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# Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony in the Face of the Confrontation Clause

*Sophia Rowlands*

## *Code Section Affected*

Penal Code § 1347 (amended).

SB 138 (Maldonado); 2005 STAT. Ch. 480.

## I. INTRODUCTION

An incident in Senator Able Maldonado's district where a four-year-old child was sexually molested inspired him to introduce Chapter 480, which he calls "Cole's Law."<sup>1</sup> The child was so traumatized he was unable to testify in front of his molester, and so the case was never prosecuted.<sup>2</sup> While California allows limited use of "shielding" procedures to protect a child witness from trauma when testifying in a criminal proceeding, none of the existing statutes covered Cole's situation.<sup>3</sup> The Senator was motivated to introduce legislation to close a loophole in the current legal system: "Because of the current law, cases go unprosecuted and these predators walk free."<sup>4</sup> However, in closing a loophole, Cole's Law also reopens a Pandora's box of historical constitutional issues.

## II. EXISTING LAW

One of the most familiar laws governing criminal prosecutions in this country is the right of the accused to face any and all witnesses against him or her.<sup>5</sup> The concept of confrontation traces back to Roman law.<sup>6</sup> Indeed, the word "confront" likely comes from the Latin words "contra" (against) and "frons" (forehead), strongly suggesting a face-to-face encounter.<sup>7</sup> However, the United

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1. Ryan Huff, *Cole's Law Passes Senate Committee*, SAN LUIS OBISPO TRIB. (San Luis Obispo, Cal.), Mar. 30, 2005, at B1 (on file with the *McGeorge Law Review*).

2. Aurelio Rojas, *California Bill Would Let Abused Children Testify Through Closed Circuit T.V.*, SACRAMENTO BEE, Feb. 3, 2005, at A3.

3. *See Lawmaker Wants to Protect Abuse Victims from Open Court Testimony*, NEWS 10 LATEST NEWS, Mar. 29, 2005, [www.news10.net/story/full1.asp?id=10014](http://www.news10.net/story/full1.asp?id=10014) (last visited July 6, 2005) [hereinafter *Protect Abuse Victims*] (on file with the *McGeorge Law Review*) (stating that California has several exceptions to open court testimony for child witnesses).

4. Rojas, *supra* note 2 (quoting Senator Abel Maldonado, California State Senate) (internal punctuation omitted).

5. *See generally* Crawford v. Washington, 541 U.S. 36, 42-53 (2004) (tracing the history of the Confrontation Clause).

6. *Id.* at 43; *see also* Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (referring to "indications that a right of confrontation existed under Roman law").

7. Coy, 487 U.S. at 1015.

States Supreme Court, interpreting the Confrontation Clause, has held that the right to face-to-face confrontation is not “absolute,” and certain alternative procedures may be employed when they are necessary to further a compelling state interest.<sup>8</sup>

Alternatives to face-to-face confrontation include: (1) screening, wherein a screen is placed between the witness and the defendant in the courtroom; (2) videotape; (3) one-way closed-circuit television; and (4) two-way closed-circuit television.<sup>9</sup> Alternative testimony methods, or “shielding procedures,” are most commonly used with child witnesses in sexual abuse trials.<sup>10</sup>

#### A. *Brief Synopsis of Federal Law Protecting Minor Witnesses in Child Abuse Cases*

The United States Supreme Court first held that the special needs of child witnesses in sexual abuse cases may occasionally justify abridgement of the defendant’s constitutional rights in *Globe Newspaper Co. v. Superior Court*.<sup>11</sup> The Court found that the state has a compelling interest in protecting its minor citizens from “public degradation, humiliation, demoralization and psychological damage” and that certain procedures could be justified by a particularized finding that they were necessary to protect the welfare of the child witness.<sup>12</sup> In *Maryland v. Craig*, the Court applied these principles when it upheld the constitutionality of one-way closed-circuit televised testimony as a means of protecting a child witness. The Court stated that the rights conveyed by the Sixth Amendment are not absolute, and that “certain narrow circumstances . . . may warrant dispensing with confrontation at trial.”<sup>13</sup>

Congress effectively codified the holding of *Craig* when it enacted section 3509 of Title 18 of the United States Code (“18 U.S.C. 3509”), which allows the use of both videotaped and two-way televised testimony of child victims in federal prosecutions under certain circumstances, including those where the court finds a “substantial likelihood . . . that the child would suffer emotional trauma from testifying” and where the child is too frightened to testify in front of the

8. See *Maryland v. Craig*, 497 U.S. 836, 845, 847 (1990) (holding that the Confrontation Clause in the Sixth Amendment does not create an absolute right to confront witnesses in person, and thus allowing a child witness to testify via one-way closed-circuit television was permissible when there was a compelling state interest in protecting the child); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that the state has a compelling interest in protecting minor children when authorizing a closed trial in violation of the defendant’s right to a public trial).

