# Are Courts-Martial Ready for Prime Time? Televised Testimony and Other Developments in the Law of Confrontation

*Major Edward J. O'Brien*
*Professor, Criminal Law Department*
*The Judge Advocate General's School, United States Army*
*Charlottesville, Virginia*

## Introduction

The Confrontation Clause of the Sixth Amendment[1] guarantees a criminal defendant the right to confront and cross-examine the witnesses against him. However, the right to confront witnesses is not absolute. This article discusses recent developments in the law of confrontation, focusing on two common situations where the right to confront witnesses can be abridged: the introduction of hearsay statements without producing the declarant to testify at trial; and the testimony of victims and witnesses from a remote location.

On 6 October 1999, the President signed Executive Order 13,140,[2] which included several changes to the *Manual for Courts-Martial* (*MCM*).[3] Executive Order 13,140 included new rules and procedures for taking remote testimony from child victims or witnesses. These changes borrowed heavily from the United States Code.[4] The drafters of the federal statute and military rules have attempted to codify the United States Supreme Court's holding in *Maryland v. Craig*.[5]

This article reviews the Court's holding and analysis in *Craig* and evaluates the new changes to the *MCM* using *Craig*'s analysis and holding. The result clearly shows that the new changes to the *MCM* go beyond the facts and holding in *Craig*. Practitioners must be careful when applying the new rules. Military judges should continue to approach remote testimony issues by focusing on the findings required by *Craig*. If a judge's findings satisfy the requirements of *Craig*, the findings will also satisfy the new rules. A military judge can make findings that satisfy the requirements of the new rules but violate constitutional law.

This article also reviews recent cases that expand the use of remote live testimony by video teleconference and closed circuit television. Practitioners must understand the limitations and rationale of *Craig* when expanding the use of remote live testimony beyond child victims in child sexual abuse cases.

Finally, this article reviews a recent development in the law of hearsay. The Sixth Amendment's Confrontation Clause does not categorically prohibit the introduction of out-of-court statements. However, when an out-of-court statement is admitted against the accused in a criminal trial and the declarant does not appear to testify, a confrontation issue arises. The proponent must show that the out-of-court statement is sufficiently reliable to satisfy the Confrontation Clause.[6] This article will review a recent case decided by the United States Supreme Court, *Lilly v. Virginia*,[7] which addressed the reliability of statements against penal interest.

## Remote Live Testimony

Executive Order 13,140 amended Military Rule of Evidence (MRE) 611 by adding a new subsection, MRE 611(d).[8] Military Rule of Evidence 611(d) prescribes rules governing the remote live testimony of children.[9] In cases involving the abuse of a child or domestic violence, the military judge shall allow a child victim or witness to testify from an area outside the courtroom if the judge makes certain findings.[10] Remote testimony will be used if the judge finds that a child is unable to testify because of one of four reasons: fear, a substantial likelihood that the child will suffer emotional trauma from testifying, the child suffers from a mental or other infirmity, or conduct by the accused or defense counsel.[11]

The executive order created a new Rule for Courts-Martial (R.C.M.) 914A, to prescribe procedures for taking remote testimony.[12] Rule for Courts-Martial 914A provides that the mili-

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

4. *See* 18 U.S.C.S. § 3509 (LEXIS 2000).

5. 497 U.S. 836 (1990).

6. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

7. 527 U.S. 116 (1999).

tary judge will decide how remote testimony will be taken, but two-way closed circuit television should normally be used.[13] The rule also provides minimum procedures the judge must follow.[14]

---

8. Military Rule of Evidence 611 is amended by inserting the following new subsection at the end:

> (d) Remote live testimony of a child.
>
> (1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.
>
> (2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, endanger parent, or guardian of the victim.
>
> (3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:
>
> (A) The child is unable to testify because of fear;
>
> (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
>
> (C) The child suffers from a mental or other infirmity; or
>
> (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.
>
> (4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).

Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118.

9. A "child" is a person who is under the age of sixteen at the time of his or her testimony. *Id.*

10. *Id.*

11. *Id.* 64 Fed. Reg. at 55,118-19.

12. The following new rule is inserted after R.C.M. 914:

> Rule 914A. Use of remote live testimony of a child
>
> (a) General procedures. A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:
>
> (1) The witness shall testify from a remote location outside the courtroom;
>
> (2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;
>
> (3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;
>
> (4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and
>
> (5) The accused shall be permitted private, contemporaneous communication with his counsel.
>
> (b) Prohibitions. The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c).

*Id.* 64 Fed. Reg. at 55,116.

13. *Id.*

The executive order also amended R.C.M. 804 by redesignating subsection (c) as subsection (d) and creating a new subsection (c).[15] The new subsection (c) allows the accused to voluntarily leave the courtroom during the witness's testimony to preclude the use of the remote testimony procedures.[16] If the accused makes this election, the child's testimony will be transmitted to a remote location where the accused can view it. The accused will also have private, contemporaneous communication with his defense counsel.[17]

These new rules closely resemble federal law.[18] Military Rule of Evidence 611(d) and 18 U.S.C. § 3509 codify the United States Supreme Court's decision in *Maryland v. Craig*.[19] However, MRE 611(d) and 18 U.S.C. § 3509 expand the use of remote testimony beyond the use approved in *Craig*. A brief review of *Craig* is necessary to understand the impact and dangers of MRE 611(d).

## Maryland v. Craig

In *Craig*, the Supreme Court upheld the use of one-way closed circuit television to allow a child victim to testify in a criminal trial from a remote location. The accused, Sandra Ann Craig, was convicted of the sexual abuse of a six-year old girl. The child victim testified against Craig via one-way closed circuit television.[20] The Court noted:

> [O]ur precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.[21]

The Court established three requirements before the Constitution's preference for face-to-face confrontation can be diminished.

First, the government must make an adequate showing of necessity. To satisfy the necessity requirement, the trial court must make three case-specific findings of fact. The trial court must find that the proposed procedure is necessary to protect

14. *Id.* The witness shall testify from a remote location outside the courtroom. Attendance at the remote location shall be limited to the child, counsel for each side (but not an accused proceeding *pro se*), equipment operators, and other persons deemed necessary by the judge (for example, an attendant for the child). Sufficient monitors shall be placed in the courtroom to allow the judge, the accused, the court members, the court reporter and the public to view and hear the testimony. The voice of the judge shall be transmitted to the remote location so the judge can control the proceeding. Finally, the accused shall have private, contemporaneous communication with his defense counsel.

