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NOTES

“Face to Face” with the Right of Confrontation: A Critique of the Supreme Court of Kentucky’s Approach to the Confrontation Clause of the Kentucky Constitution

Sarah M. Dunn

State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.2

INTRODUCTION

The language of the Sixth Amendment to the United States Constitution and section 11 of the Kentucky Constitution contain textually different expressions of the right of confrontation. The Federal Confrontation Clause frames the right explicitly as a right to confront: “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...” The analogous provision found in the Kentucky Constitution, however, “reiterates this historical right, in more definitive language.” It reads: “[i]n all criminal prosecutions the accused has the right ... to meet the witnesses face to face ...” In light of this language difference, and the preference for giving meaning to each word of the constitution where plain meaning is discernible, one might expect the

1 B.A. in English with distinction, 2004, University of Virginia; J.D. to be awarded May 2008, University of Kentucky College of Law. Some of the research for this Note was conducted while working as a summer judicial clerk for Justice John C. Roach, Supreme Court of Kentucky.
3 U.S. Const. amend. VI.
4 Commonwealth v. Willis, 716 S.W.2d 224, 234 (Ky. 1986) (Stephens, C.J., dissenting).
5 Ky. Const. § 11.
6 In construing provisions of a constitution courts generally have adopted a rule of construction sufficiently liberal to carry out its spirit and purpose rather than a strict technical construction that would operate to render it impotent and defeat the purpose of its adoption, however, there is no justification for the indulgence of liberality to an extent that would nullify or defeat plain, mandatory, constitutional provisions. City of Louisville v. German, 150
Kentucky courts to propose jurisprudence varied from that of the federal courts. In 1986, the Supreme Court of Kentucky was presented with the opportunity to support the more explicit right guaranteed by the state confrontation clause in Commonwealth v. Willis. The case considered a federal and state confrontation clause challenge to Kentucky Revised Statutes section 421.350 (3)-(5) ("section 421.350"). The statute (a "child shield" statute) authorizes a child victim or witness of sexual abuse who is under the age of twelve to testify outside of the presence of the defendant via one-way closed circuit television or in a pre-recorded proceeding conducted outside the courtroom. The testimony from these alternative settings is then shown in the courtroom during trial. Upon a showing of substantial need, the procedure can be used in trials involving a variety of prosecutions for sexual crimes or dependency proceedings. In Willis, the court held that the procedure offended neither the federal nor the state confrontation clauses. It reached this holding by conflating the language of the two clauses, holding that "[t]he requirement in the Kentucky Constitution to 'meet witnesses face to face' is basically the same as the Sixth Amendment to the federal constitution which provides a right of confrontation. The federal courts have indicated that the Confrontation Clause reflects a preference for face to face confrontation at trial." The court ignored the plain meaning interpretation of the clause, which would guarantee that the defendant would be physically present while the witness testifies, when it announced that the federal and state confrontation clauses were the same. After weakening the explicit language of the clause, the court upheld the statute.

Four years after Willis was decided, the United States Supreme Court considered a similar issue under the Federal Confrontation Clause in Maryland v. Craig. The Supreme Court of the United States upheld a

S.W.2d 931, 935 (Ky. 1940).

7 Ky. Rev. Stat. Ann. § 421.350 (West 2007). "This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS § 510.040 to 510.150, 529.040, 529.070, 529.100, 529.110, 530.020, 530.060, 530.064(1)(a), 531.310, 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection." Id. § 421.350(1). Section 421.350 was amended in 2007 to include the offenses of Human Trafficking (Ky. Rev. Stat. Ann. § 529.100) and Promoting Human Trafficking (Ky. Rev. Stat. Ann. § 529.110). 2007 Ky. Acts 19.

8 Willis, 716 S.W.2d at 227.

9 Id. at 228 ("The legislative authorization of video tape or closed–circuit trial testimony by certain child victims pursuant to KRS § 421.350 does not violate a defendant's right to confrontation as protected by the constitution").

Maryland statute authorizing the testimony of a child witness to be given outside of the defendant's presence, finding no violation of the Federal Confrontation Clause. In keeping with the single analysis of the state and federal clauses in Willis, it is not surprising that after Craig, Kentucky courts followed the Sixth Amendment jurisprudence articulated in Craig. This alignment with the federal case on point definitively unified the federal and state confrontation clause analysis on this issue, further sanctioning the weakening of the right.

In the twenty years since Willis was decided, the appellate courts of Kentucky have struggled to apply the case. In the 1990s, the Supreme Court of Kentucky took various positions on the level of deference it would give to trial court judges who expanded the procedure without legislative authority. In 2006, two cases came before the Supreme Court of Kentucky which involved a trial court judge's expansion of section 421.350. Despite the two cases having arisen during a five-month period, the court reached opposite conclusions in each case, finding error for such expansion and then affirming an opinion allowing a trial court judge to expand the statute. In addition to this confusion, a huge expansion of the use of this procedure is before the legislature at the time this Note is sent to the printer. The expansion proposes to:

[a]mend KRS 421.350, relating to the testimony of a child victim or witness, to include violent offenses; provide that the child witness, while being exempt from attendance at trial, shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing the same closed circuit or video tape procedure as for the original testimony.

Such conflicting messages coming from the highest court and an expansion to include "violent offenses" show that it is time to reconsider

11 "In Commonwealth v. Willis, Ky., 716 S.W.2d 224 (Ky. 1986), this Court upheld the constitutionality of KRS § 421.350(3) and (4) by which a trial judge is granted discretion to utilize closed-circuit television to prevent a child victim from observing the defendant. We also held that Section 11 of the Constitution of Kentucky should be consonantly construed with the Sixth Amendment to the Constitution of the United States. Thus, Maryland v. Craig would be highly persuasive." George v. Commonwealth, 885 S.W.2d 938, 943 (Ky. 1994) (Lambert, J., dissenting).

