The Constitutionality of Missouri Protective Statutes of Child Abuse Victim Testimony in Criminal Trials

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ABSTRACT

The Supreme Court decision in Iowa v. Coy and its subsequent holding in Maryland v. Craig found that the confrontation clause of the United States Constitution, like other rights, is not absolute. The Court determined that in some circumstances and under certain procedural conditions, a state’s interest in protecting a child abuse victim might permit the child to testify via video deposition. The cases were in reaction to the passage in many states of protective statutes allowing for such procedures in child-abuse prosecutions.

Missouri is one of the states that had passed such statutes prior to the Supreme Court decisions in Coy and Craig. Since the precedent set in Craig, Missouri courts have interpreted the statutes and the required procedural safeguards in their application in such a way as to closely follow the standards set by the Supreme Court. Missouri statutes aimed at protecting child abuse victims from the trauma of in-court testimony in criminal prosecution of their abusers are necessary as a public policy and do not constitute a violation of the Confrontation Clause either under the United States Constitution or Missouri Constitution.
I. Introduction

When a child abuse victim testifies against his/her abuser, courts are faced with important issues distinct from those arising with typical adult testimony. The United States Supreme Court has allowed for certain protections of a child when testifying against his or her abuser because of the emotional stress in-court testimony can cause young victims of abuse.¹ The Supreme Court has established that certain procedures that may be undertaken to protect the child from this trauma, while still respecting the accused’s Sixth Amendment Confrontation Rights.² Even before the Court’s decision upholding the constitutionality of certain protective procedures, the Missouri legislature had enacted statutes providing for such. Both before and after the Supreme Court’s leading decision on such statutes, the Missouri protective statutes have been routinely upheld by the Missouri Supreme Court. Missouri statutes aimed at protecting child abuse victims from the trauma of in-court testimony in criminal prosecution of their abusers are necessary as a public policy and do not violate the Confrontation Clause either under the United States Constitution or Missouri Constitution.

II. The Constitutional Right to Confront an Accuser

a. United States Constitution

The Confrontation Clause of the Sixth Amendment of the United States Constitution states, in part, that “In all criminal prosecutions the accused shall enjoy the

right . . . to be confronted with the witnesses against him.” 3 The Fourteenth Amendment of the United States Constitution makes this guarantee binding to the states. 4

b. Missouri Constitution

Article 1, Section 18(a) of the Missouri Constitution governs that “the accused shall have the right to meet the witnesses against him face to face.” 5

III. Protective Measures and the Confrontation Clause

a. Supreme Court Cases

In Coy v. Iowa, the United States Supreme Court was to determine whether a court may allow a victim of child abuse to testify behind a screen. 6 The determining issue was whether the Confrontation Clause of the 6th Amendment requires face-to-face confrontation, though the Clause is not explicitly stated in such terms. 7

In Coy, the trial court allowed a child to testify behind a screen, rendering him completely unable to see the defendant or jury, while allowing the defendant a very slight view of the child. 8 An Iowa statute allowed for the procedure to protect child abuse victims by effectively creating a statutory presumption that all victims, as a direct result of their abuse, would be traumatized by in-court testimony. 9 The defendant objected to the procedure as a violation of his right to confront his accuser. 10

3 U.S. Const. amend. VI.
4 U.S. Const. amend. XIV.
5 Mo. Const. art. I, §18, cl. 1.
7 Id.
8 Id.
9 Iowa Statute
10 Coy.
The Supreme Court held that defendant’s right to confrontation is “literal,” that it is an essential liberty upheld throughout longstanding legal history and tradition.  

While Justice Scalia, writing for the majority, conceded that the rights conferred by the 6th Amendment were not absolute, he was unwilling to find that the statute would satisfy the making of an exception. He indicated that the issue of whether, and to what extent, exceptions may be made would be deferred, but likewise indicated that if such exceptions existed for a testifying child abuse victim, a prerequisite for such exception would be a case-by-case finding of its necessity.

The presumption of emotional trauma created by the Iowa statute did not encompass such an individualized finding, thus the Court was unwilling to impinge on the defendant’s right to face-to-face confrontation.

Two years later, the Supreme Court was presented with the opportunity to apply and expand on its Coy decision. In Maryland v. Craig, at issue was a Maryland statute that allowed a child abuse victim to testify via one-way, closed circuit television when necessary to protect the child from emotional distress of testifying. The Court reiterated that 6th Amendment rights are not absolute, and furthered that those rights may be compromised by “shielding procedures” when those procedures are both reliable and necessary to further a compelling state interest.

