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VIDEOTAPED CHILD TESTIMONY AND THE CONFRONTATION CLAUSE: ARE THEY RECONCILABLE?

I. INTRODUCTION

A majority of state legislatures in the United States have enacted statutes providing for the use of videotaped testimony at trial in cases involving allegations of sexual abuse of children.¹ Videotaped testimony is but one of many reform measures that have been introduced by courts, legislatures, and others involved in the administration of the criminal justice system,² in response to the rapid growth in the number of reported instances of child sexual abuse.³ Other statutory reforms enacted to respond to evidentiary problems in sexual abuse cases include the elimination or modification of child competency restrictions,⁴ the enactment of special hearsay exceptions,⁵ and provisions allowing

1. Thirty-three state statutes provide for videotaping child testimony in sexual child abuse cases. These include: ALA. CODE § 15-25-2 (Supp. 1986); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(B),(C) (Supp. 1986); ARK. STAT. ANN. §§ 43-2035-2037 (Supp. 1985); CAL. PENAL CODE § 1346 (West 1986); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. § 54-86q (Supp. 1987); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986); IND. CODE ANN. § 35-37-4-8(c), (d), (f), (g) (Burns 1986); IOWA CODE ANN. § 910A.14 (West Supp. 1985); KAN. STAT. ANN. § 24-3434 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin 1986); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1987); MINN. STAT. ANN. § 595.02(4) (West Supp. 1987); MISS. CODE ANN. § 13-1-407 (1986); MO. REV. STAT. § 491.675-491.690 (1986); MONT. CODE ANN. §§ 46-15-401-403 (1986); NEV. REV. STAT. § 174.227 (1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1987); N.M. STAT. ANN. § 30-9-17 (1986); OHIO REV. CODE ANN. § 2907.41 (A), (B), (D), (E) (Baldwin Supp. 1987); OKLA. STAT. ANN. tit. 22, § 753(C) (West 1986); PA. STAT. ANN. tit. 42, §§ 5982, 5984 (Purdon 1986); R.I. GEN. LAWS § 11-37-13.2 (1986); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1987); TENN. CODE ANN. § 24-27-116(d)-(f) (Supp. 1986); TEX. CRIM. PROC. CODE art. 38.071 (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5(3)-(4) (Supp. 1987); VT. R. EVID. 807 (Supp. 1986); WIS. STAT. ANN. § 967.04(7)-(10) (West 1986); WYO. STAT. § 7-11-408 (1987).

2. *Children's Justice Act: Hearings on S.140 Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. 82 (1985) (statement of Debra Whitcomb); see also Brief of Amicus Curiae Judge Charles B. Schudson, *Coy v. Iowa*, 108 S. Ct. 2798 (1988). In his brief Judge Schudson categorized these innovations into four broad categories: (1) the elimination or modification of child competency restrictions; (2) the enactment or interpretation of hearsay exceptions to allow a jury to learn of a child's disclosure or complaints; (3) broadening the admissibility of expert testimony; and (4) the use of courtroom techniques which help the child witness feel comfortable enough to testify. *Id.*

3. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987).

4. See, e.g., MICH. STAT. ANN. § 27A.2163 (1985); MO. ANN. STAT. 491.060(2) (Vernon 1985); WIS. STAT. § 27A.2163 (Callaghan 1985).

5. See, e.g., ILL. ANN. STAT. ch 37, para. 704-6(4)(c) (Smith-Hurd 1985); IND. CODE § 35-37-4-6 (1985); MINN. STAT. § 595.02(3) (1985).

testimony of the child witness via one-way⁶ or two-way closed circuit television.⁷ These various reforms generally seek to achieve two goals: to make the legal process more sensitive to child witnesses who are allegedly victims of sexual abuse,⁸ and to increase the success rate for the prosecution of child sexual abuse cases.⁹ These are also the articulated goals of the Children's Justice Act,¹⁰ through which the federal government has offered financial grants to states as an incentive to implement protective reforms for children in sexual abuse cases.¹¹

Statutes permitting the use of videotaped testimony at trial potentially raise the issue of whether the defendant's sixth amendment right to confrontation¹² has been violated.¹³ Some statutes explicitly require that the child witness not be able to see or hear the defendant while the child's deposition or testimony is being videotaped;¹⁴ other statutes provide that the child witness may be prevented from seeing or hearing the defendant upon a finding by the court that the child is likely to suffer trauma as a result of further contact with the defendant.¹⁵ In addition, almost half the statutes designed to protect abuse victims preclude the child witness from testifying at the trial or any proceeding at which the

6. See, e.g., ALA. CODE § 15-25-3 (Supp. 1986); IND. CODE ANN. § 35-37-4-8 (Burns 1986); KAN. STAT. ANN. § 38-1558 (1986); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1986).

7. See, e.g., CAL. PENAL CODE § 1347 (West 1986); N.Y. CRIM. PROC. LAW § 65.00-65.30 (McKinney Supp. 1987); OHIO REV. CODE ANN. § 2907.41(C), (E) (Baldwin Supp. 1987).

8. Brief of Amicus Curiae The American Bar Association, *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

9. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985).

10. Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, 100 Stat. 903 (codified as amended at 42 U.S.C. § 5103(d) (Supp. 1987)).

11. 42 U.S.C. § 5103(d) (Supp. 1987).

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

13. The United States Supreme Court has held that a "face-to-face confrontation between the accused and accuser [is] 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa*, 108 S. Ct. 2798, 2801 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Every videotaping statute presently in force, however, contains at least one provision which technically infringes, to some degree, upon a defendant's constitutional right to confront the witnesses against him. See *infra* notes 14-17 and accompanying text.

