

1 **OVERTURE 40** from Tennessee Valley Presbytery (to CCB, OC)
2 “Amend *BCO* 32-13 and 35-5 to Allow Victim Protection Provisions
3

4 **Whereas**, when this Overture was filed, it was our understanding these proposals were
5 endorsed by the Ad Interim Committee on Domestic Abuse and Sexual Assault. See
6 the AIC Report for any comments.
7

8 **Whereas**, these changes are needed to protect victims of abuse during judicial process. As the
9 *BCO* sections now stand, a victim of abuse is given the right to be cross-examined by
10 the accused. That means any of the following examples are possible.
11

- 12 • A teenage girl who was raped by a church staff member is cross-examined
13 by the man who raped her.
- 14 • Someone who was emotionally and/or physically abused is cross-
15 examined by the abuser.
- 16 • A young child who was sexually abused is cross-examined by the
17 predator.
18

19 The current provision of cross-examination by the accused in these sorts of cases
20 greatly increases the risk of an abused person being unwilling to participate in a case
21 of process, and also opens the door to further trauma. There is no scriptural mandate
22 for such a right of confrontation. The only situation in which such a right was invoked
23 was the example of Paul asserting that right as a Roman citizen (Acts 25:16).
24

25 **Whereas**, the right afforded the accused to cross-examine his accuser has a long history in the
26 Presbyterian Church, dating back to at least 1858. This right of confrontation reflects
27 civil law embedded in the 6th amendment to the U.S. Constitution, ratified in 1791.
28 The 6th amendment grants the accused the right “to be confronted with the witnesses
29 against him.” In 1808, Chief Justice John Marshall famously stated of the
30 Confrontation Clause: “I know of no principle in the preservation of which all are more
31 concerned. I know none, by undermining which, life, liberty and property, might be
32 more endangered. It is therefore incumbent on courts to be watchful of every inroad
33 on a principle so truly important.” This opinion notwithstanding, it is of note that the
34 Supreme Court has wrestled with the right of confrontation and has been willing to
35 recognize the need for some protection of some accusers, particularly in cases
36 involving minors.
37

38 For example, in *Maryland v. Craig* (1990), the Court allowed a state to utilize a one-
39 way closed circuit television procedure for the receipt of testimony by a six-year-old
40 victim in an abuse case.¹

¹ In *Maryland v. Craig*, in a 5-4 decision written by O’Connor, the Court held as follows: “The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. The Clause’s central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined

1 **Whereas**, our *BCO* has not wrestled with the possibility of reasonable limits to the right of
2 confrontation. Our ecclesiastic law should incorporate reasonable protections for
3 minors and abuse victims, while at the same time protecting the rights of the accused
4 to know and “confront” his accuser. In fact, we believe that the Church should be more
5 protective of those entrusted to its care than the state.
6

7 **Whereas**, as the *BCO* currently stands, if a church court allowed an alleged child-abuse victim
8 to testify by Zoom, the accused might have grounds for appeal, alleging the court
9 violated his *BCO* 32-13 right to “examine” all witnesses “in his presence” even if
10 defense counsel cross-examined the witness over Zoom.
11

12 **Whereas**, we urge that some accommodation be made for victim testimony in cases alleging
13 child abuse, domestic abuse, sexual abuse, or sexual assault, to allow the court to make
14 reasonable accommodations to shield accusers from face-to-face contact with the
15 accused.
16

17 **Therefore, be it resolved** that *BCO* 32-13, 35-1 and 35-5 be amended by adding, to each, the
18 four-sentence paragraphs underlined below.
19

20 ***BCO 32-13.*** In order that the trial may be fair and impartial, the witnesses
21 shall be examined in the presence of the accused, or at least after he shall
22 have received due citation to attend. Witnesses may be cross-examined by
23 both parties, and any questions asked must be pertinent to the issue.

24 However, throughout the trial in cases involving alleged child abuse,
25 domestic abuse, sexual abuse, or sexual assault, a court may make
26 reasonable accommodations to shield accusers from face-to-face contact
27 with the accused. This can be done upon request by the accuser or when the
28 court determines that such accommodation is necessary. Such
29 accommodations might include procedures such as written testimony or
30 videoconferencing testimony, in which a reasonable path for cross-
31 examination is provided. The court shall include in the record its reasons

effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts*, 448 U.S. 56, 63. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, e.g., *Kirby v. United States*, 174 U.S. 470. Nonetheless, the 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 testimony's reliability is otherwise assured. *Coy, supra*, at 1021. Pp. 5-11.” <https://www.law.cornell.edu/supct/html/89-478.ZS.html>

See also Scalia’s Dissenting Opinion, joined by Brennan, Marshall and Stevens. In sum, Scalia contended the 6th Amendment to the Constitution would need to be amended in order for Maryland to do what it did, because the 6th Amendment clearly says, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...” <https://www.law.cornell.edu/supct/html/89-478.ZD.html> Scalia’s objection wasn’t to the fairness issue, but rather, he was sticking to the letter of the law. This Overture seeks to change the law, so, Scalia’s argument would not apply to the proposed revision.

1 for any accommodations and any objection from the accused to such
2 accommodation, and the objection and the court's response shall be
3 included in the record.

4
5 **BCO 35-1.** All persons of proper age and intelligence are competent
6 witnesses, except such as do not believe in the existence of God, or a future
7 state of rewards and punishments. The accused party may be allowed, but
8 shall not be compelled to testify; but the accuser shall be required to testify,
9 on the demand of the accused. Either party has the right to challenge a
10 witness whom he believes to be incompetent, and the court shall examine
11 and decide upon his competency. It belongs to the court to judge the degree
12 of credibility to be attached to all evidence.

13 Throughout the trial in cases involving alleged child abuse, domestic
14 abuse, sexual abuse, or sexual assault, a court may make reasonable
15 accommodations to shield accusers from face-to-face contact with the
16 accused. This can be done upon request by the accuser or when the court
17 determines that such accommodation is necessary. Such accommodations
18 might include procedures such as written testimony or videoconferencing
19 testimony, in which a reasonable path for cross-examination is provided.
20 The court shall include in the record its reasons for any accommodations
21 and any objection from the accused to such accommodation, and the
22 objection and the court's response shall be included in the record.

23
24 **BCO 35-5.** Witnesses shall be examined first by the party introducing them;
25 then cross-examined by the opposite party; after which any member of the
26 court, or either party, may put additional interrogatories. No question shall
27 be put or answered except by permission of the moderator, subject to an
28 appeal to the court. The court shall not permit questions frivolous or
29 irrelevant to the charge at issue.

30 Throughout the trial in cases involving alleged child abuse, domestic
31 abuse, sexual abuse, or sexual assault, a court may make reasonable
32 accommodations to shield accusers from face-to-face contact with the
33 accused. This can be done upon request by the accuser or when the court
34 determines that such accommodation is necessary. Such accommodations
35 might include procedures such as written testimony or videoconferencing
36 testimony, in which a reasonable path for cross-examination is provided.
37 The court shall include in the record its reasons for any accommodations
38 and any objection from the accused to such accommodation, and the
39 objection and the court's response shall be included in the record.

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41 *Adopted by Tennessee Valley Presbytery at its stated meeting, April 17, 2021*

42 *Attested by /s/ TE Jacob A. Bennett, stated clerk*