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18 JOSEPH EDWARD DUNCAN, III

19 UNITED STATES DISTRICT COURT
20 DISTRICT OF IDAHO
21 (HONORABLE EDWARD J. LODGE)

22 UNITED STATES OF AMERICA,)	
)	
23 Plaintiff,)	CR-07-23-N-EJL
)	
24 vs.)	RESPONSE TO GUARDIAN
)	AD LITEM'S MOTION FOR
25 JOSEPH EDWARD DUNCAN, III,)	PROTECTIVE ORDER
)	[DOCKET NO. 112]
26 Defendant.)	
27)	FILED UNDER SEAL

28 On November 5, 2007, the Guardian Ad Litem (GAL) for S.G., John Sahlin, filed on her
29 behalf a Motion for Protective Orders. [Docket No. 112]. Invoking 18 U.S.C. § 3509, the
30 motion seeks four accommodations for this child witness:

- 31 1. That she be allowed to have an "adult attendant" accompany her during

1 her testimony, pursuant to 18 U.S.C. § 3509(i);

- 2 2. That the court enter an order protecting S.G. from public disclosure of
3 her name or "any other information concerning her in the course of the
4 proceedings when she or any other witness may divulge her name or
5 any other information concerning her," pursuant to 18 U.S.C. § 3509(d)(3);
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7 3. That the court close the courtroom during S.G.'s testimony to all persons,
8 including the press, who do not have a direct interest in the case, pursuant
9 to 18 U.S.C. § 3509(e); and
10
11 4. That the court permit S.G. to testify by live 2-way closed circuit television,
12 pursuant to 18 U.S.C. § 3509(b)(1).

12 **Background**

13 Overviews of the history and circumstances of this case have been presented in numerous
14 other pleadings provided to the court. Relevant to the instant motion, on March 22, 2007, the
15 court issued an order scheduling trial in this case for January 22, 2008; this was subsequently
16 changed by the court, for administrative reasons, to January 28, 2008. In the order, the court
17 designated the case as being of "special public importance," pursuant to 18 U.S.C. § 3509(j),
18 based on the involvement of the child witness, S.G.

19 On July 9, 2007, the defense and the government filed a stipulated motion under 18
20 U.S.C. §§ 3509(d) and (e). [Docket No. 63]. In pertinent part, the parties agreed that under §
21 3509(e), the court should close the courtroom during S.G.'s testimony to all persons other than
22 witnesses, court personnel, the parties, and attorneys. Id. at 2. Accordingly, the defense has
23 already agreed to the third accommodation listed above sought by the GAL.
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1 **Analysis**

2 With respect to the remaining accommodations sought by the GAL, the defense hereby
3 advises the court that it has offered to enter stipulations relating to the subject matter of S.G.'s
4 anticipated testimony that would remove any need for her to testify either during the guilt
5 and any potential penalty phase of the trial. Should the parties reach such a stipulation, it would
6 obviously render the GAL's motion moot.

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8 Failing that, the defense hereby requests the court conduct a hearing to address the
9 remaining accommodations sought by the GAL, so that counsel and the court can address the
10 constitutional issues implicated by the GAL's motion. See also 18 U.S.C. § 3509(b)(1)(C)
11 (requiring the court to make specific findings on the record to support the conclusion that the
12 child is unable to testify in open court in the presence of the defendant). In connection with any
13 such hearing, the defense makes the following observations.

14 At this time, the GAL's motion fails to identify the individual requested to serve as S.G.'s
15 attendant during her testimony. [Docket No. 112 at 3]. The defense respectfully requests such
16 information prior to a hearing on the instant motion. Furthermore, in the event the court permits
17 the requested adult attendant to accompany S.G., the defense would ask to be heard on the
18 specific placement of such individual during the child's testimony. Section 3509(i) specifies that
19 the attendant's location is a matter within the discretion of the court. Finally, should the court
20 grant this particular request, the defense would ask the court to provide the jury with a limiting
21 instruction at the time of S.G.'s testimony, advising that the jury shall not draw any inference
22 about the substance of S.G.'s testimony, or her credibility, based on the presence of the attendant.

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24 The GAL also requests the court to enter a protective order under 18 U.S.C. § 3509(d)(3)
25 that goes beyond the statutory provisions of § 3509(d)(1) that the defense agreed to in the July
26 9th stipulated motion. Specifically, the motion seeks to "preclude any witness from testifying in
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1 an open courtroom where there is reason to believe the witness may mention S.G.'s name or
2 other information concerning her." Id. at 4 (emphasis added). At this point, the defense would
3 simply note that this request will effectively result in the courtroom being closed for the entirety
4 of Mr. Duncan's trial. As the GAL's motion itself acknowledges, there is "relatively little in this
5 case that does not, in fact, involve mention of Shasta's name or of other information concerning
6 her." Id. Indeed, the defense is hard pressed to envision any witness that could not, at least
7 potentially, testify as to information "concerning" S.G.
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9 The last requested condition at issue is for S.G. to testify via by live 2-way closed circuit
10 television. While the defense remains committed to reaching a reasonable stipulation that will
11 completely remove the need to address this request, should that effort prove fruitless, the defense
12 would ask to address the issues raised by the request under the Confrontation Clause of the Sixth
13 Amendment.