15. Rule for Courts-Martial 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

> (c) Voluntary absence for limited purpose of child testimony.
>
> (1) Election by accused. Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.
>
> (2) Procedure. The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.
>
> (3) Effect on accused's rights generally. An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

*Id.* 64 Fed. Reg. at 55,115.

16. *Id.*

17. *Id.*

18. *See* 18 U.S.C.S. § 3509 (LEXIS 2000). This section codifies the Child Victims' and Child Witnesses' Rights Act, which was enacted as part of the Omnibus Crime Control Act of 1990. *See* Lieutenant David A. Berger, *Proposed Changes to Rules For Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance with the Child Victims' and Child Witnesses' Rights Statute*, ARMY LAW., June 1999, at 19-20. *See also* UCMJ art. 36 (LEXIS 2000). "[T]rial . . . procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulations, which shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." *Id.*

19. 497 U.S. 836 (1990).

20. *Id.* at 840-43. The named victim, as well as three other children whom Craig allegedly abused were allowed to testify via closed circuit television. *Id.* at 842-43.

21. *Id.* at 850.

the welfare of the particular child witness who seeks to testify without face-to-face confrontation. Stated another way, the trial court must find that the particular witness would suffer emotional trauma if forced to testify in the conventional manner. The trial court must also find that the emotional trauma would be caused by the presence of the accused and not by the formal courtroom setting. "Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma."[22] Finally, the trial court must find that that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus*, i.e., more than 'mere nervousness or excitement or some reluctance to testify . . . .'"[23]

Second, the proposed procedure must be necessary to further an important state interest. The important public policy served by the Maryland statute reviewed by the Supreme Court in *Craig* was "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying."[24] The Court held

> if the State makes an adequate showing of necessity, 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.[25]

Finally, the proposed procedure must guarantee the reliability of the testimony. The Court said that the combined elements of the right to confrontation ensure that evidence admitted against an accused is reliable. The Court identified the elements of confrontation as physical presence in the courtroom in the presence of the defendant, the witness's oath, cross-examination, and the observation of the witness's demeanor by the trier of fact.[26] The Court stated "[t]hat the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with."[27] The reliability of the testimony received in the absence of face-to-face confrontation must be assured by the presence of the other elements of confrontation.

The language of MRE 611(d) and R.C.M. 914A raise several issues because they go well beyond the facts and logic of *Craig*. We will analyze the provisions of these new rules to try to identify the state interest involved, why the provision is necessary to further the state interest, and how the testimony's reliability is guaranteed.

*Military Rule of Evidence 611(d)*

Military Rule of Evidence 611(d)(3) provides that, "[r]emote live testimony will be used only where the military judge makes a finding on the record that a child is *unable to testify* in open court *in the presence* of the accused,"[28] for one of four reasons. The requirement that the child be unable to testify codifies *Craig*'s requirement that the distress be more than *de minimus*. Military Rule of Evidence 611's requirement that the child be unable to testify is similar to the requirement of the Maryland statute reviewed in *Craig*. In *Craig*, the statutory procedure could only be used if the emotional trauma was incapacitating.[29] In *Craig*, the Court did not decide the minimum showing of emotional trauma required for the use of special procedures because the standard specified in the Maryland statute clearly met constitutional standards.[30] Similarly, MRE 611(d)(3) requires that the child be incapacitated, or unable to testify. Military Rule of Evidence 611(d)'s required showing of the level of distress also meets constitutional standards.

Military Rule of Evidence 611(d)(3) requires that the child be unable to testify in the presence of the accused. This may be less than the required showing of necessity announced in *Craig*. In *Craig*, the Court required that the trial court find that the

22. *Id.* at 856.

23. *Id.*

24. *Id.* at 854.

25. *Id.* at 855.

26. *Id.* at 846.

27. *Id.* at 850.

28. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118 (1999) (emphasis added). *See also* 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000). "The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant." *Id.*

29. The Maryland statute required a determination that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate." *Craig*, 497 U.S. at 856.

30. *Id.*

child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.[31]

> Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that caused the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.[32]

Clearly, *Craig* requires the emotional distress to be caused by the presence of the defendant. Military Rule of Evidence 611(d)(3) only requires the child to be unable to testify in the presence of the accused. The preposition is important. Under MRE 611(d)(3) and R.C.M. 914A, a child, who is so traumatized by the formal trappings of the courtroom that she could not testify, would be required to testify via closed circuit television from a remote location. This would satisfy MRE 611(d)(3), but violate *Craig*. Military Rule of Evidence 611(d)(3) must be read to require the trauma be caused by the presence of the accused to be consistent with the constitutional law. Military judges must be careful to make this finding on the record.

Military Rule of Evidence 611(d)(3)(A) provides that remote live testimony will be used when the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of fear.[33] This language is substantially the same as the United States Code.[34] *Craig* does not discuss fear. *Craig* approved of diminishing the right of confrontation to protect child victims from the emotional distress caused by testifying in the presence of the accused in a child abuse case. To comport with *Craig*, the fear must cause emotional distress and the fear must be of the accused.[35] If this provision is used in a case other than a child sexual abuse case,[36] or if a child victim testifies from a remote location based on fear (and not emotional trauma), the proponent of the witness will have to identify the state interest being promoted and explain why these procedures are necessary to further the state interest because fear (independent of emotional trauma) does not fall under the state interest found sufficiently important to justify the derogation of the right of confrontation in *Craig.*

Military Rule of Evidence 611(d)(3)(B) provides that remote live testimony will be used in those cases in which the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of a substantial likelihood, established by expert testimony,[37] that the child would suffer emotional trauma from testifying.[38] This formulation may require less than the showing of necessity required by *Craig.* In *Craig*, the Court said "[t]he trial court must also find that the child witness *would be traumatized*, not by the courtroom generally, but by the presence of the defendant."[39] The Maryland statute reviewed in *Craig* required "that the child witness *will* suffer 'serious emotional distress such that the child cannot reasonably communicate.'"[40] The Court did not speak in terms of "substantial likelihoods." If a trial judge does not carefully make his findings, it is possible to satisfy the requirements of MRE 611(d) and still violate *Craig*.

