ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
JOHN AVERY COY,	)	
	)	
Appellant,	)	No. 86-6757
	)	
v.	)	
	)	
IOWA	)	

Pages: 1 through 57

Place: Washington, D.C.

Date: January 13, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN AVERY COY, :

Appellant, :

V. : No. 86-6757

IOWA :

Washington, D.C.

Wednesday, January 13, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

PAUL PAPAK, ESQ., Iowa City, Iowa

(Appointed by this Court);

on behalf of the Appellant.

GORDEN E. ALLEN, ESQ., Deputy Attorney General of Iowa, Des Moines, Iowa;

on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 86-6757, John Avery Coy v. Iowa. Mr. Papak, you may proceed whenever you are ready.

ORAL ARGUMENT BY PAUL PAPAK

ON BEHALF OF APPELLANT

MR. PAPAK: Thank you, Mr. Chief Justice, and may it please the Court. On November 13 of 1985 in the small town of Clinton, Iowa, twelve members of a criminal jury witnessed an unprecedented and extraordinary event.

Following opening statements by the county prosecutor and defense counsel, the court ordered the bailiff to turn off the courtroom lights and to close the window blinds. And with that court thrust in near total darkness --

QUESTION: How large a town is Clinton?

MR. PAPAK: Thirty-some thousand, Your Honor.

QUESTION: Small town?

MR. PAPAK: Relatively small town.

QUESTION: Relatively small city.

MR. PAPAK: Yes. A large wooden structure, over six feet tall and four feet wide, was dragged into the courtroom past the members of the criminal jury and placed directly in front of the Defendant at counsel table.

Then a panel of four spotlights, the only lights in

the courtroom, were turned on and focused directly on the screening structure, illuminating it and emphasizing it for everyone in the courtroom.

Finally, two thirteen year old girls, one at a time, were ushered into the courtroom through a special door to give critical testimony as the state's first and primary witnesses against the Defendant, John Avery Coy.

QUESTION: Did they identify them?

MR. PAPAK: They never identified him --

QUESTION: In what way then was it critical?

MR. PAPAK: Their testimony was critical in, of course, establishing that an assault did occur and in identifying much of the circumstantial evidence that was used or attempted to be used to tie in Mr. Coy to this particular crime, Your Honor.

That the jury eventually convicted Mr. Coy despite the paucity of incriminating evidence offered by the state is not surprising. Screening a defendant in the presence of the jury made a guilty verdict all by inevitable.

Using a screening device in the presence of those members of the jury signaled to each member of that jury that this defendant was somehow different from each of them, that he was a clear and present danger not only to these child witnesses but to the children of the community generally, and that he was undoubtedly guilty of the crime charged.

QUESTION: What did the trial court judge instruct the jury about this device and the reason for it?

MR. PAPAK: He gave instruction, Your Honor, after the first witness was called to the stand, and from the record it is the only reference to instruction in the record: "that it's quite obvious to the jury that there is a screening device in the courtroom.

"The general assembly recently passed a law which provides for this sort of procedure in cases involving children. Now I would caution you, and I would caution you later, that you are to draw no inferences of any kind from the presence of that screen."

Would you like me to go on, Your Honor?

QUESTION: Well, I would like you to comment on whether it isn't the case that kind of instruction to the jury certainly takes away much of the thrust of what you say was the inevitable consequence of use of the device.

MR. PAPAK: No, I think it does not, Justice O'Connor. I think, as the Supreme Court properly recognized, when you are dealing with inherently prejudicial devices during the course of a criminal trial, you simply can't instruct away the subconscious effect of singling out this particular person in the courtroom for such obvious different treatment.

QUESTION: I thought the people who were singled out were the child witnesses, not the Defendant.

MR. PAPAK: It wasn't in fact, Your Honor, the child witnesses who were singled out. The device was placed directly in front of the criminal Defendant at counsel table, and he was the only person that was screened. That is quite a bit different from placing a screen in front of the witnesses as they were testifying.

In fact, these children, Your Honor, could not see this criminal Defendant, but they could see the judge sitting in a black robe next to them on the right side, they could see the twelve members of the jury at their left side, they could see the media, the spectators, the bailiff, the court reporter, defense counsel, the prosecutor, etc.

It was only this one person in the courtroom who, according to the judge, needed this different treatment.

QUESTION: I think this problem could be eliminated if in the future the state puts the screen in front of the child witness instead of in front of the defendant.

MR. PAPAK: That would be one means, Justice Scalia, I think, of lessening the prejudicial impact. That doesn't resolve the problem in this particular context because the court here made absolutely no finding nor was there any showing that the use of a screen of this sort served any function in this case.

QUESTION: Counsel, what, if anything, shows who, if anybody, asked for this?

MR. PAPAK: The record shows that the county prosecutor made an application seven days prior to trial for closed-circuit television use of the child's testimony, and that while the children were out of the courtroom, the Defendant be separated from them by a screen.

And then the court, on his own motion, said, I'll deny the application for closed-circuit television, but I'll instruct the bailiff to place a screen in front of the Defendant during trial, and that's how the process occurred.

QUESTION: When was the Defendant told about this? I mean, you said he made his request a week ahead of time.

MR. PAPAK: The county prosecutor did, yes.

QUESTION: Was the Defendant advised of that?

MR. PAPAK: Yes, the Defendant received a copy of the county attorney's motion, and there was a hearing held, at which time --

QUESTION: Did he object or not?

MR. PAPAK: Yes, he objected vigorously throughout this trial on Sixth and Fourteenth Amendment grounds, and he moved for a mistrial at all appropriate stages of the proceedings to preserve his --

QUESTION: What grounds did the prosecutor give for moving?

MR. PAPAK: There is absolutely, Your Honor, in this record, no ground of any sort given by the prosecutor or found

by the trial --

QUESTION: He just said what, please have closed-circuit or a screen?

MR. PAPAK: He said, there's a new Iowa statute, and I ask that it be used. And the statute says that one device that might be imposed by a trial court would be the use of a screen.

QUESTION: When what?

MR. PAPAK: When a child testifies we might use a screen of this sort. He simply asked for it based on the statute, not a mandatory statute, a discretionary statute, and the court then imposed the screen on his own without any finding that there was some need for it in this particular case.

QUESTION: Did the screen obscure the view of the Defendant by the jury?

MR. PAPAK: No, it did not.

QUESTION: They could see him?

MR. PAPAK: They could see him, yes.

QUESTION: And he could see the witnesses?

MR. PAPAK: There is some question about how clearly, but yes, it was designed --

QUESTION: At least there was no intention of obstructing his view of the witnesses.