The State’s parens patriae duty to protect its children was found to constitute a compelling state interest, and thus, if the procedures used to protect the child are

\[11 \text{ Id.}
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\[12 \text{ Id.}
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\[13 \text{ Id.}
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\[14 \text{ Maryland v. Craig, 497 U.S. 835 (1990).}
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\[15 \text{ Id.}
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reliable and necessary, then the statute would not be facially unconstitutional.\textsuperscript{16} The Court devised a three-part test to determine the constitutionality of a shielding statute. First, there must be an individualized finding of necessity for each specific child who is to testify.\textsuperscript{17} Second, the defendant must be the cause of the trauma to the child, not the courtroom experience in general; and third, the trauma must be significant and more than just nervousness or anxiety.\textsuperscript{18}

Since the Maryland statute allowed for the procedure only when each child is individually determined to be at serious risk of trauma if made to testify in-court, the Supreme Court held that the statute satisfies the necessity element on its face.\textsuperscript{19} Likewise, the Court found that the procedure was reliable, because the child was still administered an oath, was subject to cross-examination, and the defendant and jury would still be able to view the witness’s demeanor.\textsuperscript{20} Because the Maryland statute complied with the three requirements, the Court ruled that that on its face, the statute was not unconstitutional.\textsuperscript{21}

In 2004, the Supreme Court decided \textit{Crawford v. Washington}, wherein a new standard for the constitutionality of out-of-court statements was established.\textsuperscript{22} The rule differentiated between the evidentiary rules of hearsay and the Confrontation Clause,

\begin{flushleft}
\textsuperscript{16} \textit{Id.}\textsuperscript{16}  \\
\textsuperscript{17} \textit{Id.}\textsuperscript{17}  \\
\textsuperscript{18} \textit{Id.}\textsuperscript{18}  \\
\textsuperscript{19} \textit{Id.}\textsuperscript{19}  \\
\textsuperscript{20} \textit{Id.}\textsuperscript{20}  \\
\textsuperscript{21} \textit{Id.}\textsuperscript{21}  \\
\end{flushleft}
whereas under the previous rule, established in *Ohio v. Roberts*, the Confrontation Clause was generally satisfied so long as the hearsay rules were satisfied.\(^{23}\)

*Crawford* concerned the constitutionality of playing a recorded statement made by a victim of domestic violence, who was unable to testify under the marital privilege laws of Washington, at the defendant’s criminal trial.\(^{24}\) The court ruled that “testimonial hearsay” is inadmissible, unless the declarant is both unavailable at trial as a matter of law and was previously subject to cross-examination by the defendant. The decision did not, however, elucidate the proper definition of “testimonial.” The court ultimately determined the victim’s statements were “testimonial,” and since the defendant did not have opportunity to cross-examine her, the playing of the recording was in violation of the defendant’s rights under the Confrontation Clause.\(^{25}\)

Which statements are to be considered “testimonial” was later clarified in the consolidated Supreme Court decision in *Davis v. Washington* and *Hammon v. Indiana*.\(^{26}\) Both cases involved victim statement to law enforcement officials; however, *Davis* involved a 911 call made by a victim, whereas *Hammon* involved questioning of a victim at the crime scene after police had responded to a call.\(^{27}\) The court determined that the statements in *Davis* were “non-testimonial,” and thus admissible, but that statements made directly to the police officers in *Hammon* were “testimonial,” and thus inadmissible.\(^{28}\) The court explained that if statements were made during an on-going emergency, and the primary purpose of the questioning was to enable emergency

\(^{23}\) *Ohio v. Roberts*, 448 U.S. 56 (1980).

\(^{24}\) *Crawford* at 38.

\(^{25}\) Id. at 68.


\(^{27}\) Id. at 2272-73.

\(^{28}\) Id. at 2273-76.
assistance, then the statements would not be testimonial.\textsuperscript{29} In contrast, if there was no emergency, and the primary purpose of the interrogation was to investigate past criminal conduct, the statements elicited would be testimonial.