14. The following statutes preclude the defendant from being seen or heard by the child witness during the child's videotaped deposition or testimony: ARK. STAT. ANN. §§ 43-2035-037 (Supp. 1985); CONN. GEN. STAT. § 54-86q (Supp. 1987); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986); KAN. STAT. ANN. § 24-3434 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin 1986); OKLA. STAT. ANN. tit. 22, § 753(C) (West 1986); PA. STAT. ANN. tit. 42, §§ 5982, 5984 (Purdon 1986); R.I. GEN. LAWS § 11-37-13.2 (1986); TEX. CRIM. PROC. CODE ANN. art. 38.071 § 3 (Vernon Supp. 1987).

15. The following statutes allow the defendant to be seen or heard by the child witness during the child's videotaped deposition or testimony, unless the court finds that the child will be further traumatized by the defendant's presence: MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1987); MINN. STAT. ANN. § 595.02(4) (West Supp. 1987); MISS. CODE ANN. § 13-1-407 (1986); MICH. COMP. LAWS § 17-14-152(7) (Supp. 1987); WYO. STAT. § 7-11-408 (1987).

videotaped deposition or testimony is introduced.¹⁶ Other states provide that the child witness may be precluded from testifying in-person at the trial or any other proceeding upon a finding by the court that the child may be traumatized by the presence of the defendant.¹⁷ Since these provisions enable the child witness to avoid contact with the defendant while the child testifies, they technically violate the defendant's right to a face-to-face confrontation with the child witness¹⁸ as guaranteed by the sixth amendment.¹⁹

The United States Supreme Court has not considered a constitutional challenge with regard to the use of videotaped testimony of a child witness.²⁰ Since there is a considerable degree of variation from one statute to another,²¹ it is not likely that a prospective determination could be made as to whether videotaping statutes would pass constitutional muster categorically. Rather, such statutes must be analyzed individually to determine whether there are sufficient safeguards provided in the statute to prevent the defendant in a child sexual abuse case from being denied his constitutional right to be confronted with the witnesses against him.²² The incentive provided by the Children's Jus-

16. Of the thirty-three state statutes permitting the use of a child's videotaped deposition or prior testimony at trial, fifteen statutes automatically preclude the child witness from testifying in person at the trial or proceeding at which the videotaped deposition or prior testimony is admitted. These statutes are: ARIZ. REV. STAT. ANN. §§ 13-4251, 4253(B), (C) (Supp. 1986); ARK. STAT. ANN. §§ 43-2035-2037 (Supp. 1985); CONN. GEN. STAT. § 54-86q (Supp. 1987); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986); KAN. STAT. ANN. § 24-3434 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1987); OHIO REV. CODE ANN. § 2907.41(A), (B), (D), (E) (Baldwin 1987); OKLA. STAT. ANN. tit. 22, § 753(C) (West 1986); PA. STAT. ANN. tit. 42, §§ 5982, 5984 (Purdon 1986); R.I. GEN. LAWS § 11-37-13.2 (1986); TENN. CODE ANN. § 24-27-116(d), (e), (f) (Supp. 1986); TEX. CRIM. PROC. CODE ANN. art. 38.071, § 3 (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5(3), (4) (Supp. 1987); WIS. STAT. ANN. § 967-04(7)-(10) (West 1986).

17. Eight statutes preclude the child witness from testifying in person at the trial or proceeding upon certain particularized findings by the court. These statutes are: ALA. CODE § 15-25-2 (Supp. 1986); CAL. PENAL CODE § 1346 (West 1986); COLO. REV. STAT. §§ 18-3-413, 6-401.3 (1986); IND. CODE ANN. § 35-37-4-8(c), (d), (f), (g) (Burns 1986); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1987); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1987); VT. R. EVID. 807 (Supp. 1986); WYO. STAT. § 7-11-408 (1987).

18. *Coy v. Iowa*, 108 S. Ct. 2798, 2800-01 (interim ed. 1988).

19. U.S. CONST. amend. VI.

20. The Court has, however, addressed the issue of face-to-face confrontation with respect to a similar child protective reform, the use of a screen placed between the defendant and child witness during the child's testimony at trial. *Coy*, 108 S. Ct. 2798 (108 S. Ct. at 2798). The procedure in question in *Coy* was found to violate the defendant's right to a face-to-face encounter with the witness against him guaranteed to him by the sixth amendment. *Id.*

21. Compare ALASKA STAT. § 12.45.047 (1984) and NEV. REV. STAT. § 174.227 (1986) (very few procedural guidelines) with OHIO REV. CODE ANN. § 2907.41 (Baldwin 1986) and VT. R. EVID. 807 (Supp. 1986) (explicit procedural guidelines directed toward reducing potential trauma to the child witness as well as preserving defendant's constitutional rights).

tice Act to the states²³ to implement reform measures demonstrates a strong national commitment to deal with many of the problems of prosecuting child sexual abuse cases.²⁴ Despite the encouragement provided by Congress, however, these reform measures must not contravene the defendant's right to confront the witnesses against him,²⁵ or the statutes may be invalidated by the courts if challenged.²⁶

The Ohio General Assembly has followed the national trend of enacting legislation to protect child witnesses.²⁷ In 1986, the Ohio legislature provided for the use of videotaped testimony in sex offense cases in which the alleged victim is a child under eleven years of age.²⁸ The constitutionality of the Ohio legislation provisions has not been challenged, but a recent United States Supreme Court decision, *Coy v. Iowa*,²⁹ should provide answers to many of the issues that would arise if a challenge is brought based upon the confrontation clause. Since the *Coy* decision may subject the Ohio legislation, as well as that of other states, to similar constitutional challenges, this comment will analyze the Ohio child witness legislation³⁰ in light of the United States Supreme Court's decision in *Coy* in order to determine the possibility of a

23. 42 U.S.C. § 5103(d) (Supp. 1987).

