Georgia State University Law Review

Volume 31
Issue 1 *Fall 2014*

Article 5

December 2014

Trial HB 804

Georgia State University Law Review

CRIMINAL PROCEDURE

Trial: Amend Article 3 of Chapter 8 of Title 17 of the Official Code of Georgia Annotated, Relating to Conduct of Trial Proceedings, so as to Repeal Provisions Relating to the Testimony of a Child Ten Years Old or Younger by Closed Circuit Television and Persons Entitled to be Present; Provide for the Testimony of Individuals Under 18 years of Age Outside the Physical Presence of an Accused in Criminal Proceedings Under Certain Circumstances; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. § 17-8-55 (new)
BILL NUMBER:	HB 804
ACT NUMBER:	512
GEORGIA LAWS:	2014 Ga. Laws 205
SUMMARY:	The Act allows a court to order a child witness or victim of certain offenses under the age of seventeen to testify outside the physical presence of the accused provided the court finds the child is likely to suffer serious psychological or emotional distress or trauma that impairs the child's ability to communicate. The Act also lists considerations for the judge to take into account when making this determination. It further provides what shall be included in the court's order, as well as the method of such testimony.
EFFECTIVE DATE:	July 1, 2014

History

In 1985, the General Assembly enacted Official Code of Georgia Annotated section 17-8-55.[1] The Act allowed the testimony of a child victim to certain sexual offenses to be televised in the courtroom, rather than the child victim testifying in open court in the presence of the accused.[2] First, the victim had to be fourteen years of age or younger.[3] Second, the protections of Code section 17-8-55 extended only to the offenses of "cruelty to children, rape, sodomy, aggravated sodomy, molestation or aggravated molestation."[4] Third, the court had to find that there was a "substantial likelihood" that the child victim would "suffer severe emotional or mental distress" if he had to testify openly in the courtroom.[5] Lastly, the court must have found that the defendant's rights would "not be unduly prejudiced" by allowing the child victim to testify via broadcast testimony.[6] The Act also provided that a limited number of parties were allowed to be present when the child testified.[7] By enacting this provision, the General Assembly sought to protect Georgia's children by lessening the distress surrounding testifying against the accused.[8]

In 1988, a horrific child molestation case, involving Georgia residents, brought the protection of child witnesses testifying against their accusers to the forefront of legislators' attention.[9] In 1990, the

1. 1985 Ga. Laws 1190, § 1, at 1190 (formerly found at O.C.G.A. § 17-8-55 (1985)).

2. *Id.*

3. *Id.* at 1190–91 ("[T]he state or the defendant may apply for an order to televise out of open court the testimony of a child 14 years of age or younger").

4. *Criminal Procedure Sexual Offenses: Admissible Evidence: Minors*, 1 GA. ST. U. L. REV. 294, 294 (1985); 1985 Ga. Laws 1190, § 1, at 1191 (formerly found at O.C.G.A. § 17-8-55 (1985)) (noting the protections apply to "a child 14 years of age or younger who has been the victim of violations of subsection (b) of Code Section 16-5-70, Code Section 16-6-1, Code Section 16-6-2, or subsection (c) of Code Section 16-6-4.").

5. 1985 Ga. Laws 1190, § 1, at 1191 (formerly found at O.C.G.A. § 17-8-55 (1985)).

6. *Id.*

7. *Id.* ("In all proceedings in which the court grants an order to broadcast testimony, the court shall clear the courtroom of all other persons except the judge, counsel for the parties, the defendant, a bailiff, and a parent, guardian, child psychologist, or other qualified person appointed by the court to represent the interests of the witness.").

8. *Criminal Procedure Sexual Offenses: Admissible Evidence: Minors*, *supra* note 4, at 294 (noting that this was only one of several victim protections proposed to the Georgia General Assembly and recognizing the specific focus of § 17-8-55 was "to minimize the possible trauma to children who are required to testify").

9. Jill M. Wood, *Criminal Procedure Trial: Amend Provisions Relating to Closed Circuit Television Testimony of Child Victims of Certain Sexual Offenses*, 8 Ga. St. U. L. Rev. 52, 53 (1992).

United States Supreme Court noted that twenty-four states allow a victim of child abuse to testify via one-way closed circuit television, including Georgia.[10] A Confrontation Clause challenge to one of these statutes made it to the Court in the case of *Maryland v. Craig*, in which the Court upheld the use of one-way closed circuit television when such procedures are "necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant."[11]

In 1991, guided by the Maryland statute that survived constitutional challenge in *Craig*, the General Assembly amended Code section 17-8-55.[12] The Act allowed the child victim to testify outside the courtroom via a two-way closed circuit television.[13] It changed, however, the age the child had to be to seek its protections to ten years of age and younger.[14] In addition to the originally covered offenses, the Act added sexual assault to the list.[15] The court must have found the child's testimony in the courtroom would "result in the child's suffering serious emotional distress such that the child cannot reasonably communicate."[16] The Act also changed who could be present with the child, listing the presence of only the prosecutor, the defendant's attorney, the judge, the operators of the equipment, and any person, in the court's opinion, who contributed to the child's wellbeing.[17]

Edward R. Dickey, operating pro se, cross-examined his two daughters, sixteen and eighteen, resulting in a tearful testimony. *Father of Six Convicted of Molesting Two Daughters*, ASSOCIATED PRESS (Nov. 5, 1988), http://www.apnewsarchive.com/1988/Father-of-Six-Convicted-Of-Molesting-Two-Daughters/id-f47e4cd7552f08df8248f32353f52ba3. Although Dickey was convicted for the molestation of his two teenage daughters, the prosecutors dropped the charges of molestation of his thirteen-year-old daughter in order to prevent trauma she would endure from testifying at trial. *Id.*

10. Maryland v. Craig, 497 U.S. 836, 854–55 (1990).

11. *Id*. at 855, 857 (noting the State's showing of necessity "must of course be a case-specific one").

12. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55 (1991)); Wood, *supra* note 9, at 56.

13. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55 (1991)).

14. *Id.*; Wood, *supra* note 9, at 55 (noting SB 178 originally set the age at fourteen years and younger, which was in line with the original Act, but an amendment in the House set the age to ten years and younger).

15. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55 (1991)); Wood, *supra* note 9, at 55 (stating the offenses of statutory rape and enticing a child for indecent purposes were included in the proposed bill, but were seen as too broad and later dropped).

16. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55 (1991)).

17. *Id.*

The narrow purview of this Code section, however, left some child victims outside of its protections.[18] For example, an eleven-year-old child abuse victim, who fell just outside of the statute's protections for those ten years and younger, had to testify inside the courtroom in the presence of the defendant, and as a result, he suffered severe distress.[19] Keeping Georgia's children victims and witnesses in mind and focusing on similar laws in other states, Representative Edward Lindsey (R-54th) with the help of District Attorney Paul Howard introduced House Bill (HB) 804 during the 2014 session of the General Assembly.[20] The purpose of HB 804 was to protect Georgia's children from trauma from testifying in front of the accused[21], and to bring Georgia in line with the majority of other states.[22]

Bill Tracking of HB 804

Consideration and Passage by the House

Representatives Edward Lindsey (R-54th), Buzz Brockway (R-102nd), LaDawn Jones (D-62nd), Matt Ramsey (R-72nd), and B.J. Pak (R-108th) sponsored HB 804.[23] The House read the bill for the

18. Audio Recording of Senate Judiciary Non-Civil Committee, Mar. 6, 2014 at 4 min., 43 sec. (remarks by District Attorney Paul Howard) (on file with Georgia State University Law Review) [hereinafter Senate Recording 1] (describing a sexual abuse case tried in Fulton County, where the child was eleven years old—outside of the prior statute's protections (ten and under)—and he was forced to testify, resulting in additional psychological damage and distress).

19. *Id.*

20. HB 804, as introduced, 2014 Ga. Gen. Assem.; Telephone Interview with Rep. Edward Lindsey (R-54th) (Apr. 4, 2014) [hereinafter Lindsey Interview].

21. Audio Recording of Senate Judiciary Non-Civil Committee, Mar. 12, 2014 at 8 min., 46 sec. (remarks by Rep. Edward Lindsey (R-54th)) (on file with Georgia State University Law Review) [hereinafter Senate Recording 2]. More specifically, the purpose is to protect children who fell outside of the prior statute's protections. *Id.*

22. Lindsey Interview, *supra* note 20. For those states that have such protections, only one state limits their protections of child victims to ten years of age or younger, which was the age specified in Georgia's prior statute. DEL. CODE ANN. tit. 11, § 3514 (West 2014) ("[A] court may order that the testimony of a child victim or witness less than 11 years of age . . . ."). Many more states extend their statutes to protect children under sixteen years old. *See*, *e.g.*, ALA. CODE § 15-25-3 (West 2014) (extending to child witnesses "under the age of 16"); FLA. STAT. ANN. § 92.54 (West 2013) (same); W. VA. CODE § 62-6B-2 (West 2013) (same). Fewer states extend the age to eighteen years. *See* IOWA CODE § 915.38 (West 2014) (protecting until age eighteen).

23. HB 804, as introduced, 2014 Ga. Gen. Assem.; Georgia General Assembly, HB 804, Bill Tracking, http://www.legis.ga.gov/legislation/em-US/Display/20132014/HB/804.

first time on January 23, 2014.[24] Speaker of the House David Ralston (R-7th) assigned the bill to the House Judiciary Non-Civil Committee.[25] The Committee offered several changes to the bill and favorably reported a Committee substitute on February 18, 2014.[26]

The substitute contained several substantive changes. First, it added that the bill applies to proceedings when a child is a witness to or an alleged victim of simple assault, simple battery, battery, stalking, and violation of family violence order to the crimes.[27] Representative Lindsey offered the additional crimes, upon the recommendation of Cherokee County Solicitor General Jessica Moss, because minors are often forced to testify in those situations.[28]

Second, the substitute added another layer to the standard by which a judge determines whether to allow a child to testify remotely.[29] It required the court to find not only that a child is likely to suffer serious psychological or emotional distress, but also that such distress impairs the child's ability to communicate.[30] Representative Lindsey offered the change in response to the committee's concern that, in the bill's initial version, the child's psychological or emotional distress was not tied to the child's ability to testify.[31] He reasoned that, in the abundance of caution given other states' rulings on similar statutes, it is appropriate to "tighten the language."[32]

Third, the substitute revised the bill's language regarding how a court establishes that a child is likely to suffer serious psychological or emotional distress as a result of testifying.[33] The bill's original

24. State of Georgia Final Composite Status Sheet, HB 804, May 1, 2014.

25. *Id.*

26. *Id.*

27. HB 804 (HCS), § 1, p. 1, ln. 17–19, 2014, Ga. Gen Assem. The bill's initial version included the following crimes: murder; kidnapping cruelty to children; rape; sodomy/aggravated sodomy; statutory rape; child molestation/aggravated child molestation; enticing a child for indecent purposes; sexual assault; pimping; pandering by compulsion; incest; sexual battery; aggravated sexual battery; armed robbery; and gang activity. HB 804, as introduced, § 1, p. 1, ln. 17–19, 2014 Ga. Gen. Assem.

