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Screen Used at Trial that Prevents TestifyingChild Sex Abuse Victim from Viewing Accused Violates Accused's Sixth Amendment Right to Face-to-Face Confrontation.

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CRIMINAL LAW—RIGHT OF CONFRONTATION—SCREEN USED AT TRIAL THAT PREVENTS TESTIFYING CHILD SEX ABUSE VICTIM FROM VIEWING ACCUSED VIOLATES ACCUSED'S SIXTH AMENDMENT RIGHT TO FACE-TO-FACE CONFRONTATION. *Coy v. Iowa*, __ U.S. __, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

John Avery Coy was arrested and charged with the sexual assault of two thirteen-year-old girls while they were camping in his next door neighbor's yard. According to the girls, Coy entered their tent and awoke them by shining a light in their eyes and warning them to look away from him. Subsequent police interrogation revealed that the girls were unable to describe their assailant's face.

At the beginning of Coy's trial, the state, relying on a recently enacted Iowa statute, made a motion to allow the girls to testify behind a screen or via closed-circuit television. The trial court sanctioned the use of a screen placed in front of Coy during the girls' testimony. The screen enabled Coy to dimly perceive the girls and hear their testimony, but prevented the girls from seeing Coy at all.

Coy objected to the use of the screen on grounds that it would violate both his right to confrontation and his right to a fair trial. Coy first argued that use of the screen would violate his rights under the confrontation clause, which guarantees the criminal defendant the right to unobstructed face-to-face confrontation of adverse witnesses. He further argued that his right to due process and a fair trial would be violated because using the screen would create an appearance of guilt, thus diminishing the presumption of innocence. The trial court denied both constitutional claims, and the jury subsequently convicted Coy of two counts of engaging in lascivious acts with a child.

The Iowa Supreme Court affirmed Coy's conviction. The court rejected Coy's confrontation argument on the grounds that using the screen did not impair Coy's ability to cross-examine the girls, therefore, there was no confrontation clause violation. The majority also refused to accept Coy's due process argument by deciding that the screening procedure did not unduly prejudice the jury and thus, did not compromise Coy's right to a fair trial.

On appeal, the United States Supreme Court reversed the judgment of the Iowa Supreme Court, holding that the confrontation clause extends to the accused a right to face-to-face confrontation of the witnesses appearing against him at trial. The Court concluded that the screening procedure au-

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thorized by the Iowa statute denied Coy this right. Finding it unnecessary to reach Coy's due process claim, the Court remanded the case for determination of whether the confrontation clause violation was harmless error.

In recent years, there has been increasing public awareness of the rising occurrence of sexual abuse of children in our society. *See* Watson, *Special Report: A Hidden Epidemic*, Newsweek, May 14, 1984, at 30 col. 3 (statistics reveal that between 100,000 and 500,000 American children will be sexually molested this year); *see also* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806 (1985)(media has focused increased attention on growing statistics of child abuse). Due to the inherent difficulties in prosecuting the perpetrators of these crimes, the conviction rates in such cases remain consistently low. *See* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1671 (1986)(criminal justice system unable to effectively prosecute because typically only evidence of sexual abuse is child's testimony and long delays, courtroom pressures and need to face offender make preservation of testimony nearly impossible); *see also State v. Sheppard*, 484 A.2d 1330, 1342 (N.J. Super. Ct. Law Div. 1984)(child victims' reluctance to face offenders often results in abandonment of prosecutions). In response to these problems, many state legislatures have enacted statutes which provide for new technological means of enabling the prosecution to preserve a child witness' testimony for use at trial, without forcing the child to physically face the accused. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.071, §§ 3, 4 (Vernon Supp. 1987)(child victim's testimony admissible through closed-circuit television); IOWA CODE ANN. § 910A(14) (West Supp. 1987)(permitting use of screen placed between accused and testifying child victim); TENN. CODE ANN. 24-7-116 (Supp. 1987)(authorizing admission of child victim's pre-trial videotaped testimony at trial). *See generally* Comment, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 290 (1988)(statutes of twenty-two states allow closed-circuit television and thirty-seven states permit pre-trial videotaped recordings). The common purpose of these statutes is to facilitate efficient disposition of child sex abuse cases, while also protecting the psychological well-being of the child victim. *See* Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L. J. 279, 280-81 (1986); *see also* Coyle, *Application of Confrontation Clause: A Difficult Issue in Child Abuse Cases*, Nat'l L. J., Nov. 2, 1987, at 1 col. 3, 4 (statutes permitting use of new technologies are response to societal discontent over increasing incidence of child sexual abuse, and are designed to protect child victim from traumatic in-court testimony). Although the innovative procedures that these statutes create may prove effective for achieving such laudable goals, their use raises important questions regarding the extent to which legislation

enacted to protect child witnesses can permissibly infringe upon a defendant's sixth amendment right of confrontation.