9. Katherine W. Gearson, Comment, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants’ Rights*, 45 B.C. L. REV. 467, 468 (2004).

10. *Id.* at 469.

11. 457 U.S. at 607.

12. *Id.* at 607-08.

13. 497 U.S. at 848.

defendant.<sup>14</sup> Although the United States Supreme Court has never heard a case challenging the constitutionality of 18 U.S.C. 3509, the Ninth Circuit Court of Appeals has found the statute constitutional.<sup>15</sup>

### B. California Law

California is one of thirty-nine states that allows the use of one-way or two-way closed-circuit television testimony for child witnesses under certain circumstances.<sup>16</sup> The California Penal Code permits children under the age of thirteen to testify without actually being present in the courtroom when specified criteria are met.<sup>17</sup> First, the child's testimony must concern either a sexual offense or a violent felony allegedly committed by the defendant against the child.<sup>18</sup> Second, one of the following enumerated factors must also be present: (1) the defendant made certain threats concerning the minor or a family member, including threats of bodily injury, incarceration, deportation, or removal of the child from the family unit; (2) the defendant employed a deadly weapon during commission of the crime; (3) the defendant inflicted great bodily injury on the child during the commission of the crime; or (4) the defendant or his or her counsel behaved so egregiously as to render the minor unable to continue testifying.<sup>19</sup> Additionally, the court must find that the minor would be unavailable as a witness if he or she were required testify inside the courtroom in the presence of the defendant.<sup>20</sup>

If the child satisfies the above criteria, the court may allow the child to testify via either one-way or two-way closed-circuit television.<sup>21</sup> One-way closed-circuit television may only be used when the impact of seeing the defendant via two-way television would be so substantial as to prevent the minor from testifying at all. Such impact must be proven by clear and convincing evidence.<sup>22</sup>

Like many states, California also has its own version of the Confrontation Clause embodied in its Constitution.<sup>23</sup> The wording of the clause provides that the

14. 18 U.S.C.A. 3509(b)(1)(B)(i)-(ii) (West 2004).

15. *United States v. Etimani*, 328 F.3d 493, 499 (9th Cir. 2003), *cert den.* 540 U.S. 960 (2003); *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993). Indeed, research shows that the United States Supreme Court has denied certiorari to cases challenging the constitutionality of 18 U.S.C. 3509 in almost every circuit. *See also* Grearson, *supra* n. 8, at 478 (stating that the Supreme Court has not ruled on the validity of any such statute since deciding *Craig*).

16. *See Protect Abuse Victims*, *supra* note 3 (stating that California has several exceptions to open court testimony for child witnesses, and 39 other states plus the Federal court system have exemptions for traumatized children).

17. CAL. PENAL CODE §1347 (West 2005).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. CAL. CONST. Art. 1, § 15.

defendant has the right “to be personally present with counsel, and to be confronted with the witnesses against [him].”<sup>24</sup> When Penal Code section 1347 was first enacted in 1985, it sparked much debate as to whether its provisions potentially violated this clause of the California Constitution.<sup>25</sup> However, the statute has weathered all constitutional challenges to date.

### III. CHAPTER 480

Chapter 480 amends section 1347 of the California Penal Code in several ways. First and foremost, Chapter 480 expands existing law in California by adding to the list of instances when closed-circuit testimony is permissible for child witnesses. Specifically, it would allow a victim of child abuse under the age of thirteen to testify via closed-circuit television whenever the court determines that testifying in front of the defendant would cause the child to suffer “serious emotional distress” so substantial that it would make him or her otherwise unavailable as a witness.<sup>26</sup> As under prior law, the court is still required to consider “the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged” when determining whether the alternate procedure is warranted.<sup>27</sup> Also consistent with the previous version of section 1347, the fact that the minor simply refuses to testify is not, without more, sufficient to warrant the use of the shielding procedure.<sup>28</sup> The necessity of closed-circuit testimony must still be proven by clear and convincing evidence.<sup>29</sup>

Chapter 480 also adds felony violations of Penal Code sections 273a and 273d to the list of offenses for which the prosecution may request televised testimony.<sup>30</sup> Section 273a is the child endangerment statute, and 273d covers corporal or inhumane treatment of a child.<sup>31</sup> Both are “wobbler” crimes, meaning they can be charged as either felonies or misdemeanors depending on the case,<sup>32</sup> but Chapter 480 is limited only to felony offenses charged under those sections.<sup>33</sup>

Additionally, Chapter 480 adds a new subdivision (l) to section 1347, clarifying that nothing in the new statute should be interpreted in a way that

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24. *Id.*

25. Nadine E. Betsworth, *California's Newest Child Witness Statutes: Confrontation Clause Challenges to Televised and Videotaped Testimony*, 18 SW. U.L. REV. 53, 59-77 (1987).

