify -- that the truth process is served by having adults testify in -- in front of black robes, as you put it. It might indeed be better, for all we know, to videotape them at home sitting in their easy chair in a more natural environment.

But what we do know is that sometimes -- sometimes -- often enough -- that it serves the truth-serving function. They -- they -- they get frightened by -- into telling the truth by seeing black robes, and isn't that enough to support your case? You -- you don't have to prove that it always does it or even that it usually does it.

MR. MURPHY: I agree.

QUESTION: Just that it sometimes does it, I thought. I thought that that's the assumption we operated under.

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MR. MURPHY: My mother, who was present, and my father who is a member of this Court who argued here in 1952, have both had the experience with me, of frightening me into the truth, and I am sure that they would not dispense with that.

And I am also sure that there is an analogy that can be made with people who have close relationships with children who are then accused for God knows what reason. Those people have the ability by their presence to confront the child and frighten them into the truth.

QUESTION: You're familiar with the case that's going to follow yours?

MR. MURPHY: Yes, Your Honor.

QUESTION: Idaho against Wright?

MR. MURPHY: Yes.

QUESTION: Which would you prefer, the Maryland procedure or the Idaho procedure?

MR. MURPHY: That's asking me whether I prefer the devil or the deep blue sea.

QUESTION: Exactly right.

(Laughter.)

QUESTION: You're quite right. Quite right. Which would you like? Which would you prefer?

MR. MURPHY: Which kind of poison would I ingest?

QUESTION: Exactly, exactly.

MR. MURPHY: Well, I'd reject them both, Your Honor, and that's --

QUESTION: I know. I know.

MR. MURPHY: -- the only fair answer I could give you.

(Laughter.)

QUESTION: I know. But suppose -- suppose we agreed with Idaho in the next case. I would suppose you would rather go with the Maryland procedure.

MR. MURPHY: Yes, I'd prefer the slower-acting poison to that quick fix.

QUESTION: Exactly, exactly, exactly.

MR. MURPHY: And, Your Honor, I think much of that, although said somewhat in jest, is true.

QUESTION: Functional, but -- I -- I take it that you -- you don't think there's room for much hearsay at all in a criminal trial.

MR. MURPHY: No, I think the firmly rooted historically acceptable exceptions ought to stay with us because they deal with discrete instances of reliability, not the testimony of a basically unreliable child -- and, by the way, the younger the child, the more the child needs to be protected.

QUESTION: Well, those -- those -- those

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instances of historical exceptions to the hearsay rule didn't devolve all at one time. They evolved exception by exception over a period of time.

What you're saying is that no more may -- may there be any evolution. We freeze everything the way it was at a certain time.

MR. MURPHY: Well, I'm afraid of experimental justice, and --

QUESTION: Well, the hearsay -- the hearsay rule in its evolution over the centuries was experimental.

MR. MURPHY: At -- at a great cost to innocent people.

QUESTION: Well, but are you saying that the entire rules of evidence should be frozen as of 1787?

MR. MURPHY: Oh, not at all. All I'm suggesting is that when an experiment is tried which unnecessarily takes away the right of an innocent person to traumatize a witness into telling the truth that that's too much of a cost for us to pay.

QUESTION: Well, but your -- your -- your position is that these kind of crimes that are involved here simply in many cases will not be prosecuted because the rules of evidence will be too strict to ever allow the witnesses who know most about the thing to tell their version to the jury.

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MR. MURPHY: On the other hand, many cases will not be prosecuted because the prospect of testifying face to face falsely against an accused will be too much for a child witness or an adult to bear. Constitutional rights have some costs, and one of those costs is that in order to exhort one interest, we must diminish the impact of another.

And the truth-finding function of the courtroom is the highest of all trial interests. Although there are times we dispense with it, we usually do that in the interest of making the procedure as a whole even more fair.

But to deprive a defendant of one of the fundamental tools -- in many cases the most important tool -- to -- to cause a witness to react in a way a jury might find incredible is taking far too much. I doubt if Thomas Jefferson would have accepted such a -- a radical revision of our trial procedures.

And incidentally, child abuse cases were known back then.

QUESTION: But you think Thomas Jefferson was an expert on trial procedure?

MR. MURPHY: Well, let me pick a better one.

(Laughter.)

MR. MURPHY: Let me pick a better one.

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I think one of the framers who was an expert would have known -- and, indeed, one didn't have to be an expert to know that face-to-face confrontation since the days of Susanna and the Elder or earlier works. It really does. Susanna would be in the lost and found had it not been for David's insistence that the Pharisees be confronted directly with their accusations.

