

LAW ENFORCEMENT MANAGEMENT INSTITUTE

The Delicate Balance:

**The Use of Closed-Circuit Television Testimony
in Child Abuse Cases**

vs.

The Defendant's Sixth Amendment Right to Confrontation

A RESEARCH PAPER

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I. INTRODUCTION

The exact extent of the problem of child sexual abuse is unknown. What is known is that the problem is growing with each passing year. Although emphasis should be placed on both, our main concern should not be with the exact numbers of victims, but with the victims themselves. The psychological and emotional trauma these children endure, not only due to the actual assault but also due to the trial process that may follow, is overwhelming. The criminal justice system has realized this fact and is attempting to alleviate some of the trauma by developing alternatives to in-court victim testimony. These alternatives have been challenged in state appellate courts and the Supreme Court. The issue in question is whether these alternatives violate the defendant's Sixth amendment right to confrontation.

This paper will discuss the extent of the child sexual abuse problem along with its psychological and emotional impact on the child victim. Proposed statutory alternatives to in-court testimony of the child victim will be outlined. The right to confrontation will be discussed from an historical perspective considering influences from the Biblical and Roman eras, through its development in English common law, to the final inclusion of the right in the United States Constitution. Supreme Court challenges to the

alternatives will be examined in discussions of the landmark cases of Coy v. Iowa and Maryland v. Craig. Finally, the development of the Texas Child Witness Videotape Statute will be discussed and analyzed.

II. THE UNKNOWN EXTENT OF THE PROBLEM

It is an appalling yet true fact that little is known about the incidence and types of crimes committed against children. This is due in part to the fact that there is no single data source to consult for statistics on crimes committed against children. Several services provide partial information, but due to variations in definitions and reporting practices, attempts to develop a composite are made more difficult. Although the available data are sketchy, they do suggest that children become victims of crime more often than some may care to believe (Whitcomb, 1992).

An increasing number of child sexual abuse cases are reported every year. The extent of this social and legal problem is not known, however, because it is grossly underreported. More children are sexually abused in their own homes than anywhere else. The child victim may be abused by a relative, a family friend, or an authority figure. The child victim of sexual abuse is most often female, and the victims, both male and female, range in age from one or two months up to eighteen years. One

commentator estimates that one-half of the child victims of sexual abuse are under the age of eleven (Kelly,1985).

III. THE IMPACT ON THE CHILD VICTIM

Society has become more aware of the side effects of sexual abuse - the emotional damage to the child (Parker,1982). An abused child is often confused by what has been done to him/her (Wise,1985). Children who may have some understanding about a sexual attack naturally experience some mental suffering (Flammang,1980). Emotional strain is often manifested by withdrawal, bed-wetting, school problems, anti-social behavior, lack of self-esteem, and nightmares (Wise,1985).

Testifying at trial can be another emotionally burdening experience for a child. In "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System" (1969) the author, David Liabai states: "Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court" (p.984).

A trial can inflict further strain on the child if he/she must testify against someone known - estimated to be in eighty percent of all sexual abuse cases (MacDonald,1971). The threats of these psychological

abrasions result in many cases being plea-bargained, because the victims cannot or will not testify. As a result, many consider the abused child to be an ignored victim. (Liabai,1969).

IV. STATUTORY ALTERNATIVES TO IN-COURT TESTIMONY BY THE CHILD VICTIM

Various statutory alternatives to in-court testimony by a child victim of sexual abuse have been developed in order to reduce psychological trauma to the victim and to produce more reliable testimony (Kelly,1985). The various reforms recognize the possible re-victimization of the child victim and thus are proposed to alleviate the judicial burden placed on child-victim witnesses (Fote,1985). These reforms include expanded hearsay exceptions for children, the use of expert testimony, videotapes, specially constructed courtrooms, and closed-circuit television in lieu of live, in-court child testimony.

Hearsay Exceptions

One response to the problems associated with child witness testimony has been liberality in the admission of hearsay statements of children. The hearsay rule, one of the oldest canons in the law of evidence, was designed to prohibit the introduction of oral or written evidence of statements made out of court, when that statement is being offered for the truth of the matter asserted (Fote,1985).

