

Fall 1992

A Conflict of Interests: The Constitutionality of Closed Circuit Television in Child Sexual Abuse Cases

John Paul Serketich

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

John Paul Serketich, *A Conflict of Interests: The Constitutionality of Closed Circuit Television in Child Sexual Abuse Cases*, 27 Val. U. L. Rev. 217 (1992).

Available at: <https://scholar.valpo.edu/vulr/vol27/iss1/6>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



A CONFLICT OF INTERESTS: THE CONSTITUTIONALITY OF CLOSED-CIRCUIT TELEVISION IN CHILD SEXUAL ABUSE CASES

I. INTRODUCTION

Reported incidents of child sexual abuse cases are becoming more prevalent because of the public's desire for increased disclosure of these abuses.¹ However, more than ninety percent of child abuse cases are never prosecuted.² One of the main reasons for this is the concern about the impact of the court process on the child victim.³ Children who testify in these cases experience great emotional distress and trauma.⁴ The problem of protecting child victims of sexual crimes was first discussed about twenty-five years ago,⁵

1. American Association for Protecting Children, Inc. *Highlights of Official Child Neglect and Abuse Reporting*, 1984. American Humane Association, Denver, Colorado, 1986. (Since 1960 when child sexual abuse became a reportable offense, estimates of its incidence have increased. In 1978, the reporting incidence of sexual abuse was 1.87 per 1000 children. By 1980, it went to 5.76 and in 1984 it was 15.88.) See also Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177 (1983) (also reporting increases in reporting child sexual abuse of children).

2. Gregory F. Long, *Legal Issues in Child Sexual Abuse: Criminal Cases and Neglect and Dependency Cases*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 137, 139 (Lenore E.A. Walker ed. 1988); DIANA S. EVERSTINE & LOUIS EVERSTINE, SEXUAL TRAUMA IN CHILDREN AND ADOLESCENTS 181 (1989). The unfortunate result of these cases not being prosecuted is that "many suspects are released without the imposition of justice. They not only escape any penalty, but have the opportunity for further abuse of their initial victim or other children." This ineffectiveness of dealing with child sexual abuse crime is of great concern to both society and the legal community.

3. See Long, *supra* note 2, at 139-40 and EVERSTINE & EVERSTINE *supra* note 2, at 181. These authors state that the decision not to prosecute is made because of concerns over the child's credibility or the harm that results in the child testifying in open court.

4. Herbert Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 BULL. AM. ACAD. PSYCHIATRY LAW 287 (1983) (holding that the trial adds procedural assault to the already existing sexual assault and because much of the outcome is depending on the child, the child often has feelings of guilt, distortion and denial). See also, Tarek Howard, *Child Sexual Abuse Prosecutions: Protecting the Child Victim and Preserving the Rights of the Accused*, 66 N.D. L. REV. 687 (1990) (stating that a child sexual abuse case is a complicated and problematic procedure because the child is usually very young and there are rarely witnesses. Also, nearly 50% of child sexual abuse victims are abused by a relative); and *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (showed child would be harmed through testifying in front of defendant).

5. See Vincent De Francis, PROTECTING THE CHILD VICTIM OF SEX CRIME 12 (1965) (De Francis was the Director of the Children's Division of the American Humane Association and was one of the first to report on child sexual abuse victims).

but no solutions were proposed until five years later.⁶ In the last ten years, the advent of videotaping and closed-circuit television has caused many states to propose legislation regarding the use of this technology in order to protect child sexual abuse victims.⁷

At least thirty-four states have passed laws that allow testimony of young

6. David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) (proposing protection of child victims through special hearings for the child victim or building a "child-courtroom").

7. John A. Mayers, *Coy v. Iowa: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709, 710 n.3 (1989) (listing statutes that have taken procedural steps to ease the child victim's testifying experience and still provide the defendants their constitutional confrontational rights under the Sixth Amendment). For one-way closed-circuit television, one-way screen and one-way mirror statutes, see ALA. CODE § 15-25-3 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1988); FLA. STAT. ANN. § 92.54 (West Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1988); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1988); IOWA CODE ANN. § 910A.14 (West Supp. 1988) (formerly § 910.A.3); KAN. STAT. ANN. § 38-1588 (1986); KY. REV. STAT. ANN. § 421.350(1)-(3) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1988); MD. CTS. & JUS. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1988); MINN. STAT. ANN. § 595.02(4) (West Supp. 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); N.J. STAT. ANN. § 2A.84A-32.4 (West Supp. 1988); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1989); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); PA. STAT. ANN. tit.42 §§ 5982-5985 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1988); VT. R. EVID. 807 (1983).

For two-way closed-circuit television statutes, see CAL. PENAL CODES § 1347 (West Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00 to 65.30 (McKinney Supp. 1989); OHIO REV. CODE ANN. § 2907.41(C),(D) & (E) (Anderson, 1987); HAW. R. EVID. 616 (Codified at HAWAII REV. STAT. § 626-1 (1985)); VT. R. EVID. 807 (1983).

For statutes concerning videotape deposition and testimony given before trial, see ALA. CODE § 15-25-3 (Supp. 1988); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. § § 13-4251, 13-4253(B)-(C) (Supp. 1988); ARK. STAT. ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. STAT. ANN. § 54-86g (West Supp. 1988); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1988); IND. CODE ANN. § 35-37-4-6 (Burns 1988); IOWA CODE ANN. § 910A.14 (Supp. 1988); KAN. STAT. ANN. §§ 22-3433 to -3434 (Supp. 1987); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. §§ 15:440.3-440.5 (West Supp. 1988); ME. REV. STAT. ANN. tit. 15 § 1205 (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1988); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1988); MO. ANN. STAT. §§ 491.675-.690 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. § 174.277 (1987); N.H. REV. STAT. ANN. § 517:13:a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (Supp. 1988); OHIO REV. CODE ANN. § 2907.41 (A),(B),(D) & (E) (Anderson, 1987); OKLA. STAT. ANN. tit. 22, § 753(C) (West Supp. 1986); PA. STAT. ANN. tit. 42 §§ 5982, 5984 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-116 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071 § 3 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5(3),(4) (Supp. 1988); WIS. STAT. ANN. § 967.04(7)-(10) (West Supp. 1988); WYO. STAT. § 7-11-408 (1987); VT. R. EVID. 807 (1983).

victims to be videotaped before trial, and twenty-three states allow testimony via closed-circuit television for a live presentation to the jury.⁸ Indiana is one of the states that has passed statutes concerning a child's testimony in child sexual abuse cases.⁹ Indiana does not allow a child to testify on closed-circuit television,¹⁰ but will allow a child under the age of ten to be videotaped in place of testifying in court.¹¹

In a child sexual abuse case where the victim's testimony is taken by a videotape or a closed-circuit television setup, the defendant's Sixth Amendment right to confront witnesses is at issue.¹² Thus, a conflict of interests is created between the defendants' right to confront witnesses and the states' *parens patriae* interest in protecting abused children.¹³ The difficulty is ensuring that the

8. *Mayers, supra* note 7, at 710 n.3. Many technological advances have affected the courtroom by performing functions previously only done by the human senses. For example, videotape has been used to record testimony and depositions; closed-circuit television allows one to view testimony that is occurring in another room; and the telephone allows an attorney and client to communicate without being face-to-face. For other applications of technology and law see, generally, Comment, *Speaker - Telephone Testimony in Civil Jury Trials: The Next Best Thing to Being There?*, 1988 WIS. L. REV. 293 (1988); James L. McCrystal & Ann B. Maschari, *Will Electronic Technology Take the Witness Stand?* 11 U. TOL. L. REV. 239 (1980).

9. IND. CODE ANN. § 35-37-4-6 (West Supp. 1991) and IND. CODE ANN. § 35-37-4-8 (West Supp. 1991). See *infra* note 97 (§ 35-37-4-8) and note 110 (§ 35-37-4-6) for the text of these statutes.

10. *Brady v. State*, 575 N.E.2d 981 (Ind. 1991) (held that videotaping of a child's testimony for use at trial without the child being able to hear or see the defendant but the defendant, being able to hear and see the child by a one-way closed-circuit television, violated the Indiana constitutional right of a defendant to meet witnesses face-to-face). See *infra* note 97 for the statute that this case declared unconstitutional.

11. *Miller v. State*, 517 N.E.2d 64 (Ind. 1987) (held that use of videotaped testimony of a child sexual abuse victim is constitutional if a defendant has an opportunity to cross-examine the child). See *infra* note 110 for the amended version of this statute that this case declared constitutional. The major change was that the new version defines a protected person as a child under fourteen years of age.

12. U.S. CONST. Amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

13. JEFFERY J. HAUGAARD & N. DICKON REPPUCCI, *THE SEXUAL ABUSE OF CHILDREN* 336 (1988). In order to understand the conflict between the child victim and the defendant, the author offered the following two situations:

First, be the parent of four-year-old girl who has been repeatedly sexually abused by a neighbor. Your daughter and you are both traumatized by the abuse, and you fear that her involvement with the legal system will have long lasting negative consequences. You are distressed by what appears to be more legal concern for the abuser than for your daughter. Second, be a parent of a sixteen-year-old boy who has been babysitting for a neighbor's girl for three years. One evening he returns from babysitting and

legislature balances the accused's right of confrontation and the state's interest in protecting child victims.¹⁴

This Note will examine the conflict of interest between protection of child sexual abuse victims and the defendants' right of confrontation. Part II of this Note will explore the nature of the crime of child sexual abuse and its effect on testimony.¹⁵ Part III examines the history of the Confrontation Clause in both the United States and the Indiana Constitutions,¹⁶ and relates the current status of a defendant's right to confrontation to statutes that protect child victims.¹⁷ An analysis of Indiana's treatment of sexual assault testimony will be presented in Part IV.¹⁸ Part V surveys previously proposed solutions to the conflict.¹⁹ The Note will conclude with Part VI, which proposes a balancing test that will lead to a relaxed interpretation of Indiana's Confrontation Clause in order to achieve a compromise between the procedures used to satisfy the accused's right to confront and the interest in protecting child victims.²⁰

II. THE NATURE OF THE CRIME AND ITS EFFECT ON TESTIMONY

Child sexual abuse is a crime in every jurisdiction of the United States.²¹ The National Center on Child Abuse and Neglect estimates that there are 100,000 cases of child sexual abuse each year.²² Because this estimate is an

reports that he had a difficult time with the girl and had to send her to bed early. The next morning, two police officers come to arrest your son on a charge of child sexual abuse filed by the neighbors after their daughter reported that your son has been sexually abusing her for the past two years. You are convinced that the girl is lying because of having to go to bed early, yet the girl and her parents continue to maintain that she is telling the truth. You are distressed by new legal procedures that appear to deprive your son of some of his constitutional rights.

Looking at these two positions, one can see why the legislature and the courts are entangled in a difficult legal controversy.

14. See generally Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808-09 (1985).

15. See *infra* notes 21-41 and accompanying text.

16. See *infra* notes 42-62 and accompanying text for an analysis of the United States Constitution and see *infra* notes 63-66 and accompanying text for an analysis of the Indiana Constitution.

17. See *infra* notes 67-93 and accompanying text for the current United States Supreme Court cases and see *infra* notes 94-107 and accompanying text for the current Indiana cases.

18. See *infra* notes 108-81 and accompanying text.

19. See *infra* notes 182-96 and accompanying text.

20. See *infra* notes 197-216 and accompanying text.

21. IRVING J. SLOAN, *CHILD ABUSE: GOVERNING LAW AND LEGISLATION* 105 (1983).

22. Shirley J. Asher, *The Effects of Childhood Sexual Abuse: A Review of the Issues and Evidence*, in *HANDBOOK ON SEXUAL ABUSE OF CHILDREN* 4 (Lenore E.A. Walker, ed. 1988). See *supra* note 1, stating that the reported incidence of child sexual abuse has increased due to a stronger desire to report the crime.

underestimation of this severe problem, it is even more egregious.²³ In addition, the crime is being committed against children at increasingly younger ages.²⁴

The nature and characteristics of child sexual abuse differentiate it from other crimes. In these cases, children are often assaulted by people they know and trust.²⁵ Child victims are also tormented by threats that are used by child molesters in an effort to silence their victims.²⁶ These threats have proven to be quite effective in silencing child victims.²⁷

The child is often abused by an adult that the family knows and trusts. As the abuser often threatens the child victim, sexual abuse instills in the victim an inability to trust and an immense fear.²⁸ Sexual abuse also affects its victims by causing intense feelings of guilt and anger.²⁹ The feelings that child sexual

23. See Walker, *supra* note 22, at 4. One study cited by the author was done using 930 randomly-chosen women in San Francisco. The results showed that 31 % had at least one experience with extrafamilial sexual abuse before age 18, and 16% had experienced sexual abuse within the family. In another study of 796 New England college students, about 19% of the women and almost nine percent of the men reported that they had been sexually victimized.

