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## **POSITION ON PROPOSED LEGISLATION**

**BILL: HB 141 Criminal Procedure – Child Abuse Victim – Testimony Taken Outside the Courtroom**

**FROM: Maryland Office of the Public Defender**

**POSITION: Unfavorable**

**DATE: January 23, 2024**

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 141.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees criminal defendants the right to confront witnesses against them. “The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

However, in criminal cases involving child sexual abuse, this face-to-face contact can be traumatic for child victims of sexual abuse. As one writer expressed:

Child victims of sexual abuse may experience difficulty testifying while in the same room as their abuser. Confronting a child in order to learn whether or not sexual abuse has taken place is inevitably traumatizing to the child. Whether the inquiry takes place on the witness stand, in the judge’s chambers, in the prosecutor’s or lawyer’s office, or in the office of a mental health professional, the child is going to be psychologically traumatized. The procedures are strange and frightening to the child. Interviewers, whether they go slowly or quickly, inevitably wish to focus on issues which are embarrassing, anxiety provoking, and laden with tension.

Brief of Richard A. Gardner, M.D., Amicus Curiae, in Support of Respondent, *Maryland v. Craig*, 497 U.S. 836 (1990).

In recognition of the trauma experienced by child victims of sexual abuse, Maryland has fashioned a process whereby child victims may testify “outside the courtroom by closed circuit television if 1) the court determines that testimony by the child victim in the presence of a defendant or a child respondent will result in the child victim’s suffering serious emotional

distress such that the child victim cannot reasonably communicate; and 2) the testimony is taken during the proceeding.” MD. CRIM. PRO. § 11-303(b). In determining whether the child victim may testify outside the courtroom, the court may question the child victim and hear testimony from anyone who has relevant information, including a parent, guardian, or therapist. MD. CRIM. PRO. § 11-303(c).

Maryland’s procedure for determining whether a child victim could testify outside the courtroom was upheld by the United State Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). In *Craig*, the U.S. Supreme Court reasoned that the Confrontation Clauses’ “central purpose, [was] to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact [and] by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.” *Craig*, 497 U.S. at 837. The U.S. Supreme Court also recognized that the Confrontation Clause “must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process.” *Id.* The U.S. Supreme Court concluded that confrontation is 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 testimony’s reliability is otherwise assured.” *Id.*

In *Craig*, the U.S. Supreme Court found that Maryland’s procedure for permitting child victims to testify outside the courtroom was “sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.” *Id.* However, the U.S. Supreme Court stressed that “[t]he requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure’s use is necessary to protect the particular child witness’ welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant’s presence; and find that the emotional distress suffered by the child in the defendant’s presence is more than *de minimis*.” *Id.* at 838.

House Bill 141 violates the Confrontation Clause of the Sixth Amendment and violates the U.S. Supreme Court’s ruling in *Maryland v. Craig* because the bill creates a presumption that a child victim under the age of 13 shall testify outside the courtroom. In *Craig*, the U.S. Supreme Court found that the determination regarding whether a child victim testifies outside the courtroom must be ‘case specific.’ Thus, any presumptions created by statute would run afoul of the Sixth Amendment.

Moreover, House Bill 141 creates a requirement to prove a negative — that testimony by the child victim in the presence of the defendant or child respondent will not result in the child victim suffering severe emotional distress put in place. Requiring proof of a negative fact is contrary to the ruling in *Craig* wherein the U.S. Supreme Court stated that the trial court “must hear evidence [and] find that the child would be traumatized....” *Craig*, 497 U.S. at 838.

Maryland law currently provides ample protections for child victims while also protecting the constitutional rights of the accused. House Bill 141 attempts to correct a non-problem by violating the Sixth Amendment and U.S. Supreme Court case law.

**For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB 141.**

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