12 George, 885 S.W.2d at 938; Danner v. Commonwealth, 963 S.W.2d 632 (Ky. 1998).


14 Kentucky Legislative Research Commission, http://www.lrc.ky.gov/record/o8RS/SBI3.htm (last visited Jan. 24, 2008). As of January 8, 2008, the bill was "prefiled" and introduced into the Senate. Id.

15 Id. (emphasis added).
the *Willis* decision and the issues it has left unresolved.

This Note discusses the failure of the Supreme Court of Kentucky to recognize the explicit language of the state confrontation clause and explores the consequences of *Willis*. Part I of this Note discusses the history of the "face to face" confrontation clause, focusing on Massachusetts (the first state to use the language) and Kentucky. Part II discusses Kentucky case law interpreting the "face to face" language leading up to *Willis* and focuses on the *Willis* decision. Part III discusses the approaches of other state appellate courts who have interpreted their state "face to face" confrontation clauses in light of similar statutes. Part IV discusses how *Willis* has proven hard to apply in Kentucky courts, the legislative expansion of the statute, and how such an expansion both departs from the original purpose of the statute and could result in further departure from guaranteeing defendants "face to face" confrontation.

I. HISTORY OF STATE CONFRONTATION CLAUSES

Although the right of confrontation of the Sixth Amendment to the Constitution of the United States was made applicable to the states in *Pointer v. Texas*, the majority of the states' constitutions contain a parallel confrontation right. Thirty states follow the "confront" language of the Federal Confrontation Clause, seventeen states contain "face to face" language, and three states appear to have no confrontation clause in their constitutions. See infra notes 20–39 and accompanying text.

16 See infra notes 20–39 and accompanying text.

17 See infra notes 40–79 and accompanying text.

18 See infra notes 80–91 and accompanying text.

19 See infra notes 92–110 and accompanying text.


state constitutions.\footnote{Idaho, Nevada, North Dakota.}

\section*{A. Massachusetts—the First "Face to Face" Confrontation Clause}

In its state constitution, Massachusetts was the first state to adopt the "face to face" language in its confrontation clause.\footnote{Mass. Const. pt. I, art. 12.} The Supreme Judicial Court of Massachusetts examined the history of the "face to face" clause when they considered a child shield statute comparable to section 421.350. The court noted that "[t]he Constitutions of Virginia, Pennsylvania, Delaware, Maryland, North Carolina, and Vermont contain 'to be confronted with' or 'to confront' language. The Massachusetts Declaration of Rights, which was adopted after these documents, was the first to use the language 'to meet the witnesses against him face to face.'"\footnote{Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 n.9 (Mass. 1988).}

In Massachusetts, during the Salem witch trials of the 17th Century,\footnote{"The historical significance of the Salem witch trials cannot be overestimated. They were a turning point in the transition from Puritanism, with its values of community, simplicity, and piety, to the new Yankee world of individualism, urbanity, and freedom of conscience. Yet their significance transcends the purely historical. They provide an astonishingly clear and instructive model of the universal and timeless processes by which groups of human beings instigate, justify, and escalate persecution." Francis Hill, The Salem Witch Trials Reader xvii (2000).} affidavits of complaining witnesses were used to convict suspected "witches" in a proceeding before a special tribunal without providing an opportunity for confrontation.\footnote{"A change did not come until the introduction of confrontation. Reverend Increase Mather, President of Harvard College and the Massachusetts Colony's Ambassador to England, was deeply disturbed by the tribunal's actions and declared, 'It was better that ten suspected witches should escape than that one innocent person should be condemned.... I had rather judge a witch to be an honest woman than judge an honest woman as a witch.' At Mather's insistence, the Massachusetts legislature issued a mandate requiring more substantiated evidence to be produced and an opportunity for the accused to face and answer her accusers before her conviction could be finalized. After the mandate, few individuals were willing to state their accusations in front of those they had accused. Because little substantial evidence actually existed, the Governor of Massachusetts Colony dismissed the special Salem court on October 29, 1692." Jacqueline Miller Beckett, Note, The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials, 82 Geo. L.J. 1605, 1612–13 (1994) (citations omitted).} These complaining witnesses were children, most of whom were young girls.\footnote{"The principal [accusers] and [witnesses], too, in the whole Term of the Witchcraft [prosecutions] were eight Females, nearly all young Girls, from eleven to twenty Years of Age." Samuel G. Drake, Annals of Witchcraft in New England 188–89 (Benjamin Blum 1872) (1869).}

The motivation for the child accusers in the Salem witch trials to fabricate their stories came from hiding their behavior from their Puritan elders:
The girls, probably, realized that if the exact truth were known to their elders they would be severely punished; possibly they could not help doing as they did? They undoubtedly had some knowledge of witchcraft, enough at least to enable them to make a pretense of being bewitched. The girls could not for a moment realize the terrible consequences which were to follow. Having taken the first step, they were in the position of all who take a first step in falsehood or any other wrong doing, another step became necessary, then another. Then they were probably commanded by their elders to tell who caused them to do these strange things; or, as most writers put it, who “afflicted” them.29

Both the Salem witch trials and the current child shield illustrate the problems with child witnesses testifying in court. Justice Scalia in his dissent to Maryland v. Craig explained: “[s]ome studies show that children are substantially more vulnerable to suggestion than adults and often unable to separate recollected fantasy (or suggestion) from reality.”30 Such vulnerability is compounded by the fact that children may not understand the consequences of lying in court. The possible motivation for child victims or witnesses to child abuse to lie might come from pressure from adults. In this way, the child shield statutes, while protecting vulnerable children,31 may also provide an opportunity for child witnesses to be manipulated. Justice Scalia explained this unfortunate possibility when discussing the potential consequences of upholding these statutes in his dissent to Craig:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State’s child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?” Perhaps that is a procedure today’s society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.32