26. CAL. PENAL CODE § 1347(b)(2)(A) (amended by Chapter 480).

27. *Id.* § 1347(b)(2).

28. *Id.*

29. *Id.*

30. *Id.* § 1347(b)(1)(C).

31. *Id.* §§ 273a, 273d (West 2005).

32. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 138, at 2-3 (Apr. 5, 2005).

33. CAL. PENAL CODE § 1347(b)(1)(C) (amended by Chapter 480).

would prevent the defendant from representation by counsel during a closed-circuit proceeding.<sup>34</sup>

Finally, Chapter 480 adds “any technicians necessary to operate the closed-circuit equipment” to the list of persons authorized to be physically present in the room with the minor during his or her testimony.<sup>35</sup> The prior version of the statute, perhaps due to oversight, permitted only a designated support person, a non-uniformed bailiff, and a court representative to be present.<sup>36</sup>

#### IV. ANALYSIS

The overall effect of Chapter 480 is to broaden the circumstances when closed-circuit television testimony would be available for child abuse victims.<sup>37</sup> Under prior law, such an option was only available in cases meeting certain enumerated circumstances.<sup>38</sup> Because ninety percent of sexual assaults on children are committed by family members or those close to the child,<sup>39</sup> they often do not include the factors listed under current law, such as the use of a deadly weapon, threats of physical violence or bodily injury, or the infliction of extreme bodily injury during the commission of the crime.<sup>40</sup> A significant number of offenses involve young children, who may be more easily intimidated or influenced by their molester.<sup>41</sup> Thus, in many cases, the abuser may have no need to use specific threats or weapons to commit the assault.<sup>42</sup> The purpose of Chapter 480 is to make the option of closed-circuit televised testimony available in cases where the child has been abused, but has not necessarily suffered bodily injury or threats.<sup>43</sup>

The implications of these broadening measures are troublesome to defense attorneys.<sup>44</sup> Although Chapter 480 keeps much of the original language of section

34. *Id.* § 1347(l).

35. *Id.* § 1347(f).

36. *Id.*

37. *Id.*

38. *Id.* § 1347.

39. See Georgia Center for Children, Facts and Statistics on Child Sexual Abuse and Maltreatment, <http://www.georgiacenterforchildren.org/statistics.html> (last visited July 21, 2005) (on file with the *McGeorge Law Review*) (stating that ninety-one percent of children who are molested are molested by someone they know).

40. Letter from David LaBahn, Exec. Dir., Cal. Dist. Att’y Ass’n, to Senator Abel Maldonado, Cal. State Senate (Aug. 30, 2005) (on file with the *McGeorge Law Review*).

41. See Amber Center for Missing and Exploited Children, Project KidSafe Information on Child Sexual Abuse Statistics, [http://ambercenter.org/bills\\_statistics.htm](http://ambercenter.org/bills_statistics.htm) (last visited July 21, 2005) (on file with the *McGeorge Law Review*) (stating that thirty-four percent of sexual abuse victims are under the age of twelve, and that one third of juvenile victims are under the age of six).

42. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE HEARING ON SB 138, at 3 (Jun. 28, 2005) (stating that often the assault is characterized as “our little secret” and thus threats and deadly weapons aren’t necessary).

43. Letter from David LaBahn to Senator Abel Maldonado, *supra* note 40.

44. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 138, at 6 (Mar. 29, 2005).

1347, many feel that allowing closed-circuit testimony at all is a violation of the defendant's constitutional rights and every extension of closed-circuit's use is a further abrogation of those rights.<sup>45</sup>

Historically, the contention that closed-circuit television violates a defendant's constitutional right to confront his or her accuser is premised on two arguments.<sup>46</sup> The first hinges on the purpose behind the Confrontation Clause and the theory that "it is easier to tell a lie behind someone's back than to his or her face."<sup>47</sup> Proponents of that theory argue that the stress of face-to-face confrontation encourages witness honesty and may serve to impeach or frustrate the false accuser.<sup>48</sup> Therefore, it is reasoned that closed-circuit testimony not only explicitly violates the Sixth Amendment, but potentially results in a higher rate of false convictions. The second argument against closed-circuit testimony relies on the Due Process Clause of the Fourteenth Amendment and argues that the use of witness protective measures gives the appearance of guilt, and thus is unfairly prejudicial to the defendant.<sup>49</sup>