24. *Id.* The author stated that children under five years of age used to comprise only five percent of the sexually abused children treated at Denver General Hospital, but at the time of the study these young children accounted for 25% of the total number of children treated there.

25. See EVERSTINE & EVERSTINE, *supra* note 2, at 4. The authors suggest that the majority of the adults who sexually abuse children are known by the child's family or are related to the family itself. Therefore, many parents are not prepared to face the disruption such accusations create in their families. Often these parents do not want to face these facts or believe a family member or friend is capable of such acts. *Id.* at 3. These feelings of disbelief and reluctance to face disruption within the family are probably the most compelling reasons these crimes are not reported.

26. *Id.* at 21. The authors list some of the common threats that child molesters use with their victims:

1. "If you tell, I'll come back and kill you."
2. "This is our secret, and if you tell you will be taken away."
3. "If your parents find out what we have done, they will have you locked up in jail."
4. "Your parents won't love you anymore if they find out what we have done."

27. *Id.* at 21, 22. A case study of a three year old victim illustrates the effectiveness of these threats. A boy was threatened by his stepfather that if he ever told anyone of this abuse, he would be taken away from his mother. After the boy reported that the stepfather had been abusing him, the mother took the boy to stay with his natural father while she reported the crime. This made the boy feel that his mother was abandoning him just as his abusing stepfather had threatened. Therefore, the boy recanted his story for fear he would lose his mother. After assurance from his mother that she would not abandon him, the boy was able to tell the story of the abuse again.

28. See EVERSTINE & EVERSTINE, *supra* note 2, at 17. The authors state that the most common initial reaction is fear, and because the child has been betrayed by an adult and has felt helpless and powerless, the child's ability to trust is severely limited.

29. See HAUGAARD & REPPUCCI, *supra* note 13, at 64, 65. Feelings of guilt in the child victim originate from the child feeling responsible for the abuse or the effect that occurs after the crime is reported. These feelings of guilt then develop into anger which is focused toward the abuse itself, the victim's family or those in the helping profession. See EVERSTINE AND EVERSTINE, *supra* note

abuse victims experience make it extremely difficult for the child to testify in court. An additional problem in sexual abuse cases is that the courtroom itself is intimidating to the child.³⁰ Therefore, many people view the prosecution of the abuser as a second traumatization of the child.³¹

Identifying the defendant or suspect is another difficult problem in child sexual abuse cases. This identification provokes intense fear in a victim because the victim has publicly defied the threats of the abuser.³² The victim can also be guilt ridden for being responsible for sending someone to jail.³³ Additionally, the victim may be asked to respond to specific questions that may be both difficult and embarrassing to answer.³⁴

Besides the adverse effects on the child, the crime of child sexual abuse has other unique characteristics that make it difficult to prosecute.³⁵ The problems that are inherent in child sexual abuse cases are that the child is often the only

2, at 16-18 (listing and defining many of the key symptoms that typify the effects of child sexual abuse like this).

30. See EVERSTINE & EVERSTINE, *supra* note 2, at 180.

There is nothing even vaguely comforting to a child about the traditional atmosphere of the court of law. The youngster who is at ease in the family room and schoolroom, in the neighborhood and on the playground, finds no source of warmth or nurturance in the courtroom, and a judge in his or her black robe could appear as the embodiment of a child's bad dream It is ironic that the child victim of molestation, in whose interest the court is presumably acting, is the one participant who may feel most out of place, *most intimidated* by the court process." (emphasis added).

This intimidation by the court process is greatly related to the child testifying in the defendant's presence. If the child is reluctant to testify in the defendant's presence, the child becomes adverse to the court system when it requires physical presence.

31. See HAUGAARD & REPPUCCI, *supra* note 13, at 354. The authors state some parents choose not to report the sexual abuse because they feel that reporting the abuse will only harm the child more by increasing the overall stress the child will experience. Therefore, many cases go unreported. See *supra* notes 25-31 and accompanying text for other justifications for not reporting the abuse.

32. See EVERSTINE & EVERSTINE, *supra* note 2, at 183. The entire procedure of identifying and accusing a person of a crime creates great anxiety for an adult victim and is even more disturbing for a child.

33. See EVERSTINE & EVERSTINE, *supra* note 2, at 183. Jail is a terrifying thought for children, and victims feel negative emotions when their actions cause someone to be imprisoned.

34. See EVERSTINE & EVERSTINE, *supra* note 2, at 184. "District attorneys frequently find it difficult enough for an adult witness to answer questions [concerning sexual abuse] in a public setting without becoming nervous and confused; these problems are magnified when a child is the witness."

35. See *Miller*, 517 N.E.2d at 69. These child sexual abuse cases are especially difficult to prosecute because of the problems that exist in such cases. See *supra* notes 25-38 and accompanying text.

witness to the crime,³⁶ the cases often lack corroborative physical evidence,³⁷ and the victim is usually reluctant or unable to testify against the defendant.³⁸

The nature of the child sexual abuse crime and its effects on children³⁹ has thus prompted many states to make changes in the courtroom setting and in its procurement of child testimony.⁴⁰ The purpose of these changes is to protect the child from further trauma and to obtain the truth.⁴¹

36. See Doris Stevens and Lucy Berliner, *Special Techniques for Child Witnesses*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 246, 248 (L. Schultz ed. 1980) (stating that sex abuse cases are hard to prosecute due to the lack of witnesses).

37. This is due in part to the fact that most child sexual abuse crimes are nonviolent and because most children do not resist their attackers because of ignorance or respect for authority. See C.J. Flammang, *Interviewing Child Victims of Sex Offenders*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 175, 177 (L. Schultz ed. 1980); Kee MacFarlane, *Sexual Abuse of Children*, in *THE VICTIMIZATION OF WOMEN* 81, 87 (Jane R. Chapman & Margaret Gates, eds. 1978).

38. See *supra* notes 25-35 and accompanying text. This failure to testify is often a result of the threats the molester makes to the child. See *supra* notes 26-27 and accompanying text. The fear of the courtroom and the second traumatization that a prosecution can bring have also deterred child victims from pressing charges. See *supra* notes 30-31 and accompanying text.

39. See *supra* notes 25-38 and accompanying text. In brief, the problems are that the child usually knows and trusts the abuser, the abuser makes threats to the powerless child to prevent the child from reporting the crime, and the child victim is left with intense feelings of fear and guilt. All of these contribute to the child's intimidation by the courtroom and the defendant.

40. See EVERSTINE & EVERSTINE, *supra* note 2, at 188 and HAUGAARD & REPUCCI, *supra* note 13, at 356. The authors suggest that having the judge sit at the same level as the child and dressing him in ordinary clothing instead of a robe may reduce the trauma a child faces in the courtroom, and thus the environment will be more conducive to gathering child testimony. Also, allowing the child to explain what happened using dolls and drawings will also be more effective in eliciting the child's testimony. For a listing of statutory changes enacted to ease the child's testimony experience, see *supra* note 7. For an explanation and comparison of these statutory solutions, see *infra* notes 182-196 and accompanying text.

41. See *Miller*, 517 N.E.2d at 69-71 (allows videotaped interview of children in certain cases). In *Miller*, the court gave a legislative intent summary on IND. CODE ANN. § 35-37-4-6 (West Supp. 1991). The court stated the following reasons for having this type of protective legislation:

In an effort to reduce trauma for child molested victims in a manner which resolves both confrontation and hearsay problems, all but a few states have recently enacted statutes which allow testimony by such children through videotaping or live broadcast over closed-circuit television. Such legislation has been prompted by the high number of cases involving sexual abuse of children and the difficulties inherent in successfully prosecuting them. The National Center on Child Abuse and Neglect has estimated that more than 100,000 cases of child sexual abuse occur annually, but other sources place the number as high as 500,000 for female children alone.

Miller, 517 N.E.2d at 69.

In addition, Richard Good, the Executive Director of the Prosecuting Attorney's Counsel in Indianapolis, stated that the purpose behind state statutes that allow videotaping and closed-circuit television in child sexual abuse cases is to protect the child from the trauma of testifying. He stated that Indiana's statutes (§ 35-37-4-6 and § 35-37-4-8) were modeled after Washington's and Oregon's statutes. Mr. Good said the specific purpose of § 35-37-4-6 (the hearsay and videotape statute) was to get in some evidence in order to get beyond a nonsuit. If one has a trustworthy statement, it allows that party to avoid a directed verdict. He stated the specific purpose of § 35-37-4-8 (the closed-circuit television statute) was to protect the child from the trauma of testifying in the

III. THE CONFRONTATION CLAUSE AND CHILD SEXUAL ABUSE CASES

A. Historical Background of the Confrontation Clause

1. United States Constitution

The Sixth Amendment of the United States Constitution gives the accused in criminal cases the right to confront witnesses.⁴² The Amendment states: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁴³ The right of the accused to confront witnesses originated from seventeenth century English common law.⁴⁴ This common law right to confront was reflected in the United States Constitution and was later adopted by the state constitutions.⁴⁵ The Sixth Amendment Confrontation Clause, however, “comes to us on faded parchment,”⁴⁶ and there is little documented history on the Amendment.⁴⁷

The original purpose of the Clause was to prevent a criminal defendant from being tried solely upon the use of affidavits.⁴⁸ The right of confrontation, however, is not absolute and occasionally must give way to considerations of public policy and the necessities of the case.⁴⁹ In *Mattox v. United States*,⁵⁰

courtroom. Telephone Interview with Richard Good, Executive Director of the Prosecuting Attorneys Counsel in Indianapolis, IN (Feb. 12, 1992).

42. U.S. CONST. amend. VI.

43. *Id.*

44. FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 104 (First Greenwood Reprinting 1969) (1951). Raleigh's conviction rested greatly on a confession written by his alleged co-conspirator who did not testify at the trial.

45. Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 728 (1976) (stating that Virginia was the first state to adopt a Bill of Rights that granted criminal defendants certain protections and that most of the states patterned their confrontation right after Virginia's).

46. *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

47. See Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 348-49 (1991) (stating that the Clause emerged from the demand that the familiar common law trial be guaranteed. The Framers responded by enacting the Sixth Amendment using broad and vague language referring to a right of confrontation). See *supra* notes 42-43 and accompanying text.

48. See *Kay v. United States*, 225 F.2d 476 (4th Cir. 1958), *cert. denied*, 358 U.S. 825 (1958) (stating that there was a fear that justice was not being adequately served if the defendant did not have a right to confront, as was the case with Sir Walter Raleigh).

49. *Mattox v. United States*, 156 U.S. 237, 243 (1895) (stating that “a technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant”).

50. 156 U.S. 237 (1895).

the Court stated that the most important aspects of the Confrontation Clause were to allow cross-examination and jury observation of the witness's demeanor.⁵¹ After *Mattox*, the Supreme Court rarely interpreted the Confrontation Clause until 1965,⁵² when the Court held that the Clause applies to the states under the Fourteenth Amendment.⁵³ Since 1965, the Court has decided a substantial number of Confrontation Clause cases and has recently rejected the defendants' contention that the Clause requires the physical presence of both the accused and the witness.⁵⁴

In 1970, the United States Supreme Court defined the purpose of the Confrontation Clause in *California v. Green*.⁵⁵ The Court held that the Confrontation Clause has three primary functions: (1) ensuring the witness's truthfulness by forcing testimony to be made under oath; (2) forcing the witness to submit to cross-examination in order to discover the truth; and (3) permitting the jury to observe the demeanor and assess the credibility of the witness.⁵⁶ Therefore, the Court's holding in *Green* shows that the Confrontation Clause entitles the defendant to more than just the right to cross-examine.⁵⁷

51. *Id.* at 242-43.

52. *See Mattox v. United States*, 156 U.S. 237 (1895) (held that the Confrontation Clause was not violated where on retrial of the defendant, a transcript of a subsequently deceased witness was used); *Kirby v. United States* 174 U.S. 47 (1899) (held that the Confrontation Clause was violated where evidence that others had been convicted of theft was used to prove that the property received by the defendant had been stolen). These two cases were early interpretations of the Confrontation Clause. When the Clause was applied to the states in 1965, numerous cases discussing the confrontation right resulted.