The sixth amendment to the United States Constitution guarantees, in part, 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; *see also Pointer v. Texas*, 380 U.S. 400, 403 (1965)(sixth amendment right to confrontation fundamental right binding upon states through fourteenth amendment due process clause). This portion of the amendment, commonly referred to as the confrontation clause, generally bars the admission of hearsay at trial. *See California v. Green*, 399 U.S. 149, 155 (1970)(confrontation clause and hearsay rules afford similar protection by excluding hearsay evidence from trial). Admission of hearsay evidence is precluded because of the common belief that out-of-court statements are not trustworthy or accurate. *See Chambers v. Mississippi*, 410 U.S. 284, 298 (1973); *see also* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 3 (1974)(judicial practice of excluding hearsay statements established to guard against admission of untrustworthy and erroneous evidence). The United States Supreme Court has given effect to this belief by consistently interpreting the confrontation clause as requiring that the accused be given adequate opportunity to effectively cross-examine adverse witnesses in open court in view of the jury. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). These decisions and others reflect the Court's deep-seated conviction that the interrelated guarantees of face-to-face confrontation and cross-examination operate as important vehicles through which the reliability of evidence is promoted. *See California v. Green*, 399 U.S. 149, 158 (1970)(confrontation clause assures reliability of witness' statement by requiring witness to be confronted and cross-examined while making statement); *see also Mattox*, 156 U.S. at 242-43. As a consequence, the Court has steadfastly protected these rights, going so far as to say that their unjust denial "would be constitutional error of the first magnitude and no amount of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1965).

Despite the Court's traditional reluctance to sanction infringements on a defendant's right to cross-examination and confrontation, it has declined to designate these rights as being absolute, instead acknowledging that "competing state interests . . . may warrant dispensing with [them] at trial." *Roberts*, 448 U.S. at 64. Although the Court has renounced any attempt to define either what a "competing interest" is, or when a "competing interest" will be sufficient to override confrontation clause guarantees, it has recognized exceptions whereby an accused's right to confront and cross-examine witnesses can be permissibly denied. *See, e.g., Roberts*, 448 U.S. at 64 (hearsay statement admissible if prosecution demonstrates declarant unavailable and statement possesses sufficient indicia of reliability); *Parker v. Randolph*,

442 U.S. 62, 74-75 (1979)(denial of right to confrontation may be harmless error); *Pointer v. Texas*, 380 U.S. 400, 407 (1965)(admission of dying declaration of witness who was not subject to cross-examination and confrontation). In formulating these exceptions, the Court has stated that both public policy considerations and the legitimate need of a state to conduct an effective criminal justice system may sometimes defeat a defendant's right to confrontation. *See Roberts*, 448 U.S. at 64; *see also Chambers*, 410 U.S. at 295 (although defendant's right to confrontation not absolute, denial of right requires close examination of competing interests).

In recent years, many lower courts have been called upon to decide whether the protection of child witnesses is a sufficient competing interest to justify the denial to an accused of the right to physically confront the child witness at trial. The majority of these decisions can be classified into three groups. The first group includes decisions addressing the constitutionality of statutes providing for mechanisms or procedures designed to prevent the testifying child witness from seeing the accused. *Compare State v. Coy*, 397 N.W.2d 730, 734 (Iowa 1986)(use of semi-opaque screen separating accused from child witnesses did not violate accused's right of confrontation) *with Herbert v. Superior Court*, 172 Cal. Rptr. 850, 855 (Cal. Ct. App. 1981)(defendant's right to confront witness abridged when defendant forced to sit where he can hear but not see child witness). Included in the second group are decisions addressing the constitutionality of statutes allowing into evidence the pre-trial videotaped testimony of child sex abuse victims. *Compare McGuire v. State*, 706 S.W.2d 360, 361 (Ark. 1986)(constitutional) *and State v. Cooper*, 353 S.E.2d 451, 456 (S.C. 1987)(constitutional) *with United States v. Benfield*, 593 F.2d 815, 822 (8th Cir. 1979)(unconstitutional) *and Long v. State*, 742 S.W.2d 302 (Tex. Crim. App. 1987)(unconstitutional). The final group encompasses decisions addressing the constitutionality of statutes authorizing the prosecution to introduce the child witness' testimony via two-way closed circuit television. *See, e.g.*, *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 377 (Mass. 1988)(unconstitutional); *Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986)(constitutional); *Commonwealth v. Ludwig*, 531 A.2d 459, 463 (Pa. Super. Ct. 1987)(constitutional).