MR. PAPAK: That is correct. The obstruction was

only the two thirteen year old girls, as they testified, could not see him.

QUESTION: Was the screen removed after they completed their testimony?

MR. PAPAK: Yes, after the two thirteen year old girls testified and for the remainder of the trial, the screen was no longer in place.

QUESTION: Were they the first witnesses?

MR. PAPAK: First two witnesses for the state.

QUESTION: Mr. Papak, if express findings had been made by the trial court judge that it was necessary and appropriate in this case, would you be here?

MR. PAPAK: Yes, we would still be here, Your Honor.

QUESTION: So that's irrelevant, really, to your argument.

MR. PAPAK: No, it's not --

QUESTION: You spend a lot of time talking about the need for findings, but I'm not clear that that would solve it in your view.

MR. PAPAK: No, it would not solve it in this particular instance, Your Honor, and I maintain that it would not because the requirement before the state may infringe on fundamental rights of a criminal defendant is not only a showing of necessity, but a careful tailoring of the infringement.

And it's our position, Your Honor, that this infringement was of such a gross nature and there are so many less prejudicial ways of protecting the child witness from --

QUESTION: Well, here the findings were in effect made by the state legislature, weren't they?

MR. PAPAK: No, I don't think so, Your Honor. The state legislature did not make any findings because the statute simply isn't mandatory, nor does it on its face necessarily apply just to criminal cases or just to victims.

Nor does it tell you which device should be used. It clearly, I believe, vests discretion in the trial court to determine in appropriate cases what the extent of the state interest is and how it should best be met by some protective device.

Here we have nothing by which we can judge the exercise of that court's discretion in simply saying, I decide we're going to use this large and glaring screen in front of the criminal defendant during the testimony of the two key witnesses for the state.

QUESTION: What difference does it make if it's glaring or not?

MR. PAPAK: I think it makes a lot of difference, Your Honor, although it wouldn't change its inherent prejudice. It stood out to the jury emphasizing to them that something was happening here that was very unusual, that we have a person

here who must be so different and dangerous that we have to screen him from the witnesses as they testify.

That's a pretty powerful statement. When we think about Estelle v. Williams, where this Court found much difficulty with the idea of having a criminal defendant testify in court with "Harris County" along his chest or on his back or the side of his pants, and the inherent prejudice that can be drawn from the inferences of having a defendant dressed in jail garb, I submit that this is even a stronger prejudicial inference.

It suggests that this defendant is dangerous not in a general sense, but the children, to these two children and the children in the community generally. And that --

QUESTION: He had already been indicted on these charges of child molestation.

MR. PAPAK: That's correct, Your Honor, and there is no doubt that a criminal defendant seated at counsel table is different from everyone else in the courtroom: he is the person indicted.

But this Court has taken great pains to prevent the risk of somehow letting the jury make their deliberation based on impermissible factors. And that screen was one great impermissible factor. It had, by its very nature, suggested inferences about this person that made him much different from everyone else in the courtroom.

QUESTION: I guess the jury would say, well, there's a screen there and the only thing that is screened is the witness's view of the defendant. The jury could see that.

MR. PAPAK: That may be one inference.

QUESTION: What would the jury think -- well, the court doesn't want the witnesses, these children, to see that fellow? Now if that's the fact, what inferences do you think --

MR. PAPAK: I think the inferences are clear, Your Honor. What the jury is being told is that these children as they are sitting in court are traumatized by testifying in front of this one man. And they are traumatized because he in his very presence here in court has some harmful effect on them, and that harmful effect was caused by the fact that he committed some acts against them previously as their assailant in the tent in the night of August 3, 1985, and therefore, he's guilty of the crime charged.

QUESTION: But that isn't what they were instructed. The jury was told that this device was used because the state law required it.

MR. PAPAK: First of all, Your Honor, that is not what the state law states, and it is a misstatement of state law if it's what the judge said.

QUESTION: Well, that's what they were told.

MR. PAPAK: The judge said, provides for; he didn't

say mandated. But assuming that the judge said that, first of all, it would be a misstatement, but more importantly, I think, is when we look at this Court's reasoning in cases like Estelle v. Williams.

We're not saying that you eliminate all risk and it must only be an inherently prejudicial risk that we're concerned about, but we're concerned about the variety of risks that influence the jury's deliberations, and while the jury might have said, one inference that could be drawn from this screen is something about a statute, I think the inevitable inherently prejudicial influence of singling out this one man for such different treatment in a darkened courtroom with this big screen there has another subtle effect on that jury's deliberative process that may, as I suggested, make conviction inevitable.

QUESTION: Counsel, is the colloquy between the judge and the prosecuting attorney in this record?

MR. PAPAK: Yes, it is, Your Honor. The colloquy prior to the enforcement of the screen.

QUESTION: Yes.

MR. PAPAK: There was an argument that took place prior to trial where --

QUESTION: You don't know the exact page? I guess it is the early part of the trial.

MR. PAPAK: Yes, the early part of the appendix, Your

Honor. There is --

QUESTION: Because you keep emphasizing the fact that this singles them out.

MR. PAPAK: That is correct.

QUESTION: Well, as the Chief Justice said, in a criminal trial, a criminal defendant is automatically singled out.

MR. PAPAK: Absolutely. That's correct, Your Honor.

QUESTION: So you've got to have something more than that.

MR. PAPAK: I don't think we do, Your Honor. In other Supreme Court decisions --

QUESTION: If he is singled out, at most of the trials, the prosecuting witness says, and this is the man that did it.

MR. PAPAK: That is correct.

QUESTION: And the court says, let the record show that is the one he is talking about.

MR. PAPAK: That is correct.

QUESTION: That is just the same as is done here.

MR. PAPAK: No, I beg to differ, Your Honor.

QUESTION: Your additional point is that it says the children are afraid of him. Now that, I think, is a good point. But I don't think it is a valid point to keep emphasizing that he is singled out.

MR. PAPAK: Your Honor, if I may respond to that. In Estelle v. Williams we had a criminal defendant seated in court with jail issue clothing, and it said "Harris County Jail." Now everyone in that courtroom including the jury knew that he was the charged defendant.

QUESTION: They knew he was in jail.

MR. PAPAK: That he was in jail.

QUESTION: Well, this man wasn't in jail.

MR. PAPAK: I think in the same way that jail clothing singled out --

QUESTION: I don't want to waste your time. Forget about it.

MR. PAPAK: All right.

QUESTION: Mr. Papak, in Estelle, as I recall, the Court saw no state purpose at all or state inference served by the jail garb. It is pure coincidence, really, that the guy had it on.