Military Rule of Evidence 611(d)(3)(C) provides that remote live testimony will be used in those cases in which the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because the child suffers from a mental or other infirmity. To the extent that this provision allows alternative procedures to be used without a showing of emotional trauma to the witness, this provision is constitutionally untested. In *Craig*, the Court upheld Maryland's statu-

---

31. *Id.*

32. *Id.*

33. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118.

34. "The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons: (i) The child is unable to testify because of fear." 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000).

35. Cases that have used remote testimony under 18 U.S.C.S. § 3509(b)(1)(B) involved fear of the defendant that caused emotional trauma. *See* United States v. Rouse, 111 F.3d 561 (8th Cir. 1997); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Farley, 992 F.2d 1122 (10th Cir. 1993).

36. *See supra* note 8. Military Rule of Evidence 611(d) requires the use of R.C.M. 914A's procedures in cases involving abuse of a child and domestic violence. By definition, "cases involving abuse of a child" includes physical abuse and child neglect.

37. The requirement for expert testimony is not a constitutional requirement, but experts are normally used to prove the emotional trauma. *See, e.g.*, United States v. Anderson, 51 M.J. 145 (1999).

38. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118. *See* 18 U.S.C.S. § 3509(b)(1)(B)(ii).

39. Maryland v. Craig, 497 U.S. 836, 856 (1990) (emphasis added).

40. *Id.* (emphasis added).

tory procedure for receiving testimony via one-way closed circuit television based on the state's interest in protecting child witnesses from *the trauma of testifying in a child abuse case*.[41] The government may have an interest in securing testimony from children with infirmities, but this is a different interest than the one considered in *Craig. Craig* clearly required a link between the emotional trauma suffered by the child and the presence of the accused.[42] This provision may not survive constitutional review if the infirmity is not linked to the accused because the proposed procedure would not be necessary to further the important state interest.

Military Rule of Evidence 611(d)(3)(D) provides that remote live testimony will be used when the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of conduct by an accused or defense counsel. This provision appears to be based on the waiver of the Sixth Amendment right to confrontation by the accused.[43] Arguably, the requirements of *Maryland v. Craig* do not apply to this provision.

Judges and practitioners should make sure that the judge's findings satisfy the requirements of *Maryland v. Craig.* By making findings that satisfy the requirements of *Craig*, the judge will satisfy the requirements of MRE 611(d). As noted, however, it is possible to satisfy MRE 611(d), yet still violate *Craig.*

### *Impact On Other Substitutes For Face-To-Face Confrontation*

A big difference between 18 U.S.C. § 3509 and R.C.M. 914A is the amount of discretion the trial judge has in directing the use of a two-way closed circuit television system. The United States Code provides that "the court *may* order that the testimony of the child be taken by closed-circuit television."[44] Rule for Courts-Martial 914A provides that after the military judge has determined that the requirements of MRE 611(d)(3) have been satisfied, the judge will determine the procedure to be used based on the exigencies of the situation.[45] The rule states a preference for two-way closed circuit television,[46] and the rule specifies that "[t]he witness *shall* testify from a remote location outside the courtroom."[47] The United States Code gives trial judges the option of using closed circuit television; the new Rule for Courts-Martial requires the trial judge to have the child witness testify from a remote location, with a preference for closed circuit television.[48]

Between 1990, when *Craig* was decided, and 1999, when Executive Order 13,140 was signed, military courts sanctioned the use of several methods for preventing emotional distress to child witnesses. They include the use of partitions,[49] having the witness testify with her back to the accused but facing the judge and counsel,[50] having the witness testify with her profile to the accused,[51] the whisper method,[52] and combinations of these procedures.[53] In all of these procedures, the child witness testified inside the courtroom.

Does R.C.M. 914A's mandate for testimony from outside the courtroom mean that these procedures can no longer be used? Probably not. Use of the R.C.M. 914A procedures depends on a finding that the requirements of MRE 611(d)(3) have been satisfied. One of the requirements of MRE 611(d)(3) is that the judge find on the record that the "*child is unable to testify in open court in the presence of the accused.*"[54] Military Rule of Evidence 611's requirement that the child be unable to testify is

41. *Id.* at 855.

42. *See supra* note 22 and accompanying text (explaining the requirements for a showing of necessity).

43. *Cf.* United States v. Paaluhi, 50 M.J. 782 (N.M. Ct. Crim. App. 1999) (finding the accused waived his right to confrontation where a witness's unavailability was a direct result of the actions of the accused).

44. 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000) (emphasis added).

45. The analysis to R.C.M. 914A, together with R.C.M. 914A(a)(1), makes it clear that the judge's discretion is limited to using two-way closed circuit television or one-way closed circuit television. *See* MCM, *supra* note 3, R.C.M. 914A analysis (1998); Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55121 (1999).

46. MCM, *supra* note 3, R.C.M. 914A(a). *See* Exec. Order No. 13,140, 64 Fed. Reg. at 55,116.

47. MCM, *supra* note 3, R.C.M. 914A(a)(1); Exec. Order No. 13,140, 64 Fed. Reg. at 55,115-16 (emphasis added).

48. Another alternative is a videotaped deposition. Under federal law, a district court judge can order a videotaped deposition instead of using remote live testimony. 18 U.S.C.S. § 3509 (b)(2). The 1999 changes to the *MCM* did not include the videotaped deposition option. *See* Exec. Order No. 13,140, 64 Fed. Reg. at 55,115. *See also* Berger, *supra* note 18, at 28 (arguing the military should adopt the videotaped deposition provisions of the Child Victims' and Child Witnesses' Rights Act).

49. United States v. Batten, 31 M.J. 205 (C.M.A. 1990).

50. United States v. Thompson, 31 M.J. 168 (C.M.A. 1990).

51. United States v. Williams, 37 M.J. 289 (C.M.A. 1993).

52. The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. United States v. Romey, 32 M.J. 180 (C.M.A.).

similar to the requirement of the Maryland statute reviewed in *Maryland v. Craig.*[55] In *Craig*, the Court did not decide the minimum showing of emotional trauma required for the use of special procedures because the standard specified in the Maryland statute clearly met the constitutional standard.[56] So, a child witness could suffer some emotional distress more than *de minimus*,[57] but the distress may not be so severe as to prevent her from being able to testify. In this case, R.C.M. 914A would not apply, and the court-martial could use special procedures where the witness testifies from within the courtroom.

