Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?

I. INTRODUCTION

In recent years, the number of reported child sexual abuse cases has risen dramatically.[1] Although more and more cases are reported, the conviction rate of sexual offenders remains low.[2] There are many reasons for this disparity. The child is usually the only witness to the crime, and may be very afraid or reluctant to testify against the attacker.[3] Moreover, to avoid subjecting their child to the further trauma of the courtroom experience, parents often do not cooperate with the prosecution.[4]

Recognizing the difficulty of prosecuting child sexual abuse cases, many states have adopted legislation designed to reduce trauma to children and to improve the conviction rate of sexual offenders.[5] One example of a recent legislative reform allows the child witness/victim to present his or her testimony from outside the courtroom via closed circuit television.[6] The child is thus protected from further trauma by

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

2. *Id.* at 806.

3. Note, *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).

4. *Testimony of Child Victims*, *supra* note 1, at 807.

5. This Note will focus only on one such recent procedure: the transmission of testimony by simultaneous electronic means, such as closed circuit television. Other examples of recent legislative reforms are the enactment of special hearsay exceptions for children's out-of-court statements of abuse and the videotaping of the child's testimony by deposition or at a preliminary hearing for later use at trial. *See generally*, *Testimony of Child Victims*, *supra* note 1; Bulkley, *Introduction: Background and Overview of Child Sexual Abuse, Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5 (1985).

6. At the time of this writing, 25 states have enacted legislation that provides for the testimony of a child/witness via closed circuit television: Alabama: ALA. CODE § 15-25-3 (Supp. 1987); Arizona: ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1987); California: CAL. PENAL CODE § 1347 (West Supp. 1987); Connecticut: CONN. GEN. STAT. ANN. § 54-86g (Supp. 1988); Florida: FLA. STAT. § 92.54 (Supp. 1988); Georgia: GA. CODE ANN. § 17-8-55 (Supp. 1987); Hawaii: HAWAII REV. STAT. § 626:616(d) (1985);

being removed from the unfamiliar atmosphere of the courtroom and from the physical presence of her attacker. However, allowing the child to testify via closed circuit television may constitute an abridgement of the accused's right to confront his accuser at trial.[7]

Statutes that permit the use of televised testimony have been consistently upheld by the courts in the face of constitutional[8] challenges because the underlying purposes of the Confrontation Clause have been satisfied.[9] Therefore, the primary concern has been determining *when* invocation of the televised testimony statute is appropriate and constitutionally permissible rather than whether the statute as a whole will pass constitutional muster. In other words, what admissibility standard should a court adopt before permitting the child to testify outside of court? What must be shown for a court to conclude that there is a compelling need to protect the child from further injury or that the child is intimidated by the presence of the accused?

This Comment begins by providing a brief outline of the procedures regulating the use of televised testimony. Next, against the larger backdrop of the history of the right to confrontation, Part III addresses the treatment of televised testimony as hearsay. This section presents a recent Maryland decision as an illustration of the undesirable analogy of televised testimony to hearsay that leads to a more difficult admission standard. Part III concludes with the argument that

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Indiana: IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1988); Iowa: IOWA CODE ANN. § 910A.14 (West Supp. 1988); Kansas: KAN. STAT. ANN. § 38-1558 (1986); Kentucky: KY. REV. STAT. § 421.350 (Supp. 1988); Louisiana: LA. REV. STAT. ANN. 15:283 (West Supp. 1988); Maryland: MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1987); Massachusetts: MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1988); Minnesota: MINN. STAT. ANN. § 595.02(4) (1988); Mississippi: MISS. CODE ANN. § 13-1-405 (Supp. 1987); New Jersey: N.J. STAT. ANN. 2A:84A-32.4 (West Supp. 1988); New York: N.Y. CRIM. PROC. LAW § § 65.00-65.30 (Supp. 1988); Ohio: OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); Oklahoma: OKLA. STAT. ANN. tit. 22 § 753 (West Supp. 1988); Pennsylvania: 42 PA. CONS. STAT. ANN. § 5985(a) (Purdon Supp. 1987); Rhode Island: R.I. GEN. LAWS § 11-37-13.2 (Supp. 1987); Texas: TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1988); Utah: UTAH CODE ANN. § 77-35-15.5 (Supp. 1988); and Vermont: VT. R. EVID. 807(e) (1985).

7. U.S. CONST. amend. VI. Refer to text accompanying note 19, *infra*, for the pertinent language.

8. *See In re* Appeal in Pinal County Juvenile Action, 147 Ariz. 302, 709 P.2d 1361 (1985); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986); People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (1986).

9. *See infra* text accompanying notes 19-24.

televised testimony is the functional equivalent of in-court testimony, and thus, a hearsay analysis is inappropriate.

Part IV of this Comment presents a recent Supreme Court decision directly addressing the value of face-to-face confrontation. This landmark decision now provides courts with the proper admissibility standard for a procedure in which actual face-to-face confrontation is lacking. Finally, Part V presents an appeal to the Washington legislature urging the adoption of a statute authorizing the use of televised testimony and incorporating the guidelines suggested in this Comment.