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

54. Initially, the defendants' challenges were accepted by the Court. *See Harrington v. California*, 395 U.S. 250 (1969); *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

However, in 1970, the Court began to reject the defendants' arguments. *See Maryland v. Craig*, 110 S. Ct. 3157 (will be published at 497 U.S. 805 (1990)); *United States v. Owens*, 484 U.S. 554 (1988); *Bourjaily v. United States*, 483 U.S. 171 (1987); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Parker v. Randolph*, 442 U.S. 62 (1979); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970). *But see Davis v. Alaska*, 415 U.S. 308 (1974); *Lee v. Illinois*, 476 U.S. 530 (1986); *Coy v. Iowa*, 487 U.S. 1012 (1988); *Idaho v. Wright*, 497 U.S. 805 (1990) (finding that the defendants should prevail in gender Confrontation Clause claims).

55. 399 U.S. 149 (1970) (admitting a declarant's out-of-court statement as long as he is testifying as a witness at trial and is subject to full cross-examination does not violate the Sixth Amendment's Confrontation Clause).

56. *Id.* at 158.

57. *See generally Brent J. Fields, Maryland v. Craig: The Constitutionality of Closed-Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167 (1990); *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (which listed the same three primary functions of the Confrontation Clause as did *California v. Green*).

Courts and scholars have asserted that the essential purpose of the federal confrontation right is to subject witnesses to vigorous cross-examination and ensure the reliability of the testimony against a criminal defendant.⁵⁸ This view is upheld today.⁵⁹ In 1990, the Court in *Maryland v. Craig*⁶⁰ stated that the Confrontation Clause now has four primary functions: oath, cross-examination, observance of witness demeanor by the jury, and physical presence of the witness in the courtroom.⁶¹ The purpose of requiring a witness to be physically present in the courtroom is to “confound and undo the false accuser.”⁶² This objective is undermined by a separation of the witness and the accused.

2. Indiana Constitution

Article I, Section 13 of the Indiana Constitution also gives the accused the right to confront witnesses.⁶³ However, the Indiana Constitution uses more specific language in its Confrontation Clause than the Sixth Amendment to the United States Constitution. The Indiana confrontation section provides that “[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses *face to face*”⁶⁴ This puts a premium on a defendant’s right to confront witnesses. In the United States Constitution, a defendant only has “the right to confront witnesses,” but the Indiana Constitution requires a “face-to-face” meeting between the defendant and the witness.

This face-to-face element of the Indiana Constitution was enacted in the 1800’s. The words “face-to-face” were never discussed as to their true meaning⁶⁵ because at that time, the only way to communicate was through face-

58. *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (finding “[n]o one . . . would deny the value of cross-examination in exposing the falsehood in bringing out the truth in the trial of a criminal case”); *Alford v. United States*, 282 U.S. 687, 692 (1931) (stating that the right of cross-examination is “one of the safeguards essential to a fair trial”); JOHN H. WIGMORE, 5 EVIDENCE, § 1395 at 123 (Little, Brown & Co. 1940) (stating that the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination).

59. *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990) (the Confrontation Clause does not categorically prohibit a child witness in a child sexual abuse case from testifying against the defendant at trial, outside the defendant’s presence, by a one-way closed circuit television).

60. 110 S. Ct. 3157 (1990).

61. *Id.* at 3163.

62. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). The Court further stated, “It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’ In the former context even if the lie is told, it will often be told less convincingly.” *Id.* at 1019.

63. IND. CONST. art. I, § 13.

64. *Id.* (emphasis added).

65. See generally, *Debates of Indiana Convention*, 1850. Also, Indiana courts have generally analyzed confrontation issues with reference to federal case law and treated the state as providing the same protection to a defendant as the Sixth Amendment. *Miller v. State*, 517 N.E.2d 64, 68

to-face interaction. However, technological advances such as the telephone, videotape recordings, and closed-circuit television have made communication possible without face-to-face interaction. Because closed-circuit television allows the defendant to view the witness and communicate with his or her attorney during the cross-examination of the witness, this technology enables a broader interpretation of the face-to-face requirement in Indiana's Constitution. Therefore, "face-to-face" does not need to be read literally in order to achieve the purpose of the Confrontation Clause.⁶⁶

B. *Current Status of the Confrontation Clause and Its Effect on Testimony in Child Sexual Abuse Cases*

1. United States Supreme Court

Since 1988, the United States Supreme Court has reviewed the constitutionality of separating the victim from the accused during the child's testimony on three occasions.⁶⁷ In *Coy v. Iowa*,⁶⁸ the United States Supreme Court held that the Sixth Amendment provides a defendant with the right to a "face-to-face" confrontation with adverse witnesses.⁶⁹ The Court also held that placing a screen between child sexual assault victims and the accused during the witness's testimony violates the defendant's Sixth Amendment confrontation right.⁷⁰ The Court found that the traumatization caused by testifying was not sufficient to justify infringing upon the defendant's right to confront the

(Ind. 1987); *Lagenour v. State*, 376 N.E.2d 475 (Ind. 1978) (held confrontation right of both the United States and Indiana Constitutions includes the right to full, adequate and effective cross-examination and declared this right fundamental and essential to a fair trial).

66. See *Brady v. State*, 575 N.E.2d 981, 992 (Ind. 1991) (Krahulik, J., dissenting); *Miller v. State*, 517 N.E.2d 64, 71 (Ind. 1987). If the language "face-to-face" were always construed literally, it would abolish many hearsay exceptions such as prior recorded testimony of an unavailable witness, prior inconsistent and out-of-court statement of a testifying witness, and dying declarations.

67. *White v. Illinois*, 112 S. Ct. 736 (1992); *Maryland v. Craig*, 110 S. Ct. 3157 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

68. 487 U.S. 1012 (1988).

69. *Id.* at 1028 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748 (1987) (Marshall, J., dissenting)); and *Kirby v. United States* 174 U.S. 47 (1899)). In all of these cases the Court found that the defendant had a right to meet his witnesses face-to-face. See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (stating that the Sixth Amendment Confrontation Clause provides a defendant with two protections: the right to physically face witnesses and the right to cross-examine those witnesses).

70. *Coy*, 487 U.S. at 1020-22 (1988). This child sexual abuse case dealt with a screen being set up between the defendant and the child witness. The screen and lighting were such that the defendant could see the witness but the witness could not see the defendant.

accuser.⁷¹ This decision was based in part on the lack of evidence that child victims needed protection.⁷² However, the majority of the Court stated in dicta that there may be some exceptions that would overrule this confrontational right if an important public policy was furthered.⁷³

The suggestion that there may be exceptions to the defendant's right of confrontation was further explained by Justice O'Connor in her concurring opinion.⁷⁴ Justice O'Connor stated that the rights in the Confrontation Clause "are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."⁷⁵ Justice O'Connor stated that other technological devices such as closed-circuit television systems may be allowed.⁷⁶

In 1990, the United States Supreme Court had the opportunity to rule on the use of a closed-circuit television statute.⁷⁷ In *Maryland v. Craig*,⁷⁸ the Supreme Court decided that the Confrontation Clause gives a preference for face-to-face confrontation,⁷⁹ but that it must give way to public policy and the

71. *Id.* at 1021. (The state made no showing that these two thirteen-year-old child victims would suffer any harm from a face-to-face confrontation with the defendant. Therefore, there was no showing that these victims needed any protection).

72. *Id.* This suggests that had the child abuse witnesses been able to show they needed special protection, then the Court may have seen the protection of the children as an overriding interest.

73. *Id.* The Court said if these exceptions exist they would be left for another day.

74. *Id.* at 1022 (O'Connor, J., concurring).

75. *Id.* (O'Connor, J., concurring). Justice O'Connor's concurring opinion suggested that she believed these exceptions would exist because child abuse has increased in society and this abuse is extremely hard to detect and prosecute. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (The Court stated child abuse is extremely difficult to prosecute and detect, often because there are no witnesses); Doris Stevens & Lucy Berliner, *Special Techniques for Child Witness*, in *THE SEXUAL VICTIMOLGY OF YOUTH* 246, 248 (L. Schultz ed. 1980) (stating the child is usually the only witness to the crime).

76. See *Coy*, 108 U.S. at 1023.

77. *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

78. 110 S. Ct. 3157 (1990). Here, the prosecutors used a one-way closed-circuit television statute to procure the testimony of several children molested by their teacher. This procedure was allowed after the state had made a showing that the children would suffer serious emotional distress such that they could not reasonably communicate. The procedure used allows the child, prosecutor and the defense attorney to go to a separate room for the cross-examination. This is taped and shown in the courtroom to the judge, the jury, and the defendant. The defendant is also electronically connected to his counsel so objections can be made as if the witness were testifying in the courtroom.

79. *Id.* at 3165 (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). For the cases that define the confrontation right as a guarantee to meet face-to-face with witnesses, see *California v. Green*, 399 U.S. 149, 157 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

necessities of the case.⁸⁰ Therefore, the Court held that a state can use a one-way closed-circuit television statute for child abuse testimony without violating the Confrontation Clause of the United States Constitution, if the child witness would suffer trauma from testifying in the presence of the defendant.⁸¹ Since trauma could impair the child's ability to communicate effectively, the face-to-face requirement in this instance would frustrate the purpose of obtaining the truth.⁸²

The majority opinion in *Craig* was written by Justice O'Connor, who two years earlier, in *Coy v. Iowa*,⁸³ stated that the interests of shielding a child may override a defendant's right to confrontation.⁸⁴ Justice O'Connor's concurrence in *Coy*, and the opinion of the Court in *Craig*, established that a case-specific finding of a high risk of trauma to the victim is necessary before

80. See *Craig*, 110 S. Ct. at 3165 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

81. See *Craig*, 110 S. Ct. at 3170-3171. The Maryland Statute provides:

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:

(i) The testimony is taken during the proceeding; and
(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(i) The prosecuting attorney;
(ii) The attorney for the defendant;
(iii) The operators of the closed circuit television equipment; and
(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

82. See *Craig*, 110 S. Ct. at 3170-71.

83. 487 U.S. 1012 (1988).

84. *Id.* at 1022-25 (O'Connor, J., concurring). The exception that Justice O'Connor was referring to in *Coy* exists here in *Craig*.

abridging defendant's face-to-face confrontation right.⁸⁵ According to this analysis, the decision in *Coy* could have been different if the state had shown that the child witness needed protection due to the trauma of being in the defendant's presence.

Most recently, the United States Supreme Court examined the constitutionality of hearsay statements in child sexual abuse cases.⁸⁶ In *White v. Illinois*,⁸⁷ the Court held that the Confrontation Clause of the Sixth Amendment does not require a declarant to testify at trial or be found unavailable in order to admit testimony under the "spontaneous declaration"⁸⁸ or "medical examination"⁸⁹ exception to the hearsay rule.⁹⁰ Therefore, out-

85. *Id.* at 1025. The state must show that the child will be harmed from a face-to-face confrontation. Once this is established, the court will allow the separation in order that the testimony be taken in a manner to protect the child.

86. Hearsay is defined as when a witness repeats what another person (the declarant) has said outside the courtroom and that repeated statement is offered for the purpose of proving the truth of what the declarant has previously said. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 180 (2d ed. 1987). See also, FED. R. EVID. 801(c) which defines hearsay as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 802 provides that hearsay statements are not admissible, but FED. R. EVID. 803 and FED. R. EVID. 804 each offer a list of exceptions to the hearsay rule. These exceptions are based on the notion that these hearsay statements are reliable and therefore admissible.

87. 112 S. Ct. 736 (1992). In this case a four year old girl was sexually assaulted by her mother's friend. The incident occurred one morning while the child and her babysitter were asleep. The child screamed and awoke her babysitter. When the babysitter went to the child's room, he saw the defendant leave and he asked the child what had happened. The girl told him that the defendant had touched her and put his mouth on her private parts. About thirty minutes later, the child's mother returned home and the child told her the same story. About fifteen minutes after that, the police arrived and recorded this same story when they questioned the child. The child told the same story to medical personnel about four hours after the assault. The court admitted into evidence all of these statements by the child as hearsay exceptions.

88. The spontaneous declaration hearsay exception applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." *People v. White*, 555 N.E.2d 1241, 1246 (Ill. App. Ct. 1990). This is similar to FED. R. EVID. 803(2) which states:

(2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

89. The medical diagnosis hearsay exception states:

In a prosecution for violation of Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal Code of 1961,' statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

ILL. REV. STAT. ch. 38, para. 113-15 (1989).

This is similar to FED. R. EVID. 803(4), which states:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain,

of-court statements made by the child victim covered by the two hearsay exceptions mentioned above were admitted.⁹¹

The child's statements describing the assault to her babysitter, her mother, the police officers, and the medical personnel were held to have substantial probative value, "value that could not be duplicated simply by the declarant later testifying in court."⁹² The Court concluded that a statement considered a "firmly rooted" hearsay exception is so trustworthy that adversarial testing would add little to its reliability.⁹³ The Court, in allowing these traditional hearsay exceptions without requiring the child victim to testify or be declared unavailable, has allowed state prosecutors to pursue another avenue in protecting child sexual abuse victims.

