

BALANCING THE DEFENDANT'S CONFRONTATION CLAUSE RIGHTS WITH THE STATE'S PUBLIC POLICY GOAL OF PROTECTING CHILD WITNESSES FROM UNDUE TRAUMATIZATION: ARIZONA LAW IN LIGHT OF *MARYLAND V. CRAIG* AND *COY V. IOWA*

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INTRODUCTION

Defendants have used the Confrontation Clause¹ to challenge convictions for many years.² Historically, Confrontation Clause arguments centered around the defendant's ability to cross-examine the witnesses against him.³ With the advent of closed circuit television and videotape equipment, however, the courts face a new Confrontation Clause issue. The courts must now apply the two-hundred year old Confrontation Clause in light of modern technology. This Note addresses the broad issue whether the Confrontation Clause requires strict, face-to-face confrontation between defendants and child witnesses under all circumstances.

Confrontation Clause issues arise when courts employ alternative means of procuring testimony⁴ from child witnesses.⁵ The basic question is whether defendants have an absolute right to physically confront all adverse witnesses⁶

1. U.S. CONST. amend. VI.

2. See, e.g., *California v. Green*, 399 U.S. 149 (1970); *Mattox v. United States*, 156 U.S. 237 (1895).

3. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974)).

4. Alternative means of procuring testimony include closed circuit television, videotape, silhouette screen or other methods that allow testimony but avoid a face to face confrontation between the defendant and the witness. See, e.g., ARIZ. REV. STAT. ANN. § 13-4253 (A), (B) (1989); IOWA CODE ANN. § 910A.14 (West Supp. 1990)

5. This issue may also raise potential hearsay problems beyond the scope of this Note. For a discussion of hearsay problems arising from testimony by alternative means, see Graham, *Admissibility of Hearsay Statements in Child Sexual Abuse Prosecutions*, CRIM. L. BULL., 473 (Sept.-Oct. 1989); Ringland, *Child Sex Abuse Evidence Problem — Update 1988*, 14 U. DAYTON L. REV. 147 (1988).

6. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI.

and if that right is not absolute, under what circumstances may it yield to other considerations?

Most cases and scholarly writings that address alternative means for procuring testimony involve victims of child abuse.⁷ This Note, however, discusses both child witnesses who were abused and those who were not. The controlling Arizona statute⁸ provides an opportunity to protect a broad spectrum of children from the rigors of face-to-face encounters with defendants. This Note, therefore, does not distinguish between victim and non-victim child witnesses.

Section One provides a brief review of Confrontation Clause rights generally. Section Two discusses recent United States Supreme Court⁹ and Arizona Supreme Court decisions¹⁰ which lay a foundation concerning alternative means of procuring child witnesses testimony. Section Three analyzes the current state of Arizona law. Section Four discusses the Supreme Court's answers to some of the questions raised in Section Two.

The United States Constitution guarantees the right to confront one's accusers¹¹ and necessarily involves jurisdictions other than Arizona.¹² This Note, however, primarily examines Arizona law, focusing on Arizona Revised Statutes (A.R.S.) sections 13-4251 and 13-4253.¹³

7. See generally *Coy*, 487 U.S. 1012; *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987); *State v. Vess*, 157 Ariz. 236, 756 P.2d 333 (Ct. App. 1988); *Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988), cert. granted, 314 Md. 458, 550 A.2d 1168 (1988), rev'd, 316 Md. 551, 560 A.2d 1120 (1989) (en banc), cert. granted, 110 S. Ct. 834 (1990), vacated in part, 110 S. Ct. 3157 (1990); *Abernethy, Protecting the Child Witness: Avoiding Physical Confrontation with the Accused*, THE ARMY LAWYER 23 (Nov. 1985); Note, *Criminal Procedure—Child Witnesses—The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639 (1985); Comment, *Use of Videotaping To Avoid Traumatization of Child Sexual Abuse Victim-Witnesses*, 21 LAND & WATER L. REV. 565 (1986).

8. ARIZ. REV. STAT. ANN. §§ 13-4251 to -4253 (1985). Section 13-4251(A) provides, in part, "[t]his article applies to the testimony or statements of a minor in criminal proceedings involving acts committed against the minor or involving acts witnessed by the minor" (emphasis added).

9. *Coy*, 487 U.S. 1012.

10. *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989).

11. U.S. CONST. amend. VI.

12. E.g., *Iowa (Coy)*, 487 U.S. 1012, *Ohio (Ohio v. Roberts)*, 448 U.S. 56 (1980), *California (Green)*, 399 U.S. 149, and *Maryland (Wildermuth)*, 310 Md. 496, 530 A.2d 275; *Craig*, 110 S. Ct. 3157).

13. Section 13-4253 provides:

Out of court testimony; televised; recorded

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

CONFRONTATION CLAUSE BACKGROUND

The right to confront one's accusers in a criminal trial is undeniably important. The framers of the Constitution thought it sufficiently important to include in the Bill of Rights.¹⁴ However, United States Supreme Court decisions limit its scope.¹⁵ Although the right to confront one's accusers is a fundamental right,¹⁶ it is not absolute.¹⁷

The Confrontation Clause has been interpreted as serving several purposes. The historical purpose of the Clause was to prevent the use of *ex parte* affidavits and depositions as the sole evidence in criminal trials.¹⁸ The most frequently cited purpose for requiring the confrontation of accusers, however, is the guarantee of cross-examination.¹⁹ But, the right of confrontation is broader in scope than that. The Supreme Court, in *California v. Green*,²⁰ set out the four "objectives that the framers of our Constitution intended the Confrontation Clause to satisfy":²¹ (1) to secure an opportunity for the defendant to effectively cross-examine his accuser; (2) to facilitate face-to-face confrontation; (3) to permit the jury to evaluate the demeanor of a witness who presents incriminating testimony against the accused; and (4) to ensure that the witness presents her statement while under oath.²² These factors serve to preserve and promote the integrity of the truth seeking process while protecting

B. The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall 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 and the recording is accurate and is not altered.
3. Each voice on the recording is identified.
4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

C. If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken.

14. U.S. CONST. amend. VI. *See also* *Pointer v. Texas*, 380 U.S. 400 (1965) (the right to confront one's accusers is fundamental and, therefore, applies to the states through the fourteenth amendment).

15. *See, e.g., Roberts*, 448 U.S. 56; *Mattox*, 156 U.S. 237.

16. *Pointer*, 380 U.S. 400.

17. *Roberts*, 448 U.S. 56; *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Mattox*, 156 U.S. 237.

18. *Mattox*, 156 U.S. at 242. *See also* Comment, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919, 924 (1986).

19. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Chambers*, 410 U.S. 284; *Green*, 399 U.S. 149; *Pointer*, 380 U.S. 400; *Mattox*, 156 U.S. 237.

20. 399 U.S. 149, 157-61 (citing *Mattox*, 156 U.S. 237).

21. Comment, *Preserving the Child Sexual Abuse Victim's Testimony: Videotaping is not the Answer*, 1987 DET. C.L. REV. 469, 496.