29 2 Thomas Hutchison, The History of the Colony of Massachusetts Bay 219 (1765).
31 The Craig Court cited to “the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court . . . .” Id. at 855 (majority opinion).
32 Id. at 861 (Scalia, J., dissenting).
As this dissent suggests, recognizing that children who are witnesses or victims of child abuse could suffer potential trauma by testifying under normal courtroom procedures does not justify the abrogation of a constitutional guarantee. The guarantee of “face to face” confrontation was formulated originally (in Massachusetts) to protect against this specific problem: the potential for children to make false accusations when they are not required to face the person against whom their serious charges are being levied.

B. Kentucky

Unlike the rich history behind the adoption of the Massachusetts confrontation clause, the legislative history behind the Kentucky clause is non-existent. At the time the first Kentucky Constitution was adopted in 1792, both the “confront” and the “face to face” clauses were available as models for the state confrontation clause. In 1792, the year that Kentucky became a state, the first state constitution was drafted. Kentuckians were faced with the task of achieving statehood and drafting a constitution at the same time. One historian noted, “[t]hey believed this constitution was critically important in establishing the proper development of the state and in attracting the kind of people needed to govern it. Yet they thought themselves and other Kentuckians lacking the knowledge and skill to write it.”

Out of the forty-five members of the first constitutional convention, only two were lawyers. Thus, Kentucky looked to the Pennsylvania Constitution as a model when they adopted their first constitution, which was written during a brief convention. Section 11 of the Kentucky Bill of Rights, which contains the confrontation clause, “has as its original

33 Ky. Const. § 11. “Section 11 of the Constitution of Kentucky provides that in all criminal prosecutions ‘the accused has the right . . . to meet the witnesses face to face . . .’ The identical guarantee was a part of the bill of rights in each of the previous three constitutions of this state.” Noe v. Commonwealth, 396 S.W.2d 808, 809 (Ky. 1965). For an early case citing to the right to confront the witnesses “face to face,” see Kean v. Commonwealth, 73 Ky. (ii Bush) 190 (1873) (“It is now urged by appellant’s counsel that the admission of this testimony was in violation of the twelfth section of the bill of rights, which provides that in all criminal prosecutions the accused hath the right to meet the witnesses face to face”).


35 Id. at 21–22.

36 “[I]n a remarkably brief period, the convention produced a constitution. A committee of the whole met nine days and hammered out a series of resolutions; a committee . . . drafted a constitution based on these resolutions. The convention then made a few amendments to the draft, accepted it after only one roll-call vote, and adjourned . . . without submitting the document to the people for ratification.” Id. at 25.

37 The original draft of the resolutions which later became the first constitution, in article 12, read: “In all criminal prosecutions, the accused hath a right . . . to meet the witnesses face
source the Pennsylvania Constitution of 1790, whose exact language was incorporated into the first constitution.\textsuperscript{38}

Given the lack of legal expertise at the convention and the wholesale adoption of the Pennsylvania confrontation clause, it is not surprising that there is no resource that catalogues the debates of the first constitutional convention: "The debate of . . . these two conventions [the 1792 and 1799] were probably never written out . . . ."\textsuperscript{39} Despite the lack of legislative history to explain the choice of the "face to face" language, the plain meaning of the words themselves suggest there is no need to look to outside sources for interpretive guidance.

\section*{II. Kentucky Case Law}

\subsection*{A. Pre–Willis Confrontation Clause Jurisprudence}

Before Willis, the Kentucky Supreme Court's construction of the confrontation clause of section 11 of the Kentucky Constitution, while recognizing the linguistic differences in the federal and state confrontation clauses, largely followed the federal jurisprudence. Early Kentucky cases show the confusion of state and federal confrontation rights. In Foley v. Commonwealth, which considered whether reading an affidavit accompanying a search warrant to the jury violated the confrontation clause, the court held that the defendant's confrontation right was violated. In its analysis, the court seemed to rely on the state confrontation right, but in support for its interpretation, cited a federal case:

Under our Constitution the accused in all criminal cases has the right 'to meet the witnesses face to face.' Construing a similar provision of the federal Constitution, the United States Supreme Court said: 'The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, 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,

\footnotesize{\textsuperscript{38} ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION 35 (1999). Ireland notes that "[a] full 75 of the 107 sections of the constitution were taken, verbatim or substantially from the Pennsylvania charter, including 27 of 28 sections of the Bill of Rights." \textit{Id.} at 2. It should be noted that Pennsylvania amended their state constitution in 2003 to change the language from "face to face" to "confront." Pa. Const. art. 1, § 9.

\textsuperscript{39} GEORGE L. WILLIS, SR., KENTUCKY CONSTITUTIONS AND CONSTITUTIONAL CONVENTIONS: A HUNDRED AND FIFTY YEARS OF STATE POLITICS AND ORGANIC-LAW MAKING, 1784–1933, at 25 (1930).}
and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.  

The court eluded any clarification of which right (state or federal) was being analyzed when it ultimately held that “the affidavit was prejudicial to appellant’s substantial rights.” In 1965, the court considered a challenge to the use of testimony obtained during a deposition of a witness who failed to appear at trial and held that “the admission of the depositions did not violate any of the rights vouchsafed to the appellant by Section 11 of our constitution or by the Sixth and Fourteenth Amendments of the federal constitution.” Although ultimately holding neither right was violated, the court did engage in a separate analysis for the state and federal right. In support, Foley cited to a case decided by the Supreme Court of Wisconsin, another “face to face” jurisdiction, which arguably shows an awareness of the distinct “face to face” language of the state constitution.