2. Indiana Supreme Court

The Supreme Court of Indiana recently ruled on the constitutionality of a statute similar to the one used in *Maryland v. Craig*.⁹⁴ In *Brady v. State*,⁹⁵ the Indiana Supreme Court held that the videotaping of a child's testimony without the child being able to hear or see the defendant violates the defendant's constitutional right to meet face-to-face with the witness under the state's

or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

90. See *White*, 112 S. Ct. at 739.

91. *Id.* at 743.

92. *Id.* The Court further stated that to exclude this evidence would be completely wrong because the Confrontation Clause has as its purpose the "promotion of the integrity of the fact finding process." See *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)).

93. *Id.* at 742 n.8. The Court stated that statements that had a substantial guarantee of trustworthiness were considered "firmly rooted" exceptions that would satisfy the Confrontation Clause. The two exceptions involved in this case, spontaneous declarations and statements made during the course of a medical examination, were considered firmly rooted because both are accepted by a substantial number of states and both are recognized in the Federal Rules of Evidence. See *supra* notes 88-89 for the text and explanation of these rules. Furthermore, the court stated that the exception for spontaneous declarations is at least 200 years old.

94. 110 S. Ct. 3157 (1990). See *supra* note 81 for the text of the Maryland statute and see *infra* note 97 for the text of the Indiana statute.

95. 575 N.E.2d 981 (Ind. 1991). This case involved the videotape testimony of a four year old child sexual abuse victim. The testimony was taken at the child's home in her kitchen and bedroom. The judge, prosecutor, defense attorney, investigator, the child's mother, and the video operator were all present. The defendant was situated in the garage at the residence where he was able to hear and see the child on closed circuit television. The defendant was also able to communicate with his counsel by a microphone hook-up.

Confrontation Clause.⁹⁶ The court held that the closed-circuit television statute violated the Indiana Constitution.⁹⁷ However, the court did find that this

96. *Id.* at 988. The court here based its decision on the importance of a face-to-face confrontation and stated that this face-to-face confrontation was of great importance. See *Coy v. Iowa*, 497 U.S. 1012, 1020 (1988) (Justice Scalia stated, “[f]ace-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.”) and *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1977) (The court stated, “[m]ost believe that in some undefined but real way, recollection, veracity, and communication are influenced by a face-to-face challenge”).

97. See *Brady*, 575 N.E.2d at 988 (Ind. 1991). The Indiana Statute (§ 35-37-4-8) provides:
Sec. 8 (a) This section applies to a criminal action under the following:

- (1) Sex crimes (IC 35-42-4).
- (2) Battery upon a child (IC 35-42-2-1(2)(B)).
- (3) Kidnapping and confinement (IC 35-42-3).
- (4) Incest (IC 35-46-1-3).
- (5) Neglect of a dependant (IC 35-46-1-4).
- (6) An attempt under IC 35-41-5-1 for an offense listed in subdivisions (1) through (5).
- (b) As used in this section, “protected person” has the meaning set forth in section 6 of this chapter. (See *supra* note 110 for § 35-37-4-6(b) which defines “protected person.”)
- (c) On the motion of the prosecuting attorney, the court may order that:
 - (1) the testimony of a protected person be taken in a room other than the courtroom and be transmitted to the courtroom by closed circuit television; and
 - (2) the questioning of the protected person by the prosecution and the defense be transmitted to the protected person by closed circuit television.
- (d) On the motion of the prosecuting attorney, the court may order that the testimony of a protected person be videotaped for use at trial.
- (e) The court may not make an order under subsection (c) or (d) unless:
 - (1) the testimony to be taken is the testimony of a protected person who:
 - (A) is the alleged victim of an offense listed in subsection (a) for which the defendant is being tried or is a witness in a trial for an offense listed in subsection (a);
 - (B) is found by the court to be a protected person who should be permitted to testify outside the courtroom because:
 - (i) a physician or psychologist has certified that the protected person’s testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the protected person;
 - (ii) a physician has certified that the protected person cannot be present in the courtroom for medical reasons; or
 - (iii) evidence has been introduced concerning the effect of the protected person’s testifying in the courtroom, and the court finds that it is more likely than not that the protected person’s testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the protected person;
 - (2) the prosecuting attorney has informed the defendant and the defendant’s attorney under subdivision (2) at least ten (10) days before the trial of the prosecuting attorney’s intention to have the protected person testify outside the courtroom.
- (f) If the court makes an order under subsection (c), only the following persons may be in the same room as the protected person during the protected person’s testimony:
 - (1) Persons necessary to operate the closed circuit television equipment.
 - (2) Persons whose presence the court finds will contribute to the protected person’s well-being.

statute satisfied the requirements of the federal confrontation right.⁹⁸

The decision in *Brady* has left the defendant with a strict and literal interpretation of his right of confrontation at the expense of the interests of protecting the child victim.⁹⁹ Even though the face-to-face confrontation may "reveal the child coached by a malevolent adult," it may also lead to emotional distress and trauma in the child victim.¹⁰⁰ Therefore, a literal interpretation of the defendant's right to a "face-to-face" confrontation may go beyond that which is necessary to obtain the truth.¹⁰¹ For instance, "face-to-face"

(3) A court bailiff or court representative.

(g) If the court makes an order subsection (d), only the following persons may be in the same room as the protected person during the protected person's videotaped testimony:

(1) The judge.

(2) The prosecuting attorney.

(3) The defendant's attorney (or the defendant, if the defendant is not represented by an attorney).

(4) Persons necessary to operate the electronic equipment.

(5) The court reporter.

(6) Persons whose presence the court finds will contribute to the protected person's well-being.

(7) The defendant, who can observe and hear the testimony of the protected person without the protected person being able to observe or hear the defendant. However, if the defendant is not represented by an attorney, the defendant may question the protected person.

(h) If the court makes an order under subsection (c) or (d), only the following persons may question the protected person:

(1) The prosecuting attorney.

(2) The defendant's attorney (or the defendant, if the defendant is not represented by an attorney).

(3) The judge.

IND. CODE ANN § 35-37-4-8 (West 1986 & Supp. 1992).

98. See *Brady*, 575 N.E. 2d at 986. The court in comparing the Indiana statute to the Maryland statute, *supra* note 81, found that the Indiana statute allows for videotaping pre-trial statements as well as the use of closed-circuit television during the trial. However, the court reasoned that the difference between the two methods would not offset the statutes constitutionality under the Sixth Amendment.

99. See *Brady*, 575 N.E.2d at 990 (Givan, J., dissenting). Justice Givan said there was "little if any impairment" to the defendant's right to defend himself (the confrontation right) but there was "great potential harm" to a child victim if forced to appear in open court (and face the accuser). "In some cases the harm might be so great as to cause a lifetime of impairment. In preserving the right of a defendant, I do not think we should become so technically involved that we unnecessarily traumatize the victim." (parentheses added)

100. *Id.* at 988 (citing *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (requiring the accused to look the defendant in the eye is believed to make the accuser more truthful)).

101. *Id.* at 991 (Krauhlik, J., dissenting) Justice Krauhlik stated:

In molestation cases, however, face to face confrontation may do more to hinder full, honest testimony by the witness than to encourage it. The nature of the relationship between the witness and the accused, the highly embarrassing character of the testimony and the courtroom setting itself combine to create a stressful, traumatic environment

confrontation may inhibit the victim from pressing charges.¹⁰² If the case is prosecuted, the child may be too intimidated to speak the truth in the presence of the defendant.¹⁰³ Therefore, it is necessary to balance the interests of the child with the procedures used to satisfy the rights of the defendant in order to obtain the most reliable testimony.

Evidence that the Indiana Supreme Court is moving in the direction of balancing these rights can be seen in *Hart v. State*.¹⁰⁴ The court held that the failure to comply with the Indiana Constitution's face-to-face requirement did not amount to a fundamental error because it did not substantially impair the defendant's opportunity to obtain the truth.¹⁰⁵ The court stated that except for the lack of the defendant's physical presence in the courtroom, the videotaped testimony of the child victim was "consistent with judicial fact-finding procedures."¹⁰⁶ The court reasoned that because the testimony was given in court, there was full cross-examination and the jury was given a full opportunity to assess the child victim's demeanor and credibility.¹⁰⁷ *Hart* suggests that the court may consider a balancing test in order to decide when the face-to-face requirement in Indiana's Constitution may be relaxed.

likely to make the child a reluctant, unreliable witness. Particularly, in cases where the accused is a family member or trusted friend the child is likely to be intimidated from giving clear, honest testimony out of fear, respect for authority, or even love of the accused.

102. See *supra* notes 2 and 3 and accompanying text.

103. See *supra* note 115 for two cases that exhibit the stressful impact of confrontation on the child victim.

104. 578 N.E.2d 336 (Ind. 1991). The court re-examined this case which used Indiana Code § 35-37-4-8 prior to the declaration that the statute was unconstitutional in *Brady v. State*, 575 N.E.2d 981 (Ind. 1991). The statute was used similarly in both cases, but in *Hart* the defendant could only hear the child's testimony with audio equipment while he was in an adjacent room to the courtroom, where the testimony was videotaped three days before the trial. Whereas in *Brady*, the testimony was taped in the child's bedroom and kitchen, and the defendant, who was situated in the garage of the residence, could hear and see the testimony on closed-circuit television.

105. See *Hart*, 578 N.E.2d at 338. This issue resulted because at trial the defendant failed to assert any claim that this procedure violated the Indiana Constitution's Confrontation Clause. He only referred to the procedure as violating the United States' Confrontation Clause. In deciding if there is a denial of a defendant's due process, the resulting harm or potential for harm must be substantial. *Wilson v. State*, 514 N.E.2d 282 (Ind. 1987). See also, *Games v. State*, 535 N.E.2d 530 (Ind. 1989) (fundamental error depends upon whether a defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for obtaining the truth for which the defendant otherwise would have received).

106. See *Hart*, 578 N.E.2d at 338.

107. *Id.* These factors are the elements of the Confrontation Clause: physical presence, oath, cross-examination and the jury's ability to examine witness demeanor. Here, three of the four were met and the court suggests that because three of the four were met, the evidence was reliable.

IV. ANALYSIS OF INDIANA'S TREATMENT OF CHILD SEXUAL ASSAULT TESTIMONY

A. Indiana Videotape Statute Upheld

Although the Supreme Court of Indiana declared a closed-circuit television statute unconstitutional in *Brady*, it has upheld the constitutionality of videotaping the child victim's testimony. In *Miller v. State*,¹⁰⁸ the Indiana Supreme Court held that Indiana Code Section 35-37-4-6 was constitutional under both the Sixth Amendment in the United States Constitution and Art. I, Section 13 of the Indiana Constitution.¹⁰⁹ This statute allows for a statement or videotape to be admitted in a criminal case if the court finds that the child is unavailable as a witness.¹¹⁰ The statute defines a witness as unavailable in

108. 517 N.E.2d 64 (Ind. 1987) This case involved the videotaping of a five-year-old victim's testimony before trial. When the trial court found that the child was unavailable to testify at trial, the tape was admitted into evidence.

109. *Id.* at 72. The court held that Indiana Code § 35-37-4-6 was not unconstitutional per se under the United States' or Indiana's confrontational right. However, the facts of this case revealed that the defendant did not have an opportunity to cross-examine the victim, as required by the statute. Therefore, the court held that the statute was not unconstitutional but the defendant must have an opportunity to cross-examine the victim. Thus, the court ordered a new trial because the defendant did not have the opportunity to cross-examine the witness. For the text of Indiana Code § 35-37-4-6 see *infra* note 110.