28. Video Recording of House Judiciary Non-Civil Committee, Feb 17, 2014 at 33 min., 58 sec (remarks by Rep. Edward Lindsey (R-54th)), http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx [hereinafter House Video, Feb. 17].

29. *Id.*

30. *Id.*

31. *Id.* at 31 min. 8 sec. (remarks by Rep. Edward Lindsey (R-54th)).

32. *Id.*

33. HB 804 (HCS), § 1, p. 2, ln. 28–30, 2014 Ga. Gen Assem.

language provided that the presence of any one of several enumerated circumstances "establish[es] that the child is likely to suffer serious psychological or emotional distress as a result of testifying in the presence of the accused."[34] In one Committee meeting, Sandra Michaels of the Association of Co-defense Lawyers expressed concern that the bill's original language took discretion from the court.[35] More specifically, Ms. Michaels believed that the bill allowed the mere presence of one of the factors to establish the child's likelihood to suffer serious psychological or emotional distress.[36] Acknowledging Ms. Michael's concerns, the substitute's language provided that the court may consider any number of factors in determining the establishment of such distress, eliminating the language that automatically established distress based on a factor's mere presence.[37]

Fourth, where the bill required a judge's order allowing the use of remote testimony to include a list of persons allowed to be in the presence of the child during such testimony, the substitute eliminated a non-exclusive list of those allowable persons.[38] The substitute also specifically prohibits *pro se* defendants from being present during such testimony.[39] Representative Lindsey offered these changes, again, to merely "tighten the language."[40] Lastly, where two of the factors that a court may consider in determining whether to allow remote testimony used "psychological harm" language, the substitute replaced that language with "psychological or emotional distress" in favor of consistency.[41] The House read the Committee substitute as amended on February 25, 2014 before passing it that day by a unanimous 163 to 0 vote.[42]

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34. HB 804, as introduced, § 1, p. 2, ln. 28–31, 2014 Ga. Gen. Assem.

35. House Video, Feb. 17, *supra* note 28, at 34 min. 0 sec. (remarks by Sandra Michaels).

36. *Id.*

37. HB 804 (HCS), § 1, p. 2, ln. 28–30, 2014 Ga. Gen Assem.

38. *Id. at* § 1, p. 3, ln. 71, 2014 Ga. Gen Assem. The eliminated list included "the judge, the prosecuting attorney, the attorney representing the accused, [and] individuals necessary to operate equipment necessary to transmit the proceeding . . . ." HB 804, as introduced, § 1, p. 3, ln 73-75, 2014 Ga. Gen Assem.

39. *Id. at* § 1, p. 3, ln. 78, 2014 Ga. Gen Assem.

40. House Video, Feb. 17, *supra* note 28, at 32 min. 48 sec. (remarks by Rep. Lindsey (R-54th)).

41. HB 804, as introduced, § 1, p. 2, ln. 34, p. 3 ln 64, 2014, Ga. Gen. Assem.; HB 804 (HCS), § 1, p. 2 ln. 33, p. 3, ln. 65, 2014 Ga. Gen Assem.

42. Georgia House of Representatives Voting Record, HB 804 (Feb. 25, 2014).

Consideration and Passage by the Senate

Senator John Crosby (R-13th) sponsored HB 804 in the Senate.[43] The Senate read the bill for the first time on February 26, 2014.[44] Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Judiciary Non-Civil Committee.[45] The Committee offered several changes to the bill, and favorably reported a committee substitute on March 13, 2014.[46]

The Senate Committee substitute, like the House Committee substitute, also contained several substantive changes. First, the substitute provides that a "parent, legal guardian, or custodian of a child" may move the court to hold an evidentiary hearing to determine whether a child shall testify outside the presence of the accused, replacing the bill's "proponent of the child" language.[47] Senator Curt Thompson (D-5th) offered the change to the above legally defined terms after expressing his concern that a proponent of a child "could literally be anybody."[48] Representative Lindsey also recommended the change, considering it an improvement.[49]

Second, the substitute changed the definition of child from individuals under eighteen to individuals under seventeen based on the fact that the law in only a very small minority of states goes as high as eighteen.[50] Third, it replaced "distress" with "distress or trauma," describing the effect on a child witness or victim that warrants remote testimony.[51] Senator Thompson originally offered to replace distress with trauma to track the Supreme Court's *Maryland v. Craig* language.[52] Representative Lindsey opposed that offer,

43. Georgia General Assembly, HB 804, Bill Tracking, http://www.legis.ga.gov/legislation/em-US/Display/20132014/HB/804.

44. State of Georgia Final Composite Status Sheet, HB 804, May 1, 2014.

45. *Id.*

46. *Id.*

47. HB 804 (SCSFA), § 1, p. 1, ln. 20-21, 2014 Ga. Gen Assem.

48. Senate Recording 2, *supra* note 21, at 33 min., 46 sec., (remarks by Sen. Curt Thompson (D-5th)). Concerned that a proponent of the child "could literally be anybody," Senator Thompson preferred "legally definable terms." *Id.*

49. *Id.* at 35 min., 7 sec., (remarks by Rep. Edward Lindsey (R-54th)).