22. *Green*, 399 U.S. at 158-60.

the rights of the defendant.²³ The accuser's presence at trial presumably furthers that end,²⁴ because a witness is more credible when she faces the accused.²⁵ Further, when she faces the jury, there is a "certain subjective moral effect . . . produced upon the witness."²⁶

The considerations delineated in *Green*²⁷ and *Mattox*²⁸ are not absolute and uncompromising. On the contrary, the Court stated that a literal interpretation of these factors "would require . . . the exclusion of any statement made by a declarant not present at trial."²⁹ But that would abrogate "virtually every hearsay exception, a result long rejected as unintended and too extreme."³⁰ Nevertheless, *Ohio v. Roberts*³¹ expresses a clear preference for physical confrontation.³²

As early as 1895, the Supreme Court held that rules such as the confrontation right must occasionally yield to public policy considerations and necessity.³³ Determining what circumstances will limit the confrontation right is critical. Although fundamental, public policy,³⁴ necessity,³⁵ or the *Roberts* test³⁶ can encroach upon the confrontation right. But the Court has not completely defined the exact nature of, and limitations on, the right to physically confront one's accusers. In balancing a defendant's Confrontation Clause rights with the state's public policy goal of protecting child witnesses from undue trauma, the Court must resolve currently unanswered questions.³⁷

23. Note, *supra* note 7, at 647 (citations omitted).

24. See Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 810 (1985); Note, *Closed-Circuit Television Testimony for the Sexually Abused Child: The Right To Avoid Confrontation?*, 27 SANTA CLARA L. REV. 117, 120 (1987).

25. Note, *supra* note 7, at 647.

26. *Id.* (citing J. WIGMORE, EVIDENCE § 1395(2), at 153 (rev. ed. 1974)).

27. 399 U.S. 149.

28. 156 U.S. 237.

29. *Roberts*, 448 U.S. at 63.

30. *Id.*

31. 448 U.S. 56.

32. The Court repeatedly states that the Confrontation Clause is not absolute. If the defendant is afforded the opportunity to cross-examine and the jury can view the demeanor of the witness, some closely examined circumstances may warrant dispensing with confrontation at trial. *Id.* at 63-64.

33. *Mattox*, 156 U.S. at 243.

34. *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

35. *Id.*

36. 448 U.S. at 65-66.

37. Before *Coy* and *Craig* there were two primary questions unanswered by the Court. First, is there any exception to the requirement of direct physical confrontation between defendants and child witnesses? The *Craig* Court answered this question in the affirmative. 110 S. Ct. at 3166. See also *infra* notes 182-230 and accompanying text. The second question, which remains open after *Coy* and *Craig* is, exactly what circumstances will justify an exception?

PRELIMINARY GROUNDWORK FOR A CHILD WITNESS EXCEPTION TO THE CONFRONTATION CLAUSE

Coy v. Iowa

In *Coy v. Iowa*³⁸ the trial court allowed two sexually abused girls to testify from behind a screen.³⁹ The procedure, pursuant to Iowa statute,⁴⁰ allowed the defendant to hear and dimly see the girls while they testified, but prevented the girls from seeing the defendant.⁴¹ The defendant strenuously and repeatedly objected that this procedure violated his sixth amendment confrontation right.⁴² The Supreme Court, in a decision written by Justice Scalia, agreed with Mr. Coy. The Court reversed and remanded his conviction.⁴³

The Majority Opinion

Justice Scalia acknowledged that most Confrontation Clause challenges historically involved either restrictions on the scope of cross-examination or the admissibility of out-of-court statements.⁴⁴ This is true, according to Scalia, because there is more room for doubt and, therefore, litigation in these areas than in the area of face-to-face confrontation.⁴⁵ Moreover, the Court found that the literal right to confront one's accusers forms the values at the core of the Confrontation Clause.⁴⁶ In the majority's view, "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.'"⁴⁷ In *Coy*, compassion for the victim-witnesses did not justify the use of alternative means for procuring testimony.⁴⁸ Confrontation may upset the truthful child, but it may also expose the false accuser.⁴⁹

The Iowa statute unconstitutionally violated the defendant's Confrontation Clause rights. The Court acknowledged and remedied this situation,⁵⁰ but two major questions remained unanswered. Are there exceptions to the Confrontation Clause requirement of face-to-face testimony? If so, what

38. 487 U.S. 1012. John Avery Coy was convicted of two counts of engaging in lascivious acts with a child. In the early stages of the trial, the state moved the court to permit the witnesses (also the victims in this case) to testify without directly confronting the defendant, pursuant to a recently enacted Iowa statute. *Id.* at 1014.

39. *Id.* at 1014-15.

40. The statute permits testimony of a child from behind a screen or via closed-circuit television. IOWA CODE ANN. § 910A.14 (West Supp. 1990).

41. *Coy*, 487 U.S. at 1014-15.

42. *Id.* In addition to his confrontation argument, Coy objected that the procedure violated his due process right. The Court found it unnecessary to address the second argument because it reversed and remanded his conviction on confrontation grounds. *Id.* at 1015.

43. *Id.* at 1022.

44. *Id.* at 1016 (citations omitted).

45. *Id.*

46. *Id.* at 1017 (citing *Green*, 399 U.S. at 147).

47. *Id.* (quoting *Pointer*, 380 U.S. at 404).

48. *Id.* at 1020.

49. *Id.* Justice Scalia wrote "[i]t is a truism that Constitutional protections have costs."

Id.

50. *Id.* at 1021-22

circumstances justify a reprieve from direct physical confrontation for the child witness?

The majority recognized that Confrontation Clause rights are not absolute and may give way to other important interests.⁵¹ Still, the Court refused to consider a possible balancing test concerning this issue for use in the future.⁵² The Court implied that it would allow an exception only when necessary to further an important public policy.⁵³

Although the Court "[left] for another day"⁵⁴ the question of whether any exceptions exist, it briefly stated why *Coy* did not present such an exception. First, the statute in question created a legislatively imposed presumption of trauma.⁵⁵ This presumption inferred a generalized finding of trauma for all children falling within the statute⁵⁶ but did not establish necessity to further an important public policy.⁵⁷ The statute did not require any particularized finding of trauma.⁵⁸ The Court requires something more than a generalized finding of trauma when an exception to the Confrontation Clause is not firmly rooted in our jurisprudence.⁵⁹

Additionally, *Coy* did not qualify as an exception to the Confrontation Clause because there was no individualized finding of need to avoid direct physical confrontation.⁶⁰ *Coy* lacked a specific finding that *these* girls would experience trauma if forced to testify in the direct presence of the defendant.⁶¹ The majority opinion infers that removal of these deficiencies could result in an exception that does not violate the Constitution.⁶² Given the right factual setting a majority might adopt a new exception permitting child witnesses to avoid direct physical confrontation with defendants.

51. *Id.* at 1020.

52. *Id.* at 1021.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* See generally IOWA CODE § 910A.14 (West Supp. 1990).

57. *Coy*, 487 U.S. at 1021.

58. In the majority and concurring opinions, much is made about the distinction between general and specific findings of trauma. See *id.* See also *id.* at 1025 (O'Connor, J., concurring). At the heart of this distinction lies the information the finding is based upon. A specific finding of probable trauma requires investigation concerning the particular facts, circumstances, personality traits, and needs of the child who is asked to testify. On the other hand, a generalized finding involves findings about children generally. *Id.* at 1021. Even if this general finding is limited to children in similar circumstances, it is still a generalized finding and does not suffice. *Id.*

59. *Id.* (citing *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987)). The exceptions that are "firmly rooted in our jurisprudence," referred to by the Court, are hearsay exceptions.

60. *Id.*

61. *Id.*

62. *Id.* The Court held that whether any exceptions exist and whatever they might be, they would only be allowed when necessary to further an important public policy and upon an individualized finding of need. *Id.* The Court appeared willing to acknowledge the protection of child witnesses as an exception to the Confrontation Clause if these two qualifications were met.

The Concurring Opinion

Justice O'Connor's concurring opinion agreed with the majority view that the procedure involved violated Coy's Confrontation Clause rights.⁶³ O'Connor, however, primarily discussed the exception issue.⁶⁴ Because Justice Scalia expressly declined to investigate this area,⁶⁵ Justice O'Connor, joined by Justice White, provided the best glimpse of what the Court would do in the future.