Hearsay is defined in the Federal Rules of Evidence, Section 801(c) 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". A child's spontaneous declaration or narrative account of a sexual incident would be barred from introduction at trial under this rule as inadmissible hearsay. However, the Federal Rules include several exceptions to the hearsay rule, including one that permits the admission into evidence of "excited utterances". Federal Rules of Evidence, Section 803(2) defines an "excited utterance" as "[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". Under this exception, statements by child victims regarding sexual abuse could be admitted as evidence.

Use of Expert Testimony

The trend toward adopting codified child victim hearsay exceptions is only one response to the problems raised by the use of children as witnesses. Another alternative is the use of expert testimony. This proposal involves the use of tape recorded pretrial examinations accompanied by expert testimony (Fote, 1985). This proposal would not require in-court testimony by the child witness or subject the child to multiple pretrial interrogations. The child's only interview would be conducted with an expert social worker. The expert would possess dual qualifications including

experience in the psychology of child sexual abuse and familiarity with pertinent legal standards. Expert and victim could meet in an interview room, accompanied by all parties to the action. All parties having questions for the victim would submit them to the expert who would in turn submit them to the witness. The entire session would be recorded on videotape and the tape would be substituted for the child's testimony at trial (Fote,1985).

Videotaped Testimony

Another proposed alternative is the use of videotaped testimony by the child victim. Even though videotaped testimony may serve various purposes, commentators have repeatedly cited three reasons why the testimony of children should be videotaped. First, children are often required to undergo multiple interviews. Each interview also requires the child to reiterate the unpleasant experience of being sexually abused. Having the child's testimony videotaped reduces the repetitive interviews and the subsequent trauma. Second, a therapist is able to review the videotape without having to cause any further psychological damage to the child. Third, the immediate recording of the interview may be used as a deterrent to having the complaint disavowed (Emerson,1990).

Child Courtroom

The fourth reform proposal was developed by David Liabai in 1969. His proposal addressed the problem he called "legal process trauma" and included the construction of a special "child courtroom" (Liabai,1969). The "courtroom" would consist of an inner chamber surrounded by a larger room. The inner room would be furnished so as to be less threatening to the child and would house the child, both attorneys, and the judge. The defendant, the jury, and the public would sit in the outer room and observe the child's testimony through one-way glass. The defendant and his attorney would communicate by use of microphones and earphones. The jury can observe both the defendant and the child, and the defendant can observe the child testifying. The only aspect of traditional confrontation lacking from the scenario is that the child would not be able to see the defendant (Fote,1985).

Closed-Circuit Television

The use of closed-circuit television (CCTV) is another reform proposed. CCTV allows for simultaneous transmission of the child's live testimony to the courtroom from a nearby location (Whitcomb,1992). The attorneys for the parties along with appropriate technicians accompany the child. The judge, jury and the defendant remain in the courtroom. The defendant would be provided means to communicate with his attorney during the examination. The defendant observes and

hears the testimony of the child in person, but the child cannot hear or see the defendant (Graham,1985).

V. THE RIGHT TO CONFRONTATION - AN HISTORICAL PERSPECTIVE

Inherent in any proposed solution to the problems surrounding child victim testimony is the notion that children must be accorded special protections. However, these protections come in direct conflict with well-established principles protecting defendant's rights in criminal proceedings (Fote,1985). One of these rights is the right to confrontation found in the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and 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 defence.

Roman and Biblical Influences

The right to confrontation as part of our tradition of fair play and a means of reaching the truth, is nothing new (Pollitt,1959). There are instances of the right to confrontation in Biblical and Roman history, for example, when emperor Trajan declared "anonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with the spirit of our times" (Pollitt,1959.p.384).

Whether taken there by the Romans or not, the right to confrontation existed in England even before trial by jury

(Pollitt,1969). In those days the function of the court was to determine by what means the accused was to be tried, i.e. by compurgation or by ordeal. Even in these modes of "truth finding" the court recognized the right to confrontation by allowing the accused to challenge the testimony of the accuser and his "helpers" concerning the accused's character (Pollitt,1959).