MR. PAPAK: Convenience.

QUESTION: In here I'm sure that the state argues there is a purpose served here which would distinguish it from Estelle, I think.

MR. PAPAK: Your Honor, I argue that the need for an interest must be articulated in the record. We can't intuit some state interest. I presume that what interest might be there has something to do with the children's feelings, but

there is no articulation of what that interest is.

And even if there was an articulated interest, there are certainly much clearer, less prejudicial ways of meeting that interest without infringing --

QUESTION: That's a separate argument, that could have been met in other ways that were less prejudicial in your view.

MR. PAPAK: Yes.

QUESTION: But it seems to me your case is different from Estelle in that there was no interest that this Court thought was served by having the guy go to trial in prison garb. Here there are quite obviously some reasons why child witnesses should be treated differently with respect to the accused Defendant than other people.

MR. PAPAK: That is absolutely correct, Your Honor. Children witnesses on a case by case basis should be treated differently.

QUESTION: Why should it be on a case by case basis. Why can't the legislature say, as the Iowa legislature did, that in the case of child witnesses, if there is any problem the court may use this procedure?

MR. PAPAK: Because the court hasn't, within the context of the legislation, made a mandatory determination that in all cases children are traumatized and need protective devices.

QUESTION: Why should it have to be mandatory? Why can't they leave it up to the discretion of the trial judge when it's needed in his view?

MR. PAPAK: That's correct, and that's what they did in this case, but how are we capable of reviewing the discretionary decision by the trial court if he doesn't articulate the basis and the factors that he considered in making that decision.

QUESTION: But all sorts of discretionary decisions made in the criminal process at every stage -- and I don't think we've ever said that every discretionary decision must be supported by some articulated basis for it.

MR. PAPAK: This Court in the Globe Newspaper Company case suggested that when we are dealing with child witnesses and the potential trauma of courtroom testimony, that there is a clear and easy method of determining on a case by case basis whether we should infringe on First Amendment rights, rights of access.

And that same statement, that same articulated purpose is equally applicable to infringement on the rights to a fair trial, as in this case.

QUESTION: Why?

MR. PAPAK: Because this Court has routinely and consistently --

QUESTION: Has this Court ever applied the need for

the articulated reason for closing, in the Globe Newspaper case which you refer to, in the context of the criminal process?

MR. PAPAK: No, it has not. Not in this context it has not.

The rights to a fair trial encompass, inevitably, the right to the presumption of innocence. And this Court has indicated in Holbrook v. Flynn that when you challenge a courtroom arrangement as inherently prejudicial, the important question that must be asked is whether there is a risk that practice would have some impermissible effect in the jury's deliberations.

The use of a screen in this case had quite that same effect. It has an impermissible influence in the jury's deliberations.

QUESTION: Do you think this is a more serious affront to constitutional rights than Holbrook was?

MR. PAPAK: Yes, by far, Your Honor.

QUESTION: In what respect?

MR. PAPAK: I think that in Holbrook this Court found that there were many inferences, many of which were not incriminatory, that could be taken by the jury from the use of armed guards in the courtroom.

QUESTION: Uniformed storm troopers almost, with weapons apparent.

MR. PAPAK: That was certainly the argument --

QUESTION: It was made pretty strenuously.

MR. PAPAK: -- of the criminal defendant in that case. That's correct, Your Honor. But this Court found that a much broader range of inferences could be drawn about other needs for security, considering that there were people who had not been arrested as part of the conspiracy in that case, and that the inferences would not have to be drawn relating only to the defendant in that case.

The screen in this case, the inferences that can be drawn from this screen relate only to Mr. Coy as he sat at defense counsel, because the screen was placed only in front of him and shielded only his view from that of the witnesses. It didn't --

QUESTION: What would you be satisfied with in this case?

MR. PAPAK: In this case, Your Honor, I believe that when --

QUESTION: No screen at all?

MR. PAPAK: Not in the courtroom. If the court finds it necessary to screen a defendant from the children because the children are traumatized, do it outside the courtroom. In fact, I would submit that is what the Iowa statute calls for on its face, but it hasn't been so interpreted by the Iowa Supreme Court.

QUESTION: Well, then aren't you violating some other

so-called rights by having a trial outside the courtroom?

QUESTION: Yes, you're right, Your Honor. There is an inevitable tension here in this argument between the rights of confrontation and the rights of due process. But I think when you're dealing with due process and the presumption of innocence, you're dealing with the bedrock of due process rights, rights that should only be infringed upon in the most unusual circumstances.

Confrontation has always been considered by this Court a more flexible trial right.

QUESTION: You would have been happy with a videotape outside the courtroom?

MR. PAPAK: A videotape would not have had the same prejudicial impact. There still would have to be a finding --

QUESTION: Would you be content with it is what I am asking.

MR. PAPAK: If there was a showing that it was necessary, Your Honor, yes. It still infringes on fundamental rights, there still needs to be some showing that it's necessary, not just a class based showing that somehow all children deserve protective devices.

The case does not support --

QUESTION: Would you be satisfied if the defendant was outside the courtroom in a room with a one way glass looking in?

MR. PAPAK: That would be one method. There are a variety of methods of dealing with -- that would probably be more appropriate for videotaped testimony. For closed-circuit television some courts have kept the defendant in the courtroom watching the monitor along with the jury.

QUESTION: Are you abandoning your Sixth Amendment claim now?

MR. PAPAK: No, I'm not.

QUESTION: Or are you just addressing the Due Process claim?

MR. PAPAK: No, I'm not abandoning my Sixth Amendment claim, Justice Scalia.

QUESTION: Do you think it would not offend the Sixth Amendment to put him behind a one way mirror?

MR. PAPAK: No, what I said, Your Honor, is that the Sixth Amendment is more flexible, I believe, than the Fourteenth Amendment in terms of the necessity for infringement. There still is a requirement of showing that some essential state interest in this case would be served by infringing on Sixth Amendment rights.

And yes, a screen in or out of the courtroom would infringe upon a defendant's rights to confront adverse witnesses. I'm simply saying, on the balance it's easier and it's fairer to do it outside the courtroom and infringe upon Sixth Amendment rights. They are by their very nature more

flexible.

QUESTION: Mr. Papak, did the defense make any motion or a hearing to determine the necessity for doing it this way?

MR. PAPAK: No, he did not. He argued why he thought it was inappropriate, and, in fact, mentioned during his argument the fact that these children never identified the Defendant. And there was some serious question about the inference of trauma, but he didn't make a specific request that I want a hearing to show on what basis the court has made its ruling.