Justice O'Connor recognized the Confrontation Clause's general requirement that the witness face the defendant.⁶⁶ She rejected, however, any suggestion in the majority opinion that this right, even if at the core of the Confrontation Clause, is absolute.⁶⁷ The Confrontation Clause embodies a preference for face-to-face confrontation. Competing interests can overcome this preference if a particular case so warrants.⁶⁸ These concerns must, however, survive close examination to overcome the preference for physical confrontation.⁶⁹ The concurring opinion did not disagree with the actual result reached by the majority. "[I]t extended the majority's holding to permit the use of protective devices when there is a case-specific showing of necessity."⁷⁰

Justice O'Connor went beyond the implications⁷¹ of the majority opinion to find that, given the right facts, there could be an exception to the Confrontation Clause for child witnesses.⁷² The demise of the *Coy* statute⁷³ does not doom all statutes designed to protect child witnesses.⁷⁴ Justice O'Connor provided general insight into the possible factors necessary to override a defendant's right to physical confrontation.⁷⁵ Confrontation Clause rights may, in appropriate cases, acquiesce to competing interests, permitting

63. *Id.* at 1022 (O'Connor, J., concurring, joined by White, J.).

64. *Id.* Justice O'Connor wrote a concurring opinion "only to note [her] view that [Confrontation Clause] rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." *Id.* Thus, the "exception issue" is whether there can be an exception to the Confrontation Clause rights for the protection of child witnesses.

65. *Id.* at 1021. *But see supra* note 62 and accompanying text.

66. *Id.* at 1024 (O'Connor, J., concurring).

67. *Id.* at 1025 (O'Connor, J., concurring).

68. *Id.* (quoting *Roberts*, 448 U.S. at 63-64).

69. For the majority view, see *supra* text accompanying notes 54-62. See also *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

70. *Sixth Amendment — Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 767 (1988). See also *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring). The state would have to show that the protective device was necessary to protect the child witness from undue trauma.

71. The majority left this question open for discussion and decision at some later time. *Coy*, 487 U.S. at 1021.

72. *Id.* at 1025 (O'Connor, J., concurring).

73. IOWA CODE ANN. § 910A.14. (West Supp. 1990).

74. *Coy*, 487 U.S. at 1023.

75. *Id.* at 1025 (O'Connor, J., concurring). Justice O'Connor wrote that an exception would be permitted if necessary in furthering an important public policy. She further stated that protecting child witnesses is such a policy and, therefore, the big question would be one of necessity. *Id.*

the use of procedural mechanisms that shield the child witness from the trauma of in-court testimony.⁷⁶

The concurring opinion held that it would permit testimony other than face-to-face courtroom confrontation, if necessary to further an important public policy.⁷⁷ Overcoming this Confrontation Clause right entails a two step process. First, the procedure must further an important public policy.⁷⁸ Justice O'Connor and many state legislatures consider the protection of child witnesses such a policy.⁷⁹ Second, the state must show necessity.⁸⁰ As *Coy* demonstrates, a generalized finding of necessity will not suffice.⁸¹ A case-specific finding of necessity would likely overcome the deficiencies exhibited in *Coy*.⁸² Justice O'Connor suggests that the strict requirements of the Confrontation Clause may abdicate to the state's compelling interest of protecting child witnesses.⁸³

The Dissenting Opinion

In his dissenting opinion, Justice Blackmun agreed with Justice O'Connor that the Confrontation Clause does not require face-to-face confrontation, but only prefers it.⁸⁴ Exceptions involving essential state interests limit that preference.⁸⁵ The protection of child witnesses qualifies as an essential state interest.⁸⁶ Because protecting child witnesses is an essential state interest, the dissent would require no specific finding of need.⁸⁷ The dissenters, therefore, diverged from the concurring opinion, arguing that an exception to the preference for face-to-face confrontation does not require a case-specific finding of necessity.⁸⁸

Coy Aftermath

Each state was required to examine its own child witness protection statutes and procedures in light of *Coy*, and balance the need to protect child witnesses with the confrontation rights of defendants. Although not the final word in this area, *Coy* did provide some new guidelines for the states to follow.

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

77. *Id.* at 1025 (O'Connor, J., concurring).

78. *Id.*

79. *Id.* at 1023 (O'Connor, J., concurring). Many state legislatures have passed child witness protection statutes. *See, e.g.*, ARK. CODE ANN. § 16-44-203 (1987); KAN. STAT. ANN. § 38-1558 (1986); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1990); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1990); PA. STAT. ANN. tit. 42, §§ 5982, 5985 (Purdon Supp. 1990).

80. *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

81. *Id.* Under both the majority and concurring opinions, if an exception is to exist, one inescapable ingredient is a particularized finding of need. *See also id.* at 1021.

82. No member of the Court established the exact parameters required for a finding of "necessity." *Id.* at 1012.

83. *Id.* at 1025 O'Connor, J., concurring).

84. *Id.* at 1031 (Blackmun, J., dissenting, joined by Rehnquist, C.J.).

85. *Id.*

86. *Id.*

87. *Id.* at 1032-33 (Blackmun, J., dissenting).

88. *Id.* at 1033 (Blackmun, J., dissenting).

Arizona Law: Arizona v. Vincent

State of Arizona v. Gerald Dean Vincent,⁸⁹ presented the Arizona Supreme Court with its first opportunity to interpret *Coy*. The question before the Arizona Supreme Court concerned A.R.S. sections 13-4251 through 13-4253. Vincent challenged section 13-4253 as unconstitutional both on its face and as applied to the facts of his case.⁹⁰

The trial court convicted Vincent of murdering his estranged wife.⁹¹ His two children testified in a videotaped procedure pursuant to A.R.S. section 13-4253⁹² about events surrounding the murder, but not the murder itself. The Arizona Supreme Court, en banc, reversed Vincent's conviction.⁹³

Section 13-4253 Applied to the Vincent Facts

The court first considered whether section 13-4253 was unconstitutionally applied to the facts of Vincent's case. The court held that Arizona requires an individualized finding of need to hold a child witness protection statute and conviction thereunder constitutional.⁹⁴ The Arizona Supreme Court, interpreting *Coy*, held that the absence of an individualized finding of need for special protection required reversal and remand of the conviction.⁹⁵ *Vincent* was not the first Arizona case to require a particularized showing of necessity to satisfy the Confrontation Clause of both the state and federal Constitutions.⁹⁶ In *State v. Vess*,⁹⁷ the Arizona Court of Appeals overturned a conviction under procedural circumstances similar to *Vincent* because it violated both the Arizona and the United States Constitutions.⁹⁸ The *Vess* court held that interpreting section 13-4253(A) to spare the state the burden of proving a witness' particularized need would create a group of witnesses who would never be required to appear in court.⁹⁹ In-court testimony of child witnesses would be at the discretion of the prosecution, and not the court.¹⁰⁰

89. 159 Ariz. 418, 768 P.2d 150 (1989).

90. 159 Ariz. at 426, 768 P.2d at 158.

91. *Id.* at 420, 768 P.2d at 152.

92. The text of section 13-4253 is reproduced *supra* note 13.

93. 159 Ariz. 433, 768 P.2d 165. Chief Justice Gordon did not participate in the *Vincent* decision; pursuant to the Arizona Constitution, Court of Appeals, Division One Judge Fidel sat in his stead and authored the opinion. ARIZ. CONST. art. VI, § 3. Justice Corcoran did not participate in the determination of *Vincent* either.

94. 159 Ariz. at 428, 768 P.2d at 160.