Confrontation and cross-examination were not only known in the crucial stages of trial by ordeal and trial by compurgation; it was also known in a modified form in the mode of trial brought to England by the Normans, i.e. trial by combat. Here, the accused was permitted to challenge the accuser to resolve the conflict by appeal to God's judgement on the field of battle (Pollitt,1959).

English Common Law

In 1215, the Church turned against the institutions of trial by battle and trial by ordeal and a new method of resolving disputed factual issues was found in the evolving institutions now known as trial by jury. Trial by jury has a modern sound; but such a trial meant in the twelfth century something very different from the trials of modern law. The early juries did not determine disputed questions of fact by hearing evidence, the jurors themselves were the witnesses (Pollitt,1959).

It was not until the sixteenth century that the jury ceased to be witnesses and became judges of the facts. This led the court to put more stress upon the character of the

evidence offered, and the character of the witnesses offering it (Pollitt,1959). A consequence was the right to confront and cross-examine witnesses to test credibility.

Legal commentators have suggested that the right to confrontation arose in response to the abuses of the trial of Sir Walter Raleigh in 1603 (Heller,1951). Raleigh was executed for treason following a trial conviction based solely upon ex parte affidavits induced from an alleged accomplice of Raleigh's. The government failed to produce witnesses against Raleigh, nor was he allowed to call witnesses in his own behalf (Romanoff,1986).

The right to confrontation was developing to, minimally, prevent the use of ex parte affidavits and depositions as the sole evidence in criminal trials. The English common law slowly began to recognize a defendant's right to confrontation in the mid-sixteenth century, in the trial of John Lilburne. Lilburne led a group of religious and political dissenters against Charles I and the Anglican Church. His accusers alleged that he violated the system which prevented heresy when he imported books that attacked the bishops. When questioned at the trial, Lilburne refused to answer until he could confront his accusers. The court denied the request and jailed him. Three years later, however, Parliament freed Lilburne after it declared his sentence illegal (Potter,1958).

Development of the United States Constitution

The English colonists that came to America did not bring with them all the judicial concepts of due process then existing in England. A technical system can be administered only with the aid of trained lawyers, and these were generally not found in the colonies during the seventeenth century (Potter,1958). The early immigrants did not apply the common-law rules of England, but were directed to proceed "as near the law of God as they can" (Pollitt,1959.p.391). This led to the administration of a crude equity.

It was not long, however, that some more definite standards were demanded. Several early American state constitutions incorporated provisions protecting the common-law rights of criminal defendants, including the right to confront one's accusers (Miller,1990). By the beginning of the eighteenth century, the idea that the accused had a right to confront and cross-examine all adverse witnesses had won a place in all American colonies (Pollit,1959).

In 1778, the Constitution of the United States was completed. Contrary to the states' constitutions, the United States Constitution did not explicitly mention a right to confrontation in criminal trials (Emerson,1990). When the Constitution was put before the states for ratification, objection was made to the lack of procedural safeguards. These objections resulted in a compromise: the states would ratify the constitution with the understanding

that the first Congress would propose a Bill of Rights to the federal constitution. This was done, and in 1791 the First Congress enacted the Bill of Rights which included the Sixth Amendment's right to confrontation clause. Although the sixth amendment originally only affected federal criminal trials, the Supreme Court eventually applied the sixth amendment's confrontation right to state criminal proceedings through the fourteenth amendment (Miller,1990).

VI. LANDMARK SUPREME COURT CASES

A majority of states have enacted statutes to minimize the psychological trauma a sexually abused child may encounter in the court system. While the statutes may vary in degrees of shielding the child from the accused, this very same "child" may compromise the defendant's constitutional sixth amendment rights (Emerson,1990).