II. THE TAKING OF TELEVISED TESTIMONY: A STATUTORY COMPOSITE

The various state enactments authorizing the use of televised testimony are procedurally similar. The child is typically removed to a suitable setting outside the courtroom. The only other parties present with the child are the judge, the prosecuting attorney, defense counsel, the camera operator, and a person whose presence would contribute to the welfare and well-being of the child.[10] The statute may also provide that the support person is in no way to coach, cue, or influence the child's testimony.[11]

The jury and defendant remain in the courtroom. When testimony is transmitted to the courtroom by simultaneous electronic means, the statutes may require the trial court to ensure that the courtroom be equipped with monitors that permit the jury, the defendant, and everyone else present to see and hear the transmission;[12] that the transmission be in color;[13] that the witness be visible on the monitor at all times;[14] that every voice transmitted be audible and identified;[15] and that the transmission not be altered in any way.[16]

Most importantly, the procedure must allow the defendant to be in constant communication with his attorney during the

10. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-86g(a) (Supp. 1988); FLA. STAT. § 92.54(3) (Supp. 1988); MINN. STAT. ANN. § 595.02(4)(b) (1988).

11. *See, e.g.*, CAL. PENAL CODE § 1347(d)(4) (West Supp. 1987).

12. *See, e.g., id.* § 1347(b)(3); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(7)(d) (West Supp. 1988).

13. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(7)(b).

14. *See, e.g., id.*

15. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4253(B)(3) (Supp. 1987); KAN. STAT. ANN. § 38-1558(a)(2)(C) (1986).

16. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4253(B)(3); KAN. STAT. ANN. § 38-1558(a)(2)(B); OHIO REV. CODE ANN. § 2907.41(D) (Anderson 1987).

child's testimony. This is usually accomplished through a private telephone line.[17] Thus, the defendant's opportunity to cross-examine the child is not impaired.

Some statutes also provide for two-way closed circuit televised testimony.[18] Not only is the child's image broadcast into the courtroom, but the image of the defendant is also transmitted to a monitor in full view of the child.

These procedural guidelines ensure that the taking of the televised testimony substantially comports with the reliability and trustworthiness of receiving testimony in open court. However, regardless of how accurate the transmission is, the procedure still raises confrontation issues.

III. THE RIGHT OF CONFRONTATION

The primary issue raised in connection with statutes that allow the child victim of sexual abuse to testify via closed circuit television is whether the defendant's constitutional right to confrontation under the sixth amendment is violated. The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[19]

The Confrontation Clause is based upon the rationale that face-to-face confrontation between the accuser and accused enhances the truth-seeking function of a trial.[20] The purpose of this physical confrontation is to allow the fact-finder the opportunity to view the demeanor of the witness in front of the accused, the one person who knows whether the witness is being truthful.[21] The Confrontation Clause also requires the witness to be present at the trial and allows for the witness to be cross-examined by the defendant.[22]

Although many Supreme Court cases have emphasized that the primary purpose of the Confrontation Clause is to

17. *See, e.g.*, MISS. CODE ANN. § 13-1-405(4) (Supp. 1987); N.J. STAT. ANN. 2A:84A-32.4(d) (West Supp. 1988); 42 PA. CONS. STAT. ANN. § 5985(a) (Purdon Supp. 1987).

18. *See, e.g.*, CAL. PENAL CODE § 1347; HAWAII REV. STAT. § 626:616(d); MINN. STAT. ANN. § 595.02(4); N.Y. CRIM. PROC. LAW §§ 65.00-65.30; OHIO REV. CODE ANN. § 2907.41; VT. R. EVID. 807(e).

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

20. *See* Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988); *Testimony of Child Victims*, *supra* note 1, at 810.

21. *See* California v. Green, 399 U.S. 149, 158 (1969); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

22. *See Green*, 399 U.S. at 158; Douglas v. Alabama, 380 U.S. 415, 418 (1965).

secure the benefit of cross-examination,[23] the right to encounter one's accusers face-to-face remains an essential guarantee.[24]

A. Televised Testimony as the Equivalent of Hearsay

The typical arena in which a court discusses the underlying purposes of the Confrontation Clause is when it must determine the admissibility of hearsay evidence.[25] The functions of the Confrontation Clause and the rules against admitting hearsay evidence protect similar values. A statement made out of court is inherently less reliable than a sworn statement made at trial because the declarant has not been subjected to the safeguards that ensure the accuracy of her testimony: the declarant's statement was not made under oath; the declarant was not subject to cross-examination at the time the statement was made; and the declarant was not in the presence of the trier of fact, thus her demeanor went unobserved.[26]

Hearsay is defined 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."[27] If the definition of hearsay is literally construed, then televised testimony is hearsay because the testimony takes place from outside the courtroom.

In *Ohio v. Roberts*,[28] the Supreme Court set out a two-pronged test for determining the admissibility of hearsay statements: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his state-

23. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 315 (1974); Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 406-07 (1965).

24. Coy v. Iowa, 108 S. Ct. 2798 (1988). *See infra* notes 73-91 and accompanying text.

25. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); Dutton v. Evans, 400 U.S. 74 (1970); Barber v. Page, 390 U.S. 719 (1968).

26. C. MCCORMICK, EVIDENCE § 245 (3rd ed. 1984).

27. FED. R. EVID. 801(c).

28. 448 U.S. 56 (1980). Roberts was charged with forgery of a check in the name of Bernard Isaacs and with possession of stolen credit cards belonging to Mr. and Mrs. Isaacs. At a preliminary hearing, the Isaacs' daughter, Anita, testified that she had permitted the defendant to use her apartment for several days, but refused to admit that she had given Roberts the checks and credit cards without informing him that she did not have permission to use them. Before the case went to trial, the state tried unsuccessfully to locate Anita. At trial, Roberts testified that he received the checks and credit cards from Anita with permission to use them. The state, on rebuttal, sought to admit the transcript of Anita's testimony from the preliminary hearing. *Id.* at 58-59.

ment is admissible only if it bears adequate 'indicia of reliability.' "[29] Therefore, before the televised testimony may be admitted as evidence, the *Roberts* test must first be met.