95. *Id.* at 429, 768 P.2d at 161.

96. *Id.* at 427, 768 P.2d at 159. See also *Vess*, 157 Ariz. 236, 756 P.2d 333.

97. 157 Ariz. 236, 756 P.2d 333 (Conviction was based on testimony by a child witness taken in a videotaped procedure pursuant to A.R.S. section 13-4253. No finding was made concerning the need to protect the child from undue trauma.)

98. *Id.* at 237, 756 P.2d at 334. *Vess* was convicted of child molesting, sexual abuse, and furnishing obscene material to a minor. The trial court used closed circuit television to procure testimony. The court of appeals reversed the conviction.

99. *Id.*

100. *Id.* The *Vess* court found that "[i]n effect, the legislature has created a class of prosecution witnesses in criminal trials who need not testify before the jury if the prosecutor does not want them to, whether or not any reason exists for allowing testimony to be taken in that form." *Id.*

Vess made absolutely no finding of need. The *Vess* trial court did not even attempt a generalized finding.¹⁰¹ This is important because both the United States Supreme Court and the Arizona Supreme Court emphasized that a particularized finding of need is required.¹⁰² The *Vess* procedure¹⁰³ is far from any exception the courts may establish in the area of protecting child witnesses.

The *Coy* decision mandates a particularized showing of need to have any chance of qualifying as an exception to the Confrontation Clause.¹⁰⁴ Although factually different, *Vincent* runs afoul in the same place that *Coy* did. The trial judge in *Vincent* made a generalized determination about children of similar ages in similar circumstances as the *Vincent* children,¹⁰⁵ without regard for the specifics of the two children in question. The trial judge made the decision without the benefit of evidence from either side regarding possible trauma to the children or their need for protection.¹⁰⁶ The trial court's finding does not meet the *Coy* burden of showing that these particular witnesses required special protection.¹⁰⁷

The Arizona Supreme Court held that the trial court unconstitutionally applied A.R.S. section 13-4253 in *Vincent*.¹⁰⁸ *Coy* mandated this result because the trial court did not make particularized findings regarding the *Vincent* children's inability to withstand the trauma of testifying in court.¹⁰⁹ The trial court erred by assuming that the statute embodied a presumption to accommodate substitute testimony and therefore did not require a specific finding of need.¹¹⁰

A Constitutional Construction for Section 13-4253?

Although the court reversed and remanded *Vincent*'s conviction based on the trial court's application of section 13-4253, it also discussed whether section 13-4253 is capable of constitutional construction at all.¹¹¹ The court held that an individualized finding of necessity, though not explicit in the statute, could be implied.¹¹² The court focused on the language of section 14-3253 to redeem

101. *Id.*

102. *See Coy*, 487 U.S. 1012; *Vincent*, 159 Ariz. 418, 768 P.2d 150.

103. For example, a legislatively created group of witnesses who could avoid testifying in open court at the sole discretion of the prosecution.

104. 487 U.S. at 1021. *Id.* at 1025 (O'Connor, J., concurring).

105. 159 Ariz. at 428, 768 P.2d at 160.

106. *Id.* at 427, 768 P.2d at 159. The trial court received a letter from the Foster Care Review Board concerning the *Vincent* children which advocated the use of the video taping procedure in taking the children's testimony. This letter did not meet the particularized finding of need requirement for several reasons. First, the letter played no part in the decision of the trial court. It was not received until more than two months after the decision had been made. Further, the letter was filed as a record of correspondence by the trial court, but was not entered into evidence. Finally, the letter provided only generalized conclusions and not particularized findings concerning the *Vincent* children. *Id.*

107. *Coy*, 487 U.S. at 1021.

108. 159 Ariz. at 429, 768 P.2d at 161.

109. *Id.* at 428-29, 768 P.2d at 160-61.

110. *Id.* at 429, 768 P.2d at 161.

111. *Id.*

112. The statute "necessarily contemplates that the trial judge will exercise discretion in accordance with the state and federal constitutions." *Id.*

the statute from *per se* unconstitutionality.¹¹³ A necessary element in finding the statute capable of constitutional construction is the implication of discretion.¹¹⁴ If not for the discretionary factor, A.R.S. section 13-4253 would create a statutorily imposed presumption of trauma like the Iowa statute the Supreme Court struck down in *Coy*.¹¹⁵

The Arizona Supreme Court also analyzed a difficult question the *Coy* Court left unanswered. Does even an individualized finding of likely trauma justify restriction of the defendant's right to a physical courtroom confrontation?¹¹⁶ The court found that it could not completely reconcile the competing interests of the defendant (confrontation) and the state (protecting child witnesses).¹¹⁷ The court established a new Arizona standard and held that trial courts must make individualized findings that meet the unavailability standard of *Ohio v. Roberts*.¹¹⁸ Anything less would be too weak to overcome the defendant's Confrontation Clause rights. The court based its finding on three recent cases: *Wildermuth v. State*,¹¹⁹ *Craig v. State*,¹²⁰ and *State v. Robinson*.¹²¹

The state must meet two requirements to satisfy the *Roberts* unavailability test. First, the state must prove the unavailability of the declarant.¹²² Second, the state must demonstrate that the statement bears sufficient indicia of reliability so that the trier of fact may have a basis for evaluating the truth of the statement.¹²³

Craig, *Wildermuth*, and *Robinson* applied the *Roberts* unavailability test to alternative means of procuring testimony to protect child witnesses. The *Vincent* court adopted this reasoning. For now, the state's public policy goal of

113. The court found the crucial word in the statute to be "may," "[t]he court . . . may order. . . ." *Id.* (citing ARIZ. REV. STAT. ANN. § 13-4253(B)) (emphasis added).

114. *Id.*

115. 487 U.S. at 1021. See also *Vincent*, 159 Ariz. at 429, 768 P.2d at 161.

116. *Vincent*, 159 Ariz. at 429, 768 P.2d at 161. The court, in dicta, investigated this area to provide some guidance for trial courts in the aftermath of *Coy* and *Vincent*. This issue was discussed in the concurring and dissenting opinions of *Coy*, but was not investigated in the majority opinion. *Coy*, 487 U.S. 1012 See also *id.* at 1024-25 (O'Connor, J., concurring), 1033-34 (Blackmun, J., dissenting)

117. *Vincent*, 159 Ariz. at 430, 768 P.2d at 162.

118. 448 U.S. 56.

119. 310 Md. 496, 530 A.2d 275. *Wildermuth* consisted of two cases that were consolidated by the Maryland Court of Appeals. The defendants were both convicted of child sexual abuse involving separate incidents. The alleged victims testified via closed circuit television.

120. 76 Md. App. 250, 544 A.2d 784. The defendant was convicted of various sexual offenses committed against students at the preschool she operated. Ms. Craig appealed on numerous grounds. Relevant here is her claim that some testimony was procured via closed circuit television in violation of her Confrontation Clause rights. The United States Supreme Court granted certiorari in this case and heard it this term. 110 S. Ct. 834. See also *infra* notes 185-226 and accompanying text.

121. 153 Ariz. 191, 735 P.2d 801 (Ct. App. 1987). The trial court found the five year old sexual abuse victim "unavailable" for testimony at trial. Pursuant to A.R.S. section 13-1416, The Minor Sexual Victim Testimony Act, the out of court statements of the child were admitted into evidence. The statute was held unconstitutional. However, the Arizona Supreme Court found the statements to be properly admitted under the *Roberts* test.