50. HB 804 (SCSFA), § 1, p. 1, ln. 14, 2014 Ga. Gen Assem.; Senate Recording 2, *supra* note 21, at 20 min., 35 sec., (remarks by Jack Martin, Georgia Association of Criminal Defense Lawyers).

51. HB 804 (SCSFA), § 1, p. 2, ln. 27, 2014 Ga. Gen Assem.

52. Senate Recording 2, *supra* note 21, at 39 min., 43 sec., (remarks by Sen. Curt Thompson (D-5th)).

pointing out that while the Court in *Maryland v. Craig* used trauma, the Maryland statute upheld by the Court used distress.[53] After additional discussion, the Committee decided to use both words in the disjunctive.[54] Finally, the substitute added that if the court precludes the accused or the accused's counsel from being physically present during the remote testimony, the court must likewise preclude the prosecuting attorney.[55]

The Senate read the Committee substitute as amended on March 13, 2014.[56] The Senate tabled the bill on March 8, 2014 before taking it from the table and reading it a third time that same day.[57] On March 18, 2014, the Senate passed the Committee substitute by a unanimous 54 to 0 vote.[58] On March 20, 2014, the House voted 163 to 0 in favor of the Senate Committee's substitute.[59] HB 804 was sent to Governor Nathan Deal on March 27, 2014 and signed into law on April 15, 2014.[60]

The Act

The Act amends Article 3 of Chapter 8 of Title 17 of the Official Code of Georgia Annotated, relating to the ability of child victims of certain crimes to testify outside the presence of the accused.[61] Its purpose is to protect children who fell outside of the prior Code's scope, and to bring Georgia "in line" with other states.[62] It seeks to effectuate that purpose by raising the protected age, increasing the number of crime that invoke the statute's protections, providing protection to a child *witness* of those crimes, providing the court additional guidance in determining whether to protect a child witness, and increasing the allowable methods to broadcast the testimony.[63]

53. *Id.* at 41 min., 28 sec. (remarks by Rep. Edward Lindsey (R-54th)).
54. *Id.* at 44 min., 16 sec. (remarks by Sen. Jesse Stone (R-23th)).
55. HB 804 (SCSFA), § 1, p. 3, ln. 80, 2014 Ga. Gen Assem.
56. State of Georgia Final Composite Status Sheet, HB 804, May 1, 2014.
57. *Id.*
58. Georgia Senate Voting Record, HB 804 (Mar. 18, 2014).
59. Georgia House of Representatives Voting Record, HB 804 (Mar. 20, 2014).
60. Georgia General Assembly, HB 804, Bill Tracking, http://www.legis.ga.gov/legislation/em-US/Display/20132014/HB/804. *See* O.C.G.A. § 17-8-55 (Supp. 2014).
61. O.C.G.A. § 17-8-55 (Supp. 2014).
62. Lindsey Interview, *supra* note 20; Senate Recording 2, *supra* note 21, at 8 min., 46 sec., (remarks by Rep. Edward Lindsey (R-54th).
63. O.C.G.A. § 17-8-55 (Supp. 2014).

Section One of the Act substantially revises Code section 17-8-55.[64] The previous Code section made closed-circuit television testimony available to child victims of certain crimes ten years of age and younger.[65] The revision raises the age to under seventeen and makes remote testimony available to *witnesses* of certain crimes as well.[66] It also drastically expands the list of crimes which invoke the statute.[67] The original Code section included only cruelty to children, rape, sodomy, and aggravated sodomy, child molestation and aggravated child molestation, and sexual assault.[68] The revision adds murder, simple assault, simple battery, battery, kidnapping, stalking, violation of family violence order, statutory rape, enticing a child for indecent purposes, pimping, pandering by compulsion, incest, sexual battery, aggravated sexual battery, armed robbery, and unlawful street gang acts.[69]

Section One of the Act further revises the Code by providing for an evidentiary hearing to determine whether a child shall testify outside the presence of the accused.[70] The Act also specifies that only the prosecuting attorney, the parent, legal guardian, custodian of a child, or the court itself may move the court to hold such a hearing.[71]

Section One also broadens the standard that a court applies in determining whether a child may testify outside the presence of the accused by directing it to allow such testimony if the child will likely "suffer serious psychological or emotional distress or trauma,"[72] expanding on the previous Code's "emotional distress," standard.[73] Moreover, the revision adds that a judge must find by a preponderance of the evidence that the child will likely suffer such distress or trauma.[74] The Act also adds eleven factors that a judge may consider when determining whether a preponderance of the evidence has been shown, providing substantially more guidance

