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Evidence—The Confrontation Clause—A Literal Right to a Face-to-Face Meeting. Coy v. Iowa, 108 S. Ct. 2798 (1988).

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EVIDENCE—THE CONFRONTATION CLAUSE—A LITERAL RIGHT TO A FACE-TO-FACE MEETING. *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

In early August 1985 two thirteen-year-old girls were camping out in a backyard. Sometime during the night a man entered the tent wearing a stocking over his face. He awakened the girls and shined a flashlight in their eyes. Warning them not to look at him, he sexually molested the two girls. Neither of the girls could describe the attacker. Later that month the police arrested Coy, a neighbor of one of the girls, and charged him with sexual assault.

Soon after the beginning of Coy's trial, the State moved to allow the girls to testify behind a screen or via closed-circuit television[1] in order to protect them from psychological trauma. The trial court allowed the State to use a screen which the prosecution placed between Coy and the girls during the girls' testimony. Using certain lighting adjustments, the screen completely prevented the girls from seeing Coy but allowed Coy to have a dim view of the witnesses. The screen did not obscure the view of the girls by the judge and jury.

At trial, Coy argued that use of the screen violated his sixth amendment right of confrontation.[2] While the defendant agreed the screen might accomplish its purpose of easing the girls' fears, he protested that it denied his constitutional right to confront the witnesses against him.[3] The trial court rejected Coy's claim and found him guilty.

The Iowa Supreme Court affirmed the conviction[4] and rejected the constitutional argument on the ground that the screen did not detract from Coy's opportunity to cross-examine the witnesses. The United States Supreme Court noted probable jurisdiction, reversed and remanded, noting that the confrontation clause guarantees the

1. IOWA CODE § 910A.14 (Supp. 1988) provides in part that "[t]he court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party."

2. U.S. CONST. amend. VI.

3. Coy v. Iowa, 108 S. Ct. 2798, 2799 (1988). The defendant also argued that the screen violated his right to due process since it would make him appear guilty, thus destroying the presumption of innocence. The trial court rejected this argument but instructed the jury to draw no assumptions from the use of the screen. The Iowa Supreme Court also felt that the procedure was not prejudicial. State v. Coy, 397 N.W.2d 730, 734 (Iowa 1987). The United States Supreme Court found it unnecessary to rule upon the question. 108 S. Ct. at 2803.

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

defendant a right to a literal face-to-face encounter with the witnesses. *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

The sixth amendment to the Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[5] While the concept of the confrontation clause has ancient roots,[6] it has little legislative history.[7] The sixth amendment included the confrontation clause with the other rights pertaining to a fair trial, and Congress passed the clause without debate.[8] This lack of legislative discussion requires an emphasis on judicial analysis to understand the scope of the right to confrontation.[9]

Taken literally, the clause is satisfied only when the witness is in court at the time of the trial[10] and the defendant has an opportunity to meet the witness face-to-face.[11] However, cases decided by the Supreme Court have not focused on this issue but on rights inferred by the clause[12] and exceptions to the clause.[13] While these cases discuss the right to a physical confrontation, the language often centers on tangential rights, particularly the right of cross-examination.[14] Thus, until *Coy*, a sense of disorder has prevailed regarding the breadth of the confrontation clause and how literally the courts may construe it.[15]

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5. U.S. CONST. amend. VI.

6. *See* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959). F. Heller suggests that the confrontation clause has its common law origins in the abuses which occurred at the trial of Sir Walter Raleigh in 1603. The prosecution accused Raleigh of treason against England by conspiring with Lord Cobham to make Arabella Stuart the Queen of England. Cobham confessed under torture and later repudiated the confession in a letter to Raleigh. At his trial, Raleigh demanded to have Cobham brought before the tribunal, but the prosecution refused. The state subsequently convicted and executed Raleigh. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-06 (1951).

7. California v. Green, 399 U.S. 149, 176 n.8 (1970).

8. *Id.*

9. Bainor, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995 (1985).

10. Ohio v. Roberts, 448 U.S. 56, 63 (1979).

11. *Green*, 399 U.S. at 175.

12. *E.g.*, Kentucky v. Stincer, 107 S. Ct. 2658 (1987) (the right to confront the witness at some point other than during the trial); Chambers v. Mississippi, 410 U.S. 284 (1973) (the right to cross-examine).