Such recognition of a separate vein of state jurisprudence, however, was short lived. The cases following Foley took a “functional” approach to confrontation clause analysis, focusing more on the purpose of the confrontation right than the language of the clause itself. In Flatt v. Commonwealth, the court considered a confrontation challenge on federal and state constitutional grounds. Although the court quoted the two clauses, it subsequently performed one analysis, focusing on the purpose of the clause:

The federal constitution grants the right to the accused “to be confronted with the witnesses against him,” and the state constitution guarantees to him the privilege to “meet the witnesses face to face.” The main purpose of confrontation is to insure the right of cross-examination and protect the accused from conviction by means of ex parte testimony of affidavits given in his absence.

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41 Id. at 446.
42 Noe v. Commonwealth, 396 S.W.2d 808, 812 (Ky. 1965).
43 “In State ex rel. Drew v. Shaughnessy, the Wisconsin Supreme Court, construing a constitutional provision almost identical to ours, commented as follows: ‘That section does not expressly prescribe that the requirement as to such confrontation can be satisfied only by confrontation on the trial in court; and it does not require the witnesses to face either the judge or the jurors. * * * The rule as to confrontation by witnesses is sufficiently complied with under the Constitution, as well as at common law, if the accused met the witnesses face to face, at the time that they were testifying, and if he then had the opportunity of cross-examining them. That is the primary purpose, and, when complied with, fully satisfies the rule as to confrontation. The personal appearance of the witnesses before the judge and the jury, on the trial, is of advantage also. However, that is but a secondary purpose, and that is not a right secured to an accused at common law, or under the Constitution.’ Id. at 809-10 (citations omitted).
44 Flatt v. Commonwealth, 468 S.W.2d 793, 794–95 (Ky. 1971).
The court went on to hold that neither right was violated in this case because the person who the defendant wanted to "confront" was never called as a witness in the trial, and therefore "the accused was confronted by all persons who were witnesses at the trial." In that case, therefore, analyzing the two clauses together was appropriate because both clauses guarantee the accused the right to confront or meet face to face the witnesses against him, which would not include those who were never called to testify. Despite this distinction, this approach paved the way for cases that were decided by the Supreme Court of Kentucky in the 1980s which continued the single-approach approach and definitively rendered the specific language of the state confrontation clause insignificant.

In *Stincer v. Commonwealth*, a case decided the same year as *Willis*, the defendant argued "that he was denied his right to confrontation, under the Sixth Amendment of the United States Constitution and section 11 of the Kentucky Constitution, when the trial court excluded him personally from a pre-trial hearing to determine whether the child prosecuting witnesses were competent to testify." In keeping with earlier approaches to both confrontation clauses, the court spelled out the language of the two clauses, but focused on the function of the clause in guaranteeing the right to cross-examination:

In addition to the right of confrontation provided by the Sixth Amendment to the United States Constitution, the Eleventh Section of the Bill of Rights of the Kentucky Constitution guarantees the accused in a criminal prosecution the right to be heard by himself and counsel and to meet the witnesses (against him) face to face. The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's Bill of Rights, is to ensure the defendant's right to cross-examine the witnesses against him at trial.

As with earlier opinions, the court concluded: "[w]e therefore reverse the judgment of the trial court on the ground that appellant was denied his right to confrontation by the trial court's ruling that he be excluded from a pre-trial competency hearing." The grounds for reversing the judgment were unclear and such ambiguity was part of the reason the Supreme Court of the United States, when it considered the case on appeal, could reverse the decision without having to consider the possibility of the state

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45 *Id.* at 795.
46 *Stincer v. Commonwealth*, 712 S.W.2d 939 (Ky. 1986) (Stephens, C.J.; Stephenson, J., filed concurring opinion in which Leibson, J., joined; Wintersheimer, J., filed dissenting opinion in which White, J., joined) rev'd, 482 U.S. 730 (1987); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); See *v. Commonwealth*, 746 S.W.2d 401 (Ky. 1988).
47 *Stincer*, 712 S.W.2d at 940.
48 *Id.*
49 *Stincer*, 712 S.W.2d at 942.
confrontation clause being adequate and independent state grounds for the
reversal:50

As an initial matter, respondent asks us to vacate our grant of certiorari
because, in his view, the decision of the Kentucky Supreme Court rests on
"separate, adequate, and independent grounds." We decline to do so. In
Michigan v. Long, we explained that "when . . . a state court decision fairly
appears . . . to be interwoven with the federal law, and when the adequacy
and independence of any possible state law ground is not clear from the face
of the opinion," we shall assume that the state court believed that federal
law compelled its conclusion. In this case, the Kentucky Supreme Court
consistently referred to respondent's rights under the Sixth Amendment
to the Federal Constitution as supporting its ruling. The court gave no
indication that respondent's rights under § 11 of the Bill of Rights of the
Kentucky Constitution were distinct from, or broader than, respondent's
rights under the Sixth Amendment.51

Thus, the stage was set for the court in Willis to definitively hold that the
state right was to be considered the same as the federal right.