The pivotal issue in these cases is whether the confrontation clause requires the testifying child witness to physically confront the accused in open court in view of the jury. *See generally* Comment, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 286 (1988)(issue whether eyeball-to-eyeball confrontation required). Proponents of "eyeball-to-eyeball" confrontation contend that this procedure ensures the reliability and veracity of the testimony elicited. *See Benfield*, 593 F.2d at 817; *see also* 4 J. WEINSTEIN & M. BERGER, EVIDENCE § 800[01] (1979)(requirement of personal presence makes it difficult to lie if accused present at trial). Furthermore, these proponents argue

that the right to "eyeball-to-eyeball" confrontation should be an indispensable element in child sex-abuse trials where the possibility of false accusations and irreparable damage to the accused is increased. *See Willis*, 716 S.W.2d at 226 (citing trial court opinion). Proponents of the child counter the first argument by contending that the "reliability of an abused child's testimony does not depend upon his or her ability to withstand the psychological trauma of testifying in a courtroom under the unwavering gaze" of the accused. *Ludwig*, 531 A.2d at 463 (right to confrontation includes neither right to intimidate nor right to "eyeball-to-eyeball" confrontation); *see also Cooper*, 353 S.E.2d at 456 (absence of eye-to-eye confrontation did not lessen reliability of child's testimony). On the contrary, as long as the child is subject to full and effective cross-examination, eyeball-to-eyeball confrontation is neither constitutionally required nor necessary to guarantee the reliability of the testimony elicited. *See Sheppard*, 484 A.2d at 1343; *see also Willis*, 716 S.W.2d at 230. Alternatively, these proponents argue that even assuming that face-to-face confrontation is required by the sixth amendment, the procedures authorized by child shield statutes provide the functional equivalent of (and therefore a constitutional substitute for) face-to-face confrontation. *See Willis*, 716 S.W.2d at 230; *accord State v. Daniels*, 484 So.2d 941, 945 (La. Ct. App. 1986).

Before *Coy v. Iowa*, Supreme Court authority discussing the specific issue of face-to-face confrontation, particularly in the context of child sex abuse cases, was minimal. In fact, most of the Court's encounters with the sixth amendment confrontation clause have involved restrictions on the clause's less explicit component, the right to cross-examination. *See, e.g.*, *Davis v. Alaska*, 415 U.S. 308, 309 (1974)(requiring that criminal defendant be allowed to impeach credibility of prosecution witness by cross-examination); *Douglas v. Alabama*, 380 U.S. 415, 420-21 (1965)(lower court's refusal to allow defendant to cross-examine co-defendant violated defendant's right to adequate cross-examination); *Pointer v. Texas*, 380 U.S. 400, 407 (1965)(admission of statement by declarant who defendant had no opportunity to cross-examine violated defendant's right to confrontation). These decisions have repeatedly emphasized that the primary purpose underlying the right to confrontation is to guarantee the accused the opportunity to cross-examine witnesses against him. *See, e.g.*, *Davis*, 415 U.S. at 315-16; *Douglas*, 380 U.S. at 418; *Pointer*, 380 U.S. at 406-07. Indeed, language used by the Court in more recent opinions arguably demonstrates that an "adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Douglas*, 380 U.S. at 418; *see also Kentucky v. Stincer*, ___ U.S. ___, ___, 107 S. Ct. 2658, 2664, 96 L. Ed. 2d 631, 643 (1987)(confrontation clause guarantees only opportunities for effective cross-examination). Proponents of an unequivocal right to eye-to-eye confrontation argue, however, that Supreme Court decisions have consistently interpreted the clause to confer at least "a right to meet face-to-face all those who

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appear and give evidence at trial." *California v. Green*, 399 U.S. 149, 175 (1970); *see also Snyder*, 291 U.S. at 106; *Dowdell*, 221 U.S. at 330; *Kirby*, 174 U.S. at 55. This latter view finds support in more recent decisions of the Court, which assert that "it is this literal right to confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *Green*, 399 U.S. at 157; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)(confrontation clause provides both right to face accusers and right to conduct cross-examination).