At least one comprehensive study serves to disprove these contentions. In a 2001 study specifically designed to test closed-circuit child testimony, researchers found that jurors were no better at accurately spotting false accusers in face-to-face testimony than they were via closed-circuit testimony.<sup>50</sup> Further, the study found that the use of closed-circuit television actually resulted in a pro-defense bias; that is, jurors were more inclined to discredit and disbelieve a child testifying via television than a child sitting in front of them, even when the child was telling the truth.<sup>51</sup> It was concluded that the use of closed-circuit television resulted in "a loss of emotional impact and immediacy," meaning the jurors were less likely to feel empathy for the child's story.<sup>52</sup>

Indeed, many prosecutors prefer in-court testimony to closed-circuit for those very reasons.<sup>53</sup> A survey of members of the National District Attorneys Association showed that only about seventeen percent of the attorneys surveyed

45. See generally Letter from Rickard Santwier, Cal. Att'ys for Criminal Justice, to Senator Abel Maldonado, Cal. State Senate (April 26, 2005) (on file with the *McGeorge Law Review*) (stating a systematic opposition to the bill); Letter from Francisco Lobaco, Am. Civil Liberties Union, to Senator Abel Maldonado, Cal. State Senate (Mar. 23, 2005) (on file with the *McGeorge Law Review*) (registering in opposition to the bill as an impermissible abridgement of defendant's rights).

46. Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed Circuit Trials*, 25 LAW & HUM. BEHAV. 339, 341 (2001).

47. *Id.* at 341-42.

48. *Id.* at 341.

49. *Id.* at 340; see also JOHN E.B. MYERS ET AL., *Prosecution of Child Sexual Abuse in the United States*, reprinted in CRITICAL ISSUES IN CHILD SEXUAL ABUSE 27, 93 (Jon R. Conte, ed., 2002) (stating that the defendant might argue jurors would infer the use of televised testimony means "there must be a good reason to protect the child, namely, the defendant is guilty").

50. Orcutt et al., *supra* note 46, at 366.

51. *Id.*

52. *Id.*

53. MYERS ET AL., *supra* note 49, at 58.

had ever used closed-circuit testimony for a child witness.<sup>54</sup> Although increased use of televised testimony is a possibility now under California's more permissive Chapter 480, due to the drawbacks for the prosecution, it is unknown whether it will now be utilized more frequently.

#### A. California's Chapter 480 and the Federal Codification of the "Craig" Rule

Chapter 480 is, at once, both stricter and more permissive than its federal counterpart, 18 U.S.C. 3509. Federal law allows televised testimony if the court finds "i) [t]he child is unable to testify because of fear" or "ii) [t]here is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying."<sup>55</sup> Although the statute requires that both circumstances must result in the child's inability to testify in open court in front of the defendant, and requires expert witness testimony to support the emotional trauma finding, the standard of proof applicable to both the fear and emotional trauma circumstances is a substantial likelihood.<sup>56</sup>

In contrast, Chapter 480 requires all findings that a child will suffer severe emotional distress due to testifying in front of the defendant be supported by "clear and convincing evidence."<sup>57</sup> This is admittedly a higher standard of proof than a substantial likelihood. Thus, initially, Chapter 480 makes it more difficult to obtain out of court testimony for a child witness. However, while Chapter 480 does not preclude expert testimony as a form of meeting the standard, unlike 18 U.S.C. 3509 it does not require it.

The statutes also differ in their descriptions of who may be present in the room with the child during the televised testimony. Federal law permits both the prosecuting and defense attorneys to attend, along with the child's supervisor, a court representative, and any technicians necessary to operate the equipment.<sup>58</sup> Chapter 480 does not permit the attorneys to be present, limiting the approved personnel to the child's support person, a court representative, a non-uniformed bailiff, and the equipment technicians.<sup>59</sup>

This dissimilarity serves to highlight the difference between California's Confrontation Clause and the Federal Confrontation Clause. While the Federal Confrontation Clause requires only that the defendant "have the assistance of counsel for his defense,"<sup>60</sup> California's Constitution requires that the defendant be

54. Sharon Boland Hill et al., *Current Practices in the Use of Televised Child Testimony: Questions of Constitutionality and Personal Biases*, 12 CRIM. JUST. POL'Y R. 4, 282-94 (2001).

55. 18 U.S.C.A. § 3509(b)(1)(B)(i)-(ii) (West 2004).