B. Commonwealth v. Willis and Section 421.350

Less than a month after the Supreme Court of Kentucky decided Stincer,
the court considered section 421.350(3)–(5) in Commonwealth v. Willis.52 In
Willis, the defendant was being tried for sexual abuse of a 5-year-old child.
When the trial court was unable to rule on the competency of the child
to testify because of her refusal to speak in the defendant's presence, the
prosecution moved to proceed under either section (4) or (5) of section
421.350.53 After hearing arguments on both sides, the trial court held that
section 421.350(3)–(5) was unconstitutional because it violated the right to
confrontation under both the state and federal constitutions and offended
the separation of powers doctrine under the state constitution.54 Upon an
interlocutory appeal, the Supreme Court of Kentucky reversed on both
grounds.55

True to its earlier analysis of the state and federal confrontation rights,
the court recognized the language difference between the federal and state
clauses,56 but framed the right in terms of its function: "[t]he requirement

51 Kentucky v. Stincer, 482 U.S. 730, 735 n.7 (1987) (internal citations omitted).
52 Stincer was decided by the court on June 12, 1986 and Willis was decided on July 3,
53 Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986).
54 Id.
55 Id. at 227.
56 "The issue is whether the statute in question offends either Section Eleven of the
in the Kentucky Constitution to ‘meet witnesses face to face’ is *basically the same* as the Sixth Amendment to the Federal Constitution which provides a right of confrontation. The federal courts have indicated that the Confrontation Clause reflects a *preference* for face to face confrontation at trial.” 57 In considering the two rights together, the court focused on the cross-examination function of the confrontation right (state and federal) and found the crux of the confrontation right to have been preserved. 58

By focusing on function and diminishing the importance of the clear language of the state clause, the court confused the two rights and committed the logical fallacy outlined by Justice Scalia four years later in *Maryland v. Craig,* which considered the federal clause and a Maryland child shield statute. 59

The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated “face to face confrontation”) becomes only one of many “elements of confrontation.” The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—“face to face” confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—“face to face”

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57 Id. (internal citation omitted) (emphasis added).
58 “KRS § 421.350(3) and (4) does not unduly inhibit the right of cross-examination. The accused still has the right to hear and observe the witness testify and the jury has the opportunity to view the video and evaluate the demeanor and credibility of the witness. The sections of the statute apply only to a narrow class of witnesses, children twelve years old or younger who are victims of sex offenses. They impose no restrictions on cross-examination; allow the finder of fact to observe the demeanor of the witness and require that defendant be present to see and hear the testimony.” Id.
confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right... Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the "right to meet face to face all those who appear and give evidence at trial."60

Although this passage construes the federal clause, the argument that the "functional approach,"61 found in previous Kentucky cases, "abstracts from the right to its purposes, and then eliminates the right"62 would receive even stronger support based on the more specific language of the right to "face to face" confrontation found in the Kentucky Constitution. The Willis court committed the same mistake as the Craig majority when it rejected the argument that the state confrontation right could be a more definitive guarantee of physical confrontation.63 The Willis court based its decision to analyze the clauses together on the fact that the language of the state confrontation clause has been used specifically when interpreting the Federal Confrontation Clause, thereby ignoring the fact that "face to face" is part of the right itself in the state clause, not just a part of the interpretation of the confrontation clause.64

This argument found support in Chief Justice Stephens's dissent in Willis. In recognizing the abrogation of the specific guarantees of the language of the state confrontation clause by this functional approach, he stated: "[t]he majority has put the imprimatur of this Court on a new revision of the rule which says that the right of confrontation is no longer 'face to face,' but is rather, 'face—to television screen—to face.'65 The dissent also advocated a plain language approach when it ended with the terse assertion: "[f]ace to

60 Id. at 862 (Scalia, J., dissenting; Scalia was joined in his dissent by Justice Brennan, Justice Marshall, and Justice Stevens) (internal citations omitted).
61 Willis, 716 S.W.2d at 228 ("The videotaped or televised testimony under §§ 3 or 4 of the statute is not hearsay. It is the functional equivalent of testimony in court").
62 Craig, 497 U.S. at 862.
63 The court asserted: "construction of the Sixth Amendment by federal courts has consistently included identical language." Willis, 716 S.W.2d at 229 (citations to federal authority omitted).
64 Such a confusion of precise language with meaning derived therefrom has been something the highest court of Kentucky has cautioned against:
[...]Interpretations of Constitutions by rules of implication are most hazardous, and, if ever employed at all, it ought to be done in those instances only where the subject-matter and language leave no doubt that the intended meaning of the clause which may be under investigation may be reached in that way only, and be reached in that way with approximate certainty.

Cumberland Tel. & Tel. Co. v. City of Hickman, 111 S.W. 311, 313 (Ky. 1908).
65 Willis, 716 S.W.2d at 234 (Stephens, C.J., dissenting).
The functional approach to the confrontation clause allowed the court to conflate the more specific state confrontation right with the generalized federal right, thereby avoiding an analysis of the "face to face" language in terms of the intent of the drafters of the state constitution or its plain meaning. The court, without citation to any supporting authority, dismissed the possibility that the drafters of the state constitution intended to guarantee a broader right of confrontation: "[t]here is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution." The court discussed another state appellate court's treatment of their state confrontation clause without regard to the language of the confrontation clause of that state. Specifically, the case the court cites in support of its decision, State v. Sheppard, came from a jurisdiction whose confrontation clause is almost identical to the Federal Confrontation Clause. The court also ignored the plain meaning of the clause. Instead of simply acknowledging that "face to face" carries with it a more physically descriptive right of confrontation, the court took an approach that exaggerated "face to face" in order to equate it with "eyeball to eyeball," stating: "[t]here is no constitutional right to eyeball to eyeball confrontation. The choice of the words 'face to face' may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence." The argument here goes too far; the appellant would never have argued "face to face" means "eyeball to eyeball" because witnesses can never be compelled to maintain direct eye contact with the defendant. Later in its opinion, the court itself affirms this