QUESTION: Suppose there had been such a motion and such a hearing and a determination by the trial court that to proceed with the trial, this device is necessary. Would you be here?

MR. PAPAK: Yes, I would. I believe that is similar to the question Justice O'Connor asked. I would be here because I believe that there are much less intrusive means of meeting that same interest.

That is, if you screen the defendant outside the courtroom, the jury never has to see it. And those inferences about guilt simply aren't transferred to them. And since those opportunities, those alternatives were readily available -- in fact, the county attorney requested one of those alternatives.

He said, let's do it outside the courtroom, and the judge said no. It's clear that less prejudicial alternatives

were easily within the court's grasp.

QUESTION: It seems to me a normal thing to ask witnesses like that would be, do you see your assailant in this room.

MR. PAPAK: Yes.

QUESTION: You would think that the screen would completely foreclose an answer to such a question.

MR. PAPAK: Yes. The court had some trouble with that question, and there is a little colloquy in the record about what happens if there is an eyewitness identification. Do we remove the screen or how do we deal with that problem.

And he said, we'll wait for trial and see what comes up.

QUESTION: I would think the defense would always want to ask if they knew, which they did from their depositions, that the girls could not identify this person.

MR. PAPAK: I'm not sure of that. I believe as a trial tactic it would be awfully dangerous to be saying let's remove this screen, now, thirteen year old girl, is this the person who was in your tent on the night in question?

QUESTION: I don't see any argument by defense counsel that one of the reasons that he is objecting to this is because it will keep me from asking this question.

MR. PAPAK: That's right, there is no objection on that behalf. I think he could have asked the question --

QUESTION: And I think he said from the depositions it is clear that the young ladies can't identify.

MR. PAPAK: That's right. I believe the counsel would have been capable to ask the witnesses whether they could make an in-court identification, but I think the trial tactic --

QUESTION: So defense counsel never said the biggest trouble with screen is I can't ask these girls if they can identify the defendant?

MR. PAPAK: No, the defense counsel said the biggest trouble with this screen is that the jury is going to look at it and say that man is obviously guilty and we ought to put him someplace where he can be screened permanently --

QUESTION: And I suppose certainly the prosecution wouldn't have wanted the screen if they thought there could be an in-court identification.

MR. PAPAK: I can't speak for the prosecution.

QUESTION: But he did say he claimed his Sixth Amendment rights.

MR. PAPAK: Clearly claimed both Sixth and Fourteenth Amendment rights.

QUESTION: Right.

MR. PAPAK: He claimed on the right of confrontation that there is inherent in confrontation the right to a face to face confrontation in most circumstances.

QUESTION: May I ask, what is the definition of a child in Iowa?

MR. PAPAK: With this statute it is fourteen or under.

QUESTION: Fourteen or under is --

MR. PAPAK: At fourteen they're no longer a child. So these girls at thirteen, the next year would not have met the statutory definition of child sufficient to have a protective device used.

QUESTION: I see. Were depositions taken of the two girls before?

MR. PAPAK: Yes.

QUESTION: Is there anything in the record that tells us whether there were any objection to the Defendant being present at those depositions?

MR. PAPAK: There is nothing in the record. I don't believe he was at the depositions.

QUESTION: He was not at the depositions. Is there anything in those depositions to indicate they were concerned about confronting him in person? There is nothing in the record about that.

MR. PAPAK: Your Honor, from start to finish, as far as I can tell, there is absolutely nothing in the record that suggests these two girls were afraid of testifying in the normal procedure in open court without a screen.

By this appeal Appellant is not suggesting that protective devices used to prevent potential trauma to child witnesses are always inappropriate. In some circumstances children are certainly traumatized, and if they are traumatized it is the responsibility of the courts and the legislatures to provide them sufficient protection.

However, by reversing the Iowa Supreme Court, this Court will not be, as amicus suggests, crippling some nationwide effort to protect child witnesses. We are not suggesting that you can't use appropriate measures to protect a child witness. All we are asking is that before they are used they are shown to be necessary.

I would like to reserve the rest of my time for rebuttal, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Papak. We'll hear now from you, Mr. Allen.

ORAL ARGUMENT BY GORDON E. ALLEN

ON BEHALF OF APPELLEE

MR. ALLEN: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court. John Coy has quite simply failed to carry his burden of proof on his challenge to the Iowa statute. The record he has presented here today fails to present a constitutionally significant issue, for it involves only the exercise of judicial discretion, and in this

case a legislatively suggested exercise, to control the manner in which the evidence was presented to the jury.

Our position, succinctly stated, is that because the one way mirror was not in itself inherently prejudicial, it's limited use in this case presented an acceptable risk and therefore did not deprive the Defendant of Due Process.

Secondly, Defendant offered no rebuttal whatsoever to the rebuttable presumption created by the Iowa statute that trauma to these children to testify as witnesses was the norm and not the exception.

QUESTION: Mr. Allen, is correct, as I get from the briefs, Iowa is the only state with this kind of a statute?

MR. ALLEN: It is the only statute that I know of that specifically provides for the use of a one way screen in the courtroom, yes, Your Honor.

QUESTION: Do you know what brought it about in Iowa? Was there some particular trial or case that lead to this legislative action?

MR. ALLEN: The statute itself was the result of a nationwide effort by the witness protection organization that went around. And the reason that there are so many of these statutes coming up at similar times is because of this nationwide effort.

Primarily, the use --

QUESTION: But Iowa is the only one that adopted it?

MR. PAPAK: No, the closed-circuit t.v. was also adopted. It's in the same statute. The one way mirror provision in the statute was probably in relation or response to State v. Strable, which was an Iowa Supreme Court case which occurred two years prior to the passage of this statute, whereby the Iowa Supreme Court upheld the action of a judge in exercising his own discretion to place a chalkboard in front of the defendant only while child victims testified.

Similar to the one way mirror, but with the exception that the chalkboards could not be seen through either way, as opposed to the one way mirror. In this case, the children could see the defendant.

At the trial, John Coy at no time presented any suggestion that these children would not suffer trauma be testifying. He at no time suggested that their testimony would be any different if the one way mirror were removed, and he at no time suggested that the evidence was insufficient.

He suggested that it is not overwhelming, but he at no time suggested that it would be insufficient. He simply did not provide anything other than a bald constitutional assertion that his rights had been violated --

QUESTION: Mr. Allen, can't you make precisely the same argument the other way? The state hasn't offered a bit of evidence that the child witnesses would be traumatized. There is nothing in their testimony to suggest any fear on their

part.

