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COMMONWEALTH OF KENTUCKY

APPELLANT

VS.

APPEAL FROM FAYETTE CIRCUIT COURT  
HON. GEORGE BARKER, JUDGE  
NO. 84-CR-346

LESLIE WILLIS

APPELLEE

BRIEF FOR APPELLANT

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This is to certify that a copy of the within Brief has been mailed, postage prepaid, to Honorable George Barker, Judge, Fayette Circuit Court, Courthouse, Lexington, Ky. 40507; and Honorable John P. Schrader, Gerald's, Moloney & Jones, 259 West Short Street, 2nd Floor, Lexington, Ky. 40507-1237, Counsel for Appellee, on this the 2nd day of July, 1985. I further certify that the record has been returned to the Office of the Clerk of the Fayette Circuit Court.

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MAY IT PLEASE THE COURT:

✓INTRODUCTION

The Commonwealth appeals from the order denying its request to take the testimony of a 5-year-old sexual abuse victim pursuant to KRS 421.350(3), (4), (5) and holding those portions of the statute unconstitutionally deny a defendant's right to confrontation and violate the separation of powers doctrine. At a competency hearing the complaining child witness was so intimidated by the defendant that she was unable to testify in any meaningful manner.

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✓  
STATEMENT OF THE CASE

The June 1984 term of the Fayette County Grand Jury indicted Leslie Willis for two counts of first-degree Sexual Abuse (Transcript of Record, hereafter "TR," 2). The indictment alleges that the offenses occurred during January of 1984 and on May 1, 1984 (Id.). According to statements made by the victim, Rosalind Carson, the incidents took place at the home of the appellee who was married to Rosalind's babysitter. Rosalind was five years old at the time of the indictment (Transcript of Hearing, hereafter "TH," 7-8).

On June 22, 1984, the defendant waived arraignment and entered a plea of not guilty (TR 7). A trial date was set for July 23, 1984 (Id.). On July 9, 1984 the appellee filed a motion to exclude the testimony of Rosalind Carson for the reason that she was incompetent as a witness because of her youth (TR 12-13). On July 20, 1984 a hearing was held in the chambers of Fayette Circuit Judge George Barker for the purpose of determining the competency of the witness (TH 1-26). Present at the hearing were Judge Barker, the court reporter, counsel for the defendant, the defendant, the Assistant Commonwealth's Attorney, Beverly Carson and her daughter, Rosalind Carson (Id.). ✓

The record of the July 20th hearing reflects that Rosalind was generally unresponsive during the hearing (Id.). When asked to explain why she would not respond to certain inquiries the child stated:

A. I don't want him - - hurt me.

\* \* \*

Q. Somebody here you don't want to see?

A. (Witness nods affirmatively.)

Q. Who's that?

A. Uncle Leslie." (TH 9.)

\* \* \*

Q. Are you going to talk for us?

A. I don't want him here." (TH 10.)

\* \* \*

A. Yes. I don't want Uncle Leslie,  
Mommy." (TH 19.)

As a result of her inability to testify in the presence of the defendant the court was unable to find Rosalind competent to testify (TH 23-24). The Commonwealth then submitted a motion to proceed under sections (3) or (4) of KRS 421.350, each of which permits the use of television cameras to present the testimony of a child victim in sexual abuse cases so that the child need not be aware of the defendant's presence (TR 27). The Commonwealth's proposal urged that if a videotape of the testimony could be made under KRS 421.350(4), the court would be able to judge from a review of the tape prior to trial whether the witness was competent (TH 25). Ruling was deferred pending submission of briefs on the constitutionality of the statute (TH 25-26).



On February 20, 1985, Judge Barker held that sections (3), (4) and (5) of KRS 421.350 are unconstitutional (TR 50-55). Specifically, Judge Barker held that KRS 421.350(3), (4), and (5) violate a defendant's right of confrontation under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution (TR 52-54) and violate the separation of powers doctrine contained in Sections 28 and 109 of the Kentucky Constitution (TR 51-52).