13. Snyder v. Massachusetts, 291 U.S. 97 (1934) (defendant may waive right to confront witnesses by misconduct); Diaz v. United States, 223 U.S. 442 (1912) (defendant may waive right to confront witnesses if he voluntarily keeps witnesses away); Robertson v. Baldwin, 165 U.S. 275 (1897) (dying declarations may be admitted as exception to confrontation clause).

14. *See* Douglas v. Alabama, 380 U.S. 415 (1965).

15. Examples from cases within different circuits exemplify this confusion. *Compare*

In *Mattox v. United States*[16] the United States Supreme Court defined the right of confrontation as providing a two-fold objective: the chance to meet face-to-face with the witness and the opportunity to cross-examine.[17] The right is, however, not inviolable. The Court reasoned that although there are good reasons to maintain these safeguards for defendants, the general rules of law must sometimes yield to public policy.[18] After weighing the competing interests in *Mattox*, the Court held that the testimony of a witness who died after giving evidence at a prior trial could be used in a subsequent proceeding.[19]

In several cases following *Mattox* the Court addressed other exceptions to the clause and defined the essential elements as physical confrontation and the right to cross-examine. *Kirby v. United States*[20] involved a defendant charged with receiving stolen property. The Supreme Court held that introduction of the record of those convicted of theft to prove the property was stolen was unconstitutional because the petitioner had the right to confront witnesses "upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules . . . ."[21]

In *Snyder v. Massachusetts*[22] the Court again stressed that the key elements of the confrontation clause are the "privilege to confront one's accusers and cross-examine them face to face . . . ."[23] The Court noted that the trial court did not abridge the defendant's constitutional rights by preventing him from attending a viewing of the scene

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United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) ("While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment.") *with* Canal Zone v. P. (Pinto), 590 F.2d 1344, 1352 (5th Cir. 1979) ("cross-examination is the essential right secured by the confrontation clause").

16. 156 U.S. 237 (1895).

17. *Id.* at 242-43.

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief.

Id.

18. *Id.* at 243.

19. *Id.* at 244.

20. 174 U.S. 47 (1899).

21. *Id.* at 55.

22. 291 U.S. 97 (1934).

23. *Id.* at 106.

of the crime with the jury. *Dowdell v. United States*[24] reinforced this attitude with the explanation that the right of confrontation is "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him . . . ."[25]

During the last three decades a subtle shift occurred in the Court's language. Although the Court still conceded the privilege of physical confrontation, the opinions concentrated upon the right to cross-examine.[26] As noted by the Court, while the right to confront a witness is expressly defined in the sixth amendment, the right to question that witness is the outward material result.[27]

In *Pointer v. Texas*[28] the Court pointed out the importance of the confrontation clause in the right to a fair trial, concentrating on the significance of the right of cross-examination.[29] Particularly, the Court noted that "[i]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."[30] The right to cross-examine is "one of the safeguards essential to a fair trial."[31]

The Court's emphasis on cross-examination is perhaps best shown in *Douglas v. Alabama*.[32] In *Douglas*, the state charged petitioner with assault with intent to murder. The prosecution called an accomplice to testify. The accomplice invoked the fifth amendment[33] and refused to answer questions. Under the guise of refreshing recollection, the prosecution read a confession by the accomplice, pausing now and then to ask if those were his words. The accomplice refused to answer, leaving Douglas without a chance to cross-examine.[34] The United States Supreme Court held that this tactic denied Douglas'

24. 221 U.S. 325 (1911).

25. *Id.* at 330.

26. *See* Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

27. Kentucky v. Stincer, 107 S. Ct. 2658, 2664 (1987). "[T]hese cases reflect the Confrontation Clause's functional purpose in ensuring a defendant an opportunity for cross-examination." *Id.*

28. 380 U.S. 400 (1965). *Pointer* first extended the confrontation clause to the states.

29. *Id.* at 404-05.

30. *Id.* at 404.

31. *Id.* (quoting Alford v. United States, 282 U.S. 687, 692 (1931)).

32. 380 U.S. 415 (1965).

