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## Confrontation Clause

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while on the witness stand and was reluctant to answer questions regarding the incident. Furthermore, the child stated he did not like being in the courtroom and was frightened by all of the people present in the courtroom. Lastly, the court noted that the child held on to his grandmother. Based on these observations, the trial court ordered, over defendant's objection, that the child be permitted to testify by two-way closed-circuit television.<sup>106</sup>

On appeal, the appellate court held that the defendant's confrontation rights under both the state and federal constitutions were violated.<sup>107</sup> The court relied on *People v. Cintron*,<sup>108</sup> holding that the trial judge's determination of the child's vulnerability based upon its own observations failed to satisfy the clear and convincing evidence standard as required by article 65.<sup>109</sup> Similar to *Cintron*, the court found that the defendant's confrontation rights were unconstitutionally abridged because the trial court failed to call any witnesses who could provide legal evidence that the child would likely suffer extreme mental or emotional harm if called upon to testify in the presence of the defendant. Since the state failed to properly demonstrate that the child was in need of article 65<sup>110</sup> protection, the appellate court reversed the defendant's conviction.<sup>111</sup>

*People v. Guce*<sup>112</sup>  
(decided August 27, 1990)

The defendant, convicted of first degree rape, first degree sodomy, first degree sexual abuse, incest, and endangering the welfare of a child, contended that his right to confront witnesses, as guaranteed under the state<sup>113</sup> and federal<sup>114</sup> constitutions, was

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106. *Costa*, 160 A.D.2d at 889, 554 N.Y.S.2d at 931.

107. *Id.* at 890, 554 N.Y.S.2d at 931.

108. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).

109. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931.

110. N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1991).

111. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931. For a discussion of the federal law on this issue, see *supra* notes 62-73 and accompanying text.

112. 164 A.D.2d 946, 560 N.Y.S.2d 53 (2d Dep't), *appeal denied*, 76 N.Y.2d 986, 565 N.E.2d 524, 563 N.Y.S.2d 775 (1990).

113. N.Y. CONST. art. I, § 6.

violated when the trial judge permitted two child witnesses to testify by use of a two-way closed-circuit television. On appeal, the appellate court held that the trial court's decision to allow the complaining child witnesses to testify by the use of the two-way closed-circuit television did not violate the defendant's confrontation rights protected under either the state or federal constitution.<sup>115</sup> Pursuant to article 65 of the state's Criminal Procedure Law, a trial judge can permit such testimony if it is determined:

by clear and convincing evidence that it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify in a criminal proceeding without the use of live, two-way closed-circuit and that the use of such . . . [television procedure] will help prevent, or diminish the likelihood or extent of, such harm.<sup>116</sup>

Prior to defendant's trial, the prosecution moved, pursuant to section 65.20(1),<sup>117</sup> to hold a separate hearing to allow the trial judge to determine whether two of the three children, allegedly victimized by the defendant, were vulnerable witnesses and to decide whether they can testify from a testimonial room by use of a closed-circuit television.<sup>118</sup> The motion for a pre-trial hearing was granted by the trial judge.<sup>119</sup>

At this hearing, a certified social worker, who specializes in working with sexually abused children, testified that it was likely that the children would suffer severe mental or emotional harm if required to testify in a courtroom and in the presence of the defendant. The expert noted that several circumstances were present that comport with the "extraordinary circumstances" requirement of article 65.<sup>120</sup> The expert added that the children experienced

114. U.S. CONST. amend. VI.

115. *Guce*, 164 A.D.2d at 946, 560 N.Y.S.2d at 55.

116. N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney 1982 & Supp. 1990).

117. For a discussion of article 65 *see supra* notes 39-52 and accompanying text.

118. *Guce*, 164 A.D.2d at 946, 560 N.Y.S.2d at 55.

119. *Id.* (citing N.Y. CRIM. PROC. LAW § 65.20(11) (McKinney 1982 & Supp. 1990)).