24. One commentator has suggested that the public response to the increase in reported instances of child sexual abuse has created "an atmosphere startlingly reminiscent of the Salem witch hunts and McCarthy's 'Red Scare.'" Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution: Should Children Really be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 227, 228-29 (1988). While the procedural reforms that have been implemented by the states may solve a great many problems in the prosecution of child sexual abuse cases, Feher asserts that they pose a significant threat of stripping the innocent defendant of his liberty in violation of his right to confront the witnesses against him. *Id.* at 229.

25. See *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (interim ed. 1988) (exceptions to the confrontation clause may only be allowed when necessary to further an important public policy; something more than the generalized finding underlying a statute is needed when the exception is not rooted in our jurisprudence). *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

26. *Coy* 108 S. Ct. at 2803; *Benfield*, 593 F.2d at 822.

27. OHIO REV. CODE ANN. §§ 109.54, 2151.3511, 2907.41, 2937.11, 2937.15, 2945.49 (Baldwin 1986).

28. OHIO REV. CODE ANN. §§ 2907.41, 2937.11, 2945.49, 2151.3511 (Baldwin 1986).

29. *Coy*, 108 S. Ct. at 2798.

30. This article will focus primarily on § 2907.41 of the Ohio Revised Code. O.R.C. § 2907.41 addresses itself to "any proceeding in the prosecution of a charge of a violation of" certain child sex offenses. OHIO REVISED CODE ANN. § 2907.41(A)(1) (Baldwin 1986). Sections 2937.11, 2945.49 and 2151.3511 of the Ohio Revised Code address themselves to more specific circumstances. Section 2937.11, for example, deals with a preliminary hearing set pursuant to a felony violation of certain child sex offenses. See *id.* § 2937.11. Section 2945.49 deals with any trial on a charge of a felony violation of certain child sex offenses. See *id.* § 2945.49. Section 2151.3511 deals with proceedings in juvenile court involving a complaint in which a child is charged with a violation of certain child sex offenses. See *id.* § 2151.3511. Thus, while the statutes each relate to different circumstances, the language of each is similar, and Section 2907.41 is intended to relate to all proceedings that may take place regarding the child sex offenses desig-

successful constitutional challenge.

II. THE CONFRONTATION CLAUSE REQUIREMENT OF A FACE-TO-FACE ENCOUNTER BETWEEN DEFENDANT AND WITNESS

The confrontation clause of the sixth amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."³¹ The United States Supreme Court has held that the right to confront witnesses is not only applicable to federal prosecutions, but is "likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."³² The application of the confrontation clause to the states was based upon a finding by the Court that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."³³ Since the right of confrontation applies to the states as well as to the federal government,³⁴ state laws providing for the use of videotaped testimony in child sexual abuse cases must comply with the requirements of the confrontation clause of the sixth amendment.³⁵

Two distinct rights are secured for a criminal defendant by the confrontation clause: "the right physically to face those who testify against him, and the right to conduct cross-examination."³⁶ While the United States Supreme Court has long recognized the right to a face-to-face meeting between defendant and witness under the confrontation clause,³⁷ the Court has more often been faced with cases pertaining to the right to cross-examine witnesses.³⁸ In *Coy v. Iowa*,³⁹ the Supreme Court observed that most of its encounters with the confrontation clause have concerned either the admissibility of out-of-court statements or restrictions on the scope of cross-examination.⁴⁰ As a result, the Court had little case law on which to rely in determining whether

31. U.S. CONST. amend. VI.

32. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

33. *Id.* at 405.

34. *Id.* at 403.

35. *See United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

36. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion) (quoting *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

37. The right of a face-to-face meeting between defendant and witness was explicitly recognized by the Court as early as 1899. *See Kirby v. United States*, 174 U.S. 47 (1899). The *Kirby* Court stated that "a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at trial, upon whom he can look while being tried." *Id.* at 55.

38. *Coy v. Iowa*, 108 S. Ct. 2798 (interim ed. 1988).

39. 108 S. Ct. 2798 (108 S. Ct. at 2798).

the defendant's right to a face-to-face meeting was violated in *Coy*.⁴¹

Writing for the Court, Justice Scalia made a number of references to prior Supreme Court cases in order to support its holding in *Coy*. The Court found that the confrontation clause requires a face-to-face encounter between defendant and witness.⁴² Only two of the references represent a clear holding of a majority of the Court.⁴³ These two references are to cases decided almost a century ago.⁴⁴ All other references made by the Court are either to statements made in a concurring opinion,⁴⁵ a dissenting opinion,⁴⁶ a plurality opinion,⁴⁷ or merely indirectly support the holding in *Coy*.⁴⁸ Despite these somewhat unsound precedents relied upon in *Coy*, the Court made it clear that the right to a face-to-face meeting between defendant and witness is a well-established principle.⁴⁹ Nevertheless, it is apparent from this rather weak foundation that the Supreme Court has only just begun to define the scope of the right to a face-to-face encounter embodied within the confrontation clause.⁵⁰

41. See *infra* notes 42–48 and accompanying text.

42. *Coy*, 108 S. Ct. at 2800–02.