Coy v. Iowa

The United States Supreme Court addressed this very issue in Coy v. Iowa, 108 S.Ct. 2798 (1988). In State v. Coy, 397 W.2d 730 (1986), the state alleged that John Coy sexually abused two thirteen-year-old girls. During the trial, pursuant to Iowa statute, the prosecutor requested that the testimony of the two child witnesses be taken by closed-circuit television or that the defendant be confined behind a screen or mirror during their testimony. At the trial, a large screen was placed between Coy and the witness

stand during the children's testimony. The courtroom lights were dimmed so during the testimony of the girls they could not see Coy. Coy vehemently objected to the screen being placed between him and the testifying victims arguing that the procedure infringed upon his sixth amendment right to confront his accusers. The trial court found that the procedure did not violate any constitutional guarantees. Upon appeal, the Iowa Supreme Court affirmed the trial court's decision, stating that Coy's ability to cross-examine the child witness was not impaired by the screen.

In deciding this issue, the United States Supreme Court granted certiorari to determine whether the screening device violated the defendant's guaranteed right under the confrontation clause (Emerson,1990). The majority opinion in Coy reversed the decision of the Iowa Supreme Court. Justice Scalia, who wrote the majority opinion, conclusively stated that the confrontation clause does, in fact, guarantee defendants the right to physically face those who testify against him. Justice Scalia placed very strong emphasis on the need of the criminal defendant "to be confronted with the witnesses against him," as guaranteed by the sixth amendment (Rowe,1990). The Court examined the literal meaning of the word "confront" to determine the kind of encounter to which the criminal defendant was entitled (Meyers,1988). Throughout the historical analysis, the court stated that "this opinion is embellished with references to and quotations from antiquity, in part, to

convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution" (p.1017). Justice Scalia saw the right of face-to-face confrontation as important because he believed it served to "ensure the integrity of the fact-finding process" (p.2802). The balance he struck was in favor of the defendant:

"that face-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. It is a truism that constitutional protections have costs" (p.2802).

Justice Scalia did not consider whether the protection of child witnesses was an important public policy sufficient to create an exception to the defendant's right of confrontation (Rowe,1990). The rest of the Court did though, and while they contemplated possible exceptions to the face-to-face encounter guarantee, the Court indicated that they would be rare (Meyers,1988). The majority in Coy declined to carve out any exceptions to the confrontation clause that would further enhance public policy. The Court preferred to leave that issue as to whether any exceptions exist under the confrontation clause for "another day." Instead, the majority opinion in Coy reasoned that there must be a case-by-case determination as to whether a witness is in need of a special protection under state statutes, before an exception to the confrontation clause can be sustained (Emerson,1990).

Justice O'Connor authored a concurrence that stressed the right to face-to-face confrontation may give way in an appropriate case to other competing interests such as the protection of child witnesses (Marchese,1990). She wrote:

"But it is also not novel to recognize that a defendant's right physically to face those who testify against him,'..... even if located at the 'core' of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion....Rather, the Court has time and again stated that the clause 'reflects a preference for face-to-face confrontation at trial,' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants" (p.1022).

Maryland v. Craig

On June 27, 1990, in the case of Maryland v. Craig, 110 S.Ct. 3157 (1990), the Supreme Court finally addressed the issue that Justice Scalia so obscurely decided to leave for "another day" (Emerson,1990).

In 1986, a grand jury charged Sandra A. Craig, an owner of a pre-school center, with sexually abusing several of her students. Before the trial started, the state moved to have the child victims testify through a one-way closed-circuit television, pursuant to Maryland Courts and Judicial Proceedings Code Section 9-102(a)(1)(ii). The child testified in a room separated from the defendant. The jury, judge and defendant remained in the courtroom while the prosecutor and the defense attorney examined the child witness while being broadcast to the courtroom on closed-circuit television. The camera remained focused on the witness while the attorneys examined and cross-examined

the child. The judge, jury and defendant could not see the attorneys, and the defendant could communicate with her attorney only by a phone line (Schwalb,1991). After twelve days of trial, the jury convicted Ms. Craig on all counts.