The decisions in \textit{Crawford}, and \textit{Davis} and \textit{Hammon} involved different circumstances than addressed in \textit{Craig}. They did not address testimony involving children, nor did they give any guidance as to these decisions’ effect on the \textit{Craig} holding. Despite the fact that the Supreme Court has not taken up this issue after \textit{Crawford} and its progeny, “nearly all courts and commentators have agreed [that] \textit{Crawford} did not overrule \textit{Craig}.”\textsuperscript{30} Thus, unless the Supreme Court rules otherwise, \textit{Craig} persists as the controlling precedent regarding protective statutes.\textsuperscript{31}

\textbf{b. Reactions to \textit{Craig} and \textit{Coy}}

The decision in \textit{Craig} brought about mixed feelings among the legal and scientific community.\textsuperscript{32} Parents and advocates of child abuse victims hailed the decision as providing necessary protection for children.\textsuperscript{33} The American Bar Association approved of the decision and likewise the federal legislation that followed in the decision’s wake.\textsuperscript{34} Some social scientists pointed to studies that indicate serious adverse effects of

\begin{footnotes}
\item[29] \textit{Id.} at 2273-4.
\item[33] \textit{Id.}
\item[34] \textit{Id.}
\end{footnotes}
testimony and other aspects of a trial on young victims. Supporters also pointed out that shielding statutes aid in the administration of justice by protecting the testimony of young witnesses from suggestibility.

Conversely, some social scientists and legal scholars disagreed wholly with the decision, claiming that prosecutors and therapists most often underestimate the ability of children to testify in court. Many argued that in-court testimony might actually be therapeutic for the victims. Many lawyers, judges, legal professors and scholars maintained that the shielding procedures impermissibly encroached on defendants’ confrontation rights.

Congress responded to the Craig decision by enacting the Child Victims’ and Child Witnesses’ Rights Statute (CVCWR) in 1990. The CVCWR Act provides procedures that may be taken in federal courts for videotaped testimony of a victim of child abuse when it is determined in-court testimony would result in significant trauma to the child. It provides for the public policy exception to face-to-face confrontation as described by the Craig decision as the applicable standard for federal courts. The statute, however, differs from the Craig holding in that it permits shielding procedures not addressed in Craig, such as videotape and two-way closed-circuit television.

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38 Id.
39 Greason at 471.
40 Greason at 469.
42 Greason at 471.
43 Id. at 484, 5
spite of its differences, the Ninth Circuit upheld the statute’s constitutionality in 1993 in \textit{United States v. Garcia}.\(^4^4\)

Because the statute only applies to federal courts, state courts are not bound by its provisions.\(^4^5\) State courts have taken varying approaches when interpreting their own state confrontation clauses, either following the functional trend set by \textit{Craig} or by taking the literal approach relied upon by Justice Scalia in \textit{Coy v. Iowa}.\(^4^6\)

Several state courts refused to give merit to the \textit{Craig}’s functional interpretation of the confrontation clause, utilizing the literal approach that face-to-face confrontation was a necessary component of the confrontation clause.\(^4^7\) For example, Massachusetts, one of seventeen states whose constitution explicitly requires face-to-face confrontation, has refused to allow shielding statutes.\(^4^8\) The Massachusetts Supreme Court reasons that while protection of victims is an important duty of the court, this can only constitutionally be accomplished through other accommodations, such as pretrial counseling, and may not come a the expense of a defendant’s constitutional rights.\(^4^9\) Courts in Pennsylvania and Illinois have also refused to recognize any exceptions to the right to confrontation.\(^5^0\)

The majority of states, however, have followed the trend set by \textit{Craig}. For example, the Supreme Court of Kentucky, a state whose confrontation clause includes “face-to-face” wording, holds child witness testimony by closed-circuit television to be

\(^{4^4}\) \textit{US v. Garcia}. 7 F.3d 885, (9\textsuperscript{th} Cir. 1993).
\(^{4^5}\) Greason at 479.
\(^{4^6}\) Reader.
\(^{4^7}\) Greason at 471, 2
The Kentucky Supreme Court rationalized that the drafters of the constitution could not have foreseen the technology available today that can accommodate for shielding. Likewise, in 1998 the Washington State Supreme Court ruled in State v. Foster that while its constitution contained the same face-to-face phraseology, the Washington Constitution did not differ appreciably from the United States Constitution. Using this rationale, the court employed the same functional approach as Craig and allowed for shielding exceptions.

While a number of states do recognize the constitutionality of the Craig exceptions as constitutional under the confrontation clauses of their state constitutions, shielding statutes differ significantly from state-to-state. Some permit only testimony via one-way, closed circuit television; others permit two-way television, broadcast, and videotaped testimony. Other differences include types of offense rendering a shielding procedure permissible, the age of the victim when considering ability to testify, the degree of trauma that must be shown to render protection necessary, and the standard of proof applied by the judge to determine the necessity of shielding.

c. Missouri and Protective Statutes

Even before the Supreme Court decisions in Craig and Coy, the Missouri Legislature had enacted statutes allowing for protective measures to be taken in certain criminal prosecutions involving a child witness.