33. "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

34. Although the prosecutor's reading of the statement was not entered as evidence, there is a good possibility that in the jury's mind it was. Since the accomplice had not admitted to the statement, Douglas could not cross-examine him. Likewise, since the prosecutor was not a witness, Douglas could not cross-examine him. This may have resulted in a strong inference against the defendant on the jury's mind with no way for him to counteract it. 380 U.S. at 419.

right to confrontation. Going beyond that, the Court noted that a sufficient opportunity to cross-examine may fulfill the clause even when there is no physical confrontation.[35]

In *California v. Green*[36] the Court held that the confrontation clause did not prevent the use of an out-of-court statement when the declarant was under oath, cross-examined, and available at trial.[37] In *Green*, the Court concentrated on the intent of the clause and defined its purposes as three-fold.[38] First, the clause insures that the witness testifies under oath.[39] Second, the clause allows the defendant the opportunity to cross-examine, otherwise known as the "greatest legal engine ever invented for the discovery of truth."[40] Finally, the clause permits the jurors to assess the demeanor of the witness, thus enabling them to better weigh the credibility of the testimony.[41]

Green reaffirmed the position that the right to a physical confrontation is a literal right.[42] As the opinion noted, the right to confront the witness at the time of trial "forms the core of the values furthered by the Confrontation Clause . . . ."[43] In his concurrence, Justice Harlan observed that previous decisions by the Court "indiscriminately equated [the right to] 'confrontation' with 'cross-examination,' "[44] and that this casual attitude created confusion regarding the proper role of confrontation, cross-examination, and the hearsay rule of common law.[45]

An outline of basic considerations regarding the admission of out-of-court statements as exceptions to the confrontation clause appeared in *Ohio v. Roberts*.[46] The United States Supreme Court recognized that the clause stresses a "preference" for physical confrontation at trial but that this preference could give way to exceptions based on public policy.[47] To determine these exceptions, a tribu-

35. *Id.* at 418. "Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.*

36. 399 U.S. 149 (1970).

37. *Id.* at 172.

38. *Id.* at 158.

39. *Id.*

40. *Id.* (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

41. *Id.*

42. "Our own decisions seem to have recognized at an early date . . . this literal right to 'confront' the witness at the time of trial . . . ." *Id.* at 157.

43. *Id.*

44. *Id.* at 172 (Harlan, J., concurring).

45. *Id.* at 173.

46. 448 U.S. 56 (1980).

47. *Id.* at 63-64.

nal must weigh the rights of the defendant and the facts of each case with the prevailing public policy.[48] As a general approach, the Court suggested, based on previous cases, that when a hearsay declarant is not present, the proponent of the hearsay must show the declarant is unavailable.[49] If the statement bears sufficient "indicia of reliability" the court may admit the statement.[50] When a party bases evidence on a hearsay exception firmly rooted within the traditional law, a court may assume the "reliability" of the statement.[51]

During the last ten years, the Court has heard several cases which define the clause and its exceptions still further.[52] These cases support the idea of physical confrontation, but the Court has not directly addressed the issue. *Kentucky v. Stincer*[53] is a good example of the attitudes prevailing in the Court and the difference of opinion regarding the clause and its meaning. *Stincer* involved a defendant convicted of committing sodomy with two minor girls. Prior to the introduction of evidence the court held a hearing to decide whether the girls were competent to testify.[54] The trial judge precluded Stincer, but not his attorney, from attending. Defendant's counsel questioned the girls during the hearing, and the judge declared them competent.

Stincer objected on the ground that his absence from the hearing resulted in a violation of his constitutional rights under the confrontation clause. He argued that the competency hearing was a crucial part of the trial and he therefore had a right to confront the wit-

48. *Id.* at 64.

49. In order to be declared unavailable, the prosecutorial authorities must have made a good faith effort to obtain the witness for trial. Barber v. Page, 390 U.S. 719 (1968).

50. 448 U.S. at 65-66.

51. *Id.* at 66. The Supreme Court suggested "dying declarations" as one firmly rooted hearsay exception. *See* Pointer v. Texas, 380 U.S. 400, 407 (1965). Another source of these exceptions is found in FED. R. EVID. 803-04.

52. Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (defendant does not have the right to obtain Children and Youth Services records regarding his daughter's case file in a sexual abuse case); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (defendant's rights violated by not allowing him to question a witness about an event which the jury could have found furnished the witness a motive for favoring the prosecution); Davis v. Alaska, 415 U.S. 308 (1974) (defendant's rights violated by not allowing him to question witness regarding his probation status).

53. 107 S. Ct. 2658 (1987), *cert. denied*, 108 S. Ct. 1234 (1988).