120. To comply with the extraordinary circumstances requirement of article

severe mental and emotional harm from knowing that they were going to hurt their father and be responsible for the break up of their family. Lastly, the expert testified that the children would also suffer psychological harm if required to testify in a courtroom and in the presence of the defendant. Based on this testimony, the trial judge declared that both children were vulnerable witnesses and should be permitted to testify by use of a two-way closed-circuit television.

In a memorandum opinion, the appellate court rejected the defendant's contention that his right to confront his witnesses was absolute. The court noted that the United States Supreme Court decision, in *Maryland v. Craig*,<sup>121</sup> recently decided that a criminal defendant's confrontation rights could be constitutionally infringed upon if the state establishes, by case-specific facts, that allowing the child witness to testify by closed-circuit television would protect him or her from the trauma of testifying in court.<sup>122</sup> The court noted that since the New York statute offered

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65, the court need only make "a finding that any one or more of the [twelve] factors have been established by clear and convincing evidence . . . ." N.Y. CRIM. PROC. LAW § 65.20(9) (McKinney 1982 & Supp. 1990).

In this case, the appellate court found five factors that were established by clear and convincing evidence: 1) the crimes committed were particularly heinous in degree, *see id.* § 65.20(9)(a); 2) the victimized children were particularly young, *see id.* § 65.20(9)(b); 3) the defendant, their father, was an authority figure, *see id.* § 65.20(9)(c); 4) the mother threatened the children that they would be responsible for breaking up the family if they testified against their father, *see id.* § 65.20(9)(h); and 5) the children felt abandoned by both their mother and father and would be susceptible to psychological harm if testifying in the presence of the defendant, *see id.* §§ 65.20(9), (12).

121. 110 S. Ct. 3137 (1990).

122. *Guce*, 164 A.D.2d at 947, 560 N.Y.S.2d at 55 (citing *Maryland v. Craig*, 110 S. Ct. 3157 (1990)). In *Craig*, the United States Supreme Court held that:

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 [one-way closed circuit television] 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.

*Craig*, 110 S. Ct. at 3169. However, the state must establish a case-specific finding of necessity. *Id.* The court in *Guce* stated that "[t]his is precisely what

the criminal defendant greater protection than the statute challenged in *Craig*, it followed that the former should withstand a facial constitutional challenge.

Turning to the case at bar, the appellate court affirmed the trial court's assessment that the expert witness established, by clear and convincing evidence, that the children would likely suffer severe mental and emotional harm if forced to testify in court and in the presence of the defendant. The court noted that the expert's testimony showed that these particular children would suffer such harm based on the extraordinary circumstances present in this case, as opposed to a more generalized reluctance or fear of testifying in front of their father.<sup>123</sup> By offering clear and convincing evidence of extraordinary circumstances, the appellate court found "that there [was an] individualized showing of necessity in this case warranting . . . the minimum infringement of the defendant's confrontation rights."<sup>124</sup>

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CPL article 65 requires." *Guce*, 164 A.D.2d at 947, 560 N.Y.S.2d at 55; see N.Y. CRIM. PROC. LAW § 65.00 (McKinney 1982 & Supp. 1990).

123. *Guce*, 164 A.D.2d at 948, 560 N.Y.S.2d at 56. The appellate court also noted that this case was factually distinguishable from *People v. Henderson*, 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dep't 1990).

In *Henderson*, the court held that the defendant's right to confrontation, under both the state and federal constitutions, was violated when the court permitted sexually abused children to testify by the use of two-way closed-circuit television. *Henderson*, 156 A.D.2d at 102, 554 N.Y.S.2d at 929. The court also stated that the expert witness failed to offer any particular testimony as to whether the child would suffer severe mental or emotional harm if forced to testify in court and in the presence of the defendant. *Id.* at 99, 554 N.Y.S.2d at 928.

124. *Guce*, 164 A.D.2d at 949, 560 N.Y.S.2d at 56-57 (citing *Maryland v. Craig*, 110 S. Ct. 3157 (1990); *People v. Cintron*, 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990); *People v. Henderson*, 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dep't 1990)).