This result assumes that R.C.M. 914A is not the exclusive legal authority for using alternative forms of testimony. In *Marx v. Texas,*[58] the Texas Supreme Court held, although the legislature prescribed a specific alternative testimonial procedure under certain defined circumstances, the court was free to develop different procedures under other circumstances, as long as the different procedures comported with the Constitution.[59] A Texas statute provided for testimony by closed circuit television by victims of the crimes for which the defendant is on trial if the *victim* of the offense was *under* thirteen years of age.[60] In *Marx*, the victim-witness was allowed to testify by way of closed circuit television even though she was thirteen years old. Moreover, a witness, who was not a victim of the offense for which Marx was being tried, was also allowed to testify by closed circuit television.[61] The court found no statutory violation because the statute did not apply. Since the trial judge made the requisite findings of necessity, the United States Constitution was satisfied.[62] Similarly, if R.C.M. 914A is not the exclusive legal authority for using extraordinary methods of testimony, military judges could use special procedures such that the witness could testify inside the courtroom when the judge finds the witness would suffer emotional distress that is more than *de minimus* but less than disabling.

### *Expanding* Maryland v. Craig

*United States v. Shabazz*[63] represents an attempt to expand the use of remote live testimony. In *Shabazz*, the trial judge allowed a key government witness, Mrs. White, to testify via video teleconference (VTC) from San Diego, California; the trial was in Okinawa, Japan. Mrs. White was an adult witness to an assault. Mrs. White reluctantly agreed to return to Japan to testify but changed her mind at the last minute.[64] Since the government had no authority to subpoena Mrs. White to return to Japan, the government requested permission to take her testimony via VTC. The military judge rejected the idea of moving the trial to California, and claimed that VTC was preferable to using former testimony[65] or a deposition.[66] Mrs. White testified via VTC.

The Navy-Marine Corps Court of Criminal Appeals set aside the finding of guilty of the charge related to Mrs. White's testimony. The court found the accused's right to confront Mrs. White was violated because the trial judge failed to ensure the

53. *See* United States v. Anderson, 51 M.J. 145 (1999) (using screens and closed circuit television). *Anderson* is a good case for practitioners to read because the opinion includes extensive portions of the record of trial where the judge made findings of fact based on the testimony of the government's expert witness, where the judge described the procedures that would be used, and where the judge instructed the members concerning the special procedures being used. These extracts may be helpful to counsel and judges when making the factual record supporting the finding of necessity, fashioning an appropriate procedure and instructing the panel members.

54. MCM, *supra* note 3, MIL. R. EVID. 611(d)(3); Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118 (1999) (emphasis added).

55. The Maryland statute required a determination that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate." Maryland v. Craig, 497 U.S. 836, 856 (1990).

56. *Id.*

57. To get an idea of just how minimal *de minimus* may be, see *Marx v. Texas*, 987 S.W.2d 577 (Tx.), *cert. denied*, 120 S. Ct. 574 (1999). "If the lower court's opinion in this case is in the ballpark, the 'minimum showing' required is no showing at all, and in all abused-child-witness cases this Court's exception has swallowed the constitutional rule." *Marx*, 120 S. Ct. at 574 (Scalia, J., dissenting from a denial of certiorari).

58. *Marx*, 987 S.W.2d at 577.

59. *Id.* at 583.

60. *Id.* at 579 (emphasis added).

61. *Id.*

62. *Id.* at 580-81.

63. 52 M.J. 585 (N.M. Ct. Crim. App. 1999).

64. *Id.* at 590.

65. An interesting remark considering there was no former testimony by this witness. *Id.* at 591 n.6.

66. *Id.* at 590-91.

reliability of her trial testimony.[67] During trial, and again after trial, the defense counsel objected to Mrs. White's testimony because he could hear a voice at the VTC site coaching the witness.[68] The court faulted the trial judge for not enforcing a clear protocol to control the remote site, for not immediately inquiring into the matter when the judge heard a voice at the remote site repeating questions to the witness, and for not fully developing the amount of coaching the witness received at the post-trial Article 39(a) session.[69]

The court did not address the more fundamental question of whether taking the testimony of an adult eyewitness via VTC is necessary to further an important state interest.[70] While the right to confront witnesses is a fundamental right, it is not absolute. The right to confront witnesses may be abridged to accommodate important state interests.[71] However, abrogating the confrontation right must be necessary to further the important state interest.[72] Whenever a court deviates from the common form of confrontation, the court must ensure the reliability of the testimony.[73] In *Craig*, the important state interest upon which the Court based its decision was the interest in protecting child witnesses from the trauma of testifying in child abuse cases.[74] The procedure only furthered the state's interest if the procedure was necessary in the particular case in which the procedure was proposed. If the trial court made a case-specific showing of necessity (that is, that the child would be traumatized), then the court could constitutionally use alternate procedures that eliminate the trauma but preserve the reliability of the evidence.[75]

In *Shabazz*, neither the trial court nor the appellate court identified which state interest justified abridging the accused's right to confrontation. Moreover, the court did not discuss how the use of VTC was necessary to further the state interest. The court stated, "[t]here are various interests that must be balanced against the defendant's right of confrontation, including the Government's 'strong interest in effective law enforcement,' [citing *Ohio v. Roberts*, 448 U.S. 56 (1980)] . . . the state's compelling 'interest in the physical and psychological well-being of a minor victim,' [citation omitted] and the 'societal interest in accurate factfinding.'"[76] Nonetheless, taking Mrs. White's testimony via VTC was not necessary to further any of these state interests.

The government certainly has a strong interest in effective law enforcement. But unlike *Ohio v. Roberts*,[77] in *Shabazz*, the government's witness was available to testify. The problem was the government could not force her to appear in court where the government wanted to try the case. In *Roberts*, the witness could not be located and subpoenaed.[78] In *Shabazz*, the government had other options. The trial could have been held in California or the witness could have been deposed. The trial judge rejected these options without comment.[79] Because the government had other options to procure the testimony of Mrs. White, receiving the testimony via VTC was not necessary to further this important state interest. Similarly, receiving testimony by VTC is not necessary to vindicate the societal interest in accurate fact-finding because the government had other ways to receive the testimony. The state interest in protecting minor children does not apply in this case; Mrs. White was an adult. The interest this arrangement furthered is the government interest in avoiding administrative inconvenience and delay. This interest, however, is not important enough to trump an explicit constitutional right.