54. A court uses a competency hearing to determine whether specific witnesses, especially children, are competent to testify. The judge, defendant's counsel, and plaintiff's counsel question the witness on subjects unrelated to those at trial in an attempt to resolve whether the witness understands the difference between the truth and a lie, whether the witness can relate a story to the jury, etc. Children are often asked questions such as their names, where they go to school, whether they know what a lie is, and the consequences of lying. *Id.* at 2664-65.

nesses.[55] The United States Supreme Court held that there was no violation of Stincer's rights.[56] The Court noted that the opportunity for cross-examination is the functional purpose protected by the confrontation clause.[57] For Stincer, that opportunity occurred during trial where he could ask the same questions as in the hearing.[58]

The difference of opinion between the majority in *Stincer* and the dissent reflects the ambiguity in the clause and the disagreement over how literally the courts may interpret it.[59] In his dissent, Justice Marshall, joined by Justices Brennan and Stevens,[60] argues that the Court's decision leaves the clause as nothing more than a guarantee for cross-examination at some point in the proceedings,[61] thus narrowing the analysis to address only one interest in the clause.[62] Justice Marshall also points out that the Court has never identified the right of cross-examination as the single concern of the clause and that the majority ignored the plain language of the text.[63]

In *Coy v. Iowa*[64] the Court squarely confronted the question of whether a defendant has the right to a face-to-face meeting. The United States Supreme Court noted that it had never doubted that the confrontation clause guaranteed the defendant a face-to-face meeting with the witnesses against him.[65] Previous cases involved either the admissibility of out-of-court statements[66] or the limits on cross-examination,[67] not because these issues are the essential elements of the clause, but because they are tangential, thus leaving room for uncertainty as to the extent to which the clause includes these elements.[68]

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55. *Id.* at 2661.

56. *Id.* at 2667.

57. *Id.* at 2662.

58. The questions asked during the competency hearing were questions which could easily be asked during trial. *Id.* at 2664.

59. *See supra* note 15 and accompanying text.

60. 107 S. Ct. at 2668 (Marshall, Brennan, Stevens, J.J., dissenting).

61. "The Court today defines respondent's sixth amendment right to be confronted with the witnesses against him as guaranteeing nothing more than an opportunity to cross-examine these witnesses *at some point* during his trial. The Confrontation Clause protects much more." *Id.*

62. "Without explanation, the Court narrows its analysis to address *exclusively* what is accurately identified as simply a primary interest the clause was intended to secure: the right of cross-examination." *Id.* at 2669.

63. *Id.*

64. 108 S. Ct. 2798 (1988).

65. *Id.* at 2800.

66. *E.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); Dutton v. Evans, 400 U.S. 74 (1970).

67. *E.g.*, Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974).

68. 108 S. Ct. at 2800.

After establishing the right to a face-to-face meeting, the Court applied it to the particular fact situation and found that the screen violated Coy's constitutional rights.[69] In holding that the procedure violated the defendant's right of confrontation,[70] the Court dismissed the State's contention that the protection of the witnesses outweighed the rights of the defendant.[71] The Court recognized that in previous cases, rights under the clause had not been absolute, but had given way to other important claims.[72] However, these rights had been implicit rights such as the right to cross-examine as opposed to the "irreducible literal meaning of the clause"[73]—the right to a face-to-face meeting.

Though there may be exceptions to this "core" of the clause, such exceptions are permissible only when it is necessary to further an important public policy.[74] The Iowa legislature attempted to further such a policy by imposing a presumption of trauma over all victims in this situation.[75] However, the Court pointed out that past cases dictated that even with these "inferred" rights, much less the "literal" right, there must be more than simply a generalized conclusion to support an exception when that exception is not "firmly . . . rooted in our jurisprudence."[76] Therefore, to support an abridgment of rights, there must be particularized findings in each case that a witness needs special protection.[77]

In her concurrence, Justice O'Connor agreed that use of the screen violated Coy's right to confrontation, but stated that nothing in the opinion automatically abrogates the efforts by state legislatures to protect child witnesses.[78] O'Connor noted that many state statutes

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69. *Id.* at 2802.

70. The Court stated that, "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2802-03.

74. While the Court argues that there may be exceptions to a physical confrontation, it refuses to outline what constitutes an exception but, rather, "leave[s] [it] for another day." *Id.* at 2803.

75. *Id.*

76. *Id.* (quoting Bourjaily v. United States, 107 S. Ct. 2775 (1987)). *See also* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (discussion on the availability of witnesses with regard to firmly rooted exceptions).