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51 Greason at 482.
52 Id.
54 Greason at 483, 4.
55 Greason at 483, 4.
Section 491.075 of the Missouri Revised Statutes permits the admission of extrajudicial statements made by a witness under the age of 14 in prosecutions for offenses under Chapters 565, 566, and 568.\textsuperscript{56} The statements are admissible if: “The court finds . . . that the time, content, and circumstances of the statement provide sufficient indicia of reliability,” and the child either testifies in the proceedings, is unavailable as a witness, or the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal trial.\textsuperscript{57}

Section 492.304 permits the admission of visual and aural recordings of verbal or nonverbal statements made by a victim if the court deems her unavailable as a witness at trial pursuant to § 491.075.\textsuperscript{58} It requires the recording to be both visual and aural.\textsuperscript{59}

Section 491.680 gives the court authority to order videotaped testimony of an alleged trial victim “to be used as substantive evidence at the preliminary hearing and at trial.”\textsuperscript{60} It also provides that the video recording “shall be admissible in lie of the child’s personal appearance and testimony at preliminary hearings and at trial.”\textsuperscript{61} It requires that before the court may order such video-recorded testimony of the child, the court must first hold a hearing to establish “that the significant emotional or physiological trauma to the child which would result from testifying in the personal presence of the

\textsuperscript{56} Mo.Rev.State. §492.304 (2011).
\textsuperscript{57} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Mo.Rev.Stat. §491.680 (2011).
\textsuperscript{61} Id.
被告的存在，使得孩子在初步听证会或审判时无法作证。”62

第491.685条解决了被指控的人有权面对他的控告者，要求被告的律师“在初步听证会前至少有一次机会，在审判前至少有一次额外的时间来交叉询问被控告的儿童受害者。”63

每条为儿童作证提供保护的法律都要求被告因在第565、566或568章的 statutes中所犯的罪行被起诉。64

第565章包括谋杀、过失杀人、袭击、家庭暴力、非法危险、家庭袭击、骚扰、绑架、严重拘禁、非法侵占、父权绑架、儿童诱拐、虐待老人、跟踪和侵犯隐私等，以及其他很少涉及儿童证人的罪名。65

第566章禁止犯某些性犯罪。该章规定强迫或强奸、性攻击、强迫或法定强奸、儿童性侵犯、性行为利用、促进网上性引诱、性贩卖和与动物性交是犯罪。66 这

62 Id.
65 Mo.Rev.Stat. § 565.001-565.350
66 Mo.Rev.Stat. § 566.010-566.265
Chapter also includes the requisite registration required post-conviction of violating a provision of this chapter.\textsuperscript{67}

Section 568 concerns offenses against the family. This chapter prohibits bigamy, incest, abandonment of a child, criminal nonsupport, endangering the welfare of a child, abuse of a child, engaging in an unlawful transaction with a child, and using a child in a sexual performance.\textsuperscript{68} This Chapter also places a duty on any film or print processor who observes a violation of any of these provisions to report it to law enforcement. \textsuperscript{69}

\textbf{d. Missouri Case Law on Protective Statutes}

The Missouri Supreme Court first considered the issue of the constitutionality of statute sections 491.680 and 491.685 in \textit{State v. Sanchez}.\textsuperscript{70} The defendant in this case was charged with committing rape and sodomy against his 4-and 6-year old daughters.\textsuperscript{71} The trial court sustained the prosecution’s motion to obtain in-camera videotaped testimony of the victims and to exclude the defendant from attending the deposition pursuant to the statutes. \textsuperscript{72} Videotaped depositions were taken in front of the trial judge, prosecuting attorney, and defense counsel, with the defendant placed in a nearby room with the ability to hear and view the proceedings. \textsuperscript{73}

The judge made a notation on the record that he had made the required findings and had “[taken] into account those facts mentioned in the statute.” \textsuperscript{74} The defendant was convicted after the videotaped depositions were presented at trial and was

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\textsuperscript{67} Mo.Rev.Stat. §566.135-566.265 \\
\textsuperscript{68} Mo.Rev.Stat. § 568.010-568.175 \\
\textsuperscript{69} Mo.Rev.Stat. 568.110 \\
\textsuperscript{70} \textit{State v. Sanchez}, 752 S.W.2d 319 (Mo. 1988) \\
\textsuperscript{71} \textit{Id.} \\
\textsuperscript{72} \textit{Id.} \\
\textsuperscript{73} \textit{Id.} \\
\textsuperscript{74} \textit{Id.} at 320-321.
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sentenced to a total of 35 years in prison. The defendant appealed the admission of the videotaped depositions, arguing that statutes, which permitted their admission, violated his right of confrontation both under the United States Constitution as well as the Missouri Constitution.