110. The Indiana Code § 35-37-4-6 provides:

Sec. 6. (a) This section applies to a criminal action under the following:

- (1) Sex crimes (IC 35-42-4).
 - (2) Battery upon a child (IC 35-42-2-1(2)(B)).
 - (3) Kidnapping and confinement (IC 35-42-3).
 - (4) Incest (IC 35-46-1-3).
 - (5) Neglect of a dependant (35-46-1-4).
 - (6) An attempt under IC 35-41-5-1 for an offense listed in subdivisions (1) through (5).
- (b) As used in this section, "protected person" means:
- (1) a child who is less than fourteen (14) years of age; or
 - (2) a mentally disabled individual who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:
 - (A) is manifested before the individual is eighteen (18) years of age;
 - (B) is likely to continue indefinitely;
 - (C) constitutes a substantial handicap to the individual's ability to function normally in society; and
 - (D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.
- (c) A statement or videotape that:
- (1) is made by a person who at the time of trial is a protected person;
 - (2) concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the person; and
 - (3) is not otherwise admissible in evidence;
- is admissible in evidence in a criminal action for an offense listed in subsection (a) if

three ways: (1) a psychiatrist certifies that the child's participation in trial would be traumatic; (2) a physician certifies that the child cannot participate in the trial for medical reasons; or (3) the court determines that the child is incapable of understanding the nature and obligation of an oath.¹¹¹ If the court finds that any one of these three conditions exists, the child will be declared unavailable as a witness. So long as the videotaped testimony demonstrates sufficient reliability, it will be admitted.¹¹² However, the court in *Miller* held that this statute is constitutional only if the defendant has the opportunity to cross-examine the witness.¹¹³

The *Miller* court stated that the legislature intended the hearing on the admissibility of a statement or videotape to be adversarial in nature with full confrontation between the defendant and the child.¹¹⁴ The problem with full

the requirements of subsection (d) are met.

(d) A statement or videotape described in subsection (c) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:

(1) the court finds, in a hearing:

- (A) conducted outside the presence of the jury; and
- (B) attended by the protected person; that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability;

(2) the protected person:

- (A) testifies at the hearing described in subdivision (1); or
- (B) was available for face-to-face cross-examination when the statement or videotape was made; and

(3) the protected person is found by the court to be unavailable as a witness because:

- (A) a psychiatrist, physician, or psychologist has certified that the participation of the protected person in the trial creates a substantial likelihood of emotional or mental harm to the protected person;
- (B) a physician has certified that the protected person cannot participate in the trial for medical reasons; or
- (C) the court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney at least ten (10) days before the trial of:

- (1) his intention to introduce the statement or videotape in evidence; and
- (2) the content of the statement or videotape.

IND. CODE ANN. § 35-37-4-6 (West 1986 & Supp. 1992).

111. *Id.* at § 35-37-4-6 (d)(3)(A), (B) and (C).

112. *Id.* at § 35-37-4-6 (d)(1)(B) and (d)(3).

113. *See Miller*, 517 N.E.2d at 74. The court viewed cross examination of the witness as requiring a face-to-face confrontation.

114. *Id.* at 70. The court also stated that when the legislature first introduced the statute it required no confrontation, but was amended to give the defendant notice and an opportunity to be present at the hearing. The statute also requires that the child testify at the hearing, be available for cross-examination, or be found unavailable as a witness in order to admit the statement or videotape

confrontation between the defendant and the victim in such cases is that the confrontation can be so traumatic that the victim will either not tell the truth or not be able to testify in the defendant's presence.¹¹⁵ Therefore, some precautions may be necessary to protect these children from the trauma and stress resulting from confrontations with their abuser. The statute examined in *Miller* is deficient in this regard because it requires the child to confront the defendant if the videotape statement is allowed.¹¹⁶ If the Indiana Supreme Court were to take a broader view of the defendant's "face-to-face" right to confrontation, the child victim could be spared the trauma of facing the defendant.¹¹⁷

The statute used in *Miller* is very similar to the one used in *Brady*.¹¹⁸ The statute used in *Brady* was Indiana Code Section 35-37-4-8, which allows a victim's testimony to be recorded outside the courtroom and transmitted to the court via closed-circuit television.¹¹⁹ A child who is permitted to give testimony outside of the courtroom by closed-circuit television is much like the child that is declared unavailable in *Miller* under Indiana Code Section 35-37-4-6.¹²⁰

The significant difference between the statutes is that Section 35-37-4-6 requires the defendant and the child victim to confront one another in a hearing before the child is determined to be unavailable as a witness.¹²¹ Section 35-37-4-8, on the other hand, allows the child victim to testify by closed-circuit

into evidence, *see supra* note 110 at § 35-37-4-6 (d)(2)(A) and (B) and (d)(3)(A),(B) and (C).

115. *State v. Jones*, 367 S.E.2d 139, 141 (N.C. Ct. App. 1988). In this case a psychologist testified that the child sexual abuse victim exhibited intense fear of the defendant and if forced to testify in the defendant's presence, the child could suffer emotional harm. Therefore, the judge required the defendant to view the child's testimony on a closed-circuit television in the judge's chambers. *See also*, *State v. Chisholm*, 755 P.2d 547, 549 (Kan. 1988). The child victim was confronted with the defendant at a preliminary hearing where she was frightened by him and overwhelmed by the courtroom. She was unable to say much, so the State argued that the child victim should not be forced to testify in front of the defendant again. The court found because there was such a great discrepancy between the victim's demeanor when confronted with the defendant and when apart from him that it would be appropriate for the child to testify on closed-circuit television.

116. *See supra* note 110 at § 35-37-4-6 (d)(a).

117. *See supra* note 115. In *State v. Jones*, 367 S.E.2d 139 (N.C. Ct. App. 1988), the court prevented the child from ever facing the defendant by allowing the child to testify through a closed-circuit television setup and the court held this did not violate the United States Constitution nor North Carolina's Constitution.

118. *See supra* note 97 and note 110 for the text of these two Indiana statutes.

119. *See supra* note 97.

120. *See supra* note 97, at § 35-37-4-8(e)(1)(B)(i),(ii) and (iii) and note 110 at § 35-37-4-6(d)(3)(A),(B) and (C).

121. *See supra* note 110, at § 35-37-4-6 (d).

television, without confronting the defendant face-to-face.¹²² This difference provided the rationale used in *Brady* to state that the statute in *Miller* was "significantly different" than the one in *Brady*.¹²³ Therefore, the *Miller* statute was not very influential in the *Brady* decision.

Both Indiana Code Section 35-37-4-8 and Indiana Code Section 35-37-4-6 allow for cross-examination of the witness. In *Miller*, the defendant and his attorneys were able to be physically present during the videotaped testimony.¹²⁴ Although the videotaping used in *Brady* does not allow for the defendant to be physically present during the cross-examination of the witness, the defendant's right to confront is observed by the defense attorney's opportunity to be physically present at this time.¹²⁵ Even though only the defendant's attorneys are physically present during the child's testimony, the accused can communicate with his attorneys via a microphone hook-up and can participate in the cross-examination.¹²⁶ Therefore, this seems to be as constitutional as Indiana Code Section 35-37-4-6, if the face-to-face requirement is not interpreted literally. In addition, Indiana Code Section 35-37-4-8 allows for cross-examination without any face-to-face intimidation.

B. *United States' Constitution Sixth Amendment Compared to Indiana's Confrontation Clause*

In *Maryland v. Craig*,¹²⁷ the United States Supreme Court stated that the primary purpose of the Sixth Amendment Confrontation Clause is to subject witnesses to vigorous cross-examination and ensure the reliability of the evidence against a criminal defendant.¹²⁸ The Supreme Court also stated that the Sixth Amendment guarantees a defendant's right to a face-to-face meeting with a witness, but this physical presence is only one of four elements that

122. See *supra* note 97.

123. *Brady v. State*, 575 N.E.2d 981, 985 (Ind. 1991). Because the statute in *Miller* provided for a face-to-face confrontation as strictly defined by the court, it was held constitutional, where the statute in *Brady* never allowed for a face-to-face confrontation.

124. See *Miller*, 517 N.E.2d at 74. This statement views cross-examination as the defendant having an opportunity to question the witness, not as having the right to confront the witness eye-to-eye or face-to-face.

125. See *supra* note 97 § 35-37-4-8(h)(1)-(3). Note that (h)(2) allows for the defendant to be present if the defendant is proceeding pro se.

126. See *Brady*, 575 N.E.2d at 984. (allowed the defendant to communicate with his attorney through the use of a microphone hook-up).

127. 110 S. Ct. 3157 (1990).

128. *Id.* at 3163.

ensure reliability.¹²⁹ The Court held that a defendant's right to a face-to-face confrontation can be outweighed by the need to protect the child.¹³⁰ Because three of the four criteria for the Confrontation Clause would still be met,¹³¹ the closed-circuit television evidence would be considered both reliable and admissible.¹³² Balancing the defendant's confrontation right with the necessity to protect the child victim has never yet been applied. However, it now seems to be a large factor considered by the courts in child sexual assault cases.

Even though the Sixth Amendment confrontation right is very similar to the confrontation right in Indiana's Constitution, the Indiana Supreme Court has not balanced the defendant's right to confrontation against the child's right to be protected. Instead, the Indiana Supreme Court declared that the Indiana statute that protects child victims is unconstitutional,¹³³ despite the fact that the statute is similar to the one upheld in *Maryland v. Craig*.¹³⁴ These two similar statutes had opposite rulings due to different wording and different interpretation of the Confrontation Clause by the United States Supreme Court and the Indiana Supreme Court.¹³⁵ The Court in *Craig* reasoned that the reliability of the evidence against a defendant is insured by the combined effects of the four elements of confrontation.¹³⁶ The Supreme Court stated that the right to a face-to-face meeting is dispensable.¹³⁷ If this "face-to-face" wording were

129. *Id.* The other three elements guaranteed by the Confrontation Clause are: (1) placing the witness under oath; (2) cross-examining the witness; and (3) permitting the jury to view the demeanor of the witness. *See also* *California v. Green*, 399 U.S. 149, 158 (1970) (stating the similar objectives of the confrontation right).

130. *Id.* at 3170. This suggests that the Supreme Court is going to be applying a balancing test. Today, it appears that the Court will weigh the defendant's rights and the child's interests that trauma impairs the child's ability to communicate.

131. *Id.*

132. *Id.* The Court stated because the child witnesses testified under oath, were cross-examined and were able to be observed by the jury and the defendant, the admission was consistent with the Confrontation Clause.

133. *Brady v. State*, 575 N.E.2d 981 (Ind. 1991) (declaring Indiana Code § 35-37-4-8 unconstitutional as the statute violated the Indiana Confrontation Clause, but not the federal Confrontation Clause).

134. 110 S. Ct. 3157 (1990). *See supra* note 81 for the text of the Maryland statute and note 97 for the Indiana statute. These statutes both allow for the child to give his testimony outside of the courtroom and both provide for cross-examination by defense counsel. However, if the defendant is an attorney pro se then neither statute applies. The statute in Maryland requires that the child suffer serious emotional distress such that the child cannot reasonably communicate. *See supra* note 81, at § 9-102 (a)(1)(ii). The statute in Indiana requires that the child be a protected person as defined by § 35-37-4-6. *See supra* note 110, at § 35-37-4-6(b)(1) and (2).

135. *See supra* note 12 for the text of the United States Constitution's Confrontation Clause and *supra* notes 63 and 64 for the text of the Indiana Confrontation Clause.

136. *Id.* at 3163. The four elements are physical presence, oath, cross-examination and observance of witness demeanor.

137. *Id.* at 3166.

interpreted literally, this right would abolish every hearsay exception in criminal cases.¹³⁸

The Indiana Confrontation Clause directly states that a face-to-face confrontation is required.¹³⁹ The drafters of the Indiana Constitution were likely guided by a desire to provide protection similar to that of the Sixth Amendment in the United States Constitution.¹⁴⁰ With the words "face-to-face" expressly stated, the Indiana Constitution implies that physical presence primarily assures the reliability of the evidence against the defendant. Yet, the court contradicted this implication when it declared that cross-examination is the primary interest secured by the confrontation right in Indiana's Constitution.¹⁴¹ Also, Indiana recognizes many of the same hearsay exceptions as the Federal Rules of Evidence, which would have to be abolished if the face-to-face provision was always applied literally.¹⁴²

Therefore, it is reasonable that the face-to-face requirement is not to be strictly interpreted. Assuming that the Confrontation Clause in Indiana's Constitution is patterned after the Sixth Amendment, the Indiana Supreme Court should also be willing to balance the interests of protecting the child sexual abuse victim against the defendant's confrontation right. This balancing test allows an exception to the face-to-face meeting when the interests of protecting a child victim outweigh the defendant's rights. Of course, this presupposes that the other elements of confrontation, such as oath, cross-examination, and observance of the child witness by the jury are met.

C. States with Similar Statutes and Constitutions

Other states with similar constitutional provisions and closed-circuit

138. *Id.* at 3165. See *supra* note 66 for hearsay exceptions; *Bourjaily v. United States*, 438 U.S. 171 (1987) (held that hearsay statements of nontestifying co-conspirators are admissible against a defendant even though there is no face-to-face encounter with the accused); *United States v. Inadi*, 475 U.S. 387 (1986) (also held that the co-conspirator exception was constitutional).