Another case that expands the use the remote live testimony in criminal cases is *United States v. Gigante*.[80] Gigante was convicted of racketeering, conspiracy to commit murder, and

---

67. *Id.* at 594.

68. *Id.* at 591-92.

69. *Id.* at 594.

70. "*Assuming that the use of VTC was necessary in this case,* we nonetheless find that the appellant's Sixth Amendment right to confront Mrs. White was violated when the military judge failed to ensure the reliability of her testimony . . . ." *Id.* (emphasis added).

71. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

72. Maryland v. Craig, 497 U.S. 836, 852 (1990).

73. *Id.* at 857.

74. *Id.* at 855.

75. *Id.* at 857.

76. United States v. Shabazz, 52 M.J. 585, 593 (N.M. Ct. Crim. App. 1999).

77. 448 U.S. 56 (1980).

78. *Id.* at 59-60.

79. *Shabazz*, 52 M.J. at 591 n.7.

conspiracy to commit extortion in connection with the criminal activity of La Cosa Nostra. The government called six former members of the Mafia as witnesses against Gigante. One witness's testimony was taken via two-way closed circuit television from a remote location. The witness was a participant in the Federal Witness Protection Program and, at the time of trial, was in the final stages of an inoperable, fatal cancer. Medical experts testified that it would be medically unsafe for the witness to travel to New York for testimony, but not life-threatening.[81]

The trial judge based his decision on the judge's inherent power under Federal Rules of Criminal Procedure 2 and 57(b) to conduct a criminal trial in a just manner.[82] The trial judge did not make findings that these procedures were necessary to further an important public policy. The appellate court noted the classic *Craig* formulation–the Confrontation Clause may be satisfied absent face-to-face confrontation at trial where the denial of face-to-face confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured–but held that *Craig*'s formulation was intended to constrain the use of one-way closed circuit television.[83] "Because [the trial judge] employed a two-way system that preserved the face-to face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case."[84] The court noted the trial judge could have ordered a deposition to preserve the witness's testimony, and that the two-way closed circuit television procedure afforded greater protection of the right to confrontation than a deposition. Therefore, the court reasoned, use of this procedure did not deny Gigante the right to confrontation.[85]

The court's assertion that the *Craig* standard is only designed to constrain the use of one-way closed circuit television is questionable.[86] To limit *Craig* to its facts, one must ignore most of the opinion. In *Craig*, the Court noted that:

> the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . a preference that "must give way to considerations of public policy and the necessities of the case" . . . our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.[87]

The critical inquiry in *Craig* was whether the use of Maryland's statutory one-way closed circuit television procedure was necessary to further an important state interest.[88] The balance of the opinion discusses whether Maryland's procedure sufficiently preserved the other elements of the confrontation right, whether the proffered state interest in protecting child victims is sufficiently important to justify the abridgment of the defendant's confrontation right, and what showing of necessity is required before abridging the defendant's right. Nothing in the opinion limits this analysis to the use of one-way closed circuit television. Nothing in the opinion indicates that this analysis does not apply to two-way closed circuit television.

The court's distinction between one-way and two-way closed circuit television is a distinction without a difference. *Craig* addresses the permissibility of eliminating the constitutional requirement for face-to-face confrontation in the presence of the accused. Although two-way closed circuit television allows the witness to see the accused on television while testifying, neither process allows for face-to-face confrontation in the presence of the accused. In *Craig*, the Court emphasized the importance of face-to-face confrontation in the presence of the accused.[89] The language and logic of the opinion make clear that any derogation of the confrontation right by any method must satisfy the standard enunciated in *Craig*.[90]

---

80. 166 F.3d 75 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 931 (2000).

81. *Id.* at 78-80.

82. *Id.* at 80.

83. *Id.* at 80-81.

84. *Id.* at 81.

85. *Id.* at 81-82.

86. The court's assertion in *Gigante* that the two-way closed circuit television procedure afforded greater protection of the right to confrontation than a deposition would is also questionable. In *Craig*, the court identified the elements of the right of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Maryland v. Craig, 497 U.S. 836, 846 (1990). In a deposition that is videotaped, the witness is cross-examined while under oath in the physical presence of the accused. The trier of fact can observe the witness's demeanor while testifying. When a two-way closed circuit television system is used, the witness testifies under oath, subject to cross-examination, and the trier of fact can observe the witness's demeanor. However, the witness does not testify in the physical presence of the accused. A videotaped deposition therefore protects the right to confrontation better than two-way closed circ uit television.

87. *Id.*

88. *Id.* at 852.

Justice Scalia dissented from the denial of certiorari in *Marx v. Texas*.

> I dissented in *Craig*, because I thought it subordinated the plain language of the Bill of Rights to the "tide of prevailing current opinion." [citations omitted] I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure.[91]

In *Marx*, *Gigante*, and *Shabazz*, trial courts tested the limits of *Craig* and the Sixth Amendment's Confrontation Clause. Ultimately, the United States Supreme Court will have to decide how far trial courts can go to accommodate witnesses who cannot or will not testify in the conventional manner. Until then, practitioners and judges should be very careful when derogating the accused's confrontation right. Practitioners and judges must understand the limits and rationale of *Craig*. Before allowing remote testimony by an adult witness, or in a case not involving child sexual abuse, the proponent of the remote testimony must be able to identify the state interest involved, how the use of remote testimony furthers the state interest, and how the remote testimony will otherwise assure the reliability of the testimony.

### Confrontation and Hearsay

In *Lilly v. Virginia*,[92] the United States Supreme Court considered whether the exception to the hearsay rule for statements against penal interest is a firmly-rooted hearsay exception. *Lilly* is a complicated opinion. All nine justices agreed that the admission of out-of-court statements by Mark Lilly, the defendant's brother, violated Benjamin Lilly's right to confront witnesses, but they could not agree on a rationale. To determine the impact of *Lilly*, one must understand the differences between the three approaches the Court took.