The Supreme Court of Missouri held that while depositions admitted pursuant to sections 491.680 and 491.685 are admissible at trial without violating the Constitutions of the United States or Missouri, a hearing must first be held during which the state must produce sufficient evidence to establish that testifying in court and/or in the presence of the defendant would be psychologically and emotionally traumatizing to the child.

In this case the trial court conducted no such hearing, and the court held that the admission of the depositions did not conform to the established standards of the Confrontation Clause. This case was decided before both Iowa v. Coy and Maryland v. Craig, but nonetheless comported with the requirements later established by Craig. The Sanchez decision highlighted the same principals as would be later determined as required prerequisites for such shielding statutes to be constitutionally applied. As the Missouri Supreme Court stated in State v. Naucke, “[W]e were on the right track.”

State v. Naucke presented the Supreme Court of Missouri with the opportunity to modify its decision in Sanchez to conform to the United States Supreme Court’s holding in Maryland v. Craig. In Naucke, the defendant was convicted of sodomizing his four-

75 Id.
76 Id.
77 Id.
78 State v. Naucke, 829 S.W.2d 445 (Mo. banc. 1992)
79 Id.
year old daughter.\textsuperscript{80} Before trial, a hearing was conducted to determine whether to allow the child’s deposition to be taken and used at trial out of the presence of the defendant pursuant to sections 491.680 and 491.685.\textsuperscript{81} A social worker testified that she believed the child would suffer significant psychological trauma by in-court testimony, and the trial judge found this evidence sufficient for a finding that the child would effectively be unavailable as a witness due to this trauma.

On appeal, the defendant argued that the use of the use of the child’s videotaped deposition violated his confrontation clause rights under both the United States and the Missouri Constitutions.\textsuperscript{82} The Supreme Court of Missouri rejected this argument and held that the procedure undertaken by the trial court met the constitutionality requirements mandated by \textit{Maryland v. Craig}. The also court held that under the same rational, the protective procedures pursuant to Missouri statutes sections 491.680 and 491.685 do not violate the confrontation clause of the Missouri Constitution.

The court summarized the findings of the Supreme Court in \textit{Maryland v. Craig}, and explained that this case comported with the standards established therein. The court analyzed its interpretation of the “face-to-face” language of the confrontation clause of the Missouri Constitution in prior cases and explained that it has consistently refused to apply a literal interpretation.\textsuperscript{83}

A Missouri appellate court’s decision in \textit{Kierst v. D.D.H.} again reflects an unwillingness to relax the \textit{Craig} requirements regarding the threshold issue of

\textsuperscript{80} \textit{Id.}\textsuperscript{81} \textit{Id.}\textsuperscript{82} \textit{Id.}\textsuperscript{83} \textit{Id.}
The court reiterated the Sanchez and Nauke decisions, holding that in seeking to admit out-of-court statements by a child victim, the threshold requirement of finding a child legally unavailable to testify is not satisfied unless there is evidence presented to support a finding that the child would be psychologically or emotionally traumatized by testifying in-court.

This case involved a fifteen-year-old boy who was alleged to have sexually abused a six-year-old boy. Before trial, the Judge granted a motion allowing statements the victim made out-of-court to be admitted as evidence pursuant to section 491.075. However, no evidentiary hearing was held, nor was any evidence presented as to any trauma to the child that would result from testifying in the presence of his alleged abuser. The judge based his finding that testifying in court would be psychologically and/or emotionally too traumatic to the child solely on the age of the victim and the judge’s own observation of the child from across the courtroom. Additionally, the judge “did not explain what about his observation of the child led him to conclude that the child should be considered legally unavailable.”

The Kierst court found that the trial judge’s finding did not sufficiently satisfy the standard for a finding of unavailability. The court explained that this standard requires that, before a child’s out-of-court statement may be admitted, the court must finds that “the significant emotional or psychological trauma which would result from testifying in

85 Id.
86 Id.
87 Id.
88 Id.
89 Id. at 940.
90 Id.
the personal presence of the defendant makes the child unavailable as a witness at the
time of the criminal proceeding.”

While the court maintained that the holding of a formal hearing on the child’s unavailability is not a mandatory prerequisite to such a finding, there must be at least some evidence presented, and “such evidence cannot be provided merely by knowledge of the child’s age and the sensitive nature of the subject involved.” Such evidence need not be presented by a psychologist, psychiatrist, or other physician, but some evidence presented by a person “who is knowledgeable about such issues . . . must support the court’s ruling, however, in order to meet the confrontation clause concerns under §491.680.”

The court remanded the case so the court could hold a hearing to determine the victim’s unavailability to testify based on concerns for his psychological and emotional wellbeing.

