STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION January 11, 2011
v	No. 278732 Kent Circuit Court
JAMES HENRY BUIE, Defendant-Appellant.	LC No. 05-010021-FC

AFTER REMAND

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

WHITBECK, J. (*concurring*).

I concur in the majority's scholarly opinion. I write separately only to emphasize the importance of, and the historical basis for, adherence to the constitutional requirement that an accused has the right to confront the witnesses against him.[1]

For a wide variety of reasons, our jurisprudence contains an interlocking web of rights and restrictions, all aimed at protecting those whom the state accuses of crimes. We require that when investigation turns to custodial interrogation, the police must inform the subject of that interrogation that he or she has the rights to remain silent and to the services of an attorney.[2] And there is a constitutional prohibition against unreasonable search and seizure.[3] Further, a criminal defendant has a constitutional right to a public trial by an impartial jury.[4] That defendant has a constitutional right against compelled self-incrimination and a concomitant presumption of innocence.[5] He or she has a constitutional due process right to be convicted only

[1] US Const, Am VI; Const 1963, art 1, § 20.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] US Const, Am IV; Const 1963, art 1, § 11.

[4] US Const, Am VI; Const 1963, art 1, § 20.

[5] *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995), citing US Const, Am V; Const 1963, art 1, § 15.

upon prosecutorial proof of guilt beyond a reasonable doubt,[6] a right to a unanimous jury verdict,[7] a constitutional right to compulsory process,[8] and a constitutional right to effective assistance of counsel.[9]

These protections continue even after conviction. In Michigan, a criminal defendant has an absolute right of appeal following conviction[10] and to the reasonable assistance of counsel in perfecting and prosecuting such an appeal.[11] Conversely, the prosecution has no constitutional right to appeal.[12]

Thus, the right at issue in this case, the constitutional "confrontation clause"[13] as it is popularly called, is only one strand in this interlocking web of rights and restrictions. But it is an important strand and one steeped in history. "The right to confront one's accusers is a concept that dates to Roman times."[14] The origins of the clause itself go back to the 16th and 17th centuries. During that time, the English Crown "used criminal proceedings as weapons against it political enemies," most notoriously through the device of the Star Chamber.[15] Essentially, the English courts used an inquisitorial mode of criminal procedure in which, for example, "justices of the peace would interrogate witnesses privately and offer the testimony against the accused at trial without calling the witness to the stand."[16]

The 1603 trial of Sir Walter Raleigh provides perhaps the most well-known instance of the potential for abuse inherent in the inquisitorial mode.[17] The main witness against Raleigh

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[6] *Sandstrom v Montana*, 442 US 510, 520-524; 99 S Ct 2450; 61 L Ed 2d 39 (1979).

[7] *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994), citing US Const, Am VI; Const 1963, art 1, § 14; FR Crim P 31(a); and MCR 6.410(B).

[8] Const 1963, art 1, § 20.

[9] *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

[10] Const 1963, art 1, § 20.

[11] *Id.*

[12] *People v Richmond*, 486 Mich 29, 36; 782 NW2d 187 (2010).

[13] US Const, Am VI; Const 1963, art 1, § 20.

[14] *Crawford v Washington*, 541 US 36, 43; 124 S Ct 1354; 158 L Ed2d 177 (2004), citing *Coy v Iowa*, 487 US 1012, 1015; 108 S Ct 2798; 101 L Ed 2d 857 (1988); Herrmann & Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va J Intl L 481 (1994).

[15] W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After Crawford v Washington: Smaller Mouth, Bigger Teeth*, 57 Baylor L Rev 1, 7 (2005).

[16] *Id.*

[17] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L Rev at 7-8.

never testified in person at the trial.[18] Rather, officers reported his statements in court.[19] Raleigh objected to the use of these out-of-court statements—saying at one point, "Good my Lords, let my accuser come face to face, and be deposed," [20]—but his objections were unsuccessful, and he was convicted and hanged.[21]

Rather clearly, Raleigh's trial demonstrates the twin evils caused by the inability to confront witnesses:

> First, without confrontation by cross-examination, the accused is unable to test the credibility of the declarant's testimony. Confrontation by cross-examination is needed to ensure the reliability of testimony. Second, without a right to confrontation the government may develop ex parte testimony for use against the accused at trial. The right to confrontation serves as a check on the government's ability to secretly develop evidence against its citizenry, a worthwhile purpose, irrespective of the reliability to the testimony.[22]

The proposed Federal Constitution did not originally contain a confrontation clause. But the First Congress included the clause in the proposal that became the Sixth Amendment.[23] Early state decisions indicated that the right to cross-examine witnesses in person was at the core of the original understanding of the clause.[24] And subsequent United States Supreme Court decisions followed this understanding:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than

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[18] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L Rev at 7.

[19] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L Rev at 7.

[20] 1 Criminal Trials 389-520 (David Jardine ed, 1850).

[21] *Crawford*, 541 US at 44; Counseller & Rickett, 57 Baylor L Rev at 7-8.

[22] Counseller & Rickett, 57 Baylor L Rev at 8.

[23] *Crawford*, 541 US at 49.