64. *Id.*
65. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55(a) (1991)).
66. O.C.G.A. § 17-8-55(a), (b) (Supp. 2014).
67. O.C.G.A. § 17-8-55(b) (Supp. 2014).
68. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55(a) (1991)).
69. O.C.G.A. § 17-8-55(b) (Supp. 2014).
70. O.C.G.A. § 17-8-55(c) (Supp. 2014).
71. *Id.*
72. O.C.G.A. § 17-8-55(d) (Supp. 2014).
73. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55(a)(2) (1991)).
74. O.C.G.A. § 17-8-55(d) (Supp. 2014).

than the original Code.[75] The previous Code offered no guidance for courts determining whether would likely suffer distress from testifying in court.[76]

The Act further revises the Code by requiring that a court order state the court's findings of fact and conclusions of law supporting its determination whether or not to allow remote testimony.[77] The revisions provide a non-exclusive list of certain details that the court must include in the order.[78] Finally, the Act adds guidelines regarding the allowable methods of out-of-court testimony, ensuring that such testimony is reliable and capable of transmitting in real time.[79] Such methods include, but are not limited to, a two-way closed-circuit television broadcast and an internet broadcast.[80] The previous Code section limited the broadcast method of a child witness's out-of-court testimony to two-way closed circuit television.[81]

Analysis

Several legal issues may arise from the Act's changes to the statute. Criminal defendants may argue that any of the following violates the Confrontation Clause: the increase in age, the statute's protection of witnesses to a crime, the expanded number of crimes invoking the statute, and the expansion of the standard by which the court makes the determination to allow remote testimony. The revision may give rise to arguments that all individuals who may—

75. *Id.* The factors include: (1) the heinousness of the offense, (2) the child's age or preexisting emotional state, (3) the relationship to the person who committed the offense, (4) whether the offense occurred over an ongoing period of time, (5) whether a deadly weapon was used, (6) whether the child sustained physical injury, (7) whether the perpetrator threatened the child or third person not to report the crime, (8) whether the perpetrator threatened to incarcerate or dissolve the family of the child if the crime was reported, (9) whether the perpetrator threatened a witness, (10) the accused's access to the child, and (11) expert testimony as to the child's susceptibility to "physical or emotional distress or trauma required to testify" before the accused. *Id.*

76. *See* 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55 (1991)).

77. O.C.G.A. § 17-8-55(e) (Supp. 2014).

78. *Id.*

79. O.C.G.A. § 17-8-55(f) (Supp. 2014).

80. *Id.*

81. 1991 Ga. Laws 1377, § 1, at 1378 (formerly found at O.C.G.A. § 17-8-55(a) (1991)).

under the more liberal requirements—invoke the statute's protection do not necessarily deserve it.[82]

The Confrontation Clause

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides the accused in a criminal trial the right to confront the witnesses against him.[83] As noted by the Supreme Court in *Maryland v. Craig*, the Confrontation Clause's purpose "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"[84] because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[85] The Confrontation Clause provides a criminal defendant with the following rights: (1) a personal examination of the witness; (2) while the witness is under oath; (3) the right to cross-examine the witness; and (4) the right of the jury to obverse the witness's demeanor in assessing his or her creditably.[86] In *Coy v. Iowa*, the United States Supreme Court recognized that the right guaranteed by the Confrontation Clause consists of a "face-to-face meeting" between the accused and the accuser.[87] Because HB 804 allows a child to testify outside the defendant's presence under certain circumstances, the bill may face constitutional difficulty as it directly conflicts with the defendant's right to a "face-to-face" confrontation.[88]

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82. For example, protecting a sixteen-year-old witness to gang activity may not justify infringing a defendant's right to confrontation as would protecting a ten-year old victim to child-molestation.

83. U.S. CONST. amend. VI; Coy v. Iowa, 487 U.S. 1012, 1015 (1988) ("The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.'").

84. Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.") (quoting Mattox v. United States, 156 U.S. 237, 240 (1895)).

85. *Coy*, 487 U.S. at 1019.

86. *Maryland*, 497 U.S. at 845–46.

87. *Coy*, 487 U.S. at 1017.

88. O.C.G.A. § 17-8-55(d) (Supp. 2014) ("The court may order a child to testify outside the physical presence of the accused, provided that the court finds by a preponderance of the evidence that such child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's

The United States Supreme Court has twice addressed this issue of whether a state statute allowing a child to testify outside the presence of the defendant violates the Confrontation Clause of the Six Amendment.[89] Although the Court in *Coy* held the defendant's Confrontation Clause rights were violated when the trial court allowed two witnesses to testify behind a screen, it left for another day "the question whether any exceptions exist" to the defendant's right to confront the witnesses face-to-face.[90] The Court noted that if there were such exceptions, they would only be allowed "when necessary to further an important public policy," recognizing it would take more than generalized findings.[91] In 1990, the Court in *Maryland v. Craig* answered the question left open in *Coy* in the affirmative.[92] The Court recognized that the right to confront a witness in a face-to-face meeting is only a preference and not a mandate, as it is not "an indispensable element of the Six Amendment's guarantee."[93] The State's interest in protecting child abuse victims serves as an exception that "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[94]

For a state statute to not run afoul of the Confrontation Clause, the state must make "an adequate showing of necessity."[95] First, the requisite finding of necessity requires a court to make a case-specific inquiry.[96] In HB 804, the requirement that a trial court make a case-

ability to communicate as a result of testifying in the presence of the accused.").