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Judge Barker's ruling effectively eliminated the testimony of Rosalind Carson, who is the only eyewitness to the crimes charged. Because this prevents the Commonwealth from prosecuting this case, this appeal was filed under the provisions of KRS 22A.020 (TR 56). In order that this important and timely question be answered without delay, the Commonwealth successfully sought transfer of this appeal to this Court from the Court of Appeals. This is a case of first impression in the Commonwealth.

✓  
ARGUMENT

(I)

THE TRIAL COURT ERRED IN HOLDING KRS 421.350 VIOLATES A DEFENDANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 11 OF THE KENTUCKY CONSTITUTION.

This issue was preserved by the Commonwealth's motion to take the 5-year-old sexual abuse victim's testimony under

KRS 421.350(3)(4), the trial court's denial of the motion on grounds the statute denies the defendant's right of confrontation and the Commonwealth's timely notice of appeal from that order. (TR 27, 52-54, 56.)

The trial court in the present case held that subsections (3), (4) and (5) of KRS 421.350 do not adequately protect a defendant's right of confrontation under the United States and Kentucky Constitutions. The Commonwealth respectfully submits that the discretion provided the trial court under KRS 421.350 to utilize modern procedures and technology not only comports with constitutional principles of confrontation but may also provide potential benefits. For the reasons discussed below, the opinion of the Fayette Circuit Court should be reversed.

(A.) Statutory Provisions

A review of the specific statutory language is necessary to appreciate the trial court's concerns and misapprehensions. KRS 421.350 provides in part:

\* \* \*

(3) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be

present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(4) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(5) If the court orders the testimony of a child to be taken under subsections (3) or (4) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken."

KRS 421.350 permits a <sup>very</sup> limited class of witnesses to testify with special protections provided for them. It is applicable only to children twelve years old or younger who are victims of sexual offenses. Only the statements of the alleged victim are covered by the statute. ✓

Subsections (3) and (4) of KRS 421.350, which were held unconstitutional in this case, are similar to each other except that (3) provides for the live use of closed-circuit cameras during the trial. The child witness would be in a room outside the courtroom and would be examined by both attorneys. The subsection requires that the defendant be present in person so that he may see and hear the witness but that he shall not be seen by the child. Subsection (4) establishes the same basic procedure but permits the testimony to be taken prior to trial and preserved by videotape. As in subsection (3), the child would not be able to see or hear the defendant but the defendant would be present in person and able to observe and hear the witness. ✓

The availability of procedures to permit the defendant to fully participate in cross-examination and to adequately see and hear the witness were unquestioned below. It is also assumed that the reproduced testimony would be of adequate ✓

quality for the jurors to assess the demeanor of the witness. In the trial judge's words, "The question is whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face to face confrontation." (TR 53.)

ⓑ Obligation To Construe Statutes To Uphold Constitutionality

A fundamental tenet of constitutional law is that statutes carry a strong presumption of constitutionality.

American Trucking Association v. Commonwealth, Transportation Cabinet, Ky., 676 S.W.2d 785, 789-790 (1984); Jefferson County Police Merit Board v. Bilyeu, Ky., 634 S.W.2d 414, 416 (1982).

"It is the duty of this court to 'draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act and expound it.' Folks v. Barren County, 313 Ky. 515, 519-20, 232 S.W.2d 1010, 1013 (1950)." Budget Marketing, Inc. v. Commonwealth, ex rel. Stephens, Ky., 587 S.W.2d 245, 247 (1979).

Doubt should be "resolved in favor of the voice of the people as expressed through their legislative department of government."

Walters v. Bindner, Ky., 435 S.W.2d 464, 467 (1968). The Commonwealth respectfully submits the trial court did not accord KRS 421.350 the strong presumption of constitutionality to which it is entitled and erred by failing to construe the statute so as to sustain its validity.