MR. ALLEN: I differ with that, Your Honor, and for the precise reason that you asked the question of counsel. I believe that there are several ways that presumption arises. It arises from the findings of the legislature contained within the statement of purpose.

QUESTION: If you say there is a presumption in every case by reason of the legislature's action. But in this particular record with regard to these particular children, there is no evidence whatsoever, is there?

MR. ALLEN: I believe there is no specific finding by the --

QUESTION: No evidence.

MR. ALLEN: But I believe there is evidence.

QUESTION: What?

MR. ALLEN: The specific factors that Mr. Papak suggests to this Court that should be looked at can be gleaned from the record. The judge, because he presided through all of the suppression hearings, because he reviewed the depositions, and because he attended the trial proceedings --

QUESTION: He hadn't even seen the children before, had he?

MR. ALLEN: He had seen the children at the time of the trial, but he knew their ages.

QUESTION: But he ruled before he ever saw the

children.

MR. ALLEN: Correct, but he knew prior to that time that he knew their ages, he knew their psychological maturity --

QUESTION: What does that mean? He knew they were thirteen years old.

MR. ALLEN: He knew they were thirteen years old and that they were relatively mature for thirteen year olds. These were not thirteen year olds who could march into trial and bald-facedly accuse anyone sitting there.

QUESTION: How do you know that? What is the evidence of that?

MR. ALLEN: He could glean that from the record.

QUESTION: Where?

QUESTION: Where? What in the record would support that proposition? Did they have any evidence of any kind, or is it just the fact that they're thirteen?

MR. ALLEN: There is no evidence to the contrary.

QUESTION: Your argument is they haven't put in any evidence of absence of trauma, and all I'm suggesting is you haven't put in any evidence of trauma. You rely entirely on the fact that the state legislature says that this procedure may be used when a child testifies.

It doesn't say it must be used. It doesn't say it must be used in all cases.

MR. ALLEN: That's perfectly correct.

QUESTION: It says discretion of the trial judge.

MR. ALLEN: It is not mandatory, and I think that's the --

QUESTION: Then how do we know there's a legislative finding that it must be used in all cases, or that even the inference of trauma is justified in all cases?

MR. ALLEN: How do we know that there is?

QUESTION: Yes. The legislature didn't say that. It said it may be used if the trial judge so decides.

MR. ALLEN: The legislature made a statement of purpose and a statement of finding, and I believe that that statement of purpose, which is contained within the brief, suggests that trauma is the norm.

It also is consistent with common sense. It is consistent with the commentaries that we read in this situation.

QUESTION: If that statement were that trauma was the norm, it would say that it must be used. It doesn't say it must be used; it says it may be used. All that suggests is that trauma is always a possibility with children under fourteen.

MR. ALLEN: No, I would suggest --

QUESTION: That's all that that means. And therefore we leave it up to the trial judge to decide whether it should

be used.

MR. ALLEN: If trauma were the norm and that that is in the absolute sense and it would make a mandatory statute, I would suggest that that would deprive the defendant -- who is faced with a child witness of extraordinary capabilities-- of due process.

I would suggest that the rules should be made for the ordinary child and the ordinary defendant subject to then being challenged by the --

QUESTION: The child witness of due process?

MR. ALLEN: No, no, the defendant of due process. A mandatory statute, I think, suffers from a violation. I think rebuttable presumptions created within the statute to allow the defendant to challenge, much like a rape shield law --

QUESTION: But where is the rebuttable presumption in the statute? On page two of your brief, is that the one you are talking about?

MR. ALLEN: Yes, Your Honor.

QUESTION: I don't find it there. What language are you talking about?

MR. ALLEN: Unlike Pennsylvania and Rhode Island, which specifically says that there is a rebuttable presumption in their statute, Iowa does not specifically say that there is a rebuttable presumption.

QUESTION: So there is no rebuttable presumption in

the statute.

MR. ALLEN: I believe the statute, by the permission given from the legislature based upon their findings to the trial judge, that in itself creates rebuttal.

QUESTION: And that puts the burden on the defendant to explain why the statute is not necessary in the particular case, why the procedure --

MR. ALLEN: I would agree.

QUESTION: But that's certainly not based on the text of the statute.

QUESTION: If the statute really said the judge may do it if he believes there is a danger of trauma, you might be able -- if the judge didn't make any findings but nevertheless provided the screen -- to assume he knew what the norm was, the standard was, and that he thought there was trauma.

The difficulty I have in reading this record is it sounds to me like the judge thought it was mandatory. He just thought he had to do it.

MR. ALLEN: No, I disagree. I think the record shows that he made a considered alternative judgment. He was first faced with the option of closed-circuit, which is what the county attorney specifically requested.

And the judge, based upon that request, said, no, I don't think closed-circuit, because it's too experimental, I don't think we should do that. And he went with -- primarily

because of the Sixth Amendment objection this defendant made, we're not going to use closed-circuit, we're going to use the one way mirror.

QUESTION: Well, apparently the judge thought he had to do one or the other.

MR. ALLEN: I don't agree. I think --

QUESTION: His instruction reads a little that way, doesn't it?

MR. ALLEN: I have to concede that his instruction reads a little that way. I think --

QUESTION: Yes, and when he was talking about the eyewitness identification he said, yes, there is a real problem about that. Maybe the legislature didn't even think of this, but nevertheless, he seemed to say he had to do it.

MR. ALLEN: I think the instruction goes along with the reason behind what the judge was doing. Rather than consider it mandatory and thereby give that instruction, the instruction was consistent with the multiple inferences that can be used or gleaned from the use of this one way screen.

The instruction was consistent with the inference from the jury that it was the witnesses that we were protecting, not the defendant, and the jury was specifically instructed. Only the conduct of the defendant, which went against that interest, when the defendant stood up and objected to the use of the screen, but never asked that it be removed,

as you have suggested.

QUESTION: Suppose the statute were mandatory every single time. You say that would be unconstitutional. You just said a while ago it would be.

MR. ALLEN: I would say that a mandatory statute which provides that the use of a one way --

QUESTION: I take it then that you think it should be on a case to case basis of whether there was a danger of trauma or not.

MR. ALLEN: What I think it should be is that there should be a rebuttable presumption that trauma is the norm. Like we do in other instances, such as the rape shield law or in statutory rape, what we do is we reasonably put the burden to object to that on --

QUESTION: How does a defense counsel satisfy that kind of a burden with respect to prosecution witnesses?

MR. ALLEN: By the first instance, raising an objection which this Defendant --

QUESTION: Well, they did.