89. *Coy*, 487 U.S. at 1019 (addressing the issue of whether an Iowa statute, which allowed a screen to be placed between the defendant and the witnesses while they testified, violated the defendant's right to confront); *Maryland* 497 U.S. at 840 (deciding "whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.").

90. *Coy*, 487 U.S. at 1021.

91. *Id.*

92. *Maryland*, 497 U.S. at 855 (holding when the State makes a requisite finding of necessity, "[it's] interest in protecting the child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation").

93. *Id.* at 848–49 ("The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.") (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

94. *Maryland*, 497 U.S. at 853.

95. *Id.* at 856.

96. *Id.* at 855 ("The requisite finding of necessity must of course be a case-specific one: The trial court must 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") (citing Globe

specific inquiry is expressly provided for in the language of the statute, as it mandates that a court hold an evidentiary hearing on this issue.[97] Second, to satisfy the requisite finding of necessity, the trial court must find that testifying in front of the defendant would traumatize the child witness.[98] HB 804 meets this requirement as well. It allows a court to order a child to testify outside the defendant's presence only if "the court finds by a preponderance of the evidence that such child is likely to suffer serious psychological or emotional distress or *trauma* which impairs such child's ability to communicate as a result of testifying *in the presence of the accused*."[99] In other words, the judge must find the child would suffer trauma and that testifying in the defendant's presence causes the trauma. Moreover, the Act provides eleven circumstances to help the trial court make this determination.[100] Third, to satisfy the requisite finding of the necessity, the trial court must find the child witness would suffer more than *de minimus* emotional distress, meaning "more than 'mere nervousness or excitement or some reluctance to testify.'"[101] The Court declined to decide what the minimum is for the showing of emotional trauma, as the Maryland

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Newspaper Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 597, 608–90 (1982)).

97. O.C.G.A. § 17-8-55(c) (Supp. 2014) ("The court, upon the motion of the prosecuting attorney or the parent, legal guardian, or custodian of a child, or on its own motion, shall hold an evidentiary hearing to determine whether a child shall testify outside the physical presence of the accused.").

98. *Maryland*, 497 U.S. at 856 ("The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.") (citing Arizona v. Wilhite, 772 P.2d 582 (Ariz. 1989); Connecticut v. Bonello, 554 A.2d 277 (Conn. 1989); Missouri v. Davidson, 764 S.W.2d 731 (Mo. Ct. App. 1989); Pennsylvania v. Ludwig, 531 A.2d 459 (Pa. Super 1987)).

99. O.C.G.A. § 17-8-55(d) (Supp. 2014) (emphasis added).

100. O.C.G.A. § 17-8-55(d)(1)-(11) (Supp. 2014). For example, a few of the considerations listed in the statute are as follows:

> (1) The manner of the commission of the offense being particularly heinous or characterized by aggravating circumstances;
>
> (2) The child's age or susceptibility to psychological or emotional distress or trauma on account of a physical or mental condition which existed before the alleged commission of the offense;
>
> (3) At the time of the alleged offense the accused was: (A) The parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time; or (B) A person who maintains or maintained an ongoing personal relationship with such child's parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time and the relationship involved the person living in or frequent and repeated presence in the same household or premises as the child.

O.C.G.A. § 17-8-55(d)(1)-(3) (Supp. 2014). *See also supra* note 75.

101. *Maryland*, 497 U.S. at 856 (quoting Wildermuth v. Maryland, 530 A.2d 275, 289 (Md. 1987)).

statute's requirement of "serious emotional distress such that the child cannot reasonably communicate" sufficed.[102] Although the Court did not decide what is *de minimus*, HB 804 closely tracks the language of the Maryland statute, which the Court said "clearly suffices to meet constitutional standards."[103] HB 804 requires "serious psychological or emotional distress or trauma which impairs such child's ability to communicate."[104] Though the language is slightly different than the language approved by the Supreme Court,[105] it still contains the same elements: serious emotional distress and that such distress affects the child's ability to communicate. HB 804 simply adds "psychological" distress and replaces Maryland's statute language of "such that the child cannot reasonably communicate" with "which impairs such child's ability to communicate."[106] Thus, the Act requires the trial court go through certain steps before ordering a child testify outside the defendant's presence, and it ensures that the requisite finding of necessity is met.

Georgia has an important state interest in protecting its children from trauma as a result of testifying in the presence of the accused. However, there are inconsistencies between Georgia's Act and *Maryland v. Craig* that may cause the Bill to face constitutional challenge. First, the *Craig* court dealt with the statute as applied to a six-year-old girl.[107] The Georgia Act defines a child as "an individual who is under [seventeen] years of age."[108] The question becomes will such a statute still be constitutional when applied to a sixteen-year-old or any child over the age of the six-year-old victim in *Craig*?[109] While the age may be relevant to the analysis, the trial court must

102. *Id.*

103. O.C.G.A. § 17-8-55(d) (Supp. 2014); *Maryland*, 497 U.S. at 856.

104. O.C.G.A. § 17-8-55(d) (Supp. 2014).

105. *Compare* O.C.G.A. § 17-8-55(d) (Supp. 2014) ("[S]uch child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's ability to communicate as a result of testifying in the presence of the accused"), *with Maryland*, 497 U.S. at 856 (noting the Maryland statute requires "a determination that the child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate'").