In December 1995 three men–Benjamin Lilly, his brother Mark, and Mark's roommate–broke into a home and stole liquor, guns and a safe. The next day, they robbed a small country store and shot at geese with their stolen weapons. When their vehicle broke down, they abducted a man and stole his car. They drove the man to a deserted area and killed him. The trio committed two additional robberies before being apprehended.[93]

While being interrogated by police, Mark Lilly made several incriminating statements. He admitted that he stole liquor during the initial burglary and a twelve-pack of beer in a later robbery. Mark admitted he was present during the robberies and the murder. Mark said that his brother, Benjamin, instigated the carjacking and was the one who shot the victim.[94]

When Benjamin Lilly went to trial, the state called Mark as a witness. When Mark invoked his privilege against self-incrimination, the state offered the statements Mark made to the police as statements against penal interest. The court admitted the statements over defense objection.[95] The jury convicted Benjamin Lilly and recommended the death penalty, which the court imposed.[96]

The Supreme Court of Virginia found that the statements fell within the statement against penal interest exception to the Virginia hearsay rule. Moreover, the Supreme Court of Virginia found that this exception to the hearsay rule is a firmly-rooted exception to the Virginia hearsay rule.[97] The United States Supreme Court reviewed the case to determine whether Mark Lilly's statements fall within a firmly-rooted hearsay exception for purposes of satisfying the Sixth Amendment Confrontation

---

89. *id.* "We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846. The Court cited *Coy v. Iowa*: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988). "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017. *See Craig*, 497 U.S. at 846-47.

90. *See supra* notes 49-53 for cases where courts have applied the *Craig* analysis to cases not involving one-way closed circuit television.

91. Marx v. Texas, 120 S. Ct. 574 (1999) (Scalia, J., dissenting from a denial of certiorari).

92. 527 U.S. 116 (1999).

93. *Id.* at 125.

94. *Id.*

95. *Id.* The defense objected on two grounds. First, the statements were not against Mark's penal interest because they shifted the blame to Benjamin Lilly and Mark's roommate. Second, admission of the statements violated the Confrontation Clause of the Sixth Amendment, which has been incorporated against the states through the Fourteenth Amendment.

96. *Id.*

97. *Id.*

Clause.[98] A plurality of the Court held that these statements did not fall within a firmly-rooted hearsay exception and the admission of the statements violated Benjamin Lilly's constitutional right to confrontation.[99]

The Confrontation Clause does not prohibit the introduction of all hearsay statements. However, when a prosecutor offers an out-of-court statement and the declarant does not testify, the Confrontation Clause is implicated. The Supreme Court has created and refined a methodology for analyzing the constitutionality of hearsay statements.[100]

> [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly-rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[101]

Justice Stevens, writing for a four-justice plurality, found that statements against penal interest offered by a prosecutor to establish the guilt of an alleged accomplice of the declarant did not fall within a firmly-rooted hearsay exception. Moreover, the plurality doubted that statements given under conditions that implicate the core concerns of the old *ex parte* affidavit practice could ever be reliable enough to satisfy the Confrontation Clause without adversarial testing.[102] Mark Lilly's statements implicated the core concerns of the *ex parte* affidavit practice because the statements were given to the police during a custodial interrogation, and the defendant did not get an opportunity to cross examine the declarant at trial.

*What is a firmly-rooted hearsay exception?*

Justice Stevens described what makes a hearsay exception a firmly-rooted hearsay exception.

> We now describe a hearsay exception as "firmly-rooted" if, in light of "longstanding judicial and legislative experience," [citation omitted] it "rest[s][on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the substance of the constitutional protection." [citations omitted] This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at trial. . . . Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carr[y] special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony.[103]

Justice Stevens pointed out that the "against penal interest" exception to the hearsay rule is not premised on the declarant's inability to reflect before making the statement.[104] He noted that the exception is of "quite recent vintage."[105] As a result of the shallowness of the legislative and judicial experience with this exception, and a long line of cases that declare accomplices' confessions that incriminate others "presumptively

---

98. *Id.* at 127.

99. *Id.* at 136.

100. White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980).

101. *Lilly*, 527 U.S. at 127. This article will refer to the second prong of this test as the residual trustworthiness test.

102. "The primary object of the [Confrontation Clause] 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 . . . ." Mattox v. United States, 156 U.S. 237, 242 (1895). The *ex parte* affidavit practice was an abuse common in England in the 16th and 17th Century.

> In 16th–century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present. . . . At the trial itself, "proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face" . . . .The infamous trial of Sir Walter Raleigh on charges of treason in 1603 in which the Crown's primary evidence against him was the confession of an alleged co-conspirator (the confession was repudiated before trial and probably had been obtained by torture) is a well-known example of this feature of English criminal procedure.

*White*, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted). Under the *ex parte* affidavit practice, prosecutors proved their cases by presenting out-of-court statements without giving the accused the opportunity to cross-examine the declarant(s). *See Lilly*, 527 U.S. at 127.

103. *Lilly*, 527 U.S. at 127-28.

104. *Id.*

unreliable,"[106] the Court held that accomplices' confessions that inculpate others are not within a firmly-rooted hearsay exception.[107] The Court also noted that this category of statements included statements that function similarly to those used in the ancient *ex parte* affidavit system.[108]

*The Residual Trustworthiness Test*

Justice Stevens evaluated Mark Lilly's statements under the second prong of the *Roberts* test, even though the Virginia Supreme Court did not perform this part of the analysis.[109] Hearsay that does not fall with a firmly-rooted hearsay exception can be reliable enough to satisfy the Confrontation Clause "[w]hen a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . .'"[110] Because Mark was in custody, made his statements under police supervision, responded to leading questions, had a motive to exculpate himself, and was under the influence of alcohol, the Court concluded the statements were not so reliable that adversarial testing would add nothing to their reliability.[111] Since Mark Lilly's statements failed both prongs of the test, the Supreme Court reversed the decision of the Virginia Supreme Court.[112]

Justice Scalia and Justice Thomas concurred in the judgment separately, but share a similar view of the Confrontation Clause. According to these two justices, the Confrontation Clause extends only to witnesses who testify at trial and to "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[113] Justice Scalia characterized the admission of Mark Lilly's statements as a "paradigmatic Confrontation Clause violation"[114] because Mark Lilly made the out-of-court statements to the police during a custodial interrogation and the prosecutor did not make Mark available for cross-examination. Such statements resemble the abusive practice of trial by *ex parte* affidavit.