And so history is replete with -- with -- with -- with times when the fact-finder was going to decide against the accused only to be turned around when there was a full and fair confrontation.

QUESTION: Mr. Murphy, it sounds to me like you don't defend the judgment of the Maryland court, that you would never permit under any finding the procedure that Maryland has devised for youths?

MR. MURPHY: Your Honor, you're right.

QUESTION: So you're not defending the judgment below?

MR. MURPHY: I am defending three-quarters of the judgment below. They agreed with us on three out of the four questions. I defend those.

But where the court said that the statute was constitutional and that exceptions to the rule of face-to-face confrontation could be made, no, I do not defend that holding.

QUESTION: Well, the Maryland court would prevent -- would permit a new trial?

MR. MURPHY: Yes. I -- I -- I support that.

QUESTION: Well -- but would permit -- would permit a -- would permit a trial with these witnesses if the procedure that the court specified was followed?

MR. MURPHY: I do not support that.

QUESTION: I know you don't, but the -- but, of course, you didn't cross -- you didn't cross there.

MR. MURPHY: That -- that -- that is correct, Your Honor.

Incidentally, the balancing that -- assuming for the sake of discussion that this court decides that the right is not absolute. The balancing that the Sixth Amendment requires was not made in this case. No discussion at all, no consideration at all was made about whether two-way television would have been acceptable to the psychologists or to the social worker in this case as an alternative to one-way. And there at least the child would have had some opportunity to see through the camera at the face of the defendant.

We don't know whether the child would have reacted to that as fantasy or whether he would have had the same emotional impact that face-to-face, in-the-flesh confrontation would have had, but it would certainly have

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been better than eliminating -- stripping the right that Miss Craig had to be seen by the child.

And so because Maryland didn't attempt even to balance that interest, the judgment ought to be reversed, because we cannot take away any more of Mrs. Craig's Sixth Amendment rights than is necessary on a fact-specific basis to protect that --

QUESTION: You argued that --

QUESTION: You don't mean that -- you don't mean that the judgment of the Maryland Court of Appeals should be reversed, do you?

MR. MURPHY: Only that part of the judgment which we --

QUESTION: Well, you -- you have to cross-appeal to -- to obtain that result. All you can argue for here is an affirmance.

MR. MURPHY: That is correct, Judge.

Unless there are further questions, I have concluded my presentation.

QUESTION: Thank you, Mr. Murphy.

Mr. Curran, do you have rebuttal? You have two minutes remaining.

REBUTTAL ARGUMENT OF J. JOSEPH CURRAN, JR.

ON BEHALF OF THE PETITIONER

MR. CURRAN: I would like to respond, if I

might, to Justice Kennedy. Prior to the videotaping, Justice, there was the competency hearing in which the child -- each of the children did visit the judge's chamber with the judge and there was the dialogue between the judge and the child to ascertain that the child was competent to then go into the videotape hearing.

QUESTION: Was that the same day?

MR. CURRAN: Oh, immediately preceding the taping by moments. The judge then left to go out on the bench. The child remained in the --

QUESTION: Did the judge swear the child?

MR. CURRAN: I believe, Justice, that was done by the clerk, but I -- the questioning was --

QUESTION: In the presence of the judge?

MR. CURRAN: I do not recall that, sir. I think it was done by the clerk, and it might have been when the judge was already on the bench.

We respectfully disagree with the Respondent that one should freeze in time from this day forth the -- the years and decades of exceptions that have been rightfully granted under the hearsay rule.

In truth, we could have a situation where an excited utterance of this child might be permitted in as deemed to be reliable, but we suggest that better for the defendant to have the even more reliable opportunity to

see the child live, under oath, with extensive cross-examination and the jury to assess the reliability and credibility.

We believe, Justices, that the other day has --

QUESTION: Again, it wouldn't matter whether it was live or not.

MR. CURRAN: No, sir.

QUESTION: It would be just as effective if it was a videotape, as far as the jury --

MR. CURRAN: That is correct.

QUESTION: Except that you can see the reaction of the witness -- of the defendant as she watches the testimony unfold. The jury can watch the defendant's reaction.

MR. CURRAN: The jury in our procedure is in the same room as the defendant, yes.

QUESTION: That would be the case with a videotape, too?

MR. CURRAN: Oh yes -- yes, Justice.

We believe, sir, that the other day that has been referred to in Coy has arrived. There is this compelling state interest, and indeed a genuine, compelling national interest, that -- that this type of procedure, the number -- sadly, the number of child abuse cases is rising. Maryland and other states are trying to

respond with a legitimate procedure. We have a procedure which we generally believe --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Curran. Your time has expired.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)