66 Id. at 236.
67 Compare with the Supreme Judicial Court of Massachusetts's acknowledgement of the choice of the drafters of their state "face to face" confrontation right: "[p]resumably, the framers of our State Constitution were aware of the other States' provisions and chose more explicit language to convey unequivocally their meaning." Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 n.9 (Mass. 1988).
68 Willis, 716 S.W.2d at 229.
70 Compare N.J. Const. art. 1, ¶ 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him . . . ."), with U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").
71 Willis, 716 S.W.2d at 230. Later the court reiterated the sentiment: "[i]t would be unconstitutional for the government to take evidence in secret and outside of the presence of the defendant, but there is no right to eyeball to eyeball presence." Id. at 231.
72 "Ordering a witness to make eye contact with a defendant is quite different, however, from permitting a witness to sit so that no eye contact or observation of the witness's face by the defendant is possible. In the former case, the confrontation is 'face to face,' even though it is not 'eyeball to eyeball,' and thus satisfies [the state confrontation clause]." Commonwealth
critique of its own assertion: "the only incursion on the defendant's right of confrontation is that the child is not required to look at the defendant's face or listen to his comments." The conclusion that "eyeball to eyeball" confrontation is not a part of the "face to face" confrontation right allows the court to hold the right is not offended by the statute. To equate "face to face" with "eyeball to eyeball" is to extend the physical guarantee embedded in the state confrontation right to the point of absurdity—a rhetorical feat of hyperbole that enabled the court in Willis to render the language of the confrontation clause meaningless.

Another problem with confusing "face to face" with "eyeball to eyeball" is that it ignores the intuitive meaning of "face to face." The phrase "face to face" merely suggests that the witness and the defendant be in the courtroom in each other's presence unfettered by physical obstacles between himself and the witness. Beyond that, whether or not the witness looks at the defendant is not regulated by law. Despite the possibility that a refusal to look at the defendant could be an important piece of demeanor evidence for the jury to observe, the court in Willis saw this as being preserved because the jury can see the child on the screen: "[t]he use of video tapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanor to the jury is still achieved." The court ignored the fact that the conditions under which the testimony is taken, absent the presence of the accused, is not an effective fulfillment of the opportunity to observe the demeanor of the witness. In fact, as Justice Scalia points out in his dissent in Craig, the

v. Johnson, 631 N.E.2d 1002, 1006 (Mass. 1994). Also State v. Self, a case from another "face to face" jurisdiction, states: "[a]s we have indicated, a criminal defendant is ordinarily entitled to a physical confrontation with the accusing witnesses in the courtroom. Yet, the value which lies at the core of the Confrontation Clauses does not depend on an 'eyeball to eyeball' stare-down." State v. Self, 564 N.E.2d 446, 452 (Ohio 1990). State v. Foster ("face to face" jurisdiction) states: "I part company with the dissent, however, in its conclusion that [the state confrontation clause] requires, in all circumstances, an eyeball-to-eyeball confrontation between witnesses and the accused. That view of [the state confrontation clause] is too rigid and inflexible." State v. Foster, 957 P.2d 712, 729 (Wash. 1998) (Alexander, J., concurring in part, dissenting in part).

73 Willis, 716 S.W.2d at 231.
74 "A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that she cannot testify unless she is unable to see or hear him." Id.
75 "A face to face meeting occurs when persons are positioned in the presence of one another so as to permit each to see and recognize the other." Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991) (a case from Indiana which has a "face to face" confrontation clause).
76 Willis, 716 S.W.2d at 230.
77 See Maryland v. Craig, 497 U.S. 836, 846 (1990) (in construing the federal right to confrontation, the United States Supreme Court discussed the importance of demeanor evidence
opportunity to observe the demeanor of the witness facing the accused is acutely important in sexual abuse cases where the children are the sole witnesses:

“... face to face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.” To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty. 78

While there are potentially damaging consequences of putting a child victim or witness of child abuse on the stand in front of the defendant, protecting children from this trauma should not occur at the expense of the defendant's right to "face to face" confrontation. 79 A survey of the approaches taken by other "face to face" jurisdictions demonstrates how some jurisdictions have better accomplished the social goal of protecting child witnesses from trauma while preserving "face to face" confrontation.

III. "FACE TO FACE" JURISPRUDENCE IN OTHER STATES

A. Overview of Judicial Approaches

Seventeen states currently contain the “face to face” language in their state constitutions. 80 Of those seventeen, six states (including Kentucky) have held that there is no distinction between the federal and state

being guarded by the confrontation right: “[w]e have recognized, for example, that face to face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person”; Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back . . . .’”); see also Willis, 716 S.W.2d at 234-35 (Stephens, C.J., dissenting).

78 Craig, 497 U.S. at 866-67 (internal citations omitted).

79 “By declaring the statutory scheme constitutional, the majority of this Court has taken a giant step in diminishing, if not eliminating, a fundamental right granted to all of us. No one does, and I certainly do not, condone the virulent and growing crime of child abuse. But, no one should, and I certainly do not, condone any policy of the General Assembly which effectively negates a constitutional right.” Willis, 716 S.W.2d at 235–36 (Stephenson, C.J., dissenting).

The Kentucky confrontation rights, regardless of the explicitly distinguishable language in the state confrontation clause. Two states have held that “face to face” guarantees a more stringent right to confrontation and have found their child shield statutes unconstitutional as per the state constitution. Four of the states appear not to have squarely considered the issue of whether their state confrontation clause guarantees a broader confrontation right than the federal one. Five states have no child shield act that allows the witness to testify outside the presence of the defendant, and therefore have not considered challenges to the state confrontation clause on the grounds that “face to face” confrontation is violated by a procedure allowing the witness to testify outside of the defendant’s presence.