122. *Roberts*, 448 U.S. at 65. See also *Vincent*, 159 Ariz. at 431, 768 P.2d at 163. In the area of alternative means of procuring testimony, the *Roberts* unavailability prong has been interpreted to mean that the child is unavailable if she is unable to reasonably communicate. *Vincent*, 159 Ariz. at 431, 768 P.2d at 163 (citing *Wildermuth*, 310 Md. at 519, 530 A.2d at 268). The parameters of reasonable communication have not been defined.

protecting child witnesses may outweigh a defendant's Confrontation Clause rights.¹²⁴ But this is true only if there is a well-founded judicial determination that physical confrontation with the defendant would so traumatize a child witness as to render her unable to reasonably communicate.¹²⁵

The Arizona Supreme Court has not ruled on whether a standard less stringent than unavailability will satisfy the state and federal constitutions and overcome the defendant's Confrontation Clause rights.¹²⁶ The court asked, but did not answer, that question in *Vincent*.¹²⁷ As discussed in "The Current Arizona Standard: Unavailability" section of this note, the courts should not require the unduly harsh unavailability standard in this particular area of law.¹²⁸

ARIZONA LAW IN LIGHT OF *COY* AND *VINCENT*

A.R.S. sections 13-4251 through 13-4253, and similar statutes nationwide,¹²⁹ protect child witnesses from undue traumatization while maintaining a high confrontation level for defendants.¹³⁰ Just, vigorous prosecution of criminals and protection of child witnesses from undue traumatization help serve society.¹³¹ The most favorable outcome enhances the court's truth seeking function while protecting children from additional psychological or emotional harm.

Examining the Arizona Statute

Unlike many statutes,¹³² Arizona's section 13-4253 equally protects child victims of crime and child witnesses to crimes.¹³³ In some situations testifying in the physical presence of the defendant could so traumatize the child witness of a crime that the state has a legitimate interest in protecting that child.¹³⁴ Although testifying in front of the defendant may cause different types of emotional reaction in the child witness and the child victim, both can experience substantial trauma.¹³⁵ The concurring opinion in *Coy* indicated that both victim

123. *Roberts*, 448 U.S. at 65. See also *Vincent*, 159 Ariz. at 431, 768 P.2d at 163.

124. 159 Ariz. at 433, 768 P.2d at 165.

125. *Id.* at 431-32, 768 P.2d at 163-64.

126. *Id.* at 433, 768 P.2d at 165.

127. *Id.*

128. See *infra* notes 163-71 and accompanying text.

129. At least half of the states have enacted videotape or closed-circuit statutes. The scope and requirements of the statutes and the class of children protected vary. See *supra* note 79. See also *infra* notes 132, 151.

130. Comment, *supra* note 7, at 572.

131. Comment, *supra* note 18, at 920.

132. See, e.g., ALA. CODE § 15-25-2 (Supp. 1990); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1990); KY. REV. STAT. ANN. § 421.350(1), (3) (Baldwin Supp. 1990); MO. REV. STAT. § 491.675-.705 (Supp. 1990). But see IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1990); MISS. CODE ANN. § 13-1-405 (Supp. 1990); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985); WIS. STAT. ANN. § 967.04(7)-(10) (West Supp. 1990).

133. A.R.S. section 13-4253 refers to "minors" in general. Section 13-4251(A) refers specifically to minor victims and witnesses. See also *supra* note 7 and accompanying text.

134. See *Vincent*, 159 Ariz. 418, 768 P.2d 150. Although the conviction was held unconstitutional, the court recognized the state's interest in protecting children who witness crimes. *Id.* at 430, 768 P.2d at 162.

135. Parker, *Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?*, 17 NEW ENG. L. REV. 643, 647-48, 654-56 (1982).

witnesses and non-victim witnesses deserve protection from confrontation.¹³⁶ Justice O'Connor repeatedly referred to shielding "child witnesses"¹³⁷ when speaking of the increase in reported cases of child abuse.¹³⁸ Many of the arguments forwarded by proponents of protection for child abuse victims in the criminal justice system apply to child witnesses as well.

Videotaping and closed circuit television are the two main methods that substitute for face to face testimony.¹³⁹ Arizona provides for both methods in section 13-4253(A) and (B).¹⁴⁰ The Arizona statute requires the taking of videotaped testimony outside of the courtroom for presentation during the trial.¹⁴¹ A supportive person, attorneys for the state, attorneys for the defendant, and a person to operate the equipment join the child in the videotaping room.¹⁴² The court may also interpret the statute to include the judge in the taping room.¹⁴³ The defendant cannot be present, but must be able to see and hear the proceedings as they occur.¹⁴⁴ The court must provide the defendant with a means of communicating with defense counsel during the procedure.¹⁴⁵

Courts also commonly employ the use of closed circuit television as an alternative method of procuring testimony. The Arizona statute provides for the closed circuit transmission of testimony from a separate room into the courtroom while the trial is in progress.¹⁴⁶ The primary difference between section 13-4253 (A) and (B) is the method for procuring the testimony.¹⁴⁷ The statute allows the same people to be present under section (A) as section (B)

136. 487 U.S. at 1022-25 (O'Connor, J., concurring).

137. *Id.*

138. *Id.*

139. The screen used in *Coy* is a method rarely included in child witness protection legislation.

140. Section (A) provides for closed circuit while section (B) allows videotaped testimony.

141. ARIZ. REV. STAT. ANN. § 13-4253(B). The videotape method was employed in *Vincent*. 159 Ariz. at 420, 768 P.2d at 152.

142. *Id.*

143. See *infra* note 150 and accompanying text.

144. ARIZ. REV. STAT. ANN. § 13-4253(B). The statute provides in part that "[t]he court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant."

145. This is most typically accomplished by the use of a two way private telephone line. This is not required by the express language of the statute or the Arizona Supreme Court. In *Vincent*, the court simply mentions that the telephone was available to the defendant. 159 Ariz. at 420, 768 P.2d at 152. It appears that this aspect of the procedure will have to be more firmly established by the court or the legislature in the future in order to pass a challenge in the United States Supreme Court. *Coy* alludes to the importance of private, simultaneous communication between the defendant and his counsel during the taking of testimony via an alternative method. 487 U.S. at 1023-24 (O'Connor, J., concurring). Participation in cross-examination must be assured.

146. ARIZ. REV. STAT. ANN. § 13-4253(A).

147. See ARIZ. REV. STAT. ANN. § 13-4253. Section (A) permits the use of closed circuit procurement of the child witness' testimony. Under section (B), the testimony is taken via the videotape procedure. Additionally, section (B) has some requirements not found in section (A) regarding the quality of the tape, as well as the identification of the people on the tape.

while the witness testifies.¹⁴⁸ The defendant must be able to see and hear the proceedings as they occur, but the statute excludes him from the room.¹⁴⁹

The Arizona Supreme Court has never addressed whether the judge should be in the courtroom or the closed-circuit room during closed circuit testimony. If the judge is not in the courtroom, improper activities may go unnoticed and uncontrolled by the court.¹⁵⁰ The better alternative is for the judge to remain in the courtroom. The judge could control activity in the courtroom and rule on objections via the closed circuit.

Both closed circuit and videotaped testimony deny the defendant actual physical confrontation with the witness. In Arizona, unlike some states,¹⁵¹ when an alternative method is used to procure testimony, no one can require the child to testify in open court at a later date.¹⁵² However, implementation of the videotape or closed circuit options requires a specific, particularized finding of need.¹⁵³

The judiciary has hesitated to adopt videotape and closed circuit procurement of testimony. The technical base of these methods apparently accounts for this reluctance.¹⁵⁴ In the area of technological advancements, the courts lag behind society as a whole.¹⁵⁵ The framers of the Constitution could not have envisioned today's technological advances. At that time, only live, face-to-face testimony protected the defendant's Confrontation Clause rights¹⁵⁶ and ensured that the jury could observe the demeanor of the witness.¹⁵⁷

One important fact cannot be lost in the midst of all of the technological confusion; the statutes embody and the courts employ these procedural devices to protect child witnesses. Our society no longer expects children to act like

148. *Id.*

149. *Id.*

150. Potentially, the judge's absence could encourage activities in the courtroom that would not be allowed if she were there. Problems could arise in the form of misbehavior on the part of the defendant, the jury members or the spectators.