On appeal to the Maryland Court of Special Appeals, Ms. Craig argued that the closed-circuit camera procedure violated her constitutional right to confront the witness (Pershkow,1991). The court in Craig v. State, 76 Md.App. 250 (1988), dismissed these arguments and affirmed the conviction, holding that the right to confrontation is not absolute and that the procedure authorized by section 9-102 is "necessary to further an important public policy" (p.797). The Court of Appeals of Maryland in Craig v. State, 560 A.2d 1120 (1989) reversed and remanded for a new trial because the state's evidence did not sufficiently justify either the use of Maryland's closed-circuit television procedure or the consequent denial of the defendant's right to a face-to-face encounter with her accusers.

The United States Supreme Court granted certiorari to determine whether, in a child abuse case, the admission of a child's testimony via closed-circuit television violated the defendant's sixth amendment confrontation rights (Miller,1990). The Supreme court held in a 5 - 4 decision that allowing a child abuse victim to testify via one-way closed-circuit television does not violate a criminal defendant's sixth amendment confrontation clause right if the trial court specifically finds such a procedure

necessary to protect the child's welfare (Miller,1990). In upholding the lawfulness of the Maryland procedure, the Craig court held that the confrontation clause embodies a preference for, but not an absolute guarantee of, face-to-face confrontation (Schwalb,1991). Writing the majority opinion in Craig, Justice O'Connor referred to well-established hearsay exceptions which do not violate the constitution to illustrate that face-to-face confrontation can only constitute a constitutional preference; a "literal reading of the Confrontation Clause could abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme" (p.3165).

The Craig majority employed a two pronged test to determine whether the Maryland exception to the face-to-face standard passed constitutional scrutiny. First, the Court held that an exception to face-to-face confrontation did not violate the sixth amendment when "the procedure is necessary to further an important state interest" (p.3167). Justice O'Connor outlined three elements of the finding of necessity. Initially, the trial court must determine that protecting the welfare of the particular child demands the use of the procedure. The second element requires a finding that traumatization of the child would result from his or her testifying in the presence of the defendant, and not simply from testifying in the courtroom. Finally, the trial court must find that the emotional distress the child would suffer would be more than de minimis (Miller,1990).

In the second prong of the Constitutional test, the Court insisted that the exception infringe only narrowly on a defendant's rights (Schwalb,1991).

Because the closed-circuit television procedure purported to protect children from trauma and retained the witness' oath, the opportunity for cross-examination, and the ability of the jury to observe the witness, the Court held that the procedure both furthered an important state interest and was narrowly tailored to minimize interference with Ms. Craig's right of confrontation (Schwalb,1991).

Thus, in Craig, the Court created a constitutionally valid exception to the confrontation clause by fashioning a "balancing test" which protects both the testifying child abuse victim and the individual defendant's sixth amendment rights. Although the "balancing test" acknowledges the important public policy of permitting child abuse victims to testify out of the presence of their alleged abusers, it does not tolerate interference with the defendant's sixth amendment rights unless the state can prove the compelling nature of its interest and the trial court makes a specific finding of necessity (Miller,1990).

VII. THE TEXAS CHILD WITNESS VIDEOTAPE STATUTE

In 1983, the Texas legislature enacted a statute setting forth special procedures by which testimony of the complaining witness in a prosecution for the sexual abuse of a child may be recorded and received at trial (Clark,1986).

Texas Criminal Procedure Code Article 38.071, Section 2 provides:

(a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.

(c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to time of trial.

Section 4 provides:

(a) After an indictment has been returned or a complaint filed charging the defendant with an offense to which this article applies, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may 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. To the extent practicable, only those persons permitted to be present at the taking of testimony under Section 3 of this article 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 Section 3. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and is not altered;

(3) each voice on the recording is identified;

(4) the defendant, the attorneys for each party, and the expert witnesses for each party are afforded an opportunity to view the recording before it is shown in the courtroom;

(5) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;

(6) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time the recording was made; and

(7) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings is established at trial.

(c) After a complaint has been filed or an indictment returned charging the defendant, on the motion of the attorney representing the state, the court may order that the deposition of the child be taken outside of the courtroom in same manner as a deposition may be taken in a civil matter. A deposition taken under this subsection is admissible into evidence.