MR. ALLEN: -- never did.

QUESTION: They certainly did.

MR. ALLEN: No, if you read carefully what this Defendant did, this Defendant said this is inherently prejudicial, it violates my rights. But the Defendant never suggested that these children would not be traumatized and

there was no need for the screen.

The Defendant never suggested that the screen or some other alternative should be used. He made an absolute, across the board objection. No closed-circuit t.v., no one way screen, it violates my rights. But never suggested factually why.

Never raised --

QUESTION: How could he say anything factual about these witnesses?

MR. ALLEN: He could have had a hearing, as Justice Marshall suggested. He could --

QUESTION: I guess he took their depositions, didn't he?

MR. ALLEN: He did take their depositions. He could have determined from conversations with the parents either outside the presence of the judge or outside the presence of the witnesses, have these children been in counseling?

Have they been in psychiatric care? Have these children expressed trauma to you? Have the parents expressed trauma? Any of those indicators which Mr. Papak says the court should look at could be raised by the Defendant.

QUESTION: Mr. Allen, let's talk about one of the bases for a categorical objection to it, and that's the Sixth Amendment. Children witnesses are not new, nor are crimes against children new. The same factor that causes a child to

be traumatized may also prevent a child who may have some malicious reason for lying about a defendant from lying.

It has been believed that standing fact to face with someone who is about to send you to jail deters lying, and that certainly is what the Sixth Amendment seems to express. It doesn't say you can use screens.

It says in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. And confront means, according to an 1828 dictionary, to stand face to face in full view.

Now what has changed since then? I mean, did people not know about the tenderness of children when the Bill of Rights was adopted and we've suddenly discovered it now?

MR. ALLEN: Well that in part, and I want to address that secondly. I don't believe that the face to face statement in Mattox of 1895, nor do I believe that the confrontation usage of that word in the Sixth Amendment means eye to eye.

QUESTION: That's what confront means.

MR. ALLEN: These children did stand face to face with the Defendant in front of the jury so that the jury could in fact view their demeanor while --

QUESTION: The whole purpose of it was to prevent them from having to look him in the eye. Now one of the things that could happen from that is that they'll be traumatized or terrorized and for that reason won't tell the truth.

But another thing that can happen is that they'll be shamed into telling the truth rather than lying. That's certainly the theory of the confrontation clause.

MR. ALLEN: It's one theory.

QUESTION: It's why they use the word confront. They could have said right to cross examine if that's all they meant. They believed there was something valuable in being able to confront your accuser, and you're telling us that the state can simply say, well, we've decided that you don't have to do that when it's a child offense.

You can go to jail just as well for a child offense, it's just as much a criminal prosecution. I don't see --

MR. ALLEN: This Court has historically said that confrontation includes the right to have an oath, the right to be in front of a jury, the right to know the demeanor, and the right to have unlimited cross examination.

QUESTION: Those were hard cases. That's extending the meaning of the word confront. The easy cases confront means confronting.

MR. ALLEN: All of which this Defendant had. Plus the Defendant had the opportunity to view the witnesses. The Defendant did get the opportunity to face his accusers.

QUESTION: And dimly see them according to the way the judge described it when he looked through the screen.

MR. ALLEN: But nevertheless see them.

QUESTION: No. It is to stand face to face. It's not just that he see them, it's that they see him. You know the saying, look me in the eye and say that. You've heard people say that. It means, you know, you're lying and you won't say it to me face.

That's the whole purpose of that clause, and you're saying here, we can simply say you don't need it when there is a juvenile witness.

Now what basis? If it were the development of closed-circuit television I could understand it, but you could have constructed a screen like this in 1791.

QUESTION: Mr. Allen, do you agree that this statute does not apply to every case?

MR. ALLEN: To every criminal case?

QUESTION: To every rape case with children involved.

MR. ALLEN: I believe it applies to every case wherein the child is under the age of the definition of child, which is fourteen and under in Iowa.

QUESTION: And you must put the screen up?

MR. ALLEN: No. What is does, it gives the judge discretion to use the screen, it offers him or her --

QUESTION: And discretion to the judge?

MR. ALLEN: Discretion to the judge.

QUESTION: Well, will you tell me in this record where the judge says, in my discretion, I rule that the screen

must be used in this case?

MR. ALLEN: He does not specifically say that, but the two hearings that he has are contained in A 10 through 17 wherein he discusses the objections --

QUESTION: Don't miss page 18 while you're at it. He never at any time said that in this particular case these particular people needed this protection. He never said it, did he?

MR. ALLEN: No.

QUESTION: He never said it, did he?

MR. ALLEN: He did not say --

QUESTION: So what he said was this statute applies automatically.

MR. ALLEN: He never said that either.

QUESTION: But isn't that some of what he said?

MR. ALLEN: I don't believe so.

QUESTION: What do you believe he said.

MR. ALLEN: I believe he thinks he was exercising discretion.

QUESTION: He said that?

MR. ALLEN: No. But neither did he say I'm applying a mandatory statute, either.

QUESTION: Don't you think he was obliged to say something? The statute didn't say you must do it.

MR. ALLEN: Your Honor, I am here on a record that I

think I would be obliged to say could be a little better, as Mr. Papak would say.

QUESTION: Oh, you would like a better record. I bet you would.

MR. ALLEN: There's no doubt about that, Your Honor.

QUESTION: Mr. Allen, may I ask you another question about the statute. I don't read it as being limited to cases in which the child witness is necessarily a victim of any particular kind of crime. It applies to every case in which there is a child witness, doesn't it?

MR. ALLEN: It is contained within a statute which is in our Iowa code in the criminal provision. It applies to criminal cases.

QUESTION: It would apply in a robbery case where the child was just a witness to some phase of the robbery, not necessarily saw the actual event?

MR. ALLEN: By the terms of the statute I believe it would.

QUESTION: It could if it was a very traumatized child?

MR. ALLEN: I believe it would. If the child were in the bank and the gun were waved over his or her head, I believe it could.

When we get down to the operational level of what Mr. Papak and Mr. Coy are suggesting here, he is forced by the lack

of his record, I believe, to come to this Court as he has this morning and said there is never an instance when a one way mirror can be used in the courtroom.

I would suggest that under the statute and under the facts and under contemplation, there are instances that we can conceive of when the one way mirror could be used in the courtroom consistent with Due Process if there were an essential evidentiary showing that Mr. Papak suggests we need.

So he is now forced down to the position of saying I need this hearing. What is this hearing going to consist of? And that's really the concern and the justification for finding that the statute is a rebuttable presumption.