56. *Id.*

57. CAL. PENAL CODE § 1347 (amended by Chapter 480).

58. 18 U.S.C.A. § 3509(b)(D).

59. CAL. PENAL CODE § 1347(f) (amended by Chapter 480).

60. U.S. CONST. amend. VI.

“personally present with counsel” during all phases of a criminal trial.<sup>61</sup> Under the more general wording in the Federal Clause, so long as the defendant can communicate contemporaneously with his counsel, there is no infringement on the defendant’s rights by allowing his counsel to be present with the child.<sup>62</sup> However, under California’s Clause, the physical separation of defendant and counsel could be construed as a violation of the defendant’s rights. Thus, in addition to retaining the prior section 1347’s ban against attorney presence with the child, Chapter 480 attempts to pre-empt any constitutional challenges by adding a new subsection (l): “[n]othing in this section shall be construed to prohibit a defendant from being represented by counsel during any closed circuit testimony.”<sup>63</sup>

### B. Potential Challenges to Chapter 480

Despite its relative congruence with 18 U.S.C. 3509, the federal codification of the *Craig* rule, Chapter 480 is still potentially open to objection. The primary opposition to Chapter 480’s passage in the Legislature came from the California Public Defender’s Association (CPDA), which argued that Chapter 480 “seeks drastically to restrict a defendant’s right to confront witnesses at exactly the same time as the United States Supreme Court is expanding it.”<sup>64</sup> This argument was in reference to the United States Supreme Court’s 2004 decision in *Crawford v. Washington*.<sup>65</sup> The CPDA asserted that *Crawford*’s strict interpretation of the federal Confrontation Clause mandates face-to-face witness confrontation, and thus under its holding both case and statutory law permitting child television testimony could be rendered invalid.<sup>66</sup>

This interpretation of *Crawford* and its application to the rule promulgated by *Craig* is not entirely without merit.<sup>67</sup> Indeed, Justice Scalia, the author of the *Crawford* decision, wrote a vigorous dissent to the majority holding in *Craig*.<sup>68</sup> However, the *Crawford* case was factually very dissimilar from *Craig*. The case involved the admissibility of a wife’s prior taped testimony to police in a trial against her husband.<sup>69</sup> At trial, the wife declined to testify, citing the state’s

61. CAL. CONST. art. 1, § 15.

62. MYERS ET AL., *supra*, note 49, at 92.

63. CAL. PENAL CODE § 1347(l).

64. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 138, at 6 (Mar. 29, 2005).

65. 541 U.S. 36 (2004).

66. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 138, at 6-7 (Mar. 29, 2005).

67. *See id.* (stating in the analysis that “it is unclear whether the reasoning of [*Craig*] will stand in a post-*Crawford* world”).

68. *See Maryland v. Craig*, 497 U.S. 836, 860 (1990) (asserting, generally, that the Confrontation Clause guarantees face-to-face confrontation and the Court has no authority to question the value of such confrontation and whether it can be dispensed with, even for child witnesses).

69. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

marital privilege statute.<sup>70</sup> The case did not involve child witnesses or closed-circuit testimony. Its explicit holding was limited to prior taped testimony whose reliability is in question and where the defendant has had no prior opportunity to cross-examine or confront the witness at all.<sup>71</sup> Thus, its applicability to Chapter 480 seems tenuous, at best.

## V. CONCLUSION

Historically, the right to confrontation was based on values that could only be preserved by an in-court, face-to-face meeting.<sup>72</sup> The right of confrontation was inexorably intertwined with the equally fundamental rights of cross-examination and due process of law.<sup>73</sup> From Roman times through the framing of the United States Constitution, the enactment of the Sixth Amendment, and continuing into modern day, the concept that “confrontation is essential to fairness has persisted.”<sup>74</sup>

Modern technology however, with its ability to allow real-time transmission of a witness’s visual image and audio statements, combined with the ability for instantaneous cross-examination, has become the “functional equivalent” of face-to-face confrontation.<sup>75</sup> Thus, technology provides a means of confrontation of which the forefathers and the Romans would never have conceived and yet still might approve.

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70. *Id.* at 40.

71. *See id.* at 68-69 (holding that “where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation”).

72. *Id.* at 42-57.

73. *Coy v. Iowa*, 487 U.S. 1012, 1019 n.2 (1988) (quoting Dean Wigmore: “There was never at common law any recognized right to . . . confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved and secured by confrontation; it was the same right under different names.”) (emphasis removed).

74. *Id.* at 1019.

75. MYERS ET AL., *supra* note 49, at 83.