106. *Maryland*, 497 U.S. at 856; O.C.G.A. § 17-8-55(d) (Supp. 2014).

107. *Maryland*, 497 U.S. at 840.

108. O.C.G.A. § 17-8-55(a) (Supp. 2014).

109. The Eleventh Circuit Court of Appeals has upheld the Child Witness' Rights Act, a federal rule similar to O.C.G.A. § 17-8-55, as applied to a twelve-year-old. *See infra* note 123 and accompanying text. It is also important to note the federal Act protects under age eighteen, which is a broader protection than O.C.G.A. § 17-8-55. *See infra* note 123 and accompanying text.

still find "serious psychological or emotional distress or trauma which impairs such child's ability to communicate," regardless of the age of the child, so long as the child's age falls within the statute's requirement of under seventeen.[110] Therefore, the protections cannot be provided to sixteen-year-old witnesses unless the trial court makes this specific finding of trauma that impairs their ability to communicate.

Persuasive authority exists supporting the Act's age increase as at least one state supreme court has upheld against a Confrontation Clause challenges its statute protecting individuals under seventeen.[111] In *State v, Crandall*, the New Jersey Supreme Court held that, "[b]ecause N.J.S.A. 2A:84A-32.4 allows a witness to testify outside the presence o the jury only if such a procedure is necessary, the statute is facially constitutional."[112] Although *Crandall* involved a seven year-old child victim, the court did not discuss the statute's age range and seemed to concern itself only with *Maryland v. Craig's* three explicit requirements.[113] If courts determining the constitutionality of the Act follow *Crandall's* analysis, the increase in age should not render it unconstitutional.

Second, the *Craig* Court dealt with the statute as applied to a "victim of child abuse."[114] Also, its holding is specific to child abuses cases.[115] The Georgia Act, however, includes more crimes than just those related to child abuse, whether they are physical, sexual, or emotional abuse.[116] While the victims of child-abuse-related crimes

110. O.C.G.A. § 17-8-55(d) (Supp. 2014).

111. N.J. Stat. Ann. § 2A:84A-32.4(b) (West); State v. Crandall, 577 A.2d 483, 487 (1990).

112. *Crandall*, 577 A.2d at 487.

113. *Id.*

114. Maryland v. Craig, 497 U.S. 836, 840 (1990).

115. *Id.* at 855 (holding "the state interest in protecting child witnesses from the trauma of testifying in a *child abuse case* is sufficiently important to justify the use of a special procedure that permits a child witness *in such cases* to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.") (emphasis added).

116. O.C.G.A. § 17-8-55(b) (Supp. 2014) ("This Code section shall apply to all proceedings when a child is a witness to or an alleged victim of a violation of Code Section 16-5-1 [Murder], 16-5-20 [Simple Assault], 16-5-23 [Simple Battery]. 16-5-23.1 [Battery], 16-5-40 [Kidnapping], 16-5-70 [Cruelty to Children], 16-5-90 [Stalking], 16-5-95 [Violation of Family Violence Order], 16-6-1 [Rape], 16-6-2 [Sodomy; Aggravated Sodomy], 16-6-3 [Statutory Rape], 16-6-4 [Child Molestation; Aggravated Child Molestation], 16-6-5 [Enticing a Child for Indecent Purposes], 16-6-5.1 [Sexual Assault], 16-6-11 [Pimping], 16-6-14 [Pandering by Compulsion], 16-6-22 [Incest], 16-6-22.1 [Sexual Battery], 16-6-22.2 [Aggravated Sexual Battery], 16-8-41 [Armed Robbery; Robbery by Intimidation]; or 16-15-4 [Unlawful Acts; Penalties].").

have the support of *Craig*, the testimony of victims of the other crimes included in the Act—*i.e.*, armed robbery—outside the presence of the defendant stands on much shakier ground.

Some states however, do not limit the crimes that invoke their statutes and allow a child witness to testify remotely so long as the child was a victim or witness to a crime.[117] The Kentucky Supreme Court has held its state statute facially constitutional, although it does not limit its list of crimes, because it satisfies the United States Supreme Court's explicit requirements.[118] Despite the declared constitutionality of similar state statutes, courts ruling under the Act may deny protection to a minor victim or witness to a crime such as armed robbery more frequently because it is a non-sexual crime and may not have been conducted in the home where the accused exercises control over the witness.

Third, the *Craig* Court addressed the statute as applied to a "victim."[119] HB 804 provides protection for both a child witness and a child victim.[120] Will the application of such a statute to a child witness pass constitutional muster? Though the Court uses both "witness" and "victim" throughout the opinion, the holding is specific to the facts presented before the court at that time, which involved a child victim. The Act requires the same finding of distress or trauma that impairs the child's ability to communicate, regardless of whether the testifying witness was the victim of the alleged crime or a witness thereto.[121] While the court must find the same trauma, the facts as to who the witness is in relation to the crime may affect the balancing of whether the state's interest outweighs the defendant's confrontation rights. This question will likely be

117. ARIZ. REV. STAT. ANN. § 13-4251 (West 2014) ("This article applies to the testimony or statements of a minor in criminal proceedings involving acts committed against the minor or involving acts witnessed by the minor . . . ."); KY. REV STAT. ANN. § 421.350 (West 2014) ("This section applies only to a proceeding in the prosecution of an offense, *including but not limited to* [certain enumerated crimes] . . . when the act is alleged to have been committed against a child . . . .") (emphasis added).