43. *Kirby v. United States*, 174 U.S. 47 (1899) (concerning the admissibility of prior convictions of codefendants to prove an element of an offense); see also *Dowdell v. United States*, 221 U.S. 325 (1911) (concerning a provision of the Phillipine Bill of Rights).

44. See *supra* note 43.

45. *Coy*, 108 S. Ct. at 2800 (“[s]imply as a matter of English’ it confers at least a ‘right to meet face to face all those who appear and give evidence at trial’”) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

46. *Coy*, 108 S. Ct. at 2800 (“[w]e have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to face meeting with witnesses appearing before the trier of fact”) (citing *Kentucky v. Stincer*, 107 S. Ct. 2658, 2669 (interim ed. 1987) (Marshall, J., dissenting)).

47. *Coy*, 108 S. Ct. at 2801 (“[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination’”) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion)).

48. *Coy*, 108 S. Ct. at 2801 (“we have described the ‘literal right to confront the witness at the time of trial’ as forming ‘the core of the values furthered by the Confrontation Clause’”) (quoting *Green*, 399 U.S. at 157).

49. *Coy*, 108 S. Ct. at 2800 (construing *Kirby v. United States*, 174 U.S. 47, 55 (1899)).

50. Historically, the rules governing criminal proceedings have been effective in assuring that the requirement of a face-to-face encounter was met. Ensuring the criminal defendant's rights was accomplished in most cases because, by preserving the right to the opportunity for cross-examination, the right to a face-to-face encounter was, generally, inevitably preserved. Recently, though, technological advances have made it possible to obtain testimony by methods other than in the traditional courtroom setting. The recent widespread introduction of innovations such as videotaped testimony in criminal proceedings will undoubtedly provide the Court with additional opportunities to further define the right to a face-to-face encounter under the confrontation clause.

III. *Coy v. Iowa*: THE CONFRONTATION CLAUSE REQUIRES THAT A WITNESS BE ABLE TO SEE THE DEFENDANT DURING TESTIMONY

In *Coy v. Iowa*,⁵¹ the United States Supreme Court found a procedure used by an Iowa state court in child sexual abuse cases to be an unconstitutional violation of the sixth amendment confrontation clause.⁵² In *Coy*, the defendant was charged with sexually assaulting two thirteen-year-old girls while they were camping out in the backyard of the home next door to Coy's.⁵³ According to the children, their assailant entered the tent wearing a stocking over his head, shined a flashlight in their faces, and warned the girls not to look at his face.⁵⁴ Neither of the children was able to describe their assailant's face.⁵⁵ At the beginning of Coy's trial, the state moved to have the complaining witnesses testify either behind a screen or via closed-circuit television, pursuant to Iowa Code section 910A.14.⁵⁶ At the trial, a large screen was placed between Coy and the witness stand during the children's testimony.⁵⁷ After the lighting was adjusted, Coy could dimly perceive the child witnesses, but the children could not see Coy.⁵⁸ Over the defendant's vehement objection that the screen placed between himself and the complaining witnesses infringed upon his sixth amendment right to confront his witnesses, the trial court found that the procedure was not violative of any constitutional guarantees.⁵⁹ The Iowa Supreme Court affirmed Coy's conviction, finding that, since his ability to cross-examine the children was not impaired by the screen, there was no violation of the confrontation clause.⁶⁰

Iowa Code section 910A.14⁶¹ provides for the use of several protective procedures in child sexual abuse cases. One such procedure is the use of one-way closed-circuit television during the witness' testi-

51. 108 S. Ct. 2798 (1988).

52. *Id.* at 2803.

53. *Id.* at 2799.

54. *Id.*

55. *Id.*

56. *Id.* The statute at issue in *Coy* provided, in part:

The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to hear or see the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

IOWA CODE § 910A.14 (1987).

57. *Coy*, 108 S. Ct. at 2799.

58. *Id.*

59. *Id.* at 2800.

60. *Id.*

61. Iowa Code § 910A.14 (1987).

mony at trial.⁶² Another procedure provided for in the Iowa statute is the use at trial of a videotaped deposition of the child witness.⁶³ A third procedure entails confining a defendant behind a screen or mirror that permits the defendant to see and hear the child during the child's testimony, but prevents the child from seeing or hearing the defendant.⁶⁴ The constitutionality of this third procedure was at issue in *Coy*.⁶⁵

The narrow issue before the Court in *Coy* was whether the confrontation clause requires that a witness have the opportunity to see the defendant during the witness' testimony at trial in a criminal prosecution.⁶⁶ In establishing that the confrontation clause does, in fact, impose such a requirement, the *Coy* Court relied on not only its past decisions,⁶⁷ but also on a diversity of sources tracing "back to the beginnings of Western legal culture,"⁶⁸ including the Bible,⁶⁹ Shakespeare⁷⁰ and President Eisenhower.⁷¹ The Court even went so far as to quote the common, everyday phrase, "look me in the eye and say that,"⁷² in support of its holding that the word "confrontation," as it is used in the sixth amendment, includes a face-to-face meeting between the witness and the accused.⁷³ Hence, in *Coy* the Court held that, to satisfy the confrontation clause, it was not sufficient that the defendant was indirectly capable of seeing and hearing the witnesses as they testified before the jury, nor was it enough that the defendant had the op-

62. *Id.*

63. *Id.*

64. *Id.*

65. *Coy*, 108 S. Ct. at 2799.

66. *Id.*

67. See *supra* notes 42-48 and accompanying text.

68. *Coy*, 108 S. Ct. at 2800.