③ The Trial Court's Construction of KRS 421.350

Initially, the Commonwealth notes that the trial judge construed KRS 421.350 as requiring the defendant to be placed in a separate room (TR 51, 53). While this is a plausible construction of one portion of the statutory language, it appears to conflict with the requirement that the defendant shall be permitted ". . . to observe and hear the testimony of the child in person . . ." (Emphasis added.) The focus of the statute is plainly an assurance that ". . . the child cannot hear or see the defendant." If the location of the defendant is important, the statute should be construed to permit the defendant to observe and hear the child's testimony in person in the same room but in a position so that he cannot be seen or heard by the child.

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The trial court also construed KRS 421.350 as violative of RCr 7.12. This issue is discussed more fully in the confrontation argument which follows and Argument II below. The Commonwealth respectfully submits the trial judge's construction of rules regarding depositions was narrower than intended or authorized by this Court.

✓

The only plausible remaining requirement of confrontation, under the trial court's interpretation of that right, is that the defendant be able to require the witness to look at him. The Commonwealth is not aware of any authority, even under normal courtroom procedures, which specifically

requires the witness to look at a defendant. Surely the defendant cannot argue that the testimony of a blind victim would be invalid nor the testimony of a witness who refuses to look upon the accused. By parity of reasoning, a defendant would not be denied the right of confrontation when a young victim is so intimidated by his presence that she cannot testify unless she is unable to see or hear him. Further assessment of this issue requires a review of case law construing the right of confrontation.

(D) The Right of Confrontation Under the Constitutions Of The United States and Kentucky.

The defendant argued below, and the trial court appeared to agree, that the Kentucky Constitution defines confrontation more stringently than the Sixth Amendment by use of the words "face to face." (TR 40.) Yet, construction of the Sixth Amendment by federal courts has consistently included the identical language:

"Thus, the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts [citation omitted] and in the state courts is assured very often by the constitutions of the states." Snyder v. Massachusetts, 201 U.S. 102, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 674 (1933). (Emphasis added.)

"The court has emphasized that the confrontation clause reflects a preference for face-to-face confrontation at trial." Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). (Emphasis added.)

The defendant has produced no authority, and the Commonwealth has found none, to support his position that the right of confrontation in the Kentucky Constitution should be construed as more stringent than the same right in the United States Constitution. The debates on the Kentucky Constitution of 1891 include references to the "face to face" language, but these discussions neither support nor refute the defendant's position. In Harris v. Commonwealth, Ky., 315 S.W.2d 630, 632 (1958), the Court held:

"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 or affidavits given in his absence."

This same language was cited with approval in Flatt v. Commonwealth, Ky., 468 S.W.2d 793 (1971), where the Court also stated, "An obvious purpose of these [United States and Kentucky] constitutional provisions is to secure to the accused a right of cross-examination." Id. at 794.

In the present case, the proposal to take the victim's testimony pursuant to KRS 421.350 does not in any way limit the accused's right of cross-examination, nor is he precluded from bringing forth any evidence of hostility, bias, other motive for testifying, or from otherwise attacking the witness' credibility. Cf. Barrett v. Commonwealth, Ky., 608 S.W.2d 374, 376 (1980). The right of confrontation is fully protected as required by the Constitutions and RCr 7.12.



The Kentucky statute is identical to a statute adopted in Texas in 1983. Tex. Crim. Proc. Code Ann. § 38.071 (Vernon 1983). Subsection 2 of the Texas statute has withstood attack on confrontation grounds but the comparable subsection 2 of KRS 421.350 is not in issue here. Jolly v. Texas, 681 S.W.2d 689 (Tex.App. 1984). Numerous other jurisdictions have similar statutes or rules, but the specific issue here has not been reported by their appellate courts. ✓

In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), the Court refused to uphold the use of a video-taped deposition of an adult witness who was reluctant to testify because of her fear of the defendant. The Court stated:

"Most believe that in some undefined but real way recollection, veracity and communication are influenced by face to face challenge." }  
Id. at 821.

Yet that court recognized the distinctions between that case, involving an adult victim (and) the crime of misprison of felony, and other cases involving heinous crimes and competency hearings for child abuse victims. Benfield at 821 and n. 10.