The United States Supreme Court finally resolved the dispute regarding the scope of the confrontation clause by holding that it requires eye-to-eye confrontation in *Coy v. Iowa*, — U.S. —, —, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857, 867 (1988). In reversing the Iowa Supreme Court's conviction of Coy, the majority dismissed the state's argument that the confrontation clause only extends to the criminal defendant a right to cross-examination of adverse witnesses. *Id.* at —, 108 S. Ct. at 2800, 101 L. Ed. 2d at 864. Writing for the majority, Justice Scalia asserted that adopting such a construction would ignore the obvious intent of the clause in conferring "a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* This core guarantee serves the general perception that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in criminal prosecutions." *Id.* at —, 108 S. Ct. at 2801, 101 L. Ed. 2d at 865. The majority further recognized that eye-to-eye confrontation, by its very nature, tends to confound and reveal the false accuser. *Id.* at —, 108 S. Ct. at 2802, 101 L. Ed. 2d at 866. Therefore, the majority concluded that this right must be preserved to "ensure the integrity of the fact-finding process." *Id.*

After concluding that the screening procedure violated Coy's right to face-to-face confrontation, the Court addressed the state's argument that the necessity of protecting child sex abuse victims outweighed Coy's right to confrontation. *Id.* The Court conceded that it had, in past decisions, balanced the rights guaranteed by the confrontation clause against other important state interests. *Id.* The rights balanced in these cases, however, were only reasonably implicit in the clause. *See id.* (included in these are right to cross-examination, right to exclude hearsay statements and right to physical confrontation at non-critical point in proceedings). The majority stressed that it was more reluctant to make exceptions to the right to face-to-face confrontation because this right is "narrowly and explicitly set forth in the clause" and constitutes "the irreducible literal meaning of the clause." *Id.* at —, 108 S. Ct. at 2802-03, 101 L. Ed. 2d at 867. Justice Scalia expressly declined to answer whether any exceptions to this right exist, but stated that if there were, they would certainly be granted only when necessary to affect an important public policy. *See id.* The state argued that this necessity was established by the statute, which created a legislatively imposed determina-

tion of trauma. *See id.* The majority disagreed, however, holding that "something more that the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* Because the exception created in the Iowa statute was not firmly rooted in law, nor were any individualized findings made that the child witnesses in this case were in need of special protection, the majority concluded that Coy's conviction "could not be sustained by any conceivable exception." *Id.*

Justice O'Connor concurred in the majority's holding that Coy's confrontation rights had been violated through the use of the screen and that a generalized legislative determination of necessity was insufficient to justify the violation. *See Coy v. Iowa*, ___ U.S. ___, ___, 108 S. Ct. 2798, 2803-04, 101 L. Ed. 2d 858, 868 (1988)(O'Connor, J., concurring). The Justice wrote separately, however, in an attempt to clarify the Court's holding and to limit its scope. *Id.* Justice O'Connor took note of the various state statutes which provide for closed-circuit television procedures in child sex abuse cases, and argued that the majority's decision did not necessarily doom such legislative efforts to protect child witnesses. *Id.* Reiterating the Court's position that the confrontation clause is not absolute, Justice O'Connor concluded that the clause's protections may, in certain future circumstances, give way to the "compelling state interest of protecting child witnesses." *Id.* at ___, 108 S. Ct. at 2804-05, 101 L. Ed. 2d at 869-70 (suggesting that case-specific finding of necessity sufficient to override defendant's right to face-to-face confrontation).

Justice Blackmun, joined by Chief Justice Rehnquist, dissented from the majority's holding. *Coy v. Iowa*, ___ U.S. ___, ___, 108 S. Ct. 2798, 2805, 101 L. Ed. 2d 858, 870 (1988)(Blackmun, J., dissenting). The dissent considered Coy's confrontation claim to be premised on the extremely narrow objection that the child witnesses could not see him during their testimony. *Id.* Such a claim had no basis in either the common law or Supreme Court precedent. *Id.* at ___, 108 S. Ct. at 2806-07, 101 L. Ed. 2d at 871-72 (no authority for defendant's asserted right that witnesses be able to see him while testifying). Justice Blackmun argued that even if this right were protected, it should be subordinated to the significant state interest in protecting child witnesses from traumatizing in-court testimony. *Id.* at ___, 108 S. Ct. at 2807, 101 L. Ed. 2d at 873-74. The dissent concluded that the majority's requirement of a case-specific finding of such trauma was equally flawed in that it also ignored the Court's prior decisions which have sanctioned generally applicable exceptions to the confrontation clause. *Id.* (citing Federal Rules of Evidence 801(d)(2), 803(2) and 803(6), which make admissible statements of co-conspirator, excited utterances and business records).