118. Sparkman v. Com., 250 S.W.3d 667, 669 (Ky. 2008) ("The constitutionality of this statute has been upheld by this Court. We noted that the statute allows a trial court to strike a proper balance between three competing interests: a) the criminal accused's right to receive a fair trial; b) the child's right to testify without undue distress or intimidation; and c) the Commonwealth's interest in a truthful fact-finding process.") (citing Com. v. Willis, 716 S.W.2d 224, 231 (Ky. 1986)).

119. *See Maryland*, 497 U.S. at 840.

120. O.C.G.A. § 17-8-55(b) (Supp. 2014) ("This Code section shall apply to all proceedings when a child is a witness to or an alleged victim . . . .").

121. O.C.G.A. § 17-8-55(d) (Supp. 2014).

challenged. A survey of other states' statutes, however, reveals that protecting a child witness to a crime is quite prevalent, making any finding of unconstitutionality on that ground doubtful.[122]

The Eleventh Circuit has applied the *Maryland v. Craig* test on more than one occasion, although none of the cases appear to shed any light on the constitutionality of the Act's specific protections of a child-witness to a crime.[123] The Circuit's most recent application of the test in *United States v. Fee*, however, suggests that the Act's increase in the protected age to sixteen will pass constitutional muster.[124] In *Fee*, the defendant, convicted on eight counts of child pornography, argued that the district court violated her right of confrontation by allowing her twelve-year-old daughter to testify via closed-circuit television.[125] The court allowed the testimony under the federal Child Victims' and Child Witness' Rights Act, which permits children under the age of eighteen to testify remotely when the district court "finds that the child is unable to testify in open court in the presence of the defendant."[126] After a full *Maryland v. Craig* analysis, the court affirmed the district court ruling because it "complied with the procedures outlined in and made the findings required under the Child Right's Act. And the [government] established that [the child-victim] would suffer trauma if forced to

122. State's with statutes protecting both child victims and witnesses include the following: Alabama (ALA. CODE § 15-25-3(West 2014)); Alaska (ALASKA STAT. § 12.45.046 (West 2014)); Arizona (ARIZ. REV. STAT. ANN. § 13-4251 (West 2014)); Arkansas (ARK. CODE. ANN. § 16-43-1001 (West 2014)); Minnesota (MINN. STAT. § 595.02 (West 2014)); New Hampshire (N.H. REV. STAT. ANN. § 517:13-a (West 2014)); and Virginia (VA. CODE ANN. § 18.2-67.9 (West 2014)).

123. Harrell v. Butterworth, 251 F.3d 926, 928 (11th Cir. 2001) (affirming the district court's denial of defendant's petition for a writ of habeas corpus where state trial court allowed foreign robbery victims to testify via satellite transmission); United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006) (holding that foreign witness testimony via two-way video conference violated the defendant's Sixth Amendment rights because "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendant's rights to confront their accusers face-to-face"); Fuster-Escalona v. Florida Dep't of Corr., 170 F. App'x 627, 629 (11th Cir. 2006) (affirming the district court's denial of defendant's petition for a writ of habeas corpus where four children-victims, who were five or six years old, testified via two-way closed circuit television); United States v. Fee, 491 F. App'x 151, 159 (11th Cir. 2012) (holding that a twelve-year-old child-victim's testimony via two-way, closed-circuit television did not violate the defendant's Sixth Amendment rights where the district court complied with the procedural requirements of a federal statute allowing such testimony).

124. *Fee*, 491 F. App'x at 159.

125. *Id.* at 151.

126. *Id.* at 159 (quoting 18 U.S.C. § 3509(b)(1)(B) (2006)).

testify in the [defendant's] presence."[127] Because HB 804's age limit is lower than that of the federal statute before the Elventh Circuit in *Fee*, the increase in protected age to sixteen is probably safe from constitutional challenge.

Despite the constitutional uncertainty surrounding the Act's extension to child-witnesses of a crime, Fulton County District Attorney Paul Howard is confident that the Confrontation Clause issues have been thoroughly vetted with regards to the previous Code. It seems as if the General Assembly crafted the 1991 Code to stay within the bounds of the *Maryland v. Craig* guidelines, and this Act does nothing to disturb that.[128] It also appears that the Act addressed all of the issues that concerned its sponsors. The primary purpose was to protect children who fell outside of the previous statute's scope.[129] By increasing the protected age range by six years, more than doubling the list of crimes that invoke the statute, and providing protection of child witnesses to those crimes, the Act drastically broadens the class of individuals that Georgia allows to testify outside the presence of the accused.[130]

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127. *Id.*

128. Video Recording of House Judiciary Non-Civil Committee, Feb. 15, 2014 at 22 min., 44 sec. (remarks by Fulton County District Attorney Paul Howard).

129. Lindsey Interview, *supra* note 20; Senate Recording 2, *supra* note 21, at 8 min., 46 sec., (remarks by Rep. Edward Lindsey (R-54th).

130. O.C.G.A. § 17-8-55(Supp. 2014).