In *State v. Sanders* the court took up an inverse issue to that in *Kierst*: whether it is improper for a judge to rule on the trauma issue based on expert testimony, where the judge had not personally observed or questioned the victim herself. The case involved a defendant who was charged with sodomizing his four-year-old daughter. After an evidentiary hearing in which five witnesses, three of whom were experts, testified as to the trauma the victim would suffer if required to testify in the presence of

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91 Id. at 941.
92 Id. at 941.
93 Id. at 941.
94 Id. at 942.
96 Id.
her father, the judge found sufficient evidence to rule the victim legally unavailable to
testify. The defendant was eventually found guilty.

He appealed, contending there was insufficient evidence to admit the videotaped
deposition because the judge had not personally observed, questioned, or heard
testimony from the victim. He proffered in support of this argument a portion of the
Maryland v. Craig opinion that stated, “Personal observation by the judge should be the
rule rather than the exception.”

On appeal, the court dismissed the defendant’s argument, explaining that the
defendant had taken the portion of Craig out of context and did not constitute any part of
the actual holding. The court stated that the Court’s holding in Craig actually rejected
the same argument defendant raised, holding that “although we think such evidentiary
requirements could strengthen the grounds for use of protective measures, we decline
to establish, as a matter of constitutional law, any such categorical evidentiary
prerequisites” regarding the process by which evidentiary hearings must be
carried out.

The court then stated that, following the Craig decision, it likewise would not
establish personal observance by a judge as an evidentiary requirement. This
illustrates the trend of Missouri courts in ruling on issues arising under its protective
statutes to follow the precedent set by the Supreme Court of the United States in Craig.

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97 Id.
98 Id.
99 Id. at 17.
100 Id. at 18, quoting Maryland v. Craig, 497 U.S. 836,860 (1990)
101 Sanders at 18.
In *State v. Griffin*, a Missouri appellate court took up the issue of whether the United States Supreme Court’s decisions in *Crawford, Davis* and *Hammon* have any effect on the precedent set by *Craig*. In this case, the defendant was charged with several crimes committed against his daughter. After a hearing, the victim was found to be unavailable to testify and a videotaped deposition was taken. Defendant’s attorney was given the opportunity to cross-examine her, but the judge granted a motion to exclude the defendant from the deposition. The defendant was convicted, and he appealed arguing that *Crawford* mandated that he be allowed to be personally present when the victim testified.

On appeal, the court emphasized that, while *Crawford* governs the admission of testimonial hearsay in a criminal trial, “the case did not directly address testimonial hearsay in child abuse cases.” The court furthered that the question of “whether a defendant has a right to be present when the child victim gives testimony” had already been answered in *Maryland v. Craig*. The court then summarized *Craig* and explained the Supreme Court’s decision therein, noting that *Craig* specifically permitted the exclusion of a defendant from depositions of child abuse victims. The court then acknowledged that, while neither the United States Supreme Court nor the Missouri Supreme Court had taken up the question of whether *Crawford* abrogates the *Craig* ruling, courts in other jurisdictions had consistently answered in the negative. The court

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103 *Id.*
104 *Id.*
105 *Id.* at 679/.
106 *Id.* at 679.
107 *Id.*
affirmed the conviction, refusing to depart from the general consensus of other jurisdictions that Craig is still controlling in protective statute cases.\textsuperscript{108}

The decision in Missouri v. Hill further exemplifies the court’s refusal to depart from the constitutionally permissible procedures for protecting child abuse witness established by prior case law.\textsuperscript{109} In this case, the defendant was charged with two counts of child molestation. \textsuperscript{110} When the victim was called to testify at trial, the prosecutor moved a podium so she was unable to see the defendant.\textsuperscript{111} The prosecutor explained that the child would be traumatized if she had to “confront him in front of a room full of strangers.” The defendant objected that the use of the podium, which also effectively blocked the defendant from viewing the witness as well, was a violation of his right to confrontation. The trial court overruled the objection and allowed the placement of the podium in front of the child.

On appeal, the court reviewed the statutes and pertinent Missouri and United States Supreme Court case law. The court found no Missouri law providing for such a procedure, and furthered that this action is “virtually similar to the use of the screen for the same purpose in Coy.” While the Coy decision did not specifically address the constitutionality of such practices, it did indicate that the confrontation clause would require an individualized finding that a particular witness needed special protections before any sort of exception may be allowed. The court held that, pursuant to Coy and Craig, the placement of the podium violated the defendant’s constitutional rights because there was no preliminary finding of unavailability based on trauma. This

\textsuperscript{108} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
decision shows how Missouri courts follow the federal precedent and neither expand or
slacken the standards set forth in Coy and Craig.