Consequently, several state statutes authorizing the use of televised testimony have adopted an admissibility standard requiring a finding of "unavailability."[30] Yet, the Confrontation Clause should not be interpreted to require a strict showing of unavailability as a predicate of the use of televised testimony. Furthermore, as illustrated by the following case, the unavailability test is unnecessarily harsh and fails to strike an acceptable balance between protecting the interests of the state and those of the defendant.

B. Wildermuth v. State

In *Wildermuth v. State*,[31] the Maryland Court of Appeals heard an appeal from the defendant challenging the constitutionality of section 9-102 of the Code of Maryland, Courts and Judicial Proceedings,[32] allowing a child sexual abuse victim to testify via closed circuit television. The court determined that

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29. *Id.* at 66.

30. *See, e.g.*, CAL. PENAL CODE § 1347(b)(2) (West Supp. 1987); FLA. STAT. § 92.54(1) (Supp. 1988); MINN. STAT. ANN. § 595.02(4)(c) (1988).

31. 310 Md. 496, 530 A.2d 275 (1987).

32. Section 9-102 in full provides:

(a)(1) In a case of abuse of a child as defined in § 5-901 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

the statute, on its face, did not violate the accused's constitutional right to confrontation.[33] However, failure to satisfy the statutory requirements would, according to the *Wildermuth* court, violate the defendant's constitutional right. Because the prosecution failed to show that physical confrontation between the child and the defendant would have resulted in the child suffering serious emotional distress to the degree that she could not testify,[34] the statutory provisions[35] were not satisfied.[36] Accordingly, the court reversed and remanded the defendant's conviction.

At trial, Wildermuth's nine year old daughter was allowed to testify via closed circuit television after the judge heard oral arguments from both counsel on the issue of whether to permit her to so testify.[37] Two expert witnesses, a counselor psychologist and a director of a victim assistance center, testified that the child would probably suffer some degree of emotional distress if required to testify in the courtroom and in the presence of her father.[38] The trial judge then granted the motion to allow testimony under section 9-102, finding that the child was "reticent and unable to verbalize in certain situations" and "would not be able to communicate" if required to testify under customary procedures.[39]

The Maryland Court of Appeals found that the trial judge erred in allowing the child to testify outside the courtroom because the minimum threshhold requirement necessary to invoke section 9-102 was not met.[40] The court emphasized that the Confrontation Clause requires the accuser to view the accused when the former is testifying.[41] Because actual physi-

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with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section 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 (Supp. 1987).

33. *Wildermuth*, 310 Md. at 520, 530 A.2d at 287.

34. *Id.* at 523, 530 A.2d at 288.

35. *See infra* notes 46-51 and accompanying text.

36. *Id.* at 523, 530 A.2d at 288-89.

37. *Id.* at 502, 530 A.2d at 278.

38. *Id.* at 520-23, 530 A.2d at 287-88.

39. *Id.* at 522-23, 530 A.2d at 288.

40. *Id.* at 523-24, 530 A.2d at 289.

41. *Id.* at 510, 530 A.2d at 282.

cal two-way confrontation between the accuser and accused does not take place when the child is placed in another room, the right of confrontation can only be satisfied if the child is "unavailable" to testify and if the substitute (televised testimony) is reliable.[42]

The *Wildermuth* court derived this unavailability requirement from *Ohio v. Roberts*. The *Wildermuth* court found sufficient indicia of reliability present when a child victim is allowed to testify via closed circuit television: the child testifies under oath, is subjected to cross-examination by the defendant, and is in full view of the judge, jury, and the accused while testifying.[43] The only reliability function not provided is that the accuser is not required to view the accused.[44] However, a finding of "unavailability" would be sufficient to overcome that deficiency.[45]

Compliance with section 9-102(a)(1)(ii)[46] "is tantamount to a finding of unavailability in the *Roberts* sense, and meets the necessity prong of the *Roberts* test."[47] Section 9-102 allows the testimony of the child victim to be taken outside the courtroom and shown in the courtroom via closed circuit television if "[t]he 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."[48] Therefore, the "unavailability" prerequisite is a two-step process: not only must the evidence indicate that the child will suffer serious emotional harm if required to testify in the presence of the defendant, the degree of harm must be so substantial that the child will be unable to communicate.

The Maryland Court of Appeals found that the prosecution failed to satisfy this difficult prerequisite. The evidence admitted was insufficient to show that the particular child in *Wildermuth* would be so traumatized by testifying in front of the defendant as to satisfy the requirement of "unavailability."[49] Specifically, the trial judge did not personally question

42. *Id.* at 515, 530 A.2d at 284.

43. *Id.* at 515, 530 A.2d at 285.

44. *Id.* at 516, 530 A.2d at 285.

45. *Id.* at 520, 530 A.2d at 287.

46. *See supra* note 32.

47. 310 Md. at 519, 530 A.2d at 286.

48. MD. CTS. & JUD. PROC. CODE ANN. 9-102(A)(1)(II).

49. 310 Md. at 525, 530 A.2d at 289.

or observe the child.[50] Moreover, the testimony of the expert witnesses was too general and speculative regarding the child's behavior if the child were required to testify in the customary manner.[51] "Testimony about the likely impact on the child testifying must be definite, *related to the statutory standard*, and specific to the potential child witness him or herself."[52]

C. The Better View: Televised Testimony as the Functional Equivalent of In-court Testimony

The *Wildermuth* case exemplifies the problems that have developed when courts and legislatures analogize televised testimony to hearsay. Putting an end to this analogy will better serve the interests of the state and discontinue the overprotection of the defendant's right to confrontation.