Court Challenges

Texas guarantees a greater right to confrontation than is required in the Constitution of the United States. While the United States Constitution requires that the accused is afforded the opportunity to confront the witness, the Texas Constitution requires that an actual confrontation take place (Galloway,1990). Due to this constitutional requirement, the Texas Court of Criminal Appeals attacked the constitutionality of the statute in its 1987 opinion in Long v. State, 742 S.W.2d 1120.

Long v. State

In Long, a twelve year old girl testified on tape and this testimony was presented during the prosecutor's case-in-chief. Additionally, the child was called as a rebuttal witness. The child was treated as unavailable merely because of the nature of the offense (Galloway,1990).

The court stated that the statute authorized a significant departure from normal trial procedure by negating the requirement that the prosecution put on its case-in-chief in the courtroom, in the presence of the judge, jury and defendant.

In response to the July 1, 1987 decision in Long, comprehensive revisions to the Child Witness Videotape Statute were proposed. Attempts were made to correct the inadequacies the court found in the statute's confrontation of witnesses (Galloway,1990).

In Long, the shielding statute was triggered merely by the fact that the defendant had been accused of sexually assaulting a child. The revision mandates a judicial determination that the child is unavailable. Section 8, added to the revised statute, sets out consideration for determining the victim's availability for in-court testimony. Texas Code of Criminal Procedure Article 38-071 Section 8 states:

(a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:

(1) of emotional or physical causes, including the confrontation with the defendant or the ordinary involvement as complainant in the courtroom trial;

or

(2) the child would suffer undue psychological or physical harm through his involvement at trial.

(b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

Powell v. State

The Texas Court of Criminal Appeals called into question the constitutionality of the revised statute in the 1989 decision of Powell v. State, 765 S.W.2d 435. Powell held that physical confrontation, not merely cross-examination, is mandated by the Texas and United States Constitutions (Galloway, 1990). The Texas statute in

denying the defendant the right to be seen and heard by his accuser, violated this right to physical face-to-face confrontation. Furthermore, the state's interest in the emotional well-being of its children did not outweigh this right to direct confrontation (Burke,1987).

Buckley v. State

In 1990, the Texas Court of Criminal Appeals ruled in Buckley v. State, 786 S.W.2d 357, that the new version of the Child Witness Videotape Statute was constitutional. In Buckley, a statement of an eight year old sexual assault victim was introduced into evidence over the defendant's objections (Galloway,1990). The Texas Court enumerated three goals of the right to confrontation: (1) To insure that testimony against the accused is given under oath; (2) to give the defendant an opportunity to cross-examine the witnesses against him; and (3) to allow the jury to observe the witness' demeanor while testifying (Clark-Weintraub, 1985). The Texas Court of Criminal Appeals ruled that because the defendant was provided a sufficient right of confrontation at trial, out of court statements were properly admitted at trial.

VIII. SUMMARY AND CONCLUSIONS

There is a delicate balance between the well-being of the child victim of sexual abuse and the defendant's constitutional right to confront his accuser. This balance

must be achieved because both sides are equally important and imperative. This balance cannot be achieved by requiring a child victim to testify in court. Due to today's technological advancements, an alternative has been developed that protects the child's interests but at the same time, provides the essence of confrontation to the defendant. This alternative, the use of closed-circuit television, is not automatically invoked in an abuse case - the procedure is utilized upon a court determination of necessity. And although the defendant loses his right to actual face-to-face confrontation with this accuser, the essence of confrontation is retained through the use of oath, cross-examination and observation of the witness by the judge and jury. The Supreme Court has held that the right to confrontation is not an absolute right and may be subject to a state's interest. The framers of the Constitution in providing for face-to-face confrontation did so in the context of a traditional court setting. Now, modern technology provides face-to-face confrontation via closed-circuit television without the defendant relinquishing any fundamental rights and simultaneously affording a much needed protection to the child victim's mental and emotional well-being.

The issue is far from being totally resolved, but this writer believes that the needs and rights of both sides in this delicate balance are best met by the use of closed-circuit television as an alternative to in-court victim testimony in child sexual abuse cases.

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