139. IND. CONST. art. I, § 13. See *supra* notes 63 and 64 and accompanying text for the substance of this clause.

140. *Brady v. State*, 575 N.E.2d 981 (Ind. 1991) (Krauhulik, J., dissenting). In the dissent, Justice Krauhulik states that the framers' intent was never adequately recorded, and therefore, it can be assumed they followed the form and substance of the Sixth Amendment's confrontation right.

141. *Id.* at 991 (citing *Miller*). Therefore, the court views cross-examination as the primary interest of the Confrontation Clause even though those words are not expressly stated as is "face-to-face."

142. Some of the hearsay exceptions that would be abolished if the face-to-face language were interpreted literally are: prior recorded testimony of an unavailable witness (due to death, illness, etc.), prior inconsistent and out-of-court statements of a testifying witness, testimony of nontestifying co-conspirators, and dying declarations.

television laws have upheld these statutes.¹⁴³ If one can establish that a child's interests are at risk, it is constitutional to allow this out-of-court testimony without infringing on the defendant's confrontational rights. The Kentucky Constitution provides: "In all criminal prosecutions, the accused has a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face-to-face, and to have compulsory process for obtaining witnesses in his favor."¹⁴⁴ In *Commonwealth v. Willis*,¹⁴⁵ the Kentucky Supreme Court held that a closed-circuit television statute did not violate the Kentucky or the United States Constitutions' face-to-face confrontational rights.¹⁴⁶

In *Willis*, the court stated that there is no state constitutional right to an "eyeball to eyeball" confrontation, and the words "face-to-face" may have resulted from an inability of the legislature to foresee technological advances that

143. The following is a list of state constitutions that have "face-to-face" expressly stated within their confrontation clauses. For specific statutory cites see *supra* note 7.

ARIZ. CONST., art. II, § 24; FLA. CONST. art. I, § 16; KY. CONST. § 11; MASS. CONST., part I, art. XII; PA. CONST., art. I, § 9; KANS. CONST. Bill of R., § 10. The preceding states have statutory procedures that allow for the child not to see or hear the defendant. WIS. CONST., art. I § 7. This state's statute allows for the court's discretion in deciding if a separation of the child and defendant is necessary.

Kentucky held that their statute was constitutional in *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986) (held both a one-way closed-circuit television statute and a screen between a child witness and the defendant were both constitutional). See *infra* notes 144-154 and accompanying text. Arizona has ruled on the constitutionality of its statute in *Arizona v. Vincent* 768 P.2d 150 (Ariz. 1989). In *Vincent*, the statute at issue covered both child victims and witnesses of crimes. The facts of the case were that Vincent was convicted of murdering his wife and his two children testified about the murder by a videotaped procedure. The Supreme Court of Arizona overruled his conviction because the trial court made no specific finding that these children needed protection. Therefore, they held the statute would be constitutional if the trial court were required to do so.

Florida ruled that its statute allowing hearsay statements of child sexual abuse victims was constitutional in *Perez v. State*, 536 So.2d 206 (Fla. 1988). In *Glendening v. State*, 536 So.2d 212 (Fla. 1988), the Florida Supreme Court ruled that its videotape statute that required the defendant to observe the child's testimony in another room was constitutional, even though only a moderate finding was made that the child victim would suffer harm from testifying in open court. The court stated that the defendant's confrontation right must yield to the state's interest in protecting children from the trauma of in-court testimony. *Id.* at 217. *But cf.* *Commonwealth v. Bergstrom*, 524 N.E.2d 366 (Mass. 1988) (held that a one-way closed-circuit television statute was unconstitutional because the court found the Massachusetts Constitution did not provide a basis for special treatment of one category of witnesses [children] over others).

144. KY. CONST. § 11.

145. 716 S.W.2d 224 (Ky. 1986) A five-year-old child said that she did not want to testify in front of the defendant because she feared that he would hurt her. Therefore, the Kentucky Supreme Court ruled that taking a child's testimony on closed-circuit television is constitutional if it is demonstrated that the child needs such protection. *Id.*

146. *Id.* at 232 (held that a closed circuit television system (as in *Maryland v. Craig*) and a screen between the defendant and the victim (as in *Coy v. Iowa*) were both constitutional under the federal and state constitutions).

permit cross-examination and confrontation without physical presence.¹⁴⁷ The court stated that when these constitutions were written, the only way a jury could observe the demeanor of a witness was through live testimony.¹⁴⁸ The court reasoned that the only infringement on the defendant's right of confrontation in allowing videotape testimony is that the child is not required to hear or see the defendant.

Willis is very similar to the *Brady* case, in that the statutes and constitutions under analysis are almost identical.¹⁴⁹ Both statutes were designed to protect

147. *Id.* at 230. See also *Brady*, 575 N.E.2d at 992 (Krahlulik, J., dissenting).

148. *Willis*, 716 S.W.2d at 230.

149. KY. REV. STAT. ANN § 421.350(3)-(5) (Baldwin 1991). The Kentucky statute provides: § 421.350 Testimony of child allegedly victim of illegal sexual activity

(3) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(4) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(5) If the court orders the testimony of a child to be taken under subsection (3) or (4) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken.

See *supra* note 97 for the text of the Indiana statute. These statutes are very similar except that the Kentucky statute allows for the defendant to see the child's testimony in person, but this is done in such a way that the child cannot hear or see the defendant. This is presumably done by a screen placed between the two. See § 421.350(4) this note.

See *supra* note 144 and accompanying text for the Kentucky Constitution and see *supra* notes 63 and

children from trauma and to ensure the reliability of their testimony. Yet the Kentucky Supreme Court held that closed-circuit television did not violate the defendant's right to confrontation in either the Sixth Amendment or the Kentucky Constitution.¹⁵⁰ By contrast, the Indiana Supreme Court held that Indiana's closed-circuit statute violated the State Constitution. The ruling in *Brady* ignores the argument that the historical background of the Indiana Confrontation Clause's "face-to-face" wording suggests that it should not be interpreted literally.¹⁵¹

Furthermore, the *Willis* court stated that there is "no authority under traditional courtroom procedures which specifically requires any witness to look at the defendant."¹⁵² The court further stated that no witness has ever been disqualified for not looking at the defendant. If this were true, no blind person could ever testify in court.¹⁵³ By analogy, the defendant's right to confrontation is not denied when a child sexual assault victim's testimony is taken in such a way that the child cannot see or hear the defendant.¹⁵⁴ If the court in *Brady* would have followed this reasoning, Indiana's videotape statute would have been declared constitutional as a balance between the interests of the defendant and the interests of the child.¹⁵⁵

New Jersey also has achieved a balance between the defendant's rights and the child's rights. New Jersey has a videotape statute similar to the Indiana and Kentucky statutes, but it does not have the face-to-face requirement expressly stated in its constitution.¹⁵⁶ In *State v. Sheppard*,¹⁵⁷ the New Jersey

64 and accompanying text for the Indiana Constitution.

150. *Willis*, 716 S.W.2d at 232.

151. See *supra* notes 65, 66, and 138-42 and accompanying text.

152. *Willis*, 716 S.W.2d at 231. See also *Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988). "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."

153. 716 S.W.2d at 231. This example of a blind witness shows how carrying the face-to-face wording to its literal extreme can be very illogical. Requiring both the defendant and the child abuse victim to look at each other is a physical impossibility in the case of a blind person.

154. *Id.*

155. *Id.* This is what Kentucky has done as a compromise or balance between these competing interests.

156. N.J. CONST. art. I, § 10. "In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him." This is identical to the United States Constitution's Confrontation Clause, see *supra* note 12.

N.J. STATE ANN. § 2A:84A-32.4 (West Supp. 1991). The New Jersey statute provides:

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or child abuse, or in any action alleging an abused or neglected child under P.L. 1974, c. 119 (C. 9:6-8.21 et seq.), the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a witness on closed circuit television at the trial, out of the view of the jury, defendant, or spectators upon making findings as provided in subsection b. of this

Supreme Court held that the use of videotaped testimony of a child victim would be permitted because it would not unduly inhibit the defendant's confrontation right.¹⁵⁸ In *Sheppard*, the court made a detailed showing of the extensiveness of the problem of child sexual assault and how the legal system puts the child victims in these cases under great emotional and mental stress.¹⁵⁹ The court stated that, since the risk to the child victim of being subjected to face-to-face testimony is too great, a different option that will not significantly impair the defendant's rights is dictated.¹⁶⁰

The New Jersey Supreme Court decided that one option to protect the defendant's rights and the interests of the child was to videotape the child's testimony.¹⁶¹ In this case, the defendant's rights are not substantially impaired because confrontation is merely another term for the test of cross-

section.

b. An order under this section may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order shall be specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact of the presence of each.

c. A motion seeking closed circuit testimony under subsection a. of this section may be filed by:

- (1) The victim or witness or the victim's or witness's attorney, parent or legal guardian;
- (2) The prosecutor;
- (3) The defendant or the defendant's counsel; or
- (4) The trial judge on the judge's own motion.

d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.

e. If testimony is taken on closed circuit television pursuant to the provisions of this act, a stenographic recording of that testimony shall also be required. A typewritten transcript of that testimony shall be included in the record on appeal. The closed circuit testimony itself shall not constitute part of the record on appeal except on motion for good cause shown.

157. 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

158. *Id.* at 1348 (The court also held that the defendant had waived his confrontation right by making threats to kill the victim).

159. *Id.* at 1344. See also Dustin P. Ordway, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131 (1981) (The article states that child witnesses in general have a subjective sense of time and a poor memory. These are intensified in a child incest victim because it is difficult to communicate what they do not understand or what frightens them.).

160. *Sheppard*, 484 A.2d at 1343.

161. *Id.* at 1334.

examination.¹⁶² This suggests that the main right of confrontation is to be able to cross-examine, not observe, the witness.

In *Brady*, the defendant had a chance to cross-examine the child through his attorney, the jury was able to view the child witness's demeanor, and the child was under oath. Therefore, the only element lacking was a face-to-face confrontation, which, as the court suggested in *Sheppard*, is not a substantial impairment of the defendant's rights.

D. Comparisons to Indiana's Civil Law

One situation in which Indiana protects children from confrontation is civil custody cases. Child custody cases are civil suits and therefore do not involve the confrontation clause.¹⁶³ However, these two areas of the law are worth comparing because Indiana has offered children greater protection in some of these civil law areas. Indiana passed a statute that allows the court in child custody cases to interview a child in the judge's chambers.¹⁶⁴ Many cases have examined this statute and held that the interview in chambers is a vital element in determining what is in the best interests of the child.¹⁶⁵

In the case of *In Re Marriage of Saunders*,¹⁶⁶ the court stated that allowing in-camera interviews with children gives the judge the opportunity to

162. JOHN H. WIGMORE, 5 EVIDENCE § 1365 at 27 (Little, Brown & Co. 1940) (Wigmore states that confrontation is essential only because it is a "preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential." *Id.*).

163. See U.S. CONST. amend. VI and IND. CONST. art. I, § 13. These amendments apply only in criminal prosecutions.

164. IND. CODE ANN. § 31-1-11.5-21 (Burns 1991). The relevant parts of the Indiana statute provide:

31-1-11.5-21. Child custody order—Best interests of child—considerations—Joint legal custody

(a) The court shall determine custody and enter a custody order in accordance with the best interests of the child.

(d) The court may interview the child in chambers to ascertain the child's wishes. The court may permit counsel to be present at the interview, in which event a record may be made of the interview and the same may be made for purposes of appeal.

(e) The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination of any professional personnel consulted by the court.

165. *Simons v. Simons*, 566 N.E.2d 551 (Ind. 1991); *Thompson v. Thompson*, 550 N.E.2d 1332 (Ind. Ct. App. 1990); *Matter of Paternity of Fox*, 514 N.E.2d 638 (Ind. Ct. App. 1987); *In Re Marriage of Saunders* 496 N.E.2d 419 (Ind. Ct. App. 1986); *Truden v. Jacquay*, 480 N.E.2d 974 (Ind. Ct. App. 1985).