The *Wildermuth* case can be criticized on three grounds. First, if the Maryland legislature's enactment of the statutory standard is "tantamount to a finding of unavailability," the statute is superfluous; it provides no more protection for victims of child sexual abuse than was already available under traditional hearsay analysis.[53]

Second, equating televised testimony with hearsay is inappropriate. Substantially all of the functions served by confrontation, and the protections not present with hearsay evidence, are fulfilled by the use of televised testimony: the opportunity for cross-examination, the observation of the declarant's demeanor by the trier of fact, and the giving of the statement under oath.

To illustrate, in those cases in which the Supreme Court has treated out-of-court statements as hearsay, it has done so because the defendant had no opportunity to cross-examine at an earlier hearing,[54] or because the defendant had no way of knowing the victim did not intend to testify at trial, and thus may have failed to conduct vigorous cross-examination.[55] Televised testimony, however, is live, is not recorded for presentation at a later time, and provides full opportunity for cross-

50. *Id.* at 523, 530 A.2d at 289.

51. *Id.*

52. *Id.* at 524, 530 A.2d at 289 (emphasis added).

53. *E.g.*, FED. R. EVID. 804(b)(5) (admitting hearsay statements when witness is unavailable).

54. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 407 (1965).

55. *See, e.g.*, Barber v. Page, 390 U.S. 719, 725 (1968).

examination by the defendant.[56]

Furthermore, the opportunity for the trier of fact to observe the witness's demeanor is preserved with the use of televised testimony.[57] Modern televising techniques are capable of presenting clear and undistorted images, and in some instances, are an improvement over the view that the jury has of the witness.[58] For example, with the use of a zoom lens and large television screens, the witness's facial details can be observed with great clarity.[59]

Last, the child testifies while under oath, preserving the seriousness and solemnity of the occasion.

Contemporaneous televised testimony adheres closely to the giving of testimony in the traditional courtroom setting, except that the child is not in the physical presence of the defendant.[60] For these reasons, televised testimony is the functional equivalent of testimony from within the courtroom.[61]

The final criticism of *Wildermuth* concerns that court's

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56. The absence of actual face-to-face confrontation is not critical for purposes of cross-examination. Most statutes authorizing the use of televised testimony provide for the attorneys to be present in the room from which the testimony of the child is being taken, and ensure that the defendant is able to maintain constant contact with his attorney through telephone lines. *See supra* note 17 and accompanying text.

57. *See* People v. Algarin, 129 Misc. 2d 1016, —, 498 N.Y.S.2d 977, 981 (1986) ("It is apparent to this court from a demonstration of the equipment used in this case that closed circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public. . . . [I]nstantaneous closed circuit television can surely satisfy the dictates of the Confrontation Clause."); State v. Sheppard, 197 N.J. 411, —, 484 A.2d 1330, 1341 (1984); ("Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function.") (quoting People v. Moran, 114 Cal. Rptr. 413, 420, 39 Cal.App. 3d 398, 410 (1974)); Kansas City v. McCoy, 525 S.W.2d 336, 339 (Mo. 1975) (holding that televised testimony did not significantly affect the ability to question and observe the witness, and jury impact was found to be little different, whether the witness appeared in court in person or by television).

58. *See* State v. Twist, 528 A.2d 1250, 1258 (Me. 1987); Commonwealth v. Willis, 716 S.W.2d 224, 228 (1986); *but see* Commonwealth v. Bergstrom, 402 Mass. 534, 549-50, 524 N.E.2d 366, 375-76 (1988) (the court held that it was error to allow the child victim's testimony to be televised to the jury because of the poor color, sound, and overall quality of the transmission); State v. Warford, 223 Neb. 368, 377, 389 N.W.2d 575, 582 (1986) (the camera frequently failed to provide the jury with a full view of the child and the examiner).

59. *See Sheppard*, 197 N.J. at —, 484 A.2d at 1334.

60. *But see infra* note 101.

61. *See, e.g.*, State v. Jarzbek, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987) ("We agree with the state that the circumstances surrounding the taking of the minor victim's testimony make it inherently more reliable than the out-of-court declarations characterized as hearsay. Rather than view the videotaped testimony as hearsay, we therefore consider it to be the functional equivalent of testimony in court."); Commonwealth v. Willis, 716 S.W.2d 224, 228 (Ky. 1986) ("[T]elevised testimony under

unfounded construction of section 9-102(a)(1)(ii) as the statutory adoption of the *Roberts* unavailability test. Although the inference can reasonably be drawn, nowhere in the statutory language is a finding of unavailability expressly required.[62] The court, therefore, was not compelled to analyze the admissibility of televised testimony under the *Roberts* unavailability test. As will be shown, application of the *Roberts* unavailability test to determine whether a child may testify via closed circuit television is wholly inappropriate.

In *Roberts*, the evidence sought to be admitted was the prior testimony of a declarant, taken at a preliminary hearing, who then disappeared prior to trial. The *Roberts* Court examined the unavailability requirement only as it pertained to the admission of prior testimony.[63]

The Supreme Court, in *United States v. Inadi*,[64] later emphasized that *Roberts* is not to be interpreted as standing for the proposition that a finding of unavailability is first required whenever the defendant's right to confrontation has been abridged.[65] In *Inadi*, the Supreme Court rejected the argument that a finding of unavailability is first necessary before the statement of a co-conspirator will be admitted.[66] In so doing, the Court stated:

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a long-standing rule . . . that applies unavailability analysis to *prior testimony*. *Roberts* cannot fairly be read to stand for the radical

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[the Kentucky] statute is not hearsay. It is the functional equivalent of testimony in court.").