The Benfield Court's unsupported assertions regarding recollection and veracity were refuted by the evidence and rejected by the court in State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984), the only case the Commonwealth is able to locate which is very closely on point. In Sheppard the trial court permitted, without an authorizing statute, the use of closed circuit televised testimony taken under circumstances ✓ ✓ ✓

similar to those described in KRS 421.350. The Court took evidence on the question from a forensic psychiatrist who had examined the child, and witnesses from the prosecutor's office who had experience in child abuse cases. The Court learned that probable long-range emotional consequences would result from the in-court testimony even though the child was well oriented, with a sound memory and no evidence of psychotic thoughts, delusions or hallucinations. Id. at 1332. Long-term effects could include nightmares, depression, eating, sleeping and school problems, behavioral difficulties, including "acting out" and sexual promiscuity. Id. The state's forensic psychiatrist testified that in his opinion the child was less likely to testify accurately in court and that the video presentation would "enhance, not diminish, the prospect of obtaining the truth." Id. at 1344. While the adult witness may be impressed by the solemnity of the courtroom atmosphere and so forth, the child on the other hand, because of fear, anxiety and guilt (many children feel guilty about abuse perpetrated on them), may be less likely to be truthful. Id. at 1332. The attorneys told the court that in many cases children were able to testify with difficulty before a grand jury but "froze" in front of the defendant. Children who had previously testified before a grand jury, for example, frequently "forgot" details, changed stories, or presented

inconsistent facts. Eventually many broke down, cried, ignored questions and eventually refused to answer. Id. at 1333.

The testimony of these witnesses is borne out by the behavior of Rosalind Carson. After talking to police, the prosecutor and the grand jury, she forgot details, cried, ignored questions and refused to answer questions about the charge when she finally was forced to look at the defendant.

After carefully analyzing authorities on the right of confrontation and its many exceptions and authorities on child abuse, the Sheppard court held that the videotape procedure would not deny the defendant's rights of confrontation and due process. The Court alternatively held that the minimal incursion, if any, into the confrontation clause was outweighed by the harm to victims of child abuse and the inability to prosecute child abusers because evidence against them cannot be presented. The Commonwealth submits the Sheppard court reached a well-conceived, prudent and constitutionally sound decision and urges careful consideration by this Court. (See Appendix.)

Alternatively, should this Court decide that KRS 421.350 does in some manner infringe upon the rights of confrontation or due process, the Commonwealth submits that, upon proper weighing of the competing interests, the Court should declare the statute constitutional. }

The problem of child sexual abuse is increasing both in occurrence and public awareness. In each case where a child

becomes the victim of a crime there are considerations that are not present in a criminal case with an adult victim. Children as victims cannot be expected to defend themselves and their rights. The General Assembly recognized the magnitude of this problem with the passage of KRS 199.335 which requires teachers, doctors and other persons to report cases of child abuse. Children as victims may be traumatized by the courtroom procedure itself as well as the crime. See Libai, "The Protection Of The Child Victim Of A Sexual Offense In The Criminal Justice System," 15 Wayne L. Rev. 977 (1969). It is impossible to gauge exactly what prospective damage might occur to a young child but it cannot be doubted that the mental health and possibility of serious psychological harm must be of paramount importance to Kentucky citizens.

The right and need of the people of the Commonwealth to apprehend and remove from society those who commit child abuse is obvious. Because the victim has no "rights" in the absolute sense, the Commonwealth will generally require the witness to testify because in the Commonwealth's view the state's need outweighs that of the individual child. In reality, then, the victim is urged, persuaded and eventually compelled to try to testify even when the risk of harm to him or her is present.

The solution to this dilemma is to find a better way to present the testimony of children in a sexual abuse case.

See Note, "Proving Parent-Child Incest," 15 U. of Mich. Journal ✓  
of Law Reform 131 (1981). While the rights of a defendant  
cannot be ignored, they must be balanced with legitimate concern  
for the victims of crime. Kentucky has long recognized, on a  
far broader scale, special treatment for child witnesses by  
authorizing leading questions on direct examination. Meredith  
v. Commonwealth, 265 Ky. 380, 96 S.W.2d 1049, 1051 (1936);  
Peters v. Commonwealth, Ky., 477 S.W.2d 154, 158 (1972).