69. *Id.* ("[t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges'") (quoting Acts 25:16) *Id.*

70. *Coy*, 108 S. Ct. at 2800 ("Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence - face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak') (quoting Richard II, act I, sc. 1).

71. "President Eisenhower once described face to face confrontation as part of the code of his home town of Abilene, Kansas. In Abilene, he said, it was necessary to '[m]eet anyone face to face with whom you disagree . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.'" Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959) (quoting press release of remarks made to the B'nai B'rith Anti-Defamation League, Nov. 23, 1953).

72. *Coy*, 108 S. Ct. at 2801. In support of the quotation from President Eisenhower's press release remarks *supra* note 71, Justice Scalia, the author of the majority opinion in *Coy*, stated that "[t]he phrase still persists, 'Look me in the eye and say that.'" *Coy*, 108 S. Ct. at 2801.

73. *Id.* at 2802.

portunity to cross-examine the witnesses at trial.⁷⁴ Since the use of the screen at trial prevented the witnesses from viewing the defendant and it was successful in achieving its objective, the Court held that the procedure utilized in *Coy* to protect the witnesses resulted in a violation of the "defendant's right to a face to face encounter."⁷⁵

Although the procedure used in *Coy* was found to violate the confrontation clause, the Court also held that the harmless error analysis of its decision in *Chapman v. California*⁷⁶ was applicable to the circumstances in *Coy*.⁷⁷ Thus, *Coy* was remanded to the Iowa Supreme Court for determination of whether the confrontation clause violation was harmless beyond a reasonable doubt.⁷⁸

IV. EXCEPTIONS TO THE CONFRONTATION CLAUSE REQUIREMENT OF A FACE-TO-FACE ENCOUNTER MUST BE NECESSARY TO FURTHER AN IMPORTANT PUBLIC POLICY

After the Court decided that the confrontation clause requires a face-to-face confrontation between the witness and the accused, the Court in *Coy v. Iowa*⁷⁹ addressed a second issue: whether there are any exceptions to the requirement of a face-to-face encounter under the confrontation clause.⁸⁰ In his majority decision, Justice Scalia acknowledged that exceptions to a face-to-face encounter might exist if it can be shown that the exception is necessary to further an important public policy.⁸¹ Those whose opinions formed the plurality,⁸² however, rejected Iowa's argument that the need to protect victims of sexual abuse was such an exception.⁸³ Although the state maintained that the statute created a "legislatively imposed presumption of trauma,"⁸⁴ a majority of the Court asserted that such a presumption would be insufficient to

74. The Court reversed the judgement of the Iowa Supreme Court, which had held that there was no violation of the confrontation clause because the defendant's ability to cross-examine the witnesses was not impaired by the use of the screen. *Id.* at 2803.

75. *Id.* at 2802.

76. 386 U.S. 18 (1967). In *Chapman* the Court held that a confrontation clause error will not result in the reversal of an "erroneously obtained judgment" unless the court finds that the error was harmless beyond a reasonable doubt. *Id.* at 24. This standard is based upon the original common law harmless error rule that the beneficiary of the error bears the burden of proving that no injury was sustained as a result of the error, and if this burden is not sustained then the judgment is reversed. *Id.* (citing 1 WIGMORE, EVIDENCE § 21 (3d. ed. 1940)).

77. *Coy*, 108 S. Ct. at 2803.

78. *Id.*

79. 108 S. Ct. 2798 (interim ed. 1988).

80. *Id.* at 2802-03.

81. *Id.* at 2803.

82. Justices Scalia, Brennan, Marshall and Stevens formed the plurality opinion, with Justices O'Connor and White concurring to provide a majority decision. *Id.* at 2799.

83. *Id.* at 2802.

84. *Id.* at 2803.

mandate any conceivable exception.⁸⁵ Instead, the Court reasoned that there must be an individualized finding that a particular witness needs special protection if an exception to the requirement of a face-to-face encounter is to be sustained.⁸⁶

While the Supreme Court has, in the past, admitted certain exceptions to the confrontation clause, it has always done so with respect to implicit rights embodied within the clause.⁸⁷ The particular right addressed in *Coy*, on the other hand, was the explicit right to a face-to-face encounter between defendant and witness at trial.⁸⁸ The majority indicated that a different standard⁸⁹ is applicable to a right which is "narrowly and explicitly set forth in the [Confrontation] Clause."⁹⁰ While such a standard was not articulated in *Coy*,⁹¹ the Court did hold that an exception to the confrontation clause requirement of a face-to-face encounter between the witness and the accused would at least require an individualized finding that a particular witness needs the special protection the exception provides.⁹²

V. COMPATIBILITY OF THE OHIO STATUTE AND THE REQUIREMENT OF A FACE-TO-FACE ENCOUNTER

While the placement of a screen between defendant and witness in the courtroom is a clear violation of the right to a face-to-face encounter embodied within the confrontation clause after *Coy*, the taking of videotaped testimony pursuant to section 2907.41 of the Ohio Revised Code⁹³ does not appear to constitute such a clear violation.⁹⁴ On the

85. *Id.* Justices O'Connor and White agreed with the plurality on this point; however, they drew a distinction between the procedure at issue in *Coy*, the use of a screen placed between defendant and witness at trial, and procedures provided by other state statutes, such as the use of one or two-way closed circuit television during trial. *Id.* at 2805. Because those statutes do require a case-by-case finding of necessity in order to use the procedures set forth therein, such procedures might be permissible under the confrontation clause. *Id.*

86. *Id.* at 2803.