62. Some statutes do expressly require a finding of unavailability before televised testimony is constitutionally permissible. *See, e.g.*, CAL. PENAL CODE § 1347(b)(2) (West Supp. 1987) (upon a finding that the "impact on the minor . . . is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed circuit television is used"); FLA. STAT. § 92.54(1) (Supp. 1988) ("upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable"); MINN. STAT. ANN. § 595.02(4)(c) (1988) (upon a determination "that the presence of the defendant during testimony . . . would psychologically traumatize the witness so as to render the witness unavailable to testify").

63. 448 U.S. at 68-77, relying on, among other cases, Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); and Pointer v. Texas, 380 U.S. 400 (1965).

64. 106 S. Ct. 1121 (1986).

65. *Id.* at 1125-26.

66. *Id.* at 1126-29.

> proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.[67]

Requiring a finding of unavailability in *Roberts* served to determine whether the prior testimony of a witness would be introduced at trial. Compliance with the rule would thus benefit the "truth-seeking" objective of a trial. However, no comparable benefit was derived from the application of the unavailability rule in *Wildermuth*. The rule served only to determine the location from which the live testimony would be given.

IV. THE VALUE OF FACE-TO-FACE CONFRONTATION

Although the protections afforded by the Confrontation Clause and the requirements for the admissibility of hearsay substantially overlap, they are not identical.[68] The treatment of televised testimony as the functional equivalent of testimony inside the courtroom, and not as hearsay, still creates concerns arising under the sixth amendment due to the absence of face-to-face confrontation. Therefore, a decision to invoke the use of televised testimony cannot be made on the presumption that all child victims will be traumatized as a result of testifying in the presence of the accused.[69] Generalized conclusions concerning the child's psychological welfare will fail to override a right of constitutional stature.[70] Consequently, some degree of judicial scrutiny is required before the use of televised testimony is constitutionally permissible in any particular situation.

A review of various cases at the state level illustrates inconsistent analyses (and thus inconsistent admissibility standards) of whether the use of televised testimony violates one's right to confrontation.[71] As previously discussed, the proce-

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67. *Id.* at 1126 (footnote omitted, emphasis added).

68. California v. Green, 399 U.S. 149, 155-56 (1970).

69. One state statute appears to allow a court to make generalized assumptions. Rhode Island's statute authorizing televised testimony states that "[w]hen the child is thirteen (13) years of age or younger at the time of trial, there shall be a rebuttable presumption that said child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm." R.I. GEN. LAWS § 11-37-13.2 (Supp. 1987).

70. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-09 (1982).

71. *Compare* Wildermuth v. State, 310 Md. 496, 510, 530 A.2d 275, 282 (1987) *with* Commonwealth v. Willis, 716 S.W.2d 224, 230 (1986) ("There is no constitutional right to eyeball to eyeball confrontation. The choice of the words "face to face" may have

dure of televising a child witness's testimony for simultaneous broadcast into the courtroom denies only the defendant's right to be in the presence of the witness as she testifies; all other functions of confrontation are satisfied. Authorities have simply disagreed as to whether the absence of this one guarantee justifies the imposition of a more stringent admissibility standard before the child would be permitted to testify electronically.[72] However, a very recent United States Supreme Court decision, *Coy v. Iowa*,[73] has for the first time directly addressed the value of actual face-to-face confrontation, and has provided the admissibility standard for a procedure that denies only that element of confrontation.

A. The Facts and Holding of Coy v. Iowa

Appellant Coy was accused of engaging in lascivious acts with two thirteen-year-old girls.[74] At trial, the court moved to invoke a procedure authorized by an Iowa statute[75] that allows a witness to either testify from behind a screen or via closed circuit television. The judge granted the motion and allowed a screen to be placed in front of the girls as they testified. The employment of a certain lighting procedure enabled the defendant to dimly view the witnesses through the screen, but prevented the witnesses from seeing the defendant, although they were aware of the defendant's presence.[76] Throughout the procedure, the judge and jury had a full, unobstructed view of the witnesses.[77]

Coy appealed his conviction, arguing that his sixth amend-

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resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence.") *and* People v. Algarin, 129 Misc. 2d 1016, 1021, 498 N.Y.S.2d 977, 981 (N.Y. Sup. Ct. 1986) (the "face-to-face" requirement "supports the right of cross-examination rather than of physical confrontation per se").

72. *Id.*

73. 108 S. Ct. 2798 (1988).

74. *Id.* at 2798.

75. Former IOWA CODE § 910A.3(1), which provided, in relevant part, that "[t]he court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party." The use of the procedure was limited to children under the age of fourteen.

Section 910A.3 has now been incorporated into § 910A.14 of the 1987 Code. Section 910A.14 expanded the use of testimony from an adjacent room or from behind screening devices and now also allows for testimony via closed circuit television.