Similarly, Kentucky recognizes numerous exceptions to ✓  
the right of confrontation. Business records, dying declara-  
tions, res gestae statements and excited utterances are  
admissible despite the defendant's inability to cross-examine  
the declarer. See: Lawson, Kentucky Evidence Law Handbook  
(1976), pp. 119-185. Where a witness is unavailable and there  
are circumstantial guarantees of trustworthiness, the testimony  
is admissible despite possible violations of the right of  
confrontation. Federal Rule of Evidence 804, adopted in  
Maynard v. Commonwealth, Ky.App., 558 S.W.2d 628, 633 (1977). ✓  
Written depositions may be introduced at trial. RCr 7.12; Noe  
v. Commonwealth, Ky., 396 S.W.2d 808 (1965). A defendant may  
be excluded from the courtroom, and thereby denied the right of  
confrontation, because of his misconduct. RCr 8.28; Scott v.  
Commonwealth, Ky., 616 S.W.2d 39, 43 (1981). Recently, the  
Court of Appeals affirmed a conviction based almost exclusively  
on the out-of-court statements of a five-year-old witness who

told her mother and two other persons about an abuse occurring hours earlier. McClure v. Commonwealth, Ky.App., 686 S.W.2d 469 (1985). Other jurisdictions are expanding hearsay exceptions to accommodate the special problems encountered in child sex abuse cases. See "A Comprehensive Approach To Child Hearsay Statements In Sex Abuse Cases," 83 Columbia Law Review 1745-1766 (1983). ✓

In contrast to these exceptions to the right of confrontation, KRS 421.350 applies to only a limited class of witnesses (children twelve years old or younger who are victims of sexual offenses), <sup>①</sup> permits the factfinder to observe the demeanor of the witness, <sup>②</sup> imposes no restrictions upon cross-examination, and <sup>③</sup> requires the defendant to be present in person to see and hear the testimony. The Commonwealth respectfully submits that this limited statutory exception should be made available at the discretion of the trial judge in the interest of justice. Appropriate balancing of the competing interests compels a conclusion in favor of the constitutionality of the statute.

②  
II

LEGISLATIVE ADOPTION OF A DISCRETIONARY  
METHOD FOR ADMISSION OF EVIDENCE IS NOT  
VIOLATIVE OF SEPARATION OF POWERS.

This issue was preserved through the Commonwealth's motion to take the child's testimony under KRS 421.350 (TR 27),

the trial court's denial of the motion holding the statute violates the separation of powers doctrine (TR 51-52), and the Commonwealth's notice of appeal from that order (TR 56).

In his Opinion and Order, the trial judge held:

"Clearly, this Statute involves a matter of procedure rather than substance. It purports to authorize the Court to establish a method for obtaining the testimony of a witness which has not heretofore been authorized. To this extent the Legislature has invaded the province of the judiciary in controvention (sic) of Sections 28 and 109 of the Kentucky Constitution." (TR 51-52.)

The trial court also held that the defendant's right of confrontation will not be fully protected, as required by RCr 7.12, under the provisions of KRS 421.350(3), (4), (5). (TR 52.) The Commonwealth respectfully disagrees.

First, KRS 421.350 places total discretion in the trial court as to whether its provisions are to be utilized. Subsections (3) and (4) each begin with, "The court may . . . order . . . ." (Emphasis added.) When the trial judge has unbridled discretion, there is no invasion of judicial powers.