77. 108 S. Ct. at 2803. The state argued a separate issue mentioned in the case but not covered above. It contended that any error under the confrontation clause was harmless beyond a reasonable doubt. The United States Supreme Court resolved that the Iowa Supreme Court had no reason to address the issue since they had found no constitutional violation. The Court remanded the argument to the lower court. *Id.*

78. *Id.* at 2804 (O'Connor, J., concurring).

require that procedures such as videotaped depositions be performed in the presence of the defendant, thus perhaps alleviating any conflicts with the confrontation clause.[79] She argued that even if a state statute fails the requirements of the confrontation clause, recognized exceptions to the clause may still protect the child.[80]

In agreeing with the decision by the majority in *Coy*, Justice O'Connor qualified her position by refusing to hold that the right to a physical confrontation is absolute. She emphasized that the Court has only held that there is a "preference" for physical confrontation[81] and that public policy can outweigh that preference. The protection of molested children is such a policy, but there should be a finding of "necessity" in each case rather than an overall legislative decision.[82]

Dissenting, Justice Blackmun argued that the placing of the screen between Coy and the witnesses at trial did not frustrate the purposes of the confrontation clause as outlined by *California v. Green*.[83] Specifically, the girls testified under oath, were subject to cross-examination, and the jury could observe the demeanor of the witnesses in an attempt to determine credibility.[84] The dissent quoted J. Wigmore's assertion that there "never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*"[85] and the "right of confrontation is provided 'not for the idle purpose of . . . *being gazed upon by [the witness]*' but rather, to allow for cross-examination."[86]

Justice Blackmun pointed out that there is only a "preference" for physical confrontation[87] which may give way to public policy. In

79. States use several methods to protect child witnesses. These include videotaped depositions and prior testimony, two-way closed-circuit televisions, one-way closed-circuit televisions, and one-way mirrors. These statutes differ from state to state regarding confrontation between defendant and witness. *Id. See also* Amicus Curiae Brief for the American Bar Association, Coy v. Iowa, 108 S. Ct. 2798 (No. 86-6757) (1988).

80. 108 S. Ct. at 2804 (O'Connor, J., concurring).

81. *Id.*

82. *Id.* at 2805.

83. 399 U.S. 149, 158 (1970).

84. 108 S. Ct. at 2806 (Blackmun, J., dissenting).

85. *Id.* at 2807 (quoting 5 J. WIGMORE, EVIDENCE § 1397 (J. Chadbourn rev. 1974)).

86. *Id.* Wigmore, as one of the foremost authorities on evidence, is often quoted when discussing the confrontation clause. However, Wigmore strongly adheres to the position that the opportunity to cross-examine is the essential purpose of the clause. Thus, authors often cite him to bolster this theory. "Confrontation is, in its main aspect, *merely another term for the test of Cross-examination.*" 5 J. WIGMORE, EVIDENCE § 1365 (1940). "The question, then, whether there is a right to be confronted with opposing witnesses is essentially a question whether there is a right to cross-examine. If there has been a Cross-examination, there has been a Confrontation." 5 J. WIGMORE, EVIDENCE § 1396 (1940).

87. 108 S. Ct. at 2806 (Blackmun, J., dissenting).

weighing the interests, he believed that the protection of child witnesses is such a situation. When considering the psychological grinder that these children go through and the state's interest in protecting them and reducing child abuse, the extent of the abridgment of Coy's constitutional rights is minimal.[88]

The decision in *Coy v. Iowa* is significant in two respects. First, it established the rule that there is a literal right to a face-to-face confrontation between the defendant and the witnesses against him. This decision is a surprising one considering the Court's past cases.[89] Previous decisions were ambiguous regarding the role of cross-examination and the confrontation clause. The language in these earlier cases implied that as a practical matter confrontation and cross-examination were identical and that a defendant's right to cross-examine the witnesses against him satisfied the clause.[90] *Coy* has disproved this theory and affirmed that, subject to public policy and particularized findings that the witness needs protection, a face-to-face meeting is mandated during trial.

Second, and more tailored to this case, *Coy* will have an impact on state attempts at innovative means of protecting child witnesses. The day after the Supreme Court decided *Coy*, another case involving the defendant's right to confrontation during a sexual abuse case came before the Court. In *New Mexico v. Tafoya*[91] the state accused the defendant, Tafoya, of sexually abusing several young girls. Pursuant to a state statute,[92] the trial court permitted videotaped depositions by the witnesses in lieu of court appearance. The statute permitted this procedure provided that the defendant, his attorney, and the district attorney attend the deposition.[93]

During the deposition, the court required that the defendant stay in a control booth with his lawyer. Tafoya could see the witnesses

88. *Id.* Justice Blackmun also pointed out that legislative exceptions are common to out-of-court statements, and he argued that there is no need to impose a difference in this situation. *Id.* at 2809.