14 In Coy v. Iowa, 487 U.S. 1012, 1020 (1988), the Supreme Court held that the placement
15 of a screen between the defendant and child sexual assault victims during their testimony
16 violated the defendant's Confrontation Clause rights. Justice Scalia, writing for the 6-2 majority,
17 noted that when considering the placement of the screen, which was specifically designed to
18 enable the child witnesses to avoid viewing the defendant, it was "difficult to imagine a more
19 obvious or damaging violation of the defendant's right to a face-to-face encounter" with his
20 accusers. Id. The Court concluded that the "irreducible literal meaning" of the Confrontation
21 Clause is "'a right to meet face to face all those who appear and give evidence at trial." Id. at
22 1021, quoting, California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) (emphasis
23 added in Coy).

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25 In Maryland v. Craig, 497 U.S. 836 (1990), the Court, in a 5-4 decision, reached a
26 different result in a case presenting a similar issue. In a Maryland state sexual abuse case, the
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1 named victim and three other children testified against the defendant via a one-way closed circuit
2 television. This procedure was provided for by Maryland statute. Id. at 841-43. Unlike Coy, the
3 trial court in Craig made individualized findings that each of the child witnesses needed special
4 protection. Id. at 845. Justice O'Connor, writing for the majority, noted that while "face-to-face
5 confrontation forms 'the core of the values furthered by the Confrontation Clause,' . . . we have
6 nevertheless recognized that it is not the sine qua non of the confrontation right." Id. at 847.
7 Citing Ohio v. Roberts, 448 U.S. 56 (1980) as support for its holding, the Court concluded that in
8 narrow circumstances, sufficient competing interests may warrant dispensing with the
9 confrontation right at trial. Id. at 848. Thus, the Court concluded that the Confrontation Clause
10 reflects a "preference" for face to face confrontation at trial, but that this "preference" must
11 "occasionally" give way to significant considerations of public policy and the necessities of the
12 case. Id. at 849, quoting, Roberts, 448 U.S. at 63.

14 The Court upheld the use of the closed circuit television in this particular case,
15 recognizing that the State had a "compelling" interest in protecting minor victims from further
16 trauma and embarrassment. Id. at 852. Before a trial court can permit such a procedure,
17 however, it must hear evidence to determine whether use of the procedure is necessary to protect
18 the welfare of the particular child who is to testify. Id. at 855.

19 Notably, Justice Scalia penned a dissent joined by three other Justices, contending that
20 the Court had "failed . . . conspicuously to sustain a categorical guarantee of the Constitution
21 against the tide of prevailing current opinion." Id. at 860 (Scalia, J., dissenting). Justice Scalia
22 concluded that the text of the Sixth Amendment provides an absolute right of confrontation that
23 is not subject to exception based on some compelling public policy. Id. at 861-70.

25 While Craig might appear to settle this constitutional issue in the context of testifying
26 child witnesses, more recent Supreme Court authority undermines the precedential value of that
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1 decision. In Crawford v. Washington, 541 U.S. 36 (2004), Justice Scalia delivered the majority
2 opinion for the Court, holding that out of court testimonial statements by witnesses are barred
3 under the Confrontation Clause, unless the witnesses are unavailable, and the defendant had
4 prior opportunity to cross-examine them. In doing so, the Court overruled the previous standard
5 set forth in Ohio v. Roberts, *supra*, under which out of court statements by unavailable witnesses
6 were admissible provided they had "adequate indicia of reliability." *Id.* at 59-63. Justice Scalia's
7 opinion emphasizes the "bedrock" Sixth Amendment procedural guarantee that an accused has
8 the right to be confronted by the witnesses against him, observing that this principle dates back
9 to Roman times. *Id.* at 42-43. Justice O'Connor, the majority author in Craig, joined Justice
10 Rehnquist's opinion, dissenting from the Court's decision to overrule Roberts and its acceptance
11 of a categorical rule regarding the admission of testimonial statements under the Confrontation
12 Clause. *Id.* at 69-76.

14 The Court's movement in Crawford away from a construction of the Confrontation
15 Clause that permits exceptions to its express text and towards a categorical construction of its
16 language renders Craig obsolete. To date, the Ninth Circuit has applied the Craig analysis in
17 situations raising this particular issue about the procedure for testifying child witnesses. *See*
18 United States v. Garcia, 7 F.3d 885, 887-889 (9th Cir. 1993) (cited in GAL's motion); United
19 States v. Quintero, 21 F.3d 885, 892 (9th Cir. 1994). However, because Crawford clearly
20 undercuts the legal basis on which Craig rests, this court is not bound to follow its decisions in
21 Garcia or Quintero. *See* Miller v. Gammie, 335 F.3d 889, 893 (9th Cir.2003) (en banc) (holding
22 that a three-judge panel may depart from circuit precedent when an intervening decision by the
23 Supreme Court has undercut its theory or reasoning such that the two are clearly irreconcilable).
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25 The defense offers this authority for the court's consideration when ruling on the GAL's
26 motion for protective orders. As noted, in the event the defense's proffered stipulation to remove
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