87. *Id.* Included among these implicit rights are the right to cross-examine, the right to exclude out-of-court statements, and the right to face-to-face confrontation *at some point in the proceedings other than the trial itself.* *Id.* at 2802-03 (emphasis added).

88. *Id.* at 2803. The "irreducible meaning of the [confrontation] clause" is the "'right to meet face to face all those who appear and give evidence at trial.'" *Id.* (quoting *California v. Green*, 399 U.S. 149 (1970) (Harlan, J., concurring))(emphasis added).

89. *Id.* at 2803. Justice Scalia wrote: "Our cases suggest . . . that *even as to* exceptions from the normal implications of the Confrontation Clause, *as opposed to its most literal application*, something more than [a] generalized finding . . . is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* (quoting *Bourjaily v. United States*, 107 S. Ct. 2775 (interim ed. 1987) (emphasis added)).

90. *Coy*, 108 S. Ct. at 2802.

91. *See id.* at 2803 ("(w)e leave for another day . . . the question whether any exceptions exist").

92. *Id.* at 2803.

93. OHIO REV. CODE ANN. § 2907.41 (Baldwin 1987).

one hand, a screen serves as a direct, unmistakable obstacle to the vision of one or more of the parties affected. The videotaping procedures provided for in Ohio Revised Code section 2907.41, on the other hand, allow both parties to observe each other while the child witness gives his or her testimony.⁹⁵ Even though the defendant is excluded from the room in which the child's deposition is taken,⁹⁶ the defendant is provided with a monitor in order to observe and hear the witness' testimony.⁹⁷ The child witness is also provided with a monitor by which he or she can observe the defendant while the witness testifies.⁹⁸ Thus, while the defendant and witness may not be literally face-to-face because they are not together in the same room while the witness testifies, there is no obstruction to the view of either party with respect to the other, as there was in *Coy v. Iowa*.⁹⁹

Two provisions¹⁰⁰ within Ohio Revised Code section 2907.41¹⁰¹ allow for the taking of a child's videotaped testimony for use in proceedings involving allegations of child sexual abuse. Section 2907.41(A)¹⁰² sets forth procedures to be followed with respect to obtaining a videotaped deposition of the child witness.¹⁰³ A second provision of the Ohio statute, section 2907.41(D), allows for the videotaping of a child witness' testimony at the proceeding.¹⁰⁴ In other words, rather than providing for a videotaped deposition, which is taken at some time prior to the trial or other proceeding, section 2907.41(D) provides for the videotaping of the child witness' testimony on the day of the proceeding.¹⁰⁵

Unlike the Iowa statute at issue in *Coy*,¹⁰⁶ these two provisions of section 2907.41 are subject to admissibility requirements set forth in section 2907.41(B) and section 2907.41(D) of the Ohio Revised Code.¹⁰⁷ According to the Court in *Coy*, an individualized finding that a child witness needs special protection could sustain an exception to

94. There were virtually no procedural requirements designed to ensure the preservation of a defendant's constitutional rights within the Iowa provision at issue in *Coy*. The Ohio statute to be analyzed here, on the other hand, is replete with such procedural protections.

95. OHIO REV. CODE ANN. § 2907.41(A)(2).

96. *Id.*

97. *Id.*

98. *Id.*

99. 108 S. Ct 2798, 2803 (interim ed. 1988).

100. OHIO REV. CODE ANN. § 2907.41(A), (D).

101. *Id.* § 2907.41.

102. *Id.* § 2907.41(A).

103. *Id.*

104. *Id.* § 2907.41(D).

105. *Id.* When the child witness is called to testify in the proceeding, the child's testimony is taken outside of the room in which the proceeding is being conducted. *Id.* The child's testimony is videotaped and subsequently replayed in the room where the proceeding is being conducted. *Id.*

106. IOWA CODE ANN. § 910A.14 (West Supp. 1985).

107. OHIO REV. CODE ANN. § 2907.41(B), (D).

the confrontation clause requirement of a face-to-face encounter.¹⁰⁸ The Iowa statute at issue in *Coy* did not require such a finding.¹⁰⁹ In fact, although the Iowa statute did give the court discretion in deciding whether to permit the use of the screen at trial,¹¹⁰ it provided the court with absolutely no guidelines as to what factors it might consider in making such a determination.¹¹¹ Ohio Revised Code section 2907.41, on the other hand, provides the Ohio courts with a considerable number of procedural guidelines for conducting the videotaping of a child victim,¹¹² as well as guidelines for determining whether the use of such procedures are admissible.¹¹³ Moreover, the Ohio statute explicitly requires, among other admissibility requirements, that an individualized finding be made that the child witness needs the special protection afforded by the videotaping procedure.¹¹⁴ These guidelines and admissibility requirements appear to place the Ohio statute in a relatively favorable light in terms of meeting the standards set forth in *Coy* for an exception to the face-to-face encounter requirement of the confrontation clause.¹¹⁵

VI. ADMISSIBILITY REQUIREMENTS UNDER THE OHIO STATUTE

The procedures set forth in both the deposition and testimony provisions are virtually identical.¹¹⁶ One significant difference between the

108. *Coy*, 108 S. Ct. at 2803.

109. See IOWA CODE ANN. § 910A.14.

110. *Id.* § 910A.14(1).

111. See *id.*

112. OHIO REV. CODE ANN. § 2907.41(A)(2), (O). The procedures for videotaping the child victim's testimony in proceedings is essentially the same as that used for videotaping the child victim test in depositions. See *id.* The person operating the recording equipment should be out of the child victim's sight and hearing. *Id.* Furthermore, when videotaping is conducted in a room outside the room where the proceeding takes place, the defendant shall be provided with an electronic means to communicate with his attorney. *Id.* § 2709.41(D); see *supra* notes 94–97 and accompanying text.