It is not entirely clear what impact the *Coy* decision will have on state efforts to both effectively prosecute child sex offenders while also protecting

child witnesses. This determination invariably rests on conjecture as to how lower courts will choose to interpret the holding in *Coy* that the confrontation clause guarantees a right to a face-to-face meeting between witness and accused. If the Court's decision is narrowly construed to prohibit only the use of trial devices which prevent the witness from seeing the accused at trial, then the holding will likely have little impact on the prosecution of child sex abuse cases. This conclusion would follow from the fact that Iowa was the only state to have authorized the type of screen that was used in the *Coy* case. *See Coy*, ___ U.S. at ___, 108 S. Ct. at 2804, 101 L. Ed. 2d at 868 (O'Connor, J., concurring). A full majority of the states have, however, enacted statutes authorizing the use of either videotape equipment or closed-circuit television to present the testimony of child sex abuse victims. *Id.* While these statutes differ in some respects, the majority provide for certain procedures which either prevent the testifying child from seeing the defendant at trial or allow the child witness to testify through a television monitor from a room separate from the courtroom, jury and accused. *Compare* 42 PA. CONS. STAT. § 5984 (Purdon Supp. 1987)(preventing child from seeing or hearing defendant during videotaping) *with* KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986)(allowing live testimony of child to be taken outside courtroom and televised by closed-circuit television). If the holding in *Coy* is interpreted as requiring that the child witness testify while facing the accused in open court and in the presence of the judge and jury, then it is likely that most of these statutes will be ruled unconstitutional. *See* Comment, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 287 (1988)(if Court in *Coy* holds eye-to-eye confrontation required, all closed-circuit statutes would be unconstitutional and only videotape statutes requiring defendant's presence and face-to-face confrontation would survive).

In recent years, the highest courts of many states have addressed the constitutionality of the use of videotaping or closed-circuit television in child sex abuse cases. *Compare Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986)(Kentucky statute constitutional which permits use of closed-circuit testimony in child sex abuse cases) *and State v. Cooper*, 353 S.E.2d 451 (S.C. 1987)(South Carolina statute constitutional which allows child witness' testimony presented by videotaping) *with Commonwealth v. Bergstrom*, 524 N.E.2d 366, 377 (Mass. 1988)(closed-circuit testimony in child sex abuse cases unconstitutional absent case-specific finding of compelling state interest) *and State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987)(videotape testimony of child outside presence of defendant unconstitutional unless clear and convincing evidence demonstrates compelling need). The courts that have approved of the use of videotaping and closed-circuit television argue that these procedures present no constitutional problems because they act as interchangeable substitutes for eye-to-eye confrontation and operate to ensure the reliability of the child's testimony. *See, e.g.*, *Willis*, 716 S.W.2d at

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228 (video monitor constitutionally acceptable substitute for face-to-face confrontation); *Commonwealth v. Ludwig*, 531 A.2d 459, 461 (Pa. Super. Ct. 1987)(no constitutional right of eyeball-to-eyeball confrontation and closed-circuit testimony fully reliable); *Cooper*, 353 S.E.2d at 456 (reliability of child's testimony presented by videotape not lessened because defendant prevented from confronting child). In contrast, courts that have disapproved the use of videotaping and closed-circuit television have stressed that these procedures are poor substitutes for face-to-face confrontation because they fail to facilitate the presentation of reliable evidence. *See Bergstrom*, 524 N.E.2d at 375-76 (procedures may distort witness' credibility, impair jury's ability to adequately judge demeanor of witness, and interfere with cross-examination); *see also Jarzbek*, 529 A.2d at 1250-51 (confrontation through closed-circuit television or videotape not equivalent to face-to-face confrontation). Judging from the disparate results that the states have reached on the issue of videotaped or closed-circuit testimony, it is clear that the United States Supreme Court will again need to address the conflict between a defendant's right to confrontation and state attempts to protect child witnesses.

In conclusion, the Court in *Coy* held that the sixth amendment confrontation clause guarantees a defendant the right to physically confront the child witness before the trier of fact. The Court premised its holding on the belief that face-to-face confrontation heightens the reliability of the child's testimony and enhances the overall "integrity of the fact finding process." *Chambers*, 410 U.S. at 295. Reasoning that eye-to-eye confrontation before the jury serves an independent truth-evocative function and constitutes "the irreducible literal meaning of the clause," the Court concluded that any possible exceptions to this right could only be made when necessary to affect an important public policy. Although the Court did not positively conclude that a state's asserted interest in protecting child witnesses would never be sufficient to override a defendant's right to face-to-face confrontation, it did make clear that a case-specific finding of such necessity must be reached before any such exception would be considered. The issue left open by the Court's opinion, and one it will soon be required to address, is whether a closed-circuit television or videotape procedure based on a case-specific finding of necessity will be regarded as unconstitutional under the confrontation clause.

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