N.C. Court of Appeals OKs Remote Two-Way Testimony for Ill Witnesses

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I recently published a lengthy paper here examining the constitutionality of remote testimony in criminal trials under *Crawford* and the confrontation clause. In that paper I noted that the North Carolina Court of Appeals has held that *Maryland v. Craig* procedures for child victims survive *Crawford. Maryland v. Craig* was a pre-*Crawford* United States Supreme Court case that carved out an exception to the right to face-to-face confrontation at trial. In *Craig* the Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Upholding the Maryland procedure, the Court reaffirmed the importance of face-to-face confrontation of witnesses appearing at trial but concluded that such confrontation was not an indispensable element of the right to confront one's accusers. It held that while "the Confrontation Clause reflects a preference for face-to-face confrontation . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case." It went on to explain that "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 is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." As to the important public policy, the Court stated: "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." However, the Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must (1) "hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify." The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) the child be competent to testify and testify under oath; (2) the defendant had full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant were able to view the witness's demeanor while he or she testified. Although the United States Supreme Court has not yet considered whether the procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina Court of Appeals has held that it does, State v. Jackson, ___ N.C. App. ___, 717 S.E.2d. 35, 39–40 (2011); State v. Lanford, ___ N.C. App. ___, 736 S.E.2d 619 (2013), clearing the way for continued use of *Craig* procedures for child victims post-*Crawford.*

Even before *Crawford* there had been some debate about whether *Craig* procedures could be expanded beyond the child victim context to other witnesses. *Craig* of course requires that the prosecution advance an important public policy to support the use of remote testimony. This suggests that to be *Craig* compliant, remote testimony would be permissible only when such an interest exists. Thus, once *Craig* procedures are applied outside of the child victim context, some important public policy interest other than protecting child sexual abuse victims must be asserted. As I discuss in the paper mentioned above, cases in other jurisdictions have held that the following public policy interests satisfy the confrontation clause:

- national security in terrorism cases,
- combating international drug smuggling,

- protecting witnesses who have been intimidated, and
- protecting a seriously ill witness's health.

In *State v. Seelig*, the North Carolina Court of Appeals weighed in, finding that the latter justification—protecting a seriously ill witness's health—sufficiently justifies limiting confrontation rights. In *Seelig,* the defendant was charged with obtaining property by false pretenses for selling products alleged to be gluten free but which in fact contained gluten. At trial, the trial court allowed an ill witness to testify by way of a two-way, live, closed-circuit web broadcast from Nebraska. The witness testified regarding the results of laboratory tests he performed on samples of the defendant's products. The trial court conducted a hearing and found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. The defendant was convicted and he appealed, arguing that the use of remote testimony violated his confrontation clause rights. Applying *Craig*, the court disagreed, concluding that the trial court's findings were sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest: protecting the witness's ill health. Turning to *Craig*'s second requirement, the court found that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination. In so doing, it also held that *Craig* is the proper analysis for two-way testimony, implicitly rejecting a minority view that two-way testimony need not be subjected to a *Craig* inquiry at all.

So now it's time for you to weigh in. How common is remote testimony in the trials other than those involving child victims? And for defense lawyers, does it degrade the defendant's confrontation right? If so, how? I'd love to hear your thoughts. Please post them or email me directly: smithj@sog.unc.edu