Chief Justice Rehnquist, joined by two other justices, agreed the statements at issue violated the Confrontation Clause. However, Chief Justice Rehnquist wrote that it was unnecessary for the Court to decide the issue of whether statements against penal interest fall within a firmly-rooted hearsay exception. The Chief Justice argued that the statements at issue were not against the declarant's penal interest.[115] Therefore, the Court did not have to decide if the Confrontation Clause allows the admission of a "genuinely self-inculpatory statement that also inculpates a codefendant . . . ."[116] The Chief Justice would leave open the possibility that statements against penal interest to fellow prisoners[117] and confessions to family members are reliable enough to satisfy the Confrontation Clause.[118]

Although the Court's Confrontation Clause jurisprudence is not much clearer after *Lilly* than before *Lilly*, the case contains

---

105. *Id.* at 131.

106. *Id.*

107. *Id.* at 133.

108. *Id.* at 131. *See supra* note 102 and accompanying text (describing the *ex parte* affidavit system).

109. *Id.* at 133.

> Neither [the Virginia Supreme Court] nor the trial court analyzed the confession under the second prong of the *Roberts* inquiry, and the discussion of reliability cited by the Court . . . pertained only to whether the confession should be admitted under state hearsay rules, not under the Confrontation Clause. Following our normal course, I see no reason for this Court to reach an issue upon which the lower courts did not pass.

*Id.* at 141 (Rehnquist, C.J., concurring in the judgment).

110. *Id.* at 134.

111. *Id.* at 136.

112. *Id.*

113. *Id.* at 138 (Scalia, J., concurring in part and concurring in the judgment).

> [The *Ohio v. Roberts* analysis] implies that the Confrontation Clause bars only unreliable hearsay. Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable. . . . Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them.

White v. Illinois, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring in part and concurring in the judgment).

114. *Lilly*, 527 U.S. at 138.

several helpful tips for practitioners. Trial and defense counsel must understand the narrowness of the category of statements *Lilly* affects. Statements against penal interest are a subset of statements against interest.[119] Statements against the declarant's pecuniary or proprietary interests are not affected by *Lilly.* The plurality in *Lilly* subdivided statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant.[120] The statements in *Lilly* fall into this third category. Statements that fall into the first two categories are not affected by *Lilly.*[121] As a result, the only statements affected by *Lilly* are statements made by a declarant that incriminate a co-actor when the prosecution offers the statement at the co-actor's trial.

In reality, however, even a subset of the statements which fall into the third category may be unaffected by *Lilly.* Although the plurality concluded that statements against penal interest do not fall within a firmly-rooted hearsay exception, the plurality left open the possibility that some statements in the third category could pass the residual trustworthiness test.[122] The plurality noted that statements in the third category are presumptively unreliable and that it is highly unlikely that the presumption can ever be rebutted when the "government is involved in the statements' production . . . and [the statements] have not been subjected to adversarial testing."[123] Therefore, statements in the third category that are made independent of governmental influence may be reliable enough to rebut the presumption of unreliability. The Chief Justice specifically reserved judgment on this issue when the statement against penal interest was made to a fellow prisoner or to a family member. The approach of Justices Scalia and Thomas also permits admission of statements in the third category when the government was not involved in the making of the statement; Justices Scalia and Thomas would not apply the Confrontation Clause to extrajudical statements not contained in formalized testimonial material. Trial counsel should continue to offer statements against penal interest in those cases in which the statements were made to someone who is not a government official.

Trial and defense counsel must also understand the precedential value of *Lilly.* The plurality concluded statements against penal interest do not fall within a firmly-rooted hearsay exception in Part IV. Parts III, IV, and V of Justice Stevens' opinion are not the opinion of the Court. Nevertheless, it is unlikely that the Court will find that statements against penal interest fall within a firmly-rooted hearsay exception in the future.[124] Statements that fall within a firmly-rooted hearsay exception are statements which are made under "conditions [which] have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as

---

115.

> When asked about his participation in the string of crimes, Mark admitted that he stole liquor during the initial burglary and that he stole a 12-pack of beer during the robbery of the liquor store. . . . He claimed, however, that while he had primarily been drinking, petitioner [Benjamin Lilly] and Barker [Mark Lilly's roommate] had 'got some guns or something' during the initial burglary. . . . Mark said that Barker had pulled a gun in one of the robberies. He further insisted that petitioner had instigated the carjacking and that he (Mark) 'didn't have nothing to do with the shooting' of DeFilippis. . . . In a brief portion of one of his statements, Mark stated that [Benjamin Lilly] was the one who shot DeFilippis.

*Id.* at 124-25.

116. *Id.* at 140.

117. *See* Dutton v. Evans, 400 U.S. 74 (1970).

118. *Lilly*, 527 U.S. at 141.

119. *See* MCM, *supra* note 3, MIL. R. EVID. 804(b)(3).

120. *Lilly*, 527 U.S. at 128.

121. Statements in the first category are generally admissible under MRE 801(d)(2)(A). Since the accused is the declarant, there is no confrontation issue. Joint trials could raise special problems. *See* Bruton v. United States, 391 U.S. 123 (1968). Statements in the second category do not raise a confrontation issue because the statements are offered by the defense. *See* Chambers v. Mississippi, 410 U.S. 284 (1973) (illustrating the admission of statements in the second category).

122.

> This, of course, does not mean, as the CHIEF JUSTICE and Justice Thomas erroneously suggest . . . that the Confrontation Clause imposes a "blanket ban on the government's use of [nontestifying] accomplice statements that incriminate a defendant." Rather, it simply means that the Government must satisfy the second prong of the *Ohio v. Roberts* [citation omitted] test in order to introduce such statements.

*Lilly*, 527 U.S. 133 n.5.

123. *Id.* at 135.

124. *See* United States v. Gomez, 191 F.3d 1214, 1222 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly-rooted hearsay exception).

would the obligation of an oath' and cross-examination at a trial."[125] For example, excited utterances and statements made for the purpose of receiving medical treatment were found to fall within firmly-rooted hearsay exceptions.[126] The condition that removes all temptation to falsehood from the declarant of an excited utterance is the stress caused by the excitement of a startling event. The condition that guarantees the reliability of statements made for the purpose of medical treatment is the expectation of receiving medical treatment. Statements against penal interest are not "based on the maxim that [the] statements are made without a motive to reflect on the legal consequences of one's statement . . . ."[127] Moreover, they are not made in situations that remove the temptation to lie because it is against the declarant's interests to be untruthful.[128]

Trial counsel must be prepared to satisfy the residual trustworthiness test when offering statements against penal interest. Trial counsel must understand that the particularized guarantees of trustworthiness must come from the circumstances surrounding the making of the statement.[129] Corroborating evidence that verifies the truth of the contents of the statement is irrelevant.[130] The standard for admission under the residual trustworthiness test is high. To satisfy the residual trustworthiness test, the statements must be as reliable as statements that fall within a firmly-rooted hearsay exception.[131] Trial counsel must be prepared to show that the conditions surrounding the making of the statements removed all temptation to lie.