In addition, although there are currently seventeen state constitutions which contain the “face to face” confrontation right, there were two states, Pennsylvania and Illinois, whose original constitutions contained the right to meet the witnesses “face to face.” These two states have subsequently amended the language of their confrontation clauses to the “confront” language. The amendments came in response to the highest courts of both states holding that the child shield acts violated the “face to face” confrontation guarantee of their state constitutions. In People v. Fitzpatrick, the Illinois court considered the “face to face” language to explicitly guarantee the defendant’s presence: “[t]he language in the Illinois Constitution confers an express and unqualified right to a face to face confrontation with witnesses. Clearly, a witness who is examined by

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83 State v. Vincent, 768 P.2d 150, 164–65 (Ariz. 1989); People v. Newbrough, 803 P.2d 155, 160 (Colo. 1990); State v. Deuter, 839 S.W.2d 391, 396 (Tenn. 1992); McGriff v. State, 781 A.2d 534, 541–42 (Del. 2001). Although these states (Arizona, Colorado, Tennessee and Delaware) have not considered the issue directly, two states (Arizona and Colorado) have shown a preference, in dicta, for aligning themselves with the school of thought that the state confrontation right is coextensive with the federal one. State v. Vincent, 768 P.2d 150, 164–65 (Ariz. 1989); People v. Newbrough, 803 P.2d 155, 160 (Colo. 1990).


85 Ill. Const. art. 1, § 8 (amended in 1994); Pa. Const. art. 1, § 9 (amended in 2003). This was the second time a proposed amendment to the confrontation clause was considered because the first time the amendment was proposed it did not follow the correct ballot procedure. See Bergdoll v. Kane, 731 A.2d 1261, 1270 (Pa. 1999).


87 Fitzpatrick, 633 N.E.2d 685.
closed circuit television does not provide the defendant with the face to face encounter envisioned by the drafters of the Illinois Constitution.\textsuperscript{88} Similarly, the highest court of Pennsylvania found the "face to face" guarantee to be an unequivocal assurance of physical confrontation between the victim and the defendant.\textsuperscript{89} In response to these decisions, their respective legislatures proposed an amendment to the state constitution to change the language from "face to face" to "confront," thus achieving the goal of allowing the procedures for child witnesses without violating the specific language of the state constitutions.\textsuperscript{90}

\textbf{B. Alternative Legislative Procedures}

Some courts that held the "face to face" confrontation guarantee of the state constitution provides greater protection than the Federal Constitution have suggested that a procedure authorizing the testimony of the child to be taken in the presence of the defendant (without physical obstacles shielding the defendant from the view of the witness) might pass constitutional scrutiny. As the Supreme Judicial Court of Massachusetts explained when it considered the Massachusetts child shield statute:

\begin{quote}
The courts too have recognized, and should continue to recognize, that traditional formalities of trials are not necessarily an integral part of protected constitutional rights. Our conclusion today should not be taken to preclude the use of methods by law enforcement agencies, lawyers, and trial judges designed to minimize the stress and trauma which may be imposed on victims and witnesses in cases such as the one at bar. Both before and during trial, measures can be taken to reduce the adverse impact of giving testimony. By way of example, a judge may require that the environment in which a witness is to give testimony be made less formal and intimidating, and that, before and after testimony is given, appropriate court-supervised counseling service be made available to a witness demonstrably in need of such help.\textsuperscript{91}
\end{quote}

Such alternative procedures should be considered by the Kentucky legislature if the Supreme Court of Kentucky reconsiders \textit{Willis} and strikes down section 421.350. The legislature could adopt a means whereby the defendant is present in the out-of-court proceeding, which would preserve the guarantee of "face to face" confrontation while providing a less intimidating environment for children who are victims or witnesses of sex crimes to testify.

\begin{footnotes}
88 Id. at 687.
90 Pa. Const. art. 1, § 9; Ill. Const. art. 1, § 8.
\end{footnotes}
In Willis, while the court was explicitly considering the procedure of section 421.350, the court used language that indicated that using technology to allow testimony to be taken outside defendant’s presence might be allowed in other circumstances: “The discretion provided to the trial judge pursuant to KRS 421.350 allows the utilization of modern technology so as to enhance the truth determining qualities of a trial. Live testimony is always preferred, but other techniques can be used when needed as permitted by the trial judge.”

As Justice Scalia said of the federal confrontation right in his dissent in Craig, “[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court.” The problem with such flexibility is that there is no effective yardstick by which to measure when such an abrogation through balancing of a constitutional right is warranted. This problem can be seen in the cases Kentucky courts have considered since Willis.

Several cases show how the highest court of Kentucky has inconsistently considered trial court judges’ expansion of the statute, absent legislative authority. In 1994, the Kentucky Supreme Court found error where the trial court judge allowed a child witness who was not a victim to testify via closed circuit television, because at that time, section 421.350 only allowed these procedures for child victims of the specified crimes. In finding error in this expansion, the court held that the procedure “does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful.”