151. *See, e.g.*, IND. CODE ANN. § 35-37-4-8 (Burns 1990); MINN. STAT. ANN. § 595.02(4) (West Supp. 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); NEV. REV. STAT. § 174.227 (1986).

152. "If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken." ARIZ. REV. STAT. ANN. § 13-4253(C).

153. *See, e.g.*, *Coy*, 487 U.S. at 1012; *Vincent*, 159 Ariz. 418, 768 P.2d 150; *Vess*, 157 Ariz. 236, 756 P.2d 333.

154. Many technological advances must pass the *Frye* Test to be admissible as evidence in a trial. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the Court of Appeals for the District of Columbia established a test for determining the underlying reliability of new scientific procedures. The *Frye* Test is used to determine when a new scientific technique has gained sufficient acceptance in the scientific community to produce information which can be used as evidence in court.

155. Many families in this country use cam-corders or video cassette recorders every day. They consider the devices a regular part of their modern lives. The judiciary must conform to a higher standard than the public at large, but this does not negate the fact that the courts are lagging behind our society in this regard generally. *See* Comment, *supra* note 7, at 569; Comment, *supra* note 18, at 938.

156. Comment, *supra* note 18, at 927.

157. *Parker*, *supra* note 135, at 695.

adults.¹⁵⁸ Our judicial system does not treat juvenile defendants exactly the same as their adult counterparts.¹⁵⁹ But, for the most part, the system treats children and adults the same when they are witnesses.¹⁶⁰ The balance between the defendant's rights and the rights of an adult witness does not seem appropriate when the witness is a child with a greater need for protection.¹⁶¹ Public awareness concerning the trauma suffered by child witnesses continues to grow. This is also true, to some extent, with respect to courts and legislatures.¹⁶² However, all of those involved in the judicial process must take greater strides to protect child witnesses in the adult system.

The Current Arizona Standard: Unavailability

Currently, in order for courts to employ the procedures embodied in A.R.S. section 13-4253, the state must meet the unavailability standard.¹⁶³ But in setting forth this standard, the Arizona Supreme Court questioned whether a less stringent showing would suffice to overcome the Confrontation Clause rights of defendants.¹⁶⁴ The unavailability test, in this context,¹⁶⁵ requires a finding that testifying in front of the defendant would so traumatize the child witness as to render her unable to reasonably communicate.¹⁶⁶ The courts' opinions do not link the experience of substantial trauma with an inability to communicate. More importantly, an ability to communicate is not linked with a lack of substantial trauma.¹⁶⁷ Simply stated, there is no evidence proving that the ability of a child to communicate necessarily excludes the experience of substantial trauma.

Courts should not interpret the Confrontation Clause to require a strict showing of unavailability before allowing televised testimony.¹⁶⁸ Alternative methods of procuring testimony only slightly intrude on the Confrontation Clause rights of defendants. The only Confrontation Clause right absent in videotaped or closed circuit testimony is direct, physical confrontation between the witness and the defendant. The witness is subject to cross-examination, and the defendant may participate via the telephone line.¹⁶⁹ The witness is under

158. Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 810 (1987).

159. *Id.*

160. *Id.*

161. Parker, *supra* note 135, at 644.

162. Abernethy, *supra* note 7, at 24.

163. *Vincent*, 159 Ariz. at 430, 768 P.2d at 162 (citing *Roberts*, 448 U.S. 56).

164. *Id.* at 433, 768 P.2d at 165.

165. The unavailability test in *Roberts* pertained to hearsay in a forgery and check kiting case where testimony from a preliminary hearing was admitted at trial and the declarant did not appear at trial. 448 U.S. 56.

166. *Vincent*, 159 Ariz. at 433, 768 P.2d at 165.

167. Courts have not found that the inability to communicate is proportional to the experience of trauma in child witnesses. See, e.g., *Coy*, 487 U.S. 1012; *Vincent*, 159 Ariz. 418, 768 P.2d 150; *Vess*, 157 Ariz. 236, 756 P.2d 333; *Wildermuth*, 310 Md. 496, 530 A.2d 275; *Craig*, 76 Md. App. 250, 544 A.2d 784; *Robinson*, 153 Ariz. 191, 735 P.2d 801.

168. Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are the Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. PUGET SOUND L. REV. 109, 114 (1988).

169. See *supra* note 145 and accompanying text.

oath while testifying.¹⁷⁰ Finally, this procedure enables the jury to observe the demeanor of the witness during testimony.¹⁷¹ When viewed in this light, the unavailability test is inordinately severe.

The Court has interpreted the Confrontation Clause as protecting four factors.¹⁷² The absence of one of these factors, physical confrontation, standing alone, is not enough to require the strict dictates of the unavailability test. A less stringent test strikes an appropriate balance between the defendant's interests and the state's interests. Children need and deserve protection against the harshness of the court system. The inflexible standard is unduly harsh because of the nature of the testimony involved¹⁷³ and because the procedure meets the majority of the objectives of the Confrontation Clause.¹⁷⁴

The Arizona Supreme Court left open the possibility that a lesser standard could pass constitutional muster.¹⁷⁵ The court did not, however, elaborate on an acceptable lesser standard. *Coy* and *Vincent* mandate an individualized finding of particularized need to overcome the Confrontation Clause requirement of face-to-face confrontation and permit the use of alternative means to procure child witness testimony.¹⁷⁶

There is a wealth of information showing that exposure to the criminal justice system is likely to traumatize a child.¹⁷⁷ Placing a child witness in an overly stressful environment may decrease the accuracy and reliability of the testimony.¹⁷⁸ In appropriate cases¹⁷⁹ an alternative method of procuring testimony, therefore, improves the truth seeking function of the court and pro-

170. Although this requirement is not specifically written into the statutes, it seems to have been presumed by the courts because they have not addressed this issue. See, e.g., *Craig*, 110 S. Ct. 3157; *Coy*, 487 U.S. 1012; *Vincent*, 159 Ariz. 418, 768 P.2d 150.

171. The equipment involved must ensure an accurate picture and accurate sound. There is some debate as to the precision of the image involved in these procedures. The *Vess* court indicates that the jury's capacity to observe the witness' demeanor is diminished by these alternative procedures. *Vess*, 157 Ariz. at 237-38, 756 P.2d at 334-35. However, the Arizona Supreme Court and the United States Supreme Court do not share the heightened concern of the *Vess* court. See generally *Coy*, 487 U.S. 1012; *Vincent*, 159 Ariz. 418, 768 P.2d 150. There are advantages and disadvantages for both sides which balance each other out.

172. The four factors are: (1) to secure an opportunity for the defendant to effectively cross examine his accuser; (2) to facilitate face-to-face confrontation; (3) to permit the jury to evaluate the demeanor of a witness who presents incriminating testimony against the accused; and (4) to ensure that the witness presents her statement while under oath. See *Green*, 399 U.S. at 158-60 (citing *Mattox*, 156 U.S. 237).

173. The witnesses are children. They are not the same as adults. See *supra* notes 158-62 and accompanying text.

174. *Green*, 399 U.S. 149 (1970).

175. *Vincent*, 159 Ariz. at 433, 768 P.2d at 165.