In a recent case, *United States v. Gomez*,[132] the 10th Circuit Court of Appeals applied the *Lilly* decision and reversed the defendant's conviction because the government violated her right to confrontation. Gomez was charged with conspiracy and possession with intent to distribute over fifty kilograms of marijuana. To prove its case, the government called a co-conspirator, who testified pursuant to a plea agreement, and the government presented two written confessions inculpating the defendant from two other co-conspirators. Citing *Lilly v. Virginia*, the court held these two written statements against interest did not fall into a firmly-rooted hearsay exception.[133] The court also held these statements did not have sufficient indicia of reliability to satisfy the residual trustworthiness test.[134]

This case is helpful to practitioners because the court discussed ten factors used in analyzing the statements' reliability when conducting the residual trustworthiness test. The factors the court discussed were: the amount of detail in the statement, whether the statement was coerced, whether the declarant was in a position to have personal knowledge of the events, whether the statement was given soon after the events, whether there was a reason for the declarant to retaliate against the defendant, whether there was an offer of leniency, the declarant's demeanor, whether the second declarant saw the written statement of the first declarant, the declarant's character for truthfulness, and whether the statement was strongly against the declarant's interest.[135] Trial counsel can use these factors to demonstrate the reliability of proffered hearsay from the circumstances surrounding the making of the statement.

Finally, counsel must evaluate *United States v. Jacobs*[136] in light of *Lilly* and *Gomez.* In *Jacobs*, the Court of Appeals for

125. *Lilly*, 527 U.S. at 128.

126. White v. Illinois, 502 U.S. 346 (1992).

127. *Lilly*, 527 U.S. at 128.

128. *Id.*

129. The relevant circumstances "include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Idaho v. Wright, 497 U.S. 805, 819 (1990).

130. *Lilly*, 527 U.S. at 135.

131. "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Wright*, 497 U.S. at 821.

132. 191 F.3d 1214 (10th Cir. 1999).

133. *Id.* at 1222.

134. *Id.* at 1223.

135. *Id.* at 1222-23.

136. 44 M.J. 301 (1996). The CAAF held that statements against penal interest fall within a firmly-rooted hearsay exception. However, the CAAF remanded the case to The Judge Advocate General of the Air Force to determine which parts of the declarant's statement were truly self-inculpatory in view of *Williamson v. United States*, 512 U.S. 594 (1994). In *Williamson*, the Supreme Court held the hearsay exception for statements against interest "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." On remand, the Air Force Court of Criminal Appeals found that parts of the declarant's statement were not self-inculpatory and were erroneously admitted. However, the Air Force court found the error harmless. The CAAF affirmed the decision of the Air Force court. United States v. Jacobs, 48 M.J. 208 (1998).

the Armed Forces (CAAF) held that declarations against penal interest fall within a firmly-rooted hearsay exception.[137] The CAAF's holding in *Jacobs* is vulnerable in light of *Lilly.* First, the statements at issue in *Jacobs* were made by an accomplice to police in a custodial interview. The statements fall within the third sub-category of statements against penal interest described by *Lilly.* Second, the CAAF's opinion in *Jacobs* contains no analysis. The court held statements against penal interest fall within a firmly-rooted hearsay exception based on the weight of authority.[138] The court did not evaluate the legislative and judicial experience with this category of hearsay to determine if the conditions surrounding the making of the statements "have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at trial."[139] The CAAF based its decision on the fact that six circuit courts of appeals treated declarations against penal interest as a firmly-rooted hearsay exception and only two circuits did not.[140] One of the circuits that considered declarations against penal interest as a firmly-rooted hearsay exception was the 10th Circuit. The 10th Circuit no longer views statements against penal interest as firmly-rooted hearsay in view of *Lilly.*[141] To the extent a plurality opinion can overrule a prior case, *Lilly* probably overrules *Jacobs.* As *Gomez* demonstrates, the rationale for the court's holding in *Jacobs* is no longer valid.

## Conclusion

The 1999 changes to the *MCM* create new ways to protect child victims and child witnesses from the trauma of testifying in court. Unfortunately, the recent changes to the *MCM* also create new dangers for violating the confrontation rights of a criminal defendant. The law is clear in the area of child sexual abuse cases. A military judge need only do what military judges have been doing for ten years: make sure the court's findings satisfy the requirements of *Maryland v. Craig*. In other contexts, the law is just beginning to evolve. A military judge who allows remote live testimony of a witness in a case not involving child sexual abuse must be sure to identify the important state interest served by the remote testimony. The judge must also make findings that the remote testimony is necessary to further the important state interest and assure the reliability of the remote testimony.

Trial counsel and defense counsel must recognize the Confrontation Clause issue that arises when the government offers hearsay against an accused soldier and the declarant does not testify at trial. Statements against penal interest are difficult because the setting in which they are made may make the difference when the defense challenges their admission. Trial counsel must be careful offering statements against penal interest in those cases in which the declarant made the statement to the police. Nevertheless, trial counsel should not over react to *Lilly v. Virginia.* Trial counsel should continue to offer statements against penal interest that are not made to government officials. In all cases, trial counsel must be prepared to demonstrate the reliability of out-of-court statements against penal interest from the circumstances surrounding the making of the statements. Defense counsel must be prepared to oppose these statements. Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[142] The defense should not lightly surrender the right of confrontation.

---

137. *Jacobs*, 44. M.J. at 306.

138. *Id.*

139. Lilly v. Virginia, 527 U.S. 116, 128 (1999).

140. *Jacobs*, 44 M.J. at 306.

141. *Compare* United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly-rooted hearsay exception) *with* Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) (holding statements against penal interest do fall within a firmly-rooted hearsay exception).

142. LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 2 (1993) (quoting 5 WIGMORE, EVIDENCE § 1367 (Chadborn Rev. 1794)).