IV. Analysis of Public Policy Interest in Favor of Protective Statutes

a. Judicial Recognition of the State’s Interest in Protective Statutes

In both Coy and Craig, the Supreme Court acknowledged the fact that states
have a very important interest in protecting children from further psychological and
emotional trauma resulting from abuse.

In the Coy decision, Justice O’Connor’s concurrence stated that, while she
agreed with the ruling and majority opinion in the instant case, she thought it important
to add that the Confrontation Clause might give way in appropriate circumstances to
protect an child abuse victim from the trauma of in-court testimony. She pointed out that
“Just last term, [the Court] recognized that ‘[c]hild abuse is one of the most difficult
problems to detect and prosecute, in large part because there are often no witnesses
except the victim.’”112 She explained how a large number of states have recognized the
necessity for similar shielding statutes as were at issue in Coy. In addition, she
concluded by stating that past Supreme Court cases have suggested that the “strictures
of the Confrontation Clause may give way to the compelling state interest of protecting
child witnesses,” and that, because nothing in the majority opinion conflicts with that
proposition, she joins it.113

113 Id. at 1025.
The holding in *Craig* echoed Justice O’Conner’s concurring opinion. The Court acknowledges the compelling interest a state has in “the protection of minor victims of sex crimes from further trauma and embarrassment,”\(^{114}\) by sustaining legislation aimed at protecting children that affected other constitutionally protected rights.\(^ {115}\) The Court cites to various academic and scientific works that document the traumatic effect of in-court testimony on child abuse victims, and explains that the statute in question was initially enacted based on a report on the growing documentation of the problem with child abuse in the state.

**b. Empirical Psychological and Sociological Data**

Various studies have determined whether and to what extent child abuse victims have been both an influencing factor in the enactment of protective statutes and an attempt to substantiate the *Coy* and *Craig* decisions. The consensus of data obtained indicates that children can be negatively affected psychologically and emotionally by testifying in-court.\(^ {116}\) Further, some findings indicate that the negative impact of protective devices on a defendant is so minimal that claims of confrontation clause violations with respect to prejudice are unsubstantiated.\(^ {117}\)

**1. Study of Trauma of In-Court Testimony**


\(^{115}\) *Id.* at 683.


A studied performed in 1992 confirmed that testifying in criminal court is associated with negative effects for many child sexual assault victims.\(^{118}\) The researchers assessed following a group of 218 children who were victims of child abuse throughout the prosecution of their cases and collected data on their experiences. The psychological “well-being” of the children who testified in-court was assessed at various periods after their trials, and was compared to assessments taken of children who did not testify in-court.

The study found that testifying in criminal court is associated with negative effects on children. The data collected indicates that the two most pervasive predictors of negative experiences of children testifying in court were the child’s age and the severity of the abuse. The study concluded by clarifying that the conclusions were not meant to be seen as discouraging the prosecution of child abuse, but that the “findings are more appropriately interpreted as indicating that changes in the current legal system are needed so that children can serve as more effective and less traumatized witnesses.”\(^{119}\)

2. Study on Protective Shields and Conviction Rates

A 1994 study found that protective devices do not put defendants at a risk for higher conviction rates.\(^{120}\) The study involved two simulated sexual abuse trials that included a 10-year-old witness testifying in different forms. The first experiment examined whether the use of videotaped testimony had an impact of conviction rates.

\(^{118}\) Goodman, Taub, Jones, et. al.
\(^{119}\) Id. at 126.
The subjects watched the entire trial before making judgments of guilt and credibility. The second experiment was identical to the first except the trial stopped immediately after the testimony of the child, who was the first witness to testify, and subjects judged the guilt of the defendant.

In the first experiment, no evidence showed that jurors were more likely to convict the defendant or perceive him negatively when a child testified via videotape versus in-court testimony, and the modality of the testimony of the child had no impact on the outcome of the trial.\textsuperscript{121} The findings of the second experiment indicated that jurors were actually less likely to convict the defendant when the victim testified via videotape.\textsuperscript{122}

The authors found that the studies suggest that the impact on the trial outcome may be eliminated if measurements are taken after all the testimony in the case is presented. They concluded that the data obtained "indicates that the use of protective devices in trials of child sexual abuse do not pose a threat to the defendant’s Sixth Amendment right to confrontation—at least in terms of increasing the probability of a conviction."