Because the hearing that Mr. Papak requests will be of either two kinds. It will be one, a pro forma, routinized kind of version where the father comes in and says, my daughter is traumatized and the judge says, fine, we'll use a one way mirror.

Or it will be the other end of the spectrum where we will put these little girls through three days of psychiatric counseling. We will then have a battle of experts where the Defendant will bring a psychiatrist and will bring a psychiatrist --

QUESTION: Mr. Allen, you can't really predict that here. Supposing you just asked the judge to call the girls in and say, do you know this man who lived next door to you before

this event, have you ever talked to him, does it bother you to testify in his presence, and they said, no, we don't care.

I mean, that's conceivable.

MR. ALLEN: That's conceivable.

QUESTION: You don't have to have fourteen psychiatrists testify when things are rather clear.

MR. ALLEN: No, you don't, and our interest is that you do not, because if that is the kind of hearing that Mr. Papak suggests, that will necessarily preclude the use of these alternative devices in most cases in small towns or small cities of Iowa simply because the expense to both the victim and the expense to the state will limit it to the most egregious kinds of cases.

The limited kinds of cases, those that have gone over the years without prosecution because of the reluctance of these victims to come to court and testify without the alternative procedures, those kinds of cases will again go under the rug.

They will again not be prosecuted either because the county attorney doesn't want to put the child through the emotional abuse, or else because the child does not herself or himself want to come to court to testify.

If this Court -- and I glean from the questions today -- wants to get into the issue of balancing the interests of the defendant for confrontation and for Due Process in this

area versus the rights of the child victim and the state to exercise these alternative testimonial techniques, I would suggest this is not the case to do that.

QUESTION: There's not one word in this record that the person involved asked for this.

MR. ALLEN: The county attorney filed a formal motion.

QUESTION: There's not one word that says either the child, the parent, or anybody asked for this.

MR. ALLEN: Conceded. The county attorney on their behalf, we would suggest, filed the motion. The county attorney had also sat through the depositions, the county attorney also, it is presumed though it was not ever in the record --

QUESTION: Wouldn't your record have been better if he'd said they asked me to do it?

MR. ALLEN: I agree with that also, Your Honor. Mr. Papak and Mr. Coy's record would have been better had they made some suggestion that there would have been no trauma, had they made some suggestion that some alternative procedure other than none --

QUESTION: He said that there not be a trial?

MR. ALLEN: No trauma, Your Honor.

QUESTION: Mr. Allen, let me ask you another question about your legal position. It seems to me that there are a lot

of cases in which older people also suffer severe trauma when they are forced to confront someone with whom they've had a violent experience of some kind.

Would it not be correct that if your argument is sound with respect to a thirteen year old that it would equally apply to 70 year old or an 85 year old person who is just scared to death of the person she has to testify in front of?

MR. ALLEN: The short answer is that for the 85 year old who is scared to death to testify, I believe the one way mirror is permissable, but I would differentiate in this regard.

I think the age differentiation should in the first instance be made by the legislature. As the appendix of the American Bar Association brief says, they have been all over the board in this statute. There are twelve to eighteen to whatever.

Then I think the rebuttable presumption, that is that trauma is the norm, should be applied to those under the age level that the legislature has chosen. In this case children.

QUESTION: Or a 55 year old. What about a 55 year old?

MR. ALLEN: I think a 55 year old could use the screen, but at their request.

QUESTION: So all you have to say is I will be traumatized by confronting the person I am accusing, and that's

all it takes to say, that's okay then, if you'll be traumatized by confronting the person you are accusing, you don't have to confront them. That's not much of a constitutional guarantee it seems to me.

MR. ALLEN: That is not what I'm saying. What I am saying is that the proof, the burden must then be on the requester if they are over the age that the legislature has chosen. There is no longer a rebuttable presumption, and in fact --

QUESTION: No, I am assuming that I can prove it. I will really be traumatized by confronting the person I am accusing, the reason being I am lying; I am sending him to jail.

MR. ALLEN: Then we are back to differentiating again on the definition of confrontation, and I don't think that there is any case that this Court has said that eyeballing someone or forcing a glare on someone is contained within the confrontation clause.

QUESTION: I don't think there's any case we've decided that says that any instance in which a witness has to be present in a courtroom, he can be present in that courtroom without confronting, that is being eye to eye with the defendant. Do you know of any case where we have allowed that?

MR. ALLEN: I know of several where we have not, and to use your carrying the argument on further, can that be used

offensively. For instance, can the witness suggest that I no longer want to look at the defendant and look to the other side of the courtroom.

Can the defendant ask the judge to force that witness to look them in the eye?

QUESTION: Probably not, but if he looks away like that the jury can draw some conclusions from that. That jury can say, ah, this witness does not want to confront the person he accusing.

MR. ALLEN: I think if the judge cannot compel that witness to look at the defendant under the Sixth Amendment, then I think the Sixth Amendment does not contain an eye to eye confrontation requirement. It contains a face to face in front of the jury, where the jury has the opportunity to observe the demeanor.

QUESTION: All right, I'll say face to face.

MR. ALLEN: I think these witnesses, this defendant were given face to face confrontation. They were given every essential element of the Sixth Amendment.

QUESTION: He saw her face, she didn't see his face.

MR. ALLEN: She didn't see his, but the jury saw both.

QUESTION: Of course, all this argument overlooks the obvious fact that some prosecutor or defense counsel and some witnesses are blind, and yet it doesn't cause us a great deal

of trouble. There is no eyeball to eyeball confrontation there.

MR. ALLEN: That was raised by one of the amicus, that a blind defendant would have a tough time with face to face confrontation if it were taken to its logical conclusion.

As I was saying, I would suggest that this is not the case for this Court to make a balancing of interest between the two prongs of the interest. That is, the interest of the defendant in confrontation and due process, and the interest of the state essentially in protecting the interest of these child victims so that they can come to court and testify.

I believe that this case can be decided simply because the use of this one way mirror is not inherently prejudicial and therefore no constitutional issue presents itself.

If it is inherently prejudicial I think the essential state interest was shown by the rebuttable presumption contained within the statute which the Defendant took extreme pains --

QUESTION: It seems to be a Due Process problem if there is a problem at all.

MR. ALLEN: If there is a problem at all-

QUESTION: Because the confrontation clause is just beside the point. In any case you could have the defendant outside the courtroom with a one way mirror. That wouldn't

violate the Sixth Amendment. Whether there is any trauma or not.

MR. ALLEN: So long as the essential elements of the Sixth Amendment are provided, yes. Trauma or not.