176. *Coy*, 487 U.S. at 1021; *id.* at 1025 (O'Connor, J., concurring); *Vincent*, 159 Ariz. at 432, 768 P.2d at 164.

177. See, e.g., *Parker*, *supra* note 135; *Note*, *supra* note 158; *Note*, *supra* note 7; *Berliner & Barbieri*, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984); *Avery*, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1 (1983); *Bernstein & Claman*, *Modern Technology and the Child Witness*, 65 CHILD WELFARE 155 (1986).

178. See, e.g., *Comment*, *supra* note 18, at 931-32; *Note*, *supra* note 158.

179. An appropriate case is one in which the trial court makes a particularized finding of need. *Coy*, 487 U.S. 1012. The finding, in Arizona, must include the determination that a certain child witness would be unduly traumatized by being required to testify in the physical presence of the defendant. *Vincent*, 159 Ariz. 418, 768 P.2d 150.

tests the child witness. Using alternative means to procure the testimony of some child witnesses could advance both of these societal goals.

The state's burden, if lower than unavailability, must still be high. It is doubtful that the courts would uphold an infringement on Confrontation Clause rights based upon a finding that a witness might suffer slight trauma. The state would have to show that this witness would experience substantial trauma if forced to testify before the defendant.¹⁸⁰ A more stringent standard is inappropriate. A child who is able to communicate in spite of her trauma may still incur substantial emotional harm. Discretion, as directed in the statute, would rest with the trial judge. Judges could freely make the case-specific findings of necessity which the courts found so important.¹⁸¹

MARYLAND V. CRAIG: THE QUESTION IS ANSWERED

The *Coy* Court refused to decide whether a child witness exception to the Confrontation Clause existed, reserving the decision "for another day."¹⁸² That issue was squarely presented in *Maryland v. Craig*.¹⁸³ Writing for the majority,¹⁸⁴ Justice O'Connor framed the issue saying "[t]his case requires us to decide whether the Confrontation Clause . . . categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television."¹⁸⁵ The Court held that the Confrontation Clause does not so prohibit.¹⁸⁶

Sandra Ann Craig was convicted of a variety of crimes against students at the preschool she owned and operated.¹⁸⁷ The evidence against Ms. Craig included testimony of children elicited via a one-way closed circuit television procedure pursuant to Maryland statute.¹⁸⁸ Preliminarily, the statute requires trial courts to determine that testifying in the presence of the defendant would

180. See, e.g., *Coy*, 487 U.S. at 1021.

181. See, e.g., *Coy*, 487 U.S. at 1021; *Vincent*, 159 Ariz. at 428, 768 P.2d at 160.

182. *Coy*, 487 U.S. at 1021.

183. 110 S. Ct. 3157 (1990).

184. The alignment of Justices in the *Craig* case is unusual. In *Craig*, O'Connor delivered the opinion of the Court joined by Rehnquist, White, Blackmun and Kennedy. In *Coy*, Scalia wrote the opinion joined by Brennan, White, Marshall, Stevens and O'Connor; Justice O'Connor joined by White concurred, and Blackmun dissented joined by Rehnquist. Scalia switched from writing the opinion in *Coy* to the dissent in *Craig*. Scalia is paired in *Craig* with the unlikely allies Brennan, Marshall and Stevens. Justice Scalia wrote a scathing dissent in *Craig* which is inconsistent with his *Coy* opinion in a number of ways. The most glaring inconsistency involves the issue "left for another day" in *Coy*; that is, does a Confrontation Clause exception exist for child witnesses? In *Coy*, Scalia opened the door for a possible exception in the future saying that any exceptions, "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy." *Coy*, 487 U.S. at 1021. In *Craig*, however, Scalia inexplicably departed from his *Coy* stance stating, "[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Craig*, 110 S. Ct. at 3171. The only logical explanation is that in *Coy*, Scalia tempered his true feelings with conciliatory language necessary to maintain a majority. In *Craig*, on the other hand, Scalia wrote in dissent without any need to appease other members of the Court.

185. *Craig*, 110 S. Ct. at 3160.

186. *Id.* at 3170.

187. *Id.* at 3160-62.

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

cause serious emotional distress to the child witness.¹⁸⁹ The trial judge, after hearing expert testimony, concluded that the state met the statutory threshold requirement.¹⁹⁰ Craig appealed, claiming the procedure violated her sixth amendment right to confrontation.¹⁹¹ The Maryland Court of Appeals reversed and remanded on other grounds.¹⁹²

The Answer, the Court's Pronouncement on Child Witnesses and the Confrontation Clause

In *Craig*, a majority of the Supreme Court explicitly held for the first time that the Confrontation Clause does not unconditionally prohibit child abuse victim-witnesses from testifying outside the defendant's physical presence via one-way closed circuit television.¹⁹³ Thus, the Court affirmatively answered the question left open in *Coy*.¹⁹⁴ The Court determined that, in some instances, the protection of child witnesses is a state interest sufficiently strong to outweigh a defendant's right to confront witnesses against him face-to-face.¹⁹⁵ The Court established a framework to aid courts in determining whether the facts of individual cases meet the burden necessary to override a defendant's physical confrontation right.¹⁹⁶

The Court reiterated the idea articulated in *Coy* that a defendant's Confrontation Clause right is not absolute.¹⁹⁷ The Court did not reach the issue of a child witness exception in *Coy* because the trial court did not make a particularized finding of need concerning each child witness before it employed the screen.¹⁹⁸ The *Craig* Court could examine and determine the exception question because the trial court had made individualized findings of need for each witness. Justice O'Connor reviewed the reliability concerns of the Confrontation Clause,¹⁹⁹ as well as the hearsay exceptions to support the contention that the Confrontation Clause cannot be understood to unequivocally require face-to-face confrontation.²⁰⁰ The Court held that although face-to-face confrontation is important, it is not "an indispensable element of the Sixth

189. *Id.* Section 9-102(a)(1)(ii) requires "emotional distress such that the child cannot reasonably communicate."

190. *Craig*, 110 S. Ct. at 3162.

191. *Id.*

192. *Id.* See also *infra* notes 219-21 and accompanying text.

193. *Craig*, 110 S. Ct. at 3171.

194. 487 U.S. at 1021. The *Coy* Court stated, "[w]e leave for another day . . . the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." *Id.*

195. *Craig*, 110 S. Ct. at 3167-69.

196. *Id.* at 3162-71.

197. *Id.* at 3163. The Court found it "never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face" confrontation. *Id.* (emphasis added in part). The *Coy* Court stated "we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." 487 U.S. at 1020.

198. See *supra* text accompanying notes 54-62.

199. *Craig*, 110 S. Ct. at 3163-64, 3166. The Court determined that face-to-face confrontation can be denied when "denial of such confrontation is necessary to further an important public policy *and only* when the reliability of the testimony is otherwise assured." *Id.* at 3166 (emphasis added). Moreover, the Court found that the individualized finding of need for each child in *Craig* distinguished its overall reliability from *Coy*. *Id.* at 3163.

200. *Id.* at 3163-65.