\textbf{V. Constitutional Analysis of Missouri’s Protective Statutes.}

Based on the interests a state has in protecting child abuse victims from suffering further trauma as a result of testifying to their abuse, the Missouri statutes providing for protective procedures are a constitutional exception to the confrontation clauses of both the United States and Missouri Constitutions. Court decisions and empirical data show that requiring a child abuse victim to testify in-court can be psychologically and

\textsuperscript{121} Id.
\textsuperscript{122} Id.
emotionally traumatic.\textsuperscript{123} This is particularly true when the abuser is a victims’ parent or other adult of close relationship.\textsuperscript{124} Since a state has a great interest in protecting such victims from further trauma resulting from prosecution of their abuse, the enactment of protective statutes was a rational and legitimate step in helping further that state interest.

The case law from the Missouri Supreme Court and Court of Appeals indicates that Missouri courts, in ruling on Constitutional objections on the application of the protective statutes, cautiously attempt to ensure the requirements set forth by the Supreme Court in \textit{Craig} are complied with. The Missouri court decisions exemplify the attempt to ensure Missouri’s approach to protective statutes is constitutionally permissible by closely mirroring the findings in \textit{Craig}.

In \textit{Nauke}, the Missouri Supreme Court specifically took on the task of ensuring its decision was consistent with the recently decided \textit{Craig} standards.\textsuperscript{125} Likewise, the decision in \textit{Kierst} shows how, when presented with a questionable constitutional issue regarding the required procedures to be followed in cases concerning child victims, Missouri courts will defer to the Supreme Court’s resolution of the matter.\textsuperscript{126} The Missouri Supreme Court has followed the trend of the United States Supreme Court in

\begin{thebibliography}{99}
\bibitem{124} Goodman.
\bibitem{125} \textit{State v. Naucke}, 829 S.W.2d 445 (Mo. banc. 1992)
\end{thebibliography}
holding that, while the Missouri Constitution’s Confrontation Clause requires “face-to-face” confrontation, this will not be interpreted or applied literally.\(^{127}\)

Additionally, in the face of uncertainty regarding the effect of *Crawford* and its progeny on protective statutes, the Missouri court was reassured of *Craig'*s authority by the fact that this issue had already been answered by District Courts and courts in other jurisdiction. The Missouri protective statutes give reverence to the rights of a defendant to confront witnesses, as confirmed in *Crawford*, specifically requiring that a defendant's attorney "shall have at least two opportunities to cross-examine the deposed alleged child victim: once prior to the preliminary hearing and at least one additional time prior to the trial."\(^{128}\)

The line of jurisprudence regarding Missouri’s statutes also exemplify an acknowledgement by its courts of the necessity of carefully balancing the constitutional rights of defendants and the interest in protecting victimized children. The decisions in *Kierst* and *Sanders* illustrate how Missouri courts consistently require respect for the constitutional protections intended by the Missouri protective statutes and the applicable case law.\(^{129}\)

Missouri courts have been mindful of the constitutional rights of defendants and have carefully balanced those rights with the state’s interest in protecting children. The court’s recognition of the potential for infringement on constitutional rights and the unwillingness to compromise those have ensured that the Missouri protective statutes

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\(^{127}\) *Nauke* at 454.
are constitutionally applied, pursuant to the standards mandated by the United States Supreme Court in *Maryland v. Craig*.

**VI. Conclusion.**

An analysis of the case law interpreting the protective procedures sanctioned by Missouri Law in light of Constitutional considerations demonstrates that Missouri’s applicable statutes are not in violation of either the United States Constitution or the Missouri Constitution. As has been recognized by the courts rendering such decisions, the public policy interest in such devices is significant and necessitates the availability of such procedures. This finding is supported by empirical data resulting from various psychological and sociological studies designed to examine the emotional and psychological effect of in-court testimony on child abuse victims as well as the effect of protective statutes on the outcomes of cases in which such measures are applied. The Missouri court cases ruling on constitutional objections to the protective statutes recognize their necessity in furthering the states interest in protecting abused children, while still protecting the rights of defendants as much as possible by imposing specific standards and procedures that must be followed.

The national trend regarding protective statutes appears to be favorable, as exemplified by the number of states that have enacted shielding statutes, and the many court decisions that have refused to tighten the *Craig* requirements post-*Crawford*. Missouri courts have even seen attempted, and in some cases allowed, extensions of the protective statutes to admit certain out-of-court statements and interviews that were not addressed in the *Craig* decision. Perhaps eventually the Supreme Court will clarify
which procedures are, and are not, constitutionally permissible to accomplish this goal, but until then, the Missouri courts appear to be taking great care in deciding such cases, and making great efforts to respect the confrontation clause rights of defendants, both under the Federal and the State Constitutions.