76. State v. Coy, 397 N.W.2d 730, 734 (Iowa 1987).

77. *Id.* at 734.

ment right to confrontation was violated when he was denied face-to-face confrontation with the witnesses. The Iowa Supreme Court upheld the conviction, however, holding that the appellant's right to confrontation was not violated because the three underlying purposes of the Confrontation Clause were fulfilled: (1) the ability to cross-examine was not impaired by the use of the screen; (2) the judge and jury were fully able to view the demeanor of the girls as they testified; and (3) both girls testified under oath, impressing them with the seriousness and solemnity of the proceeding.[78] Furthermore, the court rejected Coy's argument that a showing of necessity was first required before permitting the use of the screen, stating that "[i]n the Confrontation Clause context, the issue of necessity arises when a witness is unavailable for trial and a party seeks to introduce some prior statement or testimony of that witness."[79]

The United States Supreme Court reversed the judgment of the Iowa Supreme Court in a 6-2 decision.[80] In reference to the placement of the screen authorized by the Iowa statute, the Court found it "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[81]

Justice Scalia's majority opinion, replete with references to Shakespeare, President Eisenhower, and past decisions, upheld the accused's right to encounter his accusers face-to-face as a core guarantee of the Confrontation Clause. "[T]he right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss — the right to cross-examine the accuser; both 'ensur[e] the integrity of the fact-finding process.' "[82]

The majority opinion emphasized the importance of face-to-face confrontation, "the irreducible literal meaning of the

78. *Id.*

79. *Id.* (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980) and Barber v. Page, 390 U.S. 719, 722 (1968)).

80. Justice Scalia wrote the majority opinion, joined by Justices Brennan, Marshall, White, Stevens, and O'Connor. O'Connor wrote a separate concurring opinion, in which Justice White joined. Justice Blackmun filed a dissenting opinion, in which Chief Justice Rehnquist joined. Justice Kennedy played no part in the consideration or decision of the case.

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

82. *Id.* (quoting Kentucky v. Stincer, 107 S. Ct. 2658, 2662 (1987)).

clause,"[83] as it "serves ends related both to appearances and reality."[84] Confrontation serves to promote the truth-finding function, since a witness is less likely to lie about the defendant in his presence.[85] The role of the jury in assessing the credibility of the witness who testifies in the physical presence of the accused is enhanced. The Court further acknowledged that the effect of face-to-face confrontation is so profound so as to unfortunately cause a child witness to be traumatized. However, the Court stated "[i]t is a truism that constitutional protections have costs."[86]

Justice Scalia's rigid stance then softened somewhat when he noted that the rights conferred by the Confrontation Clause are not absolute,[87] but may give way when necessary to further other important interests.[88]

Permitting a child witness to testify from behind a screen, in this particular case, did not constitute an exception to Coy's right to physical confrontation.[89] The Court required more than the generalized presumption of the Iowa statute that the child would be traumatized if required to testify in the customary manner.[90] The requisite finding of necessity would be fulfilled only by evidence specific to the individual that the State wished to protect.[91]

Justice O'Connor joined in the majority opinion, but wrote a separate opinion in which she recognized the pervasive problem of child abuse in today's society.

> I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the

83. *Id.* at 2803.

84. *Id.* at 2801.

85. *Id.* at 2802.

86. *Id.*

87. That the right to confrontation is not absolute was recognized by the Supreme Court as long ago as 1895 in Mattox v. United States, 156 U.S. 237, 243 (1895) ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case") (quoted in Ohio v. Roberts, 448 U.S. 56, 65 (1980)).

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

89. *Id.* at 2803.

90. *Id.*

91. *Id.*

> necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.[92]

Unfortunately, the Court's opinion stopped short of providing useful guidance for courts or legislatures in determining the degree of "necessity" that must be shown before the procedure (whether placement of a screen or televised testimony) will be upheld as constitutionally permissible. However, by its long-awaited decision, the Supreme Court has determined that the appropriate inquiry is whether the state's interest in protecting its child victims is so compelling as to override the defendant's right to confrontation, *not* whether the child witness is "unavailable."

B. The "Necessity" Test

Testifying via television from just outside the courtroom is not unlike testifying from behind a screen inside the courtroom, the procedure reviewed in *Coy v. Iowa*. The only element served by adherence to the strictures of the Confrontation Clause, but lacking in the aforementioned procedures, is the guarantee that the witness will testify in the presence of the defendant. Application of the "necessity" test is the better standard for the admissibility of televised testimony because it will now provide greater protection for child abuse victims that otherwise would not have been afforded the benefits of the procedure.

The primary interest of a state is to protect its child victims from being traumatized as a result of testifying in the presence of the defendant. Whether the use of televised testimony provides the only means of obtaining the child's testimony so that a case may be brought to trial should only be of secondary concern.

If required to testify in the presence of the defendant, one of two results may occur. First, the child may suffer severe emotional distress such that she will not be able to effectively communicate, or second, the child may suffer psychological

92. *Id.* at 2805 (O'Connor, J., concurring) (citations omitted).

trauma, but not to the degree that prevents her from testifying. Compliance with the "unavailability" prerequisite may permit the child witness, in the first example, to testify electronically, but not in the second, since the child would still be able to testify *even though doing so would be psychologically damaging.* Application of this harsher standard wrongly presumes that a child's ability to communicate is an indication that the child is suffering no harm. A more difficult predicate,[93] such as a finding of "unavailability," thus undermines the very goals of these statutes; it forces the child to endure further trauma before the court can determine that the statute may be invoked to protect the child from further trauma.