166. 496 N.E.2d 419 (Ind. Ct. App. 1986).

fulfill his duties without placing the child in an "adversative position between battling parents."¹⁶⁷ The court reasoned that assuring the child that his statements will be strictly confidential facilitates determination of the child's best interests.¹⁶⁸ The court held that the entire trial record supported the court's custody determination, and this decision was not based solely on the in-camera interview.¹⁶⁹ Therefore, the court did not abuse its discretion.¹⁷⁰

Similarly, in *Blue v. Brooks*,¹⁷¹ the court stated that the confidential interviews between the court and the children should be encouraged because it enables the court to ascertain the best interests of the child without the constraints of open court with both parents and witnesses present.¹⁷² The court held that so long as the trial court's decision does not rest solely upon an in-chambers interview, the evidence gathered in-chambers can be excluded from the record.¹⁷³ The court stated that the statute gives the trial court full discretion in deciding whether the counsel should be present or whether the interview should be recorded.¹⁷⁴ Allowing children to state their wishes in a child custody case is analogous to the closed-circuit television testimony in that the child in each case is benefitted by being separated from the defendant or parents.¹⁷⁵ In a child sexual abuse case under a closed-circuit television statute, the defendant is able to see the child witness, have an attorney cross-examine the child, and have the jury view the child witness' demeanor. However, in child custody cases, the judge may interview the child without

167. *Id.* at 421 (quoting from *Watkins v. Watkins*, 47 N.E.2d 606 (Ind. 1943)).

168. *Id.* Just as determining the child's best interests is facilitated by protecting the child's statements with confidentiality, so to is the child sexual abuse victim's best interests protected by a separation between the child and the defendant.

169. *Id.* at 421-22. *See also* *Truden v. Jacquay*, 480 N.E.2d 974 (Ind. Ct. App. 1985) (The court found no error in the trial court's decision to hold the in-camera interview off the record and to not use questions proposed by either parent during the interview. The court stated "the father's attempt to direct the questions put to the children and to offer rebuttal to their responses would put the children in precisely the sort of adversative position the statute seeks to avoid." *Id.*)

170. *In Re Marriage of Saunders*, 496 N.E.2d at 422.

171. 303 N.E.2d 269 (Ind. 1973).

172. *Id.* at 272. These constraints of open court with parents and witnesses present are similar to the constraints that exist in a child sexual abuse victim's testimony. Therefore, a separation as in these child custody cases can also be beneficial for these child sexual abuse victims.

173. *Id.* *See also* *Watkins v. Watkins*, 47 N.E.2d 606 (Ind. 1943) (held that a judgment could not be based solely upon an extra-judicial inquiry).

174. *Blue*, 303 N.E.2d at 272. *See supra* note 164 § 31-1-11.5-21(d). *See also* Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988) (A survey of judges in Virginia who decide custody cases found that two-thirds prefer an interview of the child in chambers to determine the child's best interests.).

175. Although the child custody suit is civil and the child sexual abuse case is criminal, it is still worth comparing the two. The parents in the civil case and the defendant in the criminal case both face important consequences. Each parent has the potential to lose the right to raise their children and the defendant may be sentenced to prison.

parents or attorneys present, and the judge may decide not to record it.¹⁷⁶ The parent who loses custody could argue that the opportunity to question or rebut the child's responses should have been available. Yet, this procedure is allowed in Indiana.

However, Indiana does not allow a victim's testimony by closed-circuit television, even though it provides the defendant in a criminal sexual abuse case with the opportunity to cross-examine the witness while under oath and have the witness viewed by the jury. If the concern is to protect children from the trauma of being in an adversarial position, then there seems to be an equal rationale for protecting a child in a sexual abuse case, just as the child is protected in a custody case. Opponents contend that the potentially severe consequences of a criminal suit justify this lack of protection for the child. But to a parent, losing custody of a child may be just as severe as a prison sentence. Therefore, child victims of sexual abuse deserve the same protection as children in custody cases.

Another area of Indiana civil law that has protected children is the Child in Need of Services (CHINS) program implemented by Child Protective Services (CPS).¹⁷⁷ If parents are abusing or neglecting a child, the state welfare department can bring suit against the parents to prevent them from continuing their abuse. The court appoints a special advocate¹⁷⁸ for the child, who testifies on the child's behalf in court.¹⁷⁹ The CHINS program provides

176. See *supra* note 164, at § 31-1-11.5-21(d).

177. IND. CODE ANN. § 31-6-4-3 (West Supp. 1991).

178. The court can appoint a special advocate or a guardian ad litem for the abused child. IND. CODE ANN. § 31-6-1-12 defines a court appointed special advocate (CASA):

a court appointed special advocate means a community volunteer: who has completed a training program approved by the court; and who has been appointed by a court represent and protect the best interests of a child and to provide that child with services requested by the court.

IND. CODE ANN. § 31-6-1-12 (West Supp. 1991).

IND. CODE ANN. § 31-6-1-18 defines a guardian ad litem (GAL):

"Guardian ad litem" means an attorney or a volunteer appointed by a court to represent and protect the best interests of a child and to provide that child with services requested by the court. A guardian ad litem who is a volunteer must complete the same court approved training program that is required for a court appointed special advocate under IC 31-6-1-12.

IND. CODE ANN. § 31-6-1-18 (West Supp. 1991).

179. IND. CODE ANN. § 31-6-3-4 states:

(a) The juvenile court may appoint a guardian ad litem or a court appointed special advocate, or both, for the child at any time. A guardian ad litem or court appointed special advocate need not be an attorney, but the attorney representing the child may be appointed the child's guardian ad litem or court appointed special advocate.

(b) A guardian ad litem or court appointed special advocate shall represent and protect the best interests of the child. A guardian ad litem or court appointed special advocate serves until the juvenile court enters an order for discharge under IC 31-6-4-19(g).

children with protection from testifying in court for many of the same reasons that the criminal statutes were designed to protect children of sexual abuse crimes.¹⁸⁰ In a CHINS case, as in a child sexual abuse case, "there is usually a bond between the victim and the defendant, making it difficult to testify against the defendant."¹⁸¹ In a CHINS case, the child is given substantial protection while giving testimony. Similarly, this protection should also extend to the child victims of sexual abuse.

V. EXISTING SOLUTIONS TO THE CONFLICT OF INTERESTS

A. Two-Way Closed-Circuit Television

One system that has been established to ease the traumatic experience of a victim's testimony is a two-way closed-circuit television setup.¹⁸² This system requires the child to view the defendant on a television screen while the defendant and jury are viewing the victim's testimony on a screen from the courtroom.¹⁸³ This proposal is of great significance as it was proposed by the

IND. CODE ANN. § 31-6-3-4(a)-(b) (West Supp. 1991).

180. Peg Wisneski, Director of the CASA program and Associate Director for the Youth Services Bureau of Porter County, Inc., said, "These statutes were all designed to protect a child and to make it easier to gather the child's testimony." She also stated the reasons why such protection was necessary: "We teach our children to obey authority figures and it is extremely difficult to testify against these people. There is usually a bond between the victim and the defendant making it difficult to testify against the defendant. Also, often the child is made to feel guilty and responsible for this abuse." Telephone Interview with Peg Wisneski, Director of the CASA program and Associate Director for the Youth Services Bureau, Porter County, Inc., in Porter County, Indiana (February 11, 1992).

181. *Id.*

182. See *supra* note 7 for a list of the states that have two-way closed-circuit television statutes. See also Maria H. Bainor, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995 (1985) (The author asserts that this system strikes the most acceptable balance between the defendant's confrontation right and the state's interest in protecting children).

183. See Bainor, *supra* note 182, at 1011. (Bainor's proposed setup would be to have the bailiff and parent accompany the child in a room separate from the defendant. The child would face television monitors that show the defendant, jury, judge and attorneys, who would all view the child on a separate monitor in the main courtroom. Bainor also states that the prosecutor would have to show by a preponderance of the evidence that the closed circuit setup is necessary to prevent substantially compounded trauma in the child.) See also N.Y. CRIM. PROC. LAW § § 65.00 to 65.30 (McKinney Supp. 1992). In Vermont, the state also has a two-way closed-circuit law, VT. R. EVID. 807 (1985). However, this law seems to be a hybrid of the one-way and a two-way closed circuit statutes. The rule states that the defendant's image should be transmitted to the child so the child can see and hear the defendant. In the event the court finds that requiring the child to hear and see the defendant would create a substantial risk of trauma to the child which would impair the child's testimony, the court may rule that the defendant's image not be transmitted to the child. VT. R. EVID. 807.

Indiana Supreme Court in *Brady*.¹⁸⁴

The obvious advantage of the two-way closed-circuit television statute is that it meets the defendant's right to a literal face-to-face confrontation as stated in the Indiana Constitution.¹⁸⁵ However, there is a substantial disadvantage to the child who is required to view the defendant. The video confrontation increases the risk of trauma to the child, exactly the risk that the statute was designed to avoid.¹⁸⁶ Thus, these statutes are deficient in protecting child sexual abuse victims because they require victims to hear and see the defendant.

B. Videotaped Depositions

Another system that has been utilized to protect child victims of sexual abuse is audio or videotaping a child's statements and testimony before trial and then playing them in the courtroom.¹⁸⁷ States vary on how these statutes are implemented. In some states the procedure is that the child is behind a one-way mirror and does not have to hear or see the defendant,¹⁸⁸ but in other states the defendant's face-to-face confrontation with his accuser is required at the

184. See *Brady*, 575 N.E.2d at 989 (Ind. 1991) (The court stated that a two-way closed-circuit television statute would provide the defendant a face-to-face confrontation as required by the constitution and at the same time it would reduce the trauma of the child.)

185. *Id.*

186. See *supra* note 183 where the Vermont rule makes a specific provision to protect a child from trauma if the court finds the defendant's presence will harm the child. If the court makes this type of finding then the defendant's presence on the television screen is not required. However, this is an exception to the procedure practiced in most other states. Most states with a two-way closed-circuit television statute require that the defendant's image be transmitted to the child. See *supra* note 7 for a listing of these states.

187. See *supra* note 3 (listing statutes that authorize videotaped depositions).

188. See ARIZ. REV. STAT. ANN. § 13-4253(B)-(C) (1989); FLA. STAT. ANN. § 92.53 (WEST SUPP. 1992); VT. R. EVID. 807 (1985). These statutes all provide that the defendant be allowed to see and hear the child but the child is not required to hear and see the defendant. The Arizona statute makes this a necessary element of the procedure. In Vermont and Florida's laws this separation will only take place if the court finds that this confrontation between the defendant and the child victim will create a substantial risk of trauma to the child which would impede the child's testimony. Because the Arizona law did not require a court finding that the specific victims or witnesses needed special protection, it was found to be unconstitutional. See *Arizona v. Vincent*, 768 P.2d 150, 160-61 (Ariz. 1989). Vincent was convicted for the murder of his wife based in part on the videotaped testimony of his two children. Because the trial court made no particularized finding that these children needed special protection, the conviction was reversed and remanded. See also *State v. Vess*, 756 P.2d 333 (Ariz. Ct. App. 1988) (conviction for child molesting based on the victim's videotaped testimony was reversed because no finding was made concerning the need to protect the child from undue trauma).

taping.¹⁸⁹

These statutes have the same advantage and disadvantage as the two-way closed-circuit television statutes. The advantage is that laws that require the defendant's presence meet all four of the stated objectives of the right to confrontation.¹⁹⁰ The disadvantage is that if these laws require a face-to-face confrontation at the videotaping, they fail to adequately protect the child.¹⁹¹ Statutes that do not require the child to hear or see the defendant protect the child while also allowing for effective cross-examination without witness intimidation.

C. One-Way Closed-Circuit Television

One-way closed-circuit television is another solution offered for protecting child sexual assault victims.¹⁹² This method allows the child's testimony to be broadcast on a screen in the courtroom for the defendant and jury to see, but the child is not required to hear or see the defendant. This type of statutory solution was at issue in *Brady v. State*.¹⁹³ The court in *Brady* found that this solution violated the defendant's confrontational right because there was not a face-to-face confrontation as required by the Indiana Constitution.¹⁹⁴ However, other states have found that one-way closed-circuit statutes do not violate the defendant's confrontational right because the defendant is still allowed to view the witness' demeanor and communicate with the defense attorneys

189. See ALA. CODE § 15-25-3 (Supp. 1991); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1991); Wis. Stat. Ann. § 967.04(7)-(10) (West Supp. 1991). The Alabama statute requires the defendant's presence at the videotaped deposition. In Section 967(8)(b)11, Wisconsin's statute seems to give the trial judge discretion concerning whether or not the defendant may or may not be present. The Indiana statute requires that the defendant be at the hearing to determine if the videotape be necessary.

190. See *supra* notes 60-61 and accompanying text listing the four elements of confrontation. These four elements have also been declared essential to Indiana's confrontation rights. However, in *Brady*, the court held that there was a premium upon live testimony and that the right to cross-examine may not be enough to meet the Indiana Constitution's face-to-face requirement. See *Brady*, 575 N.E.2d at 988.