Second, the Court has not adopted formal rules of evidence and has long upheld statutes relating to the admissibility of certain testimony, the competency of testimony and witnesses, etc. See, e.g., KRS 421.210 (dead man's statute, self-serving declarations, privileged communications); KRS 421.200 (competency of witnesses); KRS 421.240, KRS 421.250 (procedures for attendance of witnesses); KRS 422.010 through

422.087 (judicial notice, proof and admissibility of laws and documents); KRS 422.120 (evidence of genuineness of handwriting); and KRS 510.145 (rape shield law, held constitutional in Smith v. Commonwealth, Ky.App., 566 S.W.2d 181, 183 (1978). In Ex parte Farley, Ky., 570 S.W.2d 617, 624-625 (1978), this Court noted:

"Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters, just as we accept KRS 532.075, even though it has been argued with much force that there is no constitutional basis for a statute enlarging the scope of appellate review beyond the matters of record in the proceeding under consideration."

In O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 158 (1982), this Court's response to claims under KRS 452.220, which sets out procedure for change of venue, was:

"Until this statute is superseded by this Court, under the Court's paramount rule-making authority, it stands as enacted by the General Assembly under the principles of comity elucidated in Ex Parte Auditor of Public Accounts, Ky., 609 S.W.2d 682 (1980)."

Most recently, in Commonwealth v. Littrell, Ky., 677 S.W.2d 881, 885 (1984), the Court reviewed KRS 22A.020(4) relating to procedures for appeals by the Commonwealth and added: ✓

"The fact that this Court has not attempted to preempt this statute by the adoption of pertinent Criminal Rules to parallel the old Criminal Code provisions is in itself tacit



approval of the propriety and efficacy of the statute."

In the present case, the statute does not threaten to interfere with the orderly administration of justice and it has not been superseded by a rule of procedure. KRS 421.350 stands as enacted under the principles of comity.

Third, the Commonwealth submits KRS 421.350 does not conflict with nor violate the requirements of RCr 7.12. As discussed above, the defendant's right of confrontation is fully protected. The defendant must be permitted to see and hear the child "in person" and will be permitted to participate in cross-examination through his attorney. The witness in this case is unable to testify under normal trial conditions because of the frailties and infirmities associated with her tender years and the nature of the crime against her; thus, her deposition should be admissible. See RCr 7.20(1). In Wells v. Commonwealth, Ky., 562 S.W.2d 622, 624 (1978), this Court held that RCr 7.20 regarding the use of depositions should not be so narrowly construed to preclude other circumstances when a witness is unavailable, as was the case in Wells when the witness was available and present but her testimony was privileged at the time of trial. "Its [RCr 7.20] clear purpose is to preserve the evidence against the event of the witness's becoming unavailable to testify." Id.

The public's strong interest in ascertaining the truth and providing adequate protection for child abuse victims, along with the underlying policies of KRS 421.350, which further justice without undue interference with the rights of a defendant or the discretion of the court, provide additional support for the Commonwealth's position that the statute should be declared constitutional.

CONCLUSION ✓

No right assured the criminal defendant by the Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution is infringed by the provisions of KRS 421.350(3), (4), (5). If the Commonwealth is permitted to proceed with the testimony of Rosalind Carson by video, then the accused will still be accorded the full right of cross-examination, and may hear and observe the witness testify. The jury as well will have the opportunity to view the video and evaluate the demeanor and credibility of the witness.

The only possible objection to this procedure is to the inability to intimidate the child/witness into silence by forcing her to look upon the accused. No case has been found where a witness was disqualified by the mere refusal or inability to look upon the defendant. Available evidence suggests that the child witness in a sexual abuse case is less

likely to testify accurately when burdened with the inherent stress of ordinary courtroom procedures. | -

The Federal and State Constitutions are not such inflexible documents that they are resistant to pragmatic interpretations of their intent to allow this Court to find the challenged statute constitutional. KRS 421.350 is a well-conceived statutory plan designed to protect the interests of both society and the accused and to further justice.

Additionally, KRS 421.350 does not interfere with or threaten to interfere with the orderly administration of justice, nor has it been preempted by the Court's rule-making authority. Total discretion remains with the judiciary. The limited provisions of KRS 421.350 should stand as enacted under the principles of comity.

For all the foregoing reasons, the Commonwealth submits the decision of the Fayette Circuit Court should be reversed, the statute declared constitutional, and the case remanded for trial. | ✓

Respectfully submitted,

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