QUESTION: So just so the jury can see him and the witness.

MR. ALLEN: And that the testimony is taken under oath --

QUESTION: Yes, and that the defendant can see the witness.

MR. ALLEN: So that in the language of California v. Green, so that the circumstances closely approximate a trial.

QUESTION: So that just leaves the question of prejudice from the way they do it.

MR. ALLEN: I would say that's correct. Although the Sixth Amendment was utilized by this Defendant at the trial and in his appeal to the Supreme Court as the primary thrust of his argument, he now comes to this Court and his primary thrust is Due Process, and I would agree that that is the primary issue before us.

QUESTION: When did these two young girls identify this man?

MR. ALLEN: They did not, Your Honor, and that leads right to my next issue, which is that if there is a rebuttable presumption, and if there is evidence --

QUESTION: A man who was never identified and he was convicted.

MR. ALLEN: They did not identify him because they could not. He was masked during the altercation, and they were not able to identify him specifically either at the time of their depositions or at the time of the trail. It was circumstantial evidence --

QUESTION: Well, then why were they scared to look at him?

MR. ALLEN: I think you have to understand --

QUESTION: They couldn't identify him.

MR. ALLEN: Trauma, as the commentators will tell you, and it's listed in all the amicus, is really on several levels. The first trauma is in relating the incident, relating the event, and that is trauma which is --

QUESTION: I don't find one word of trauma in this record.

MR. ALLEN: It is presumed. It is in the common sense commentaries.

QUESTION: I have difficult in deciding cases on presumptions.

QUESTION: Mr. Allen, one part of their testimony really was quite critical for identification purposes, wasn't it? He was wearing his watch in a particular way?

MR. ALLEN: Circumstantially identifiable, yes. He

was wearing his watch in a certain way, he made a statement when he entered the tent which indicated that he had been watching them that afternoon. Yes, there was some critical circumstantial identification.

QUESTION: I mean, part of their testimony was critical in hooking up the Defendant to this particular incident.

MR. ALLEN: And in the identification of the items which were found in his house.

The third point I would like to suggest is that under Estelle, this Defendant had the opportunity and as offered to him by the judge, the reasoned opportunity, that he could upon his request have that one way mirror removed.

He stood up in front of the jury and called attention to the jury to the one way mirror contrary to the attempts that the judge had made in order to say that this one way mirror reflects more on the victims than it does on the Defendant.

The Defendant stood up and said, oh, that's not true. It reflects upon me because it's against my constitutional rights. But the Defendant never then took the next step and said, after cross examining the witnesses as he did, can you identify your attacker, and they said, no, he was wearing a mask.

Then the defense attorney never took that next logical step and said, well, we'll remove the one way mirror.

Is this gentleman in the courtroom your attacker? And in front of the jury they would presumably testify the same and say, no, he's not.

He never made that next logical step. Consequently --

QUESTION: Don't you think the judge would have gotten made if he had tried to do that? I mean, the judge ordered the thing --

MR. ALLEN: The judge offered him that opportunity.

QUESTION: The judge said he could do that?

MR. ALLEN: The judge said, if we have an identification question, obviously we are going to have a problem under this statute, and he in fact told the jury that the one way mirror might have to be removed.

QUESTION: I didn't interpret that to mean if we had an identification question that the defense itself chose to raise in the fashion you've just said. Do you think that's what it meant? That it was inviting the defense to offer these young ladies to look at the Defendant?

MR. ALLEN: I take that from a reading of the transcript. On A 22 I believe the judge is offering the defense counsel the specific opportunity that under appropriate questions, and I would assume that would be identity since he reviewed the depositions, that in fact the one way mirror could be removed.

What the state is asking for in this case is not to balance the interests of Due Process in favor of children as opposed to this Defendant's rights. What we are really asking is that we remove a vestige of discrimination.

The essential interests of the state are in obtaining a fair trial for all concerned, the Defendant as well as the witnesses in the state. And historically, child victims have been unable to come to testify in front of their accusers either because they are secondarily traumatized or because when we do get them there, we damage their credibility by placing them in front of their defendants.

What this one way mirror does is attempt, pursuant to the legislative finding of a rebuttable presumption -- I see my time is up and I ask for an affirmance.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Allen. Mr. Papak, you have three minutes remaining.

ORAL ARGUMENT BY PAUL PAPAK

ON BEHALF OF APPELLANT -- REBUTTAL

MR. PAPAK: Thank you, Mr. Chief Justice. We don't contest that some children are traumatized, and that those that are need protective devices, but there is nothing in the Iowa statute that suggests that there is some rebuttable presumption that the Defendant in a particular case must prove some lack of trauma.

It's the responsibility of the state making the

application or the court making the order to show some necessity in a particular case. And further, there is nothing in the statute that suggests that the least intrusive means of meeting a presumed interest is through a screen in a courtroom.

And I would submit to this Court that there are clearly other less intrusive means if you need to protect a child witness from the defendant of doing that outside the courtroom where the jury would not be affected by the presence of that screen throughout the critical testimony of the child witnesses --

QUESTION: What is the closest case in this Court suggesting that the confrontation clause requires face to face --

MR. PAPAK: Well, the Court has historically discussed face to face confrontation. But I think we can find the answer in really the background and theory of confrontation --

QUESTION: I just asked you about a case.

MR. PAPAK: Ohio v. Roberts. There the Court said the truth finding function is the central mission of confrontation, and as Justice Scalia suggested --

QUESTION: I know, but what is the case that says that to satisfy the confrontation clause there must be eyeball to eyeball or face to face.

MR. PAPAK: Mattox says face to face. That language

has been used historically. There is no Supreme Court decision that directly says eyeball to eyeball.

QUESTION: None in this Court.

MR. PAPAK: None in this Court, that is correct. There are courts that go both ways in the circuits and the state courts.

QUESTION: Only because the word confront means face to face, that's the only reason.

MR. PAPAK: Exactly. And further, that confrontation, its basic purpose of finding out the truth is advanced by face to face, that some people will, in fact, be induced to be more truthful, to give more honest and complete testimony by a face to face confrontation.

And so when we can, we require it. When we can't, when some children can't tolerate that, then fine, then it's appropriate then to infringe on that right. Simply not shown in this case.

All we ask is that the judge articulate what the necessity is, why the children were so traumatized that they couldn't give complete or accurate testimony and that he consider the alternate measures of protecting those child witnesses in the least intrusive method possible.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Papak.

The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: No. 86-6757

CASE TITLE: John Avery Coy v. Iowa

HEARING DATE: January 13, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: January 13, 1988

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005