191. See *Miller v. State*, 517 N.E.2d 64 (Ind. 1987) (The court held the videotaped testimony statute was constitutional as long as the defendant had an opportunity to cross-examine the child in a face-to-face pre-trial hearing as established by the statute. However, this requirement puts the child sexual abuse victim under the stress of testifying against the defendant in a face-to-face situation. The trauma the child is put under here contradicts the statute's purpose of protecting these victims).

192. See *supra* note 7 for a listing of these statutes.

193. 575 N.E.2d 981. The court held that Indiana Code § 35-37-4-8 was unconstitutional because it did not allow the defendant to confront his accusers face-to-face. The court found that even though the statute was scrupulously followed, the statute's provisions violated Art. I, § 13 of the Indiana Constitution. *Id.* at 988-89.

194. 575 N.E.2d at 988-89.

about cross-examination.¹⁹⁵

In summary, all of these solutions are beneficial in that they attempt to protect a child from unnecessary trauma. Whether the statute calls for the use of a one-way or two-way closed-circuit television system or videotaping a deposition, the child's interests are the driving force behind the protection.¹⁹⁶ However, when it is shown that a child sexual abuse victim will be put under severe emotional stress and trauma if required to confront the defendant, the two-way closed-circuit television and the videotaped deposition statutes do not provide adequate protection. The necessary protection for the child can only result from a separation of the child and the defendant, which exists in a one-way mirror setup at a videotaped deposition or a one-way closed-circuit television system. However, because Indiana has continued to strictly interpret its face-to-face Confrontation Clause, these statutes do not pass Indiana constitutional muster. Therefore, reform is needed in Indiana's judicial interpretation of the face-to-face requirement.

VI. PROPOSED REFORM

"Truth is the ultimate quest."¹⁹⁷ Since a child victim may be put under emotional stress, the child is often reluctant and even incapable of giving reliable testimony in front of the defendant.¹⁹⁸ Therefore, provisions have been made to protect these children and ensure the reliability of their testimony. The

195. See ARIZ. REV. STAT. ANN. § 13-4253 (1989); FLA. STAT. ANN. § 92.54 (West Supp. 1992); Vt. R. Evid. 807. A variation of these one-way television statutes is to allow for a one-way mirror or a one-way screen to separate the defendant and the child victim. Cf. *Coy v. Iowa*, 108 S. Ct. 2798 (1988). This case involved a one-way screen statute that separated the child and the defendant by a screen so that the child could not see or hear the defendant but the defendant can see and hear the child. See also Libai, *supra* note 6 at 1016-17 for yet another variation. Professor Libai's child courtroom is the modern day equivalent of the one-way mirror statutes. The setup that Libai proposed was having the judge, prosecutor, defense attorney and child examiner all in the judge's room with the child victim. The accused and the jury would be seated in an adjacent room with one-way glass, enabling them to view everything. The defendant is also hooked up by microphone and earphone to his attorney so they can communicate with each other during the testimony. This aspect of the proposal makes it similar to the statute used in *Brady*. Professor Libai also proposed having a special hearing for the victim. Here, Libai says the child's testimony can be given and recorded in the child courtroom before the trial. This way the trauma of testifying over and over is eliminated and the child will testify only this one time and without the defendant present in the same room. This proposal is similar to many states' videotape deposition and testimony statutes, see *supra* note 185-189 and accompanying text.

196. See *supra* note 41. See also *Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986) The court stated that the Kentucky legislature enacted a closed circuit television statute because the legislature accepted the idea that testifying in court "can be one of the most intimidating and stressful aspects of the legal process for children."

197. See *Sheppard*, 484 A.2d at 1343.

198. See *supra* notes 25-38 and accompanying text.

United States Supreme Court and other state courts have held that videotaping and using closed-circuit television to obtain a child victim's testimony is constitutional when the state shows that it is necessary to protect the child's interests.¹⁹⁹ These state courts have held that the taping of testimony does not violate the defendant's right to a face-to-face confrontation of the witness. Other state courts hold that the confrontation right must be balanced with the interests of the child and must give way when the child's well-being is threatened.

Indiana case law has said that a one-way closed-circuit television statute violates the defendant's face-to-face confrontation right because the Indiana State Supreme Court has followed a strict and literal interpretation of the words "face-to-face."²⁰⁰ However, "the right to confront does not confer an automatic right to intimidate."²⁰¹ If Indiana had followed this reasoning, the Indiana Supreme Court would have ruled that the one-way closed-circuit television statute is a valid constitutional approach to meet the defendant's right to confront while protecting the child sexual abuse victim from intimidation. Therefore, the right to confrontation must be balanced with the child's interests in order to achieve a fair result by obtaining the truth.²⁰²

In order to achieve the goal of finding the truth in child sexual abuse cases, reform is needed in judicial interpretation. The strength of any constitution lies in its ability to be flexible, to grow and adapt as society progresses.²⁰³ The Indiana Supreme Court must relax its strict interpretation of the face-to-face element in the Confrontation Clause of Indiana's Constitution. The state can achieve this by implementing a balancing test.

A balancing test is needed in child sexual abuse cases in order to obtain the truth. This is necessary because "in some undefined but real way, recollection, veracity, and communication are influenced by a face-to-face challenge."²⁰⁴ However, a face-to-face confrontation between a child sexual assault victim and defendant can have both positive and negative effects on obtaining the truth. The balancing test must determine when the face-to-face requirement should receive a relaxed interpretation, evaluate all of the interests involved, and balance them to develop the best method of obtaining the truth. This balancing should be done on a case-by-case basis.

199. See *supra* notes 77-85 and accompanying text for United States Supreme Court analysis and see *supra* notes 143-62 and accompanying text for other states analysis.

200. *Brady v. State* 575 N.E.2d 981, 988 (Ind. 1991).

201. See *Willis*, 716 S.W. 2d at 231.

202. *Id.*

203. *Id.*

204. *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979).

One set of interests involved in these cases includes the child's and the legislature's desire for creating a separation between the child and the defendant when it is necessary to obtain the truth and protect the child from trauma and stress.²⁰⁵ Another set of interests is the defendant's confrontation right and the judiciary's interest in strictly construing the face-to-face requirement to maintain the integrity of the Indiana Constitution. The defendant and the judiciary seek to obtain the truth by unveiling falsehoods through a face-to-face confrontation.²⁰⁶ Both interest groups mentioned above attempt to seek the truth and satisfy society's desire to prosecute child sexual abuse offenders. However, strict adherence to either side could lead to erroneous rulings and, at times, suppress the truth.²⁰⁷ The victim's side has certain factors that, when present, may call for a deviation from a strict interpretation of the face-to-face element in the Confrontation Clause.

There are three factors that the court should take into account that increase the probability of harm to the child victim if required to meet the accused face-to-face. The first factor is the nature of the threats that the accused allegedly made to the victim in order to keep the abuse a secret.²⁰⁸ These threats can cause an intense fear in the child victim, and it would be extremely intimidating for the child to defy these threats while in the presence of the perpetrator.²⁰⁹ Therefore, the severity of the threats needs to be considered as an important factor by the court in deciding when a separation of the child and the defendant would be beneficial.

The second factor that should be considered is the child's relationship with the defendant. Child sexual abuse victims are often molested by adults that they know and trust.²¹⁰ This trust, and often affection, for the perpetrator make it especially difficult for the victim to testify and possibly send the molester to jail.²¹¹ Therefore, the closer the relationship between the child and the defendant, the stronger these feelings are, and a separation in these cases is

205. *See supra* note 41.

206. *See supra* note 62 and accompanying text.

207. *See supra* note 49 and accompanying text. Concerning the child's interests and legislative goals, strict adherence to a separation between the child and the defendant could lead to erroneous rulings when the child is coached to lie and a separation from the defendant only makes this task easier. On the other hand, a strict adherence to the face-to-face element that is applied by the Indiana Supreme Court may also lead to an erroneous ruling. The truth may not be reached in cases where the child is so traumatized that, when confronted with the defendant the child will not communicate effectively or where, out of fear from previous threats, the child will change his or her story.

208. *See supra* note 26 and accompanying text (lists the common threats child molesters use with their victims).

209. *See supra* notes 27, 28 and 32 and accompanying text.

210. *See supra* note 25 and accompanying text.

211. *See supra* note 33 and accompanying text.

necessary to obtain reliable testimony.

The third factor is the presence of physical corroborative evidence. The existence of such evidence is rare because child sexual abuse cases are often nonviolent. However, when the abuse is violent, the victim is more likely to suffer serious emotional damage.²¹² Thus, physical corroborative evidence is the final factor that the court should weigh when deciding the probability that a child will suffer serious trauma if confronted by the defendant.

If any one or a combination of these three factors are present in a child sexual abuse case, the court should utilize the balancing test and relax its interpretation of the face-to-face requirement on a case-by-case basis.²¹³ When a separation of victim and defendant is required, the judge should tell the jury that this separation is not to influence their decision concerning the guilt of the accused, that it is only a precautionary measure to protect the child. A relaxed interpretation, resulting in separation, would allow the child to overcome the abuser's threats and the abuser's intimidating presence, both of which hinder the truth-seeking process. However, this does not mean that the right to face-to-face confrontation is abolished. The importance of the face-to-face requirement will be retained, but its strict interpretation will be relaxed. The court can view the defendant as securing his face-to-face element via the defense attorney who will cross-examine the child face-to-face as the defendant's proxy.²¹⁴ Because the defendant and his attorney are in constant communication during the witness's testimony, the goal of obtaining the truth can most effectively be achieved.

This balancing test seems to be the most viable solution to remedy the conflict of interests in child sexual abuse cases. Other options, such as amending Indiana's Constitution or proposing a new statute, are less effective. Proposing an amendment to the Constitution may not change the court's insistence on a strict interpretation of the Confrontation Clause. Removing the words "face-to-face" from Indiana's Constitution does not guarantee that the Indiana courts will not interpret confrontation as a face-to-face meeting because Indiana courts can give defendants greater rights than those provided in the United States Constitution. A new statute would add little to the already existing

212. See *supra* note 37 and accompanying text.

213. A similar balance was done in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court held that disability benefits could be terminated without a prior evidentiary hearing based on a balancing test that the Court established. A procedural safeguard would only be required if the amount of private interest at stake multiplied by the likelihood of an erroneous decision being reduced by the safeguard is greater than the cost to the government in granting the safeguard. This balancing test is a variation of the balancing test formulated to obtain the truth in child sexual abuse cases.

214. See *supra* notes 182-96 and accompanying text for possible solutions to effectuate separation of the child victim and the defendant in order to achieve the most reliable testimony.

innovative statutes. The court, in following its strict interpretation, would likely strike down any statute that calls for a protective separation.

One final problem encountered, if a balancing test is not implemented in order to relax the strict interpretation of the face-to-face requirement, is that prosecutors in Indiana will try to circumvent this problem altogether. They could achieve this by using the hearsay exceptions that have been traditionally accepted, and admit statements into evidence without the child ever testifying.²¹⁵ This has proven to be effective and the result leaves those accused with less confrontation rights than they received under current statutes that are now considered unconstitutional by the Indiana Supreme Court.²¹⁶ Therefore, the balancing test is necessary to insure that the child sexual abuse victim's interests and the defendant's interests are adequately protected.

VII. CONCLUSION

The current practice in Indiana is to allow for intimidation of child sexual assault victims by their alleged perpetrators. To insure reliability of the child victim's testimony and to protect the child's interests, the literal interpretation of the face-to-face confrontation between the defendant and the victim should be relaxed. This can be accomplished by adopting a balancing test which weighs the factors that influence the probability the child will be traumatized by a confrontation against the process used to achieve the defendant's right to meet face-to-face with the witness against him. In this way, the court will have struck a balance between the rights of the accused and the interests of protecting the child victims, while still meeting the ultimate goal of obtaining the truth.

John Paul Serketich

215. See *supra* notes 86-93 and accompanying text for a discussion of *White v. Illinois*, 112 S. Ct. 736 (1992) (spontaneous declaration and medical examination hearsay statements admitted into evidence with the child never testifying in court).

216. See *Brady*, 575 N.E.2d 981 (Ind. 1991) (holding Indiana Code § 35-37-4-8 unconstitutional). Under these hearsay procedures, the evidence is admitted without the child ever testifying. Therefore, the defendant loses all of his rights of confrontation. Under the statute used in *Brady*, the child would be put under oath, cross-examined and viewed by the jury.