113. *Id.* at § 2907.41(A)(2)(a–c), (B)(1).

114. *Id.* at § 2907.41(B)(1)(b).

115. The Court's discussion in *Coy* strongly suggested that a standard might be applied to evaluate the validity of exceptions regarding a face-to-face encounter requirement in future cases of child sexual abuse where a statute designed to protect a child witness allegedly constitutes a violation of the confrontation clause. *Coy*, 108 S. Ct. at 2802–03. That standard is: (1) the exception must be necessary to further an important public policy, and (2) the necessity of the exception must be established by an individualized finding that the particular witness in each case needs the special protection created by the exception. *Id.* at 2803. At this point, prior to any other Supreme Court decision having been rendered on the subject, one can only speculate as to whether the Court will impose an additional standard on such an exception, as was indicated by the Court in *Coy*. See *supra* notes 80–82 and accompanying text.

116. Both provisions of the Ohio Revised Code allow the defendant to be present for the taking of the deposition or the testimony. OHIO REV. CODE ANN. § 2907.41(A)(2), (D) (Baldwin 1987). However, these provisions confine the defendant to a room separate than that in which either the deposition or the testimony is given. *Id.* § 2907.41(D). Both provisions provide the

two provisions, however, is that they are each subject to different requirements for admissibility.¹¹⁷ Thus, section 2907.41 provides explicit requirements regarding the admissibility of the procedures for videotaping depositions as well as trial testimony.¹¹⁸ The statute distinguishes between the two procedures for purposes of admissibility, indicating a recognition of the possibility that they might each affect a defendant's rights under the confrontation clause differently.

Section 2907.41(A), which governs videotaped depositions, makes it mandatory for a judge, upon motion by the prosecution, to order that a deposition of a child witness be videotaped.¹¹⁹ However, the videotaped deposition is also subject to the admissibility requirements set forth in section 2907.41(B).¹²⁰ The videotaped deposition is admissible in a trial or other proceeding only if the testimony therein (or the part to be admitted as evidence) is not excluded by the hearsay rule¹²¹ and the testimony is otherwise admissible under the Ohio Rules of Evidence.¹²² The videotaped deposition will also be admissible if both of the two statutory requirements are fulfilled.¹²³ These requirements are: (1) that the defendant had an opportunity for cross-examination at the time when the deposition was taken,¹²⁴ and (2) that the judge determines that there is reasonable cause to believe that the child witness whose videotaped deposition was taken would experience serious emotional trauma as a result of participation in the proceeding.¹²⁵

Unlike a videotaped deposition, the videotaping of a child witness' testimony at a proceeding is not mandatory upon request by the prosecution under the Ohio statute.¹²⁶ Rather, the use of such a procedure is at the discretion of the judge.¹²⁷ The judge's decision to allow the testi-

defendant and the child witness with monitors by which they can observe each other as the child gives the deposition or testimony. *Id.*

117. *Id.* § 2907.41(A)(2), (D).

118. *Id.*

119. *Id.* § 2907.41(A).

120. *Id.* § 2907.41(A)(2). "If the prosecution requests that a deposition to be taken under division (A)(1) of this section be videotaped, the judge *shall* order that the deposition be videotaped . . ." *Id.* (emphasis added).

121. *Id.* § 2907.41(B)(1).

122. *Id.* The applicable Ohio Rules of Evidence are 801, 803 and 804. *Id.* The statute specifies that the testimony in question is not excluded by the hearsay rule if it is not hearsay under Evidence Rule 801; if it is within one of the Rule 803 exceptions to the hearsay rule, if the child whose deposition was videotaped is unavailable as a witness, as defined in Evidence Rule 804, and testimony is within the parameters set by rule 804. *Id.*

123. OHIO REV. CODE ANN. § 2907.41(B)(1)(a), (B)(1)(b).

124. *Id.* § 2907.41(B)(1)(a).

125. *Id.* § 2907.41(B)(1)(b).

126. *See id.* § 2907.41(D).

127. *Id.* ("The judge may issue such an order, upon motion of the prosecution, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is
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mony to be videotaped must be based upon the judge's determination that the child is unavailable to testify in the same room with the defendant for at least one of three reasons set forth in section 2907.41(E).¹²⁸ The judge must find that (1) the child persistently refuses to testify despite judicial requests to do so;¹²⁹ (2) the child is unable to communicate about the alleged violation as a result of extreme fear, failure of memory, or another similar reason;¹³⁰ or (3) a substantial likelihood exists that the child will suffer serious emotional trauma as a result of testifying in the presence of the defendant.¹³¹

Pursuant to section 2907.41(D),¹³² the videotaping of a child witness' testimony actually takes place at the proceeding.¹³³ Consequently, when the judge determines that the use of the procedure is permissible, the judge determines at the same time that the evidence is admissible at the proceeding. Therefore, the three factors set out above for determining a child witness' unavailability are also the factors for determining whether the testimony will be admissible at trial.

A comparison of the admissibility requirements for videotaped depositions with the admissibility requirements for videotaped testimony reveals that different standards are applicable to the admissibility of the evidence obtained in the two procedures. While the videotaping of a deposition is mandatory upon request by the prosecution,¹³⁴ its admissibility at a proceeding depends upon either its consistency with the common law or statutory hearsay rules,¹³⁵ or upon a particularized finding by the judge that the child witness is likely to experience serious emotional trauma by testifying in person at the proceeding.¹³⁶ This is a much broader standard than that applicable to the admissibility of videotaped testimony. While videotaped testimony is admissible at the

being conducted in the physical presence of the defendant . . .").