89. *See supra* notes 27-63 and accompanying text.

90. *See* Kentucky v. Stincer, 107 S. Ct. 2658 (1987); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). *See also* 5 J. WIGMORE, EVIDENCE § 1365 (1940).

91. 105 N.M. 117, 729 P.2d 1371 (1986).

92. N.M. STAT. ANN. § 30-9-17 (1978) provides that:

> In any prosecution for criminal sexual . . . contact of a minor . . . the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys.

93. 105 N.M. at 119, 729 P.2d at 1373.

testify, and his attorney was in contact with the witnesses through a headset and microphone. Tafoya argued that this violated his constitutional right to confrontation. The New Mexico Supreme Court disagreed and held that because the "utility of face-to-face confrontation as an aid to eliciting the truth was remote,"[94] the witnesses were unavailable, and the defendant was provided with a chance to cross-examine, Tafoya's rights were not violated.[95] The United States Supreme Court, in a decision with no written opinion, vacated the judgment and remanded it for further consideration in light of *Coy v. Iowa*.[96]

In the aftermath of *Coy* there is assurance that defendants in criminal cases will challenge several of the statutes used by the states to protect child witnesses.[97] If later Supreme Court cases affirm Justice O'Connor's position,[98] those statutes which require the presence of the defendant during the various procedures may be constitutionally valid.[99] However, those statutes which do not require the defendant's presence and do not require a "case-specific finding of necessity"[100] to support an exception to the right of confrontation are open to challenge.

An issue which the Supreme Court did not fully discuss concerns the dictum regarding the need for particularized findings. In *Tafoya*, the prosecution presented expert testimony that the children would suffer emotional damage if forced to confront the defendant, and on this evidence the court consented to the videotaped deposition.[101]

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94. *Id.* at 121, 729 P.2d at 1375.

95. *Id.*

96. 108 S. Ct. 2890 (1988).

97. One example is CONN. GEN. STAT. § 54-86g (Supp. 1988). This statute provides that a child of twelve or younger may give testimony by closed-circuit television and have present only the judge, both attorneys, equipment operators, and any person who contributes to the welfare of the child. The statute does allow for cross-examination and provides for the defendant to see and hear the testimony, but protects the child from hearing or seeing the defendant. The procedure may occur upon motion by any party. Another example is ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988) which provides for testimony by closed-circuit television or by pre-recorded videotape upon motion by the prosecution. The statute allows the attorneys to question the child and permits the defendant to see and hear the witness, but provides that the child cannot see or hear the defendant.

98. Justice O'Connor stated, "I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant." 108 S. Ct. at 2804 (O'Connor, J., concurring). *See supra* notes 78-80 and accompanying text.

99. Several states require the presence of the defendant in the room during testimony. *See, e.g.*, FLA. STAT. § 92.54(4) (Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1988).

100. 108 S. Ct. at 2805.

101. 105 N.M. at 121, 729 P.2d at 1374-75.

Under the terms set forth in *Coy*, it would appear that the court made an individualized finding that it was necessary to protect the children, thus creating an exception to the confrontation clause. However, the Supreme Court has not yet decided if the exception is valid.

Arkansas allows videotaped depositions of child victims under the age of 17 in sexual offense prosecutions.[102] The effect of *Coy* on this procedure will depend on future developments in this area. Overall, the statute does appear to provide the guidelines set out by the Court by mandating that the defendant be present at the deposition,[103] thus fulfilling the right to a face-to-face meeting. The statute also allows the prosecutor to call the witness to testify in court if necessary to discover the truth.[104] However, the statute does not provide the criteria needed to establish particularized findings of necessity to create an exception to the confrontation clause.

There is a fundamental need to protect child witnesses from the trauma of facing the accused sexual offender in court. In composing an adequate statute, a state legislature must consider this policy when balancing the child's rights against those of the accused. In light of *Coy*, however, drafters must understand that the defendant's right to confront the witness is a basic foundation for the proposed statute. Therefore, any statute must have that foundation built into it when considering videotaped depositions or testimony by two-way cameras or closed-circuit television.

Depending on future developments and how literally the courts interpret the dictum in *Coy*, there is an exception to confrontation. In addressing this exception, statutes should include a detailed procedure by which courts may find it necessary to protect these child witnesses based on expert testimony of physical or emotional problems which would occur should the child have to confront the accused.

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102. ARK. CODE ANN. § 16-44-203 (1987). Arkansas allows the court to accept videotape depositions if good cause is shown.

103. *Id.*

104. *Id.*