[24] *Id.*, citing *North Carolina v Webb*, 2 NC 103, 104 (1794) to the effect that, "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine[,]" and *South Carolina v Campbell*, 30 SCL 124, 125 (1844) to the effect that one of the "'indispensable conditions' implicitly guaranteed by the State Constitution was that 'prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.'"

> a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[25]

Indeed, as Justice SCALIA opined, the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."[26]

But technology has intruded and public policy concerns have surfaced. In *Maryland v Craig*,[27] the United States Supreme Court faced the question whether the confrontation clause categorically prohibited 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. A majority of the Court held that there was no such categorical prohibition.[28] The majority adopted a two-pronged test to determine if allowing a child witness's testimony outside the defendant's physical presence by one-way closed circuit television in a sexual abuse case violated the confrontation clause. The Court delineated four elements of the confrontation clause: (1) physical presence, (2) an oath, (3) cross-examination, and (4) "observation of demeanor by the trier of fact."[29] In conjunction with these elements, the first prong of the *Craig* test is whether there is a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation.[30] And the second prong is whether the procedure in question preserves all the other elements of the confrontation clause.[31]

Notably, Justice SCALIA, joined by Justice BRENNAN, Justice MARSHALL, and Justice STEVENS, dissented.[32] Justice SCALIA asserted that the rule that a "defendant should be

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[25] *Crawford*, 541 US at 61; see also *Mattox v United States*, 156 US 237, 244; 15 S Ct 337; 39 L Ed 409 (1895) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . .")

[26] *Crawford*, 541 US at 54.

[27] *Maryland v Craig*, 497 US 836, 840; 110 S Ct 3157; 111 L Ed 2nd 666 (1990).

[28] See *id.* at 844 ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with the witnesses against them at trial." [emphasis in the original]) and *id.* at 847 ("[W]e have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." emphasis in the original [emphasis in original]).

[29] *Id.* at 846.

[30] *Id*. at 851-852, 855.

[31] *Id.*

[32] *Id.* at 860-870 (SCALIA, J., *dissenting*).

confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed."[33] Justice SCALIA went on to say,

> The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction. [34]

In our prior opinion in this case,[35] we noted that, like the United States Supreme Court in *Craig*, this Court has recognized that presenting testimony over closed-circuit television does not violate the defendant's right of confrontation in two special circumstances.[36] We analyzed a number of federal decisions and then went on to adopt the *Craig* test:

> Like the majority of federal courts that have examined this issue, we adopt the *Craig* test to determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology. The trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause. [37]

While I see considerable intellectual merit in Justice SCALIA's absolutist view of the confrontation clause—after all, the document does say, "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[38]—I believe that our decision to adopt the *Craig* test in our prior opinion was a prudential one, given the prior decisions in *People v Burton* and *People v Pesquera*, and the precedent in *Craig* itself.

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[33] *Id.* at 863.

[34] *Id.* at 870.

[35] *People v Buie*, 285 Mich App 401; 775 NW2d 817 (2009).

[36] *Id.* at 409, citing to *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001) and *People v Burton*, 219 Mich App 278, 290-291; 556 NW2d 201 (1996).

[37] *Id.* at 415.

[38] US Const, Am VI (emphasis added).

I also find significant that the prosecution concedes that in this case there was no public policy or state interest in having the witnesses in question testify by video. Therefore, despite the trial court's conclusory statements to the contrary, there is no basis on the record on which we could ground a holding that there was a public policy or state interest sufficiently important to outweigh Buie's constitutionally guaranteed right of confrontation. Further, although Buie's *counsel* may have consented to the video procedure pursuant to MCR 6.006(C)(2), she did so over Buie's express objection. Manifestly, then, it was plain error to permit the two witnesses in question to testify using the video procedure.

I fully recognize that the crimes in question here—criminal sexual conduct involving a victim under the age of 13,[39] three counts of criminal sexual conduct involving the use of a weapon,[40] and one count of possession of a firearm during the commission of a felony[41]—are heinous ones. I further recognize that there was substantial evidence of Buie's guilt in this matter and that the video testimony of the two witnesses in question was crucial to establishing that guilt. And I finally recognize that others may assert that we base our decision to vacate Buie's convictions and sentence upon "technicalities."

But, while it is true that the Constitution is not a suicide pact,[42] it is also not a wish list. Nor can we modify it in lockstep with evolving technology. The words in our most fundamental formative documents have continuing meaning and it is our responsibility as members of the judiciary to ensure that such meaning has effective life. The web of protection that we have woven around those whom the state accuses, or may accuse, of crimes is at the center of our system of justice. It is one of the safeguards that distinguish that system from those despotic and tyrannical regimes in which political prosecutions and governmentally orchestrated sham trials are commonplace. A criminal defendant's right to confront witnesses face to face and to subject such witnesses to the test of cross-examination is not a technicality, it is crucial protection that has been with us almost from the very beginning of our republic. It may be waived, as MCR 6.006(C)(2) provides, but it cannot be judicially abrogated. Raleigh's ghost haunted the Framers and he haunts us still, to our great benefit.

/s/ William C. Whitbeck

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[39] MCL 750.520b(1)(a).

[40] MCL 750.520(1)(e).

[41] MCL 750.227b.

[42] See *Terminiello v Chicago*, 337 US 1, 37; 69 S Ct 894; 93 L Ed 1131 (1949) (VINSON, J., *dissenting*).