Thus, before the procedure for the taking of televised testimony is permitted, it should automatically be presumed that the child witness will be able to communicate effectively in the presence of the defendant. However, in the event the prosecution feels that testimony in the customary manner will cause the child to suffer needlessly, and in an effort to avoid victimizing the child again, the state should be allowed to introduce supporting evidence. This evidence should be specific to the child and show, by a preponderance of the evidence, that the child would suffer psychological or emotional harm as a result of testifying in the presence of the defendant. The factors determinative of the compelling need for the procedure should pertain only to the inquiry of whether the child is likely to suffer serious emotional distress, and not to whether

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93. A finding of "unavailability" is not the only difficult admissibility standard adopted by a state court before the practice of televising testimony will be constitutionally permissible. In State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), the court held that the procedure would be permitted only when the State proved by clear and convincing evidence a compelling need to exclude the defendant from the taking of the child's testimony: "[w]e reiterate that, in light of the constitutional right of confrontation at stake here, the primary focus of the trial court's inquiry must be on the reliability of the minor victim's testimony, not on the injury that the victim may suffer by testifying in the presence of the accused." 204 Conn. at 705, 529 A.2d at 1255-56 (footnote omitted). In his dissenting opinion, Associate Justice Shea noted:

> Without some actual experience where the child has been unable to testify adequately in a courtroom setting, however, it is not readily apparent that a 'clear and convincing' demonstration complying with the majority's novel standard can be made, assuming the usual conflict between the opinions of experts produced by the state and those of the defendant. As a practical matter, I fear that many child victims will be obliged to testify without the benefit of the safeguards designed [by the Connecticut statute] to mollify the impact of the experience of reliving the crime itself that their testimony entails and thus to protect their mental health.

Id. at 711, 529 A.2d at 1258.

the child will be able to communicate in the presence of the defendant.[94] Rather than requiring a finding of "unavailability"[95] to satisfy the necessity requirement, a more appropriate finding is one of "vulnerability."[96]

V. AN APPEAL TO THE WASHINGTON LEGISLATURE

Washington has been a forerunner in enacting legislation designed to protect child witnesses from the psychological trauma of the courtroom ordeal, to encourage victims to come forward, and to aid in the prosecution of otherwise difficult matters. For example, in 1982, Washington was the first of several states[97] to enact what is now commonly known as "the child hearsay exception."[98] The child hearsay exception permits the admission of an out-of-court statement about sexual

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94. In reference to the admissibility standard set forth in Section 9-102(a)(1)(ii) of the Maryland Code, this could be accomplished by striking "such that the child cannot reasonably communicate." *See supra* note 32.

95. *See, e.g.*, CAL. PENAL CODE § 1347(b)(2) (West Supp. 1987) (upon a finding that the "impact on the minor . . . is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed circuit television is used"); FLA. STAT. § 92.54(1) (Supp. 1988) ("upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable"); MINN. STAT. ANN. § 595.02(4)(c) (1988) (upon a determination "that the presence of the defendant during testimony . . . would psychologically traumatize the witness so as to render the witness unavailable to testify").

96. The term "vulnerability" is borrowed from New York's statute authorizing the use of two-way closed circuit television in child sexual abuse or assault cases. *See* N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (Supp. 1988). The statute defines a "vulnerable" child as one likely to suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of closed circuit television. *Id.* at § 65.10(1).

97. *See, e.g.*, COLORADO: COLO. REV. STAT. § 13-25-129 (Supp. 1987); KANSAS: KAN. STAT. ANN. § 60-460(dd) (Supp. 1987); MINNESOTA: MINN. STAT. ANN. § 595.02(3) (1988).

98. WASH. REV. CODE § 9A.44.120 (1987) provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:
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> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement

abuse, made by a child under the age of ten, provided that the court finds the statement to contain sufficient indicia of reliability, and, if the child is unavailable, that evidence of the criminal act is corroborated.

However, the child hearsay exception should not be mistaken as a substitute for the much needed legislation authorizing the use of televised testimony of child sexual abuse victims. The child hearsay exception allows only for the admission of past, out-of-court statements, about which the child, if unavailable, will not be subject to cross-examination, thereby incorporating the requirements set forth by *Ohio v. Roberts*. The admissibility of televised testimony, on the other hand, should not be analyzed under the *Ohio v. Roberts* criteria. As previously discussed,[99] the testimony is live, is broadcast simultaneously into the courtroom, and is fully subject to cross-examination by the defendant.

A statute authorizing the use of televised testimony would provide additional protection for child victims of sexual abuse in Washington. In an effort to accommodate the competing concerns of the state and the defendant, the statutory language should address the procedural guidelines necessary for taking televised testimony; the burden of proof that must first be overcome by the state before the procedure will be permitted; and the factors to be considered by the trial court that indicate a particular child's vulnerability.

The admissibility standard and suggested factors for consideration might be worded as follows:

> The court on its own motion, or on the motion of the proponent of a child witness, may order the child's testimony to be taken by closed circuit television, provided that the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in the presence of the defendant. If the court orders the use of a suitable alternative for taking the testimony of the child,

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sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

For countervailing commentaries on the constitutionality of Washington's child hearsay exception, see Note, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983), and Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387 (1984).

99. *See supra* notes 54-59 and accompanying text.

> the court shall make and enter specific findings upon the record describing with particularity the reasons for such order. In making the determination set out above, the trial court may consider: (1) the age of the child; (2) the demeanor of the child as observed during all phases of the criminal proceeding; (3) the relationship of the child to the defendant; (4) whether the defendant is in a position of authority to the child; (5) whether a firearm or deadly weapon was used by the defendant in the commission of the crime; (6) whether the defendant inflicted any serious bodily injury upon the victim during the commission of the crime; (7) whether the child or another family member was subjected to threats of bodily harm by the defendant in order to prevent the child from reporting the offense or testifying during any phase of the criminal proceeding; (8) the conduct of the defendant during the hearing or trial that may cause the child to be traumatized if required to be in the presence of the defendant; (9) expert testimony as to whether the child is susceptible to psychological harm if required to testify in the presence of the defendant; and (10) any other factors the trial court finds relevant to the issue of the child's susceptibility to psychological harm.[100]