Four years later in Danner v. Commonwealth, the court took a more deferential approach to the trial court’s unauthorized expansion of the use

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92 Commonwealth v. Willis, 716 S.W.2d 224, 228 (Ky. 1986).
94 Compare with the reasoning of the Massachusetts court in invalidating the child shield act on state confrontation clause grounds, and explicitly rejecting the view of the Kentucky court in Willis: “[f]or constitutional purposes, no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment. [The child shield act], creates a rule of witness protection that is too broad to pass constitutional muster. While we are willing to consider the validity of new techniques of preserving and presenting evidence at a criminal trial on a case-by-case basis, we are unable to uphold broad categorical exemptions from constitutional mandates.” Bergstrom, 524 N.E.2d at 374–75.
95 George v. Commonwealth, 885 S.W.2d 938 (Ky. 1994).
96 Id. at 941. The legislature subsequently amended section 421.350 in 1996 to include child witnesses as well as victims. 1996 Ky. Acts 685.
97 Danner v. Commonwealth, 963 S.W.2d 652 (Ky. 1998).
of section 421.350. In that case, the victim of sexual abuse "was between the ages of five and ten years old when appellant sexually abused her, but she was fifteen by the time appellant was brought to trial. Because the Commonwealth felt that the victim could not testify in the presence of appellant, it sought to have her testimony taken outside appellant's presence pursuant to KRS 421.350." The court considered the language and purpose of section 421.350 and held that the trial court judge did not err in allowing the witness to testify via closed circuit television even though she was fifteen at the time of the trial:

As applied to the facts of this case, the statute must be regarded as ambiguous. One portion clearly refers to the age of the victim when the act is committed, but another portion refers to the age of the victim when the testimony is given. The statute assumes the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial. The statute does not preclude this interpretation and its language focuses on the age of the child when the crime was committed: "[t]his section applies . . . when the act is alleged to have been committed against a child twelve years of age or younger . . ." KRS 421.350(1). To hold otherwise would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes were committed, but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.99

The deference to the "broad purpose underlying the statute" shows the court's willingness to allow this procedure to be used as broadly as the language allows.

In May of 2006, however, the court refused to sanction the trial court's expansion of the statute in Greene v. Commonwealth.100 The court would not allow the procedure to be used for a child witness of murder (not a listed sexual crime of section 421.350):

In this case, however, [the witness] was not a member of the class of minors authorized to testify under KRS 421.350. KRS 421.350(1) is limited to specific categories of crimes, mostly sexual, which may be subject to "out-of-the-courtroom" testimony by a victim, or witness, twelve or under. Murder and/or First Degree Manslaughter are not included in the crimes listed.101

98 Id. at 633.
99 Id. at 634.
100 Greene v. Commonwealth, 197 S.W.3d 76 (Ky. 2006).
101 Id. at 83.
While a majority of the court found the trial court expansion to be erroneous, the error was ultimately held harmless.

Shortly after Greene, in September of 2006, the courts of Kentucky were faced with a case involving the expansion of section 421.350. Kraus v. Commonwealth, the unreported Court of Appeals opinion, described the facts of the case. The defendant alleged error in the trial court's decision to allow one of the victims of sexual abuse to testify via closed circuit television. The victim, who was twenty-four years old at trial, was mentally handicapped and "function[ed] at about the level of a thirteen or fourteen-year-old child." Before trial, there were two hearings to consider the competency of the victim and the manner in which the victim would testify. Despite the witness clearly falling outside the class of witnesses for whom this procedure could be used, the trial court judge "concluded that the use of closed circuit television equipment was necessary given the women's anxiety concerning the trial and reaction to the mention of appellant's name." In affirming the conviction and finding no error in the trial court's expansion of the statute, the Court of Appeals looked at Willis and found the case to justify the expansion: "[w]e are convinced that the rationale set out to support the Court's conclusion that the statute does no violence to a defendant's confrontation rights applies with equal force to this situation." The Court of Appeals also supported the trial court's interpretation of Willis:

Thus, we find no impermissible expansion of the statute in the procedure utilized by the trial judge. After determining that KRS 421.350 was inapplicable due to the victims' ages at the time of the offense, the trial judge fully explained his rationale for his decision that a similar procedure could be utilized. Using the analysis cited from Willis as support, the trial judge concluded that appellant's right of confrontation was not absolute and that he had the discretion to fashion a procedure which best protected the appellant's rights as well as those of the victims in this case. The special needs of the victims in this case satisfied the "necessity" prerequisite to deviating from the normal face-to-face method of confrontation, but it did not deprive appellant of any right.

with one member not sitting, the court split three-three, and did not produce an opinion, resulting in an order affirming the Court of Appeals decision and the judgment of the trial court. By issuing an order that affirms the Court of Appeals opinion, the Supreme Court of Kentucky allowed an expansion of the procedure that was clearly not authorized by the statute. This acquiescence in the expansion came just several months after the court had refused to allow the statute to be expanded absent legislative authority in Greene. This expansion is the most recent pronouncement from the court and is both inconsistent with its most recent precedent and a troubling judicial extension of the procedure.

The issues raised by Willis and its progeny might again resurface if the legislature passes the amendment to section 421.350 to include the "violent offenses" in the types of crimes for which the procedures in the statute may be used. Expanding the class of offenses to include violent offenses is a huge expansion of the original statute which focused on child victims of sexual abuse crimes.

**Conclusion**

This Note has attempted to highlight the problems with the Kentucky approach to interpreting its confrontation clause in light of the child shield statute. It suggests, by way of comparison to other states with similar clauses, that a different approach might have prevented the confusion that currently surrounds the application of the child shield statute. As the lower courts expand the statute without legislative authority and as the legislature moves towards expanding the statute, the failure of the court to have established an effective yardstick to measure when public policy should allow this type of testimony will cause more confusion and instability, risking the proliferation of categories when a defendant's confrontation right under the state constitution can be abrogated.

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108 Three judges affirmed the judgment and three would have reversed the judgment. One judge was not sitting. Order, Kraus v. Commonwealth, No. 2005-SC-000304 (Ky. Sept. 13, 2006).


110 See Commonwealth v. Willis, 716 S.W.2d 224, 227 (Ky. 1986) (articulating the legislative purpose behind enacting the child shield act: "Our legislature, after extensive public hearings on the matter of child sex abuse and responding to a plea for witness protection, has accepted the philosophy that testifying in a formal court room atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for children. Exercising the legitimate right of legislative policy making, the statute in question was enacted").