Amendment's guarantee of the right to confront one's accusers."²⁰¹ A defendant's right to face-to-face confrontation, however, cannot be easily discarded; it will only be dispensed with when the denial of physical "confrontation is necessary to further an important public policy" and there are adequate assurances of reliability.²⁰²

The Court began its evaluation of *Craig* directly by reviewing the Maryland statute.²⁰³ When employed, the statute prevents the child witness from seeing the defendant while testifying.²⁰⁴ The Court determined, however, that all other elements of confrontation were preserved by the procedure.²⁰⁵ The Court reasoned that the testimony procured possessed greater assurances of adversariness and reliability than is constitutionally required to admit hearsay.²⁰⁶ Consequently, "where necessary to further an important state interest, [the procedure] does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause."²⁰⁷

It follows that constitutionality turns on whether "the procedure is necessary to further an important state interest."²⁰⁸ Maryland argued that it did have a substantial interest in protecting alleged child abuse victims from the alleged assailant and that the procedure at issue was necessary to further that concern.²⁰⁹ The Supreme Court agreed, holding that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."²¹⁰ The statute at issue, like many nationwide, was precisely intended to guard the psychological and physical health of child victims.²¹¹ The Court determined that in light of the state's traditional interest in protecting the welfare of children and the increasing academic evidence that child abuse victims forced to testify in court suffer psychological trauma, it would not override the Maryland legislature's discretion concerning the protection of child abuse victims.²¹² The Court held that if a state makes a satisfactory showing of necessity, the state's interest in protecting child abuse victims from the trauma of testifying is important enough to warrant the use of special procedures which deny physical confrontation with the defendant.²¹³

201. *Id.* at 3166.

202. *Id.*

203. *Id.* at 3166-67. *See also* MD. CTS. & JUD. PROC. CODE ANN. § 9-102.

204. MD. CTS. & JUD. PROC. CODE ANN. § 9-102.

205. *Id.* The Court determined that testimony under oath, cross-examination, and observation of the witness' demeanor ensures that it is both adequately reliable and "subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.*

206. *Id.* at 3167.

207. *Id.*

208. *Id.* In fact, the Court determined the "critical inquiry" in this case to be whether the procedure was necessary to further an important state interest. *Id.*

209. *Id.*

210. *Id.* The Court noted that a majority of states have statutes designed to protect child witnesses from the undue trauma of testifying in the physical presence of defendants. These statutes are evidence of the widespread belief in the importance of this public policy. *Id.*

211. *Id.* at 3168.

212. *Id.* at 3168-69.

213. *Id.* at 3169.

As suggested in the *Coy* concurrence,²¹⁴ *Craig* requires a case specific particularized showing that the alternative procedure is necessary to protect the individual child witness.²¹⁵ Furthermore, the trial court must be satisfied that the child witness will be traumatized by the presence of the defendant, and not the courtroom generally.²¹⁶ Finally, the trial court must determine that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" ²¹⁷ The Court was not required to establish what minimum showing of emotional trauma would be sufficient to employ the special procedure because the Maryland statute compelled a showing that emotional harm prevented reasonable communication.²¹⁸

The Maryland Court of Appeals held that face-to-face confrontation is not an absolute constitutional requirement and that it can be overcome by a fact specific showing of necessity.²¹⁹ The court nonetheless reversed and remanded the conviction. The court of appeals appears to have interpreted *Coy* to require trial judges to observe the child in the presence of the defendant and to examine less restrictive procedures before employing an alternative process.²²⁰ The Court rejected this interpretation, holding that neither was constitutionally required, but that the information could be considered in evidence.²²¹

Craig's Impact on Arizona and Other States

It is now constitutional for states to impinge upon a defendant's confrontation right, in some situations, by employing methods for procuring the testimony of child witnesses that avoid physical confrontation.²²² Although the door is clearly open, the parameters of this new exception are not certain. Many questions remain.

First, the controlling Maryland statute requires "serious emotional distress such that the child cannot reasonably communicate;"²²³ consequently, the Court did not feel compelled to determine whether something less than the *Roberts* unavailability test²²⁴ would pass constitutional muster.²²⁵ The Court did comment that the trauma suffered by the child witness if required to testify

214. *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

215. "[T]rial court[s] must hear evidence and determine whether use of the . . . procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Craig*, 110 S. Ct. at 3169.

216. The Court found "if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary. . . ." *Id.*

217. *Id.*

218. *Id.* Section 9-102(a)(1)(ii) specifically requires "serious emotional distress such that the child cannot reasonably communicate."

219. *Id.* at 3170.

220. *Id.* at 3171.

221. The Court held "[a]lthough we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." *Id.*

222. *Id.* at 3170.

223. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(i), (ii).

224. See *supra* notes 122-28 and accompanying text.

225. *Craig*, 110 S. Ct. at 3169.

in the presence of the defendant must be more than *de minimis*.²²⁶ Although the Court implies that something less than the inability to communicate will be sufficient, a minimum standard has not been established.²²⁷

Some of the *Craig* language indicates that Arizona's child protection statutes could be in constitutional trouble. Unlike O'Connor's *Coy* opinion in which she spoke of victim and nonvictim witnesses alike,²²⁸ the *Craig* opinion refers specifically to child abuse victim witnesses.²²⁹ As previously discussed, Arizona's statutes provide for the protection of children who are the victims of crime (abuse and other crimes), as well as those who are merely witnesses.²³⁰ It is unclear whether the Court will limit the child protection exception to apply only to child abuse victims. If that is the case, the Arizona statute will have to be changed to reflect that requirement. Consequently, the constitutionality of the procedure employed in *Vincent* would be in serious jeopardy since the Vincent children were only witnesses. It can be argued, however, that the state has a strong interest in protecting all children. If the appropriate standards and safeguards are met, it should not matter whether the child is an abuse victim or a witness.

We do know that the trial court must make a particularized finding that the child in question would be seriously traumatized by a physical confrontation.²³¹ The child's trauma must be more than *de minimis*, but an inability to communicate may not be required. Furthermore, the child must be traumatized by the presence of the defendant, not the courtroom setting generally.²³² Additionally, it is within the discretion of the trial judge to determine who should give proof concerning the trauma that will be experienced by the child. This may include expert testimony, but experts are not absolutely required.

Craig also provides guidance as to what is *not* required at the trial court level. Trial judge observation of the child witness in the presence of the defendant is not a requirement. An examination of a less restrictive alternative to procure testimony is also not required. The Court was quick to comment that, although not required, examination of these issues could be used as evidence in the trial court's decision whether to employ an alternative method for procuring testimony.

226. *Id.*

227. *But see* State of New Jersey v. Crandall, 120 N.J. 649, 577 A.2d 483 (1990) (court held that unavailability is not required by *Craig* and case met "substantial likelihood" test embodied in N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1990)).

228. *See supra* text accompanying notes 136-38.

229. *Craig*, 110 S. Ct. at 3160-71.

230. *See* ARIZ. REV. STAT. §§ 13-4251 to -4253. *See also supra* notes 132-38 and accompanying text.

231. *See* Leggett v. State of Florida, 565 So. 2d 315, *rev'd sub nom.* D.A.D. v. State of Florida, 566 So. 2d 257 (Fla. Dist. Ct. App. 1990) (conviction reversed because child's testimony was broadcast over speaker from chambers, there was no attempt to comply with the Florida statutory requirements, there was no finding of trauma and no system providing for contemporaneous communication between the defendant and his counsel). *See also* FLA. STAT. §§ 92.53, 92.54(1) (West Supp. 1990).

232. *See* People v. Guce, 560 N.Y.S.2d 53 (N.Y. App. Div. 1990) (court found that the witness would be traumatized by the presence of the defendant and not by the courtroom setting generally).

CONCLUSION

When children participate in the adult world of our criminal justice system, they need special help and protection. Society cannot abandon all other interests for the sake of the child. But it must balance all the interests involved, including those of the child. Allowing a child witness to testify via closed circuit or videotape minimally invades the defendant's Confrontation Clause rights. The Confrontation Clause provides a right of confrontation, not intimidation.

Technology provides different and better ways to procure child witness testimony. If technological advances are accepted, courts can advance the vital public policy goal of protecting our children with no significant harm to defendants.