128. *Id.* § 2907.41(E).

129. *Id.* § 2907.41(E)(1).

130. *Id.* § 2907.41(E)(2).

131. *Id.* § 2907.41(E)(3).

132. *Id.* § 2907.41(D).

133. *Id.* ("[t]he prosecution may file a motion with the judge requesting the judge to order the testimony of the child victim to be taken outside of the room in which the proceeding is being conducted and be recorded for showing in the room in which the proceeding is being conducted . . .").

134. *Id.* § 2907.41(A)(1).

135. *Id.* § 2907.41(B)(1).

136. *Id.* § 2907.41(B)(1)(b). In addition to the particularized finding that the child is likely to experience serious emotional trauma, admissibility also must meet the requirement that the defendant had an "opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination." *Id.* § 2907.41(B)(1)(a). Without both of these requirements fulfilled, the deposition is not admissible unless the testimony therein complies with the hearsay rules. *See supra* notes 101, 108, 109, 124 and accompanying text.

discretion of the judge,¹³⁷ it is only admissible upon the judge's determination that the child is considered unavailable as a witness for very specific reasons,¹³⁸ one of which is the substantial likelihood that the child witness will suffer serious emotional trauma as a result of testifying in person.¹³⁹

The significance of this distinction drawn between the admissibility requirements of videotaped depositions and videotaped testimony under section 2907.41 is that it illustrates a recognition on the part of the Ohio legislature that a defendant's rights secured by the sixth amendment confrontation clause may very well be less seriously threatened by the videotaped deposition procedure than by videotaping the child witness' testimony at the proceeding.

For example, the provision allowing the child witness' deposition to be videotaped explicitly requires that the defendant's attorney be given the right to a full examination and cross-examination of the child whose deposition is being taken.¹⁴⁰ The provision allowing videotaped testimony at the proceeding,¹⁴¹ on the other hand, does not explicitly set forth such a requirement.¹⁴² Moreover, the videotaped deposition provision permits the attorney for the defendant to request that another deposition of the child witness be taken because new evidence material to the defense has been discovered.¹⁴³ This request can be made at any time prior to the end of the proceeding at which the original videotaped deposition is admitted.¹⁴⁴ There is no similar provision related to the videotaped testimony in the Ohio statute.¹⁴⁵ The differences between the two provisions¹⁴⁶ suggest that the Ohio legislature considered the potential injury that each of the procedures might infringe upon a defendant's rights under the confrontation clause.

VII. CONCLUSION

The United States Supreme Court has not yet had the opportunity

137. OHIO REV. CODE ANN. § 2907.41(D).

138. *Id.* § 2907.41(E). The reasons set forth in this section are limited to only several instances of unavailability as defined within Ohio Rule of Evidence 804. *See supra* notes 118-120 and accompanying text.

139. *Id.* § 2907.41(E). The child will likewise be considered unavailable when the child refuses to testify despite the court's request to do so, and when the child cannot communicate testimony regarding the alleged violations due to "extreme fear, failure of memory, or another similar reason" *Id.* § 2907.41(E)(1), (E)(2).

140. *Id.* § 2907.41(A)(1).

141. *See id.* § 2907.41(D).

142. *Id.*

143. *Id.* § 2907.41(A)(1).

144. *Id.*

145. *See id.* § 2907.41(D).

146. *See supra* notes 10-11 and accompanying text.

to address the issue of whether a statute providing for the use of videotaped testimony of a child witness in child sexual abuse cases meets the requirement of a face-to-face encounter embodied within the confrontation clause of the sixth amendment. Should the Court be faced with this issue regarding section 2907.41 of the Ohio Revised Code or a substantially similar statute, the fact that the statute requires that both parties be provided with monitors with which to view each other during the child witness' testimony will certainly present a less clear case of a confrontation clause violation than was presented to the Court in *Coy v. Iowa*.¹⁴⁷ This fact alone, however, might not be sufficient to sustain the constitutionality of the statute, since the Court could potentially hold that any technical violation of the defendant's right to a face-to-face encounter with the child witness will invalidate the statute.

In light of Congress' 1989 amendment of The Children's Justice Act,¹⁴⁸ which provides financial grants to states that enact child protective reforms, it appears likely that the Court will recognize that protecting victims of child abuse is an important public policy. While the Court was not willing to accept this argument in *Coy*, it is quite possible that the Court would reconsider such an argument if the statute in question requires a particularized finding that the child witness would experience serious emotional trauma by testifying in person. Section 2907.41 of the Ohio Revised Code specifically requires an individualized finding of serious emotional trauma to the child witness.¹⁴⁹ It also requires that both the defendant and child witness be able to see each other during the use of either procedure.¹⁵⁰ Moreover, virtually every state has confirmed the existence of an important public policy by enacting child protective reforms similar to those provided by the Ohio statute.¹⁵¹ For these reasons, section 2907.41 stands a strong chance of withstanding constitutional scrutiny should it be challenged as violating the sixth amendment confrontation clause requirement of a face-to-face encounter between defendant and witness at trial.

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147. 108 S. Ct. 2798 (interim ed. 1988).

148. OHIO REV. CODE ANN. § 2907.41(B), (E).

149. *Id.* § 2907.41(E)(3).

150. *Id.* § 2907.41(A), (D).

151. See *supra* notes 1-2 and accompanying text.