Striking a proper balance between the state's interest in protecting the welfare of child victims and the defendant's confrontation right can be further accomplished by providing for the use of two-way closed circuit television.[101] While the

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100. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In *Globe*, the Supreme Court invalidated a Massachusetts statute that authorized mandatory exclusion of the press and the public from trials of specified sexual offenses involving a minor victim. The Court went on to recognize, however, that the state had a compelling interest in protecting young victims from the psychological trauma of testifying in open court. To aid courts in determining when the state's interest overrode the constitutional concern, the Court suggested the following standard:

> A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

457 U.S. at 608 (footnotes omitted).

The statutes authorizing the use of closed circuit television in California (CAL. PENAL CODE § 1347(b)(2)(A)-(D) (West Supp. 1987)) and New York (N.Y. CRIM. PROC. LAW § 65.20(9)(a)-(l) (Supp. 1988)) also set out similar factors that the court should consider in determining whether the procedure is constitutionally permissible.

101. Interestingly enough, Justice O'Connor found that the use of two-way televised testimony, by which the image of the defendant is transmitted into the room for viewing by the child as she testifies, might not raise any Confrontation Clause concerns because the testimony of the witness takes place *in the presence of the defendant*. Coy v. Iowa, 108 S. Ct. 2798, 2804 (O'Connor, J., concurring).

child's image is being projected into the courtroom, an image of the courtroom, including the judge, the jury, and the defendant, can be projected simultaneously into the room where the child is located.[102] As a result, actual face-to-face contact, albeit electronically, will take place, and arguably all components of the Confrontation Clause will be satisfied.[103]

The Confrontation Clause of Washington's Constitution does not present an obstacle to the enactment of statutory language requiring a lesser burden of proof before televised testimony will be allowed. Unlike the United States Constitution, the Washington Constitution specifically requires "face to face" confrontation between the accused and his accuser.[104] This express requirement might suggest that the Washington courts have interpreted its Confrontation Clause more strictly than its federal counterpart, and in turn justified the determination that a higher burden of proof is first required before a procedure that denies the defendant this right is allowed. Yet, the Washington courts have not done so. In fact, when given the opportunity, the Washington Supreme Court has addressed Confrontation Clause issues by relying on federal precedent rather than by adopting their own analysis specific to the State's Confrontation Clause.[105] Therefore, Washington's constitutional requirement of face-to-face confrontation has not been held to provide greater protection for the accused, and thus does not create a justification for the imposition of a more burdensome standard of admissibility for televised testimony.[106]

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102. *See supra* note 18 and accompanying text.

103. *See generally*, Note, *supra* note 3.

104. WASH. CONST. art. I, § 22. "In criminal prosecutions the accused shall have the right to . . . meet the witness against him face to face . . . ."

105. *See, e.g.*, State v. Anderson, 107 Wash. 2d 745, 733 P.2d 517 (1986) (the Confrontation Clause analysis and application of the *Roberts* "unavailability" test applied to determine whether the admission of declaration against penal interest was proper); State v. Hieb, 107 Wash. 2d 97, 727 P.2d 239 (1986) (same, excited utterance); State v. Parris, 98 Wash. 2d 140, 654 P.2d 508 (1982) (same, declaration against penal interest).

106. Indeed, the Confrontation Clauses contained in the state constitutions of both Kentucky and Pennsylvania contain wording identical to that of Washington's. Yet the courts in those states have refused to construe the express language as strictly as might be suggested, finding that the "face to face" requirement did not provide any greater protection for the defendant. *See* Commonwealth v. Willis, 716 S.W.2d 224, 229 (1986) ("There is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution."); Commonwealth v. Ludwig, 366 Pa. Super. 361, —, 531 A.2d 459, 462 (1987) (" 'There is no constitutional

VI. CONCLUSION

Allowing a child victim of sexual abuse to provide testimony via closed circuit television is a minimal infringement of a defendant's right to confront his accuser. The testimony is given under oath, provides full opportunity for cross-examination by the defense, and allows the trier of fact to view the demeanor of the child while subject to questioning. The only difference between this procedure and testimony given under normal conditions is that the child is not forced to look at the defendant or listen to his comments. Accordingly, the need to protect the child victim from further psychological injury weighs more heavily than does the defendant's right to literal physical confrontation.

Televised testimony should not be treated as hearsay, thereby requiring that the child be found unavailable before she is permitted to testify via closed circuit television. The test for unavailability is harsh and counterproductive to the policy underlying the procedure, that is, protecting the child from serious psychological injury. Rather, the procedure functions as the constitutional equivalent of in-court testimony.

The Washington Legislature should respond to the needs of children in the courtroom by enacting a statute authorizing the use of televised testimony under the guidelines described above. The statute should incorporate the "necessity" test promulgated by the Supreme Court's decision in *Coy v. Iowa*, and provide the trial court with guidelines, such as those suggested in this Comment, to ensure that both the interests of the child and the defendant are protected.

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right to eyeball to eyeball confrontation. The choice of the words 'face to face' may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence.' ") (quoting Commonwealth v. Willis, 716 S.W.2d at 230).

The Washington, Kentucky, and Pennsylvania courts' refusals to construe the express "face to face" language of their states' Confrontation Clauses as providing greater protection for a defendant may have been due in part to the Supreme Court's emphasis that the Confrontation Clause of the federal constitution, although not expressly stating so, "reflects a *preference* for face-to-face confrontation at trial." Ohio v. Roberts, 448 U.S. at 63 (emphasis added). Now, in light of *Coy v. Iowa*, an adoption of a separate analysis under the stricter language would be incorrect. *See supra* notes 82-86 and accompanying text.