SUPREME COURT OF KENTUCKY

FILE NO. 85-SC-218-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

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

LESLIE WILLIS — APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

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, Kentucky 40507; to Honorable Raymond M. Larson, Commonwealth Attorney, Twenty-Second Judicial District, 275 West Main Street, Lexington, Kentucky 40507; and to Honorable David L. Armstrong, Attorney General, c/o Honorable Penny R. Warren, Capitol Building, Frankfort, Kentucky 40601-3494, on this 2ND day of August, 1985. I further certify that the record on appeal has been returned to the Office of the Clerk of the Fayette Circuit Court.

John P. Schrader
JOHN P. SCHRADER

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Leslie Willis is basically in agreement with the Appellant's Statement of the Case, but states that the following matters are essential to a fair and adequate presentation of the disposition of the case at the Circuit Court level.

Shortly after the indictments against Willis were returned, he filed a motion through his attorney for the Commonwealth to make available the alleged victim, Rosalind Carson, for a medical and psychological examination and evaluation, in part for the purpose of determining her competency as a witness. (Transcript of Record, hereafter "TR", 8 and Appendix, hereafter "App." 1). The Commonwealth objected and the Court overruled the motion. (TR 11 and App. 2).

The Commonwealth stated that the defendant had filed a motion to exclude the testimony of Rosalind Carson because of incompetency, by reason of her young age. (Brief for Appellant, p.1). However, a reading of the motion clearly shows that the motion was based not only upon age, (she had just turned 5) but upon several factors, including lack of understanding of the facts concerning the alleged offenses, insufficiently developed intelligence to allow a reliable observation, recollection and narration of the facts, and an inability to understand the nature of an oath and the consequences of

false testimony (TR 12-13 and App.-3). The motion was further based on the fact that according to the statement provided for the defendant and the grand jury tapes, Rosalind had only been able to offer "testimony" in response to coaxing and leading questions.

On July 20, 1984, a competency hearing was held, with the defendant present and as the Commonwealth stated, Rosalind was "generally unresponsive" (Brief for Appellant, p.1). After several moments, Rosalind was finally persuaded to state her name (Transcript of Hearing, hereafter "TH", p.7). After a series of other questions and unresponsive answers, Rosalind indicates that her mother pinched her (TH, p.14). Her mother further persuaded her by saying, "Go ahead and talk so we can get out of here." (TH 14). Not only did she not respond to any questions pertaining to the alleged offense, she was also unable to testify with any degree of consistency as to whether she understands what it means to tell the truth. The following excerpt illustrates this:

Q. What happens to people that don't tell the truth?

A. (Inaudible)

Q. I couldn't hear you.

A. Get a whipping.

Q. Get a whipping from who?

A. From my momma. And my daddy.

Q. Did your momma and daddy tell you what a lie is?

A. (Witness nods affirmatively)

Q. What's a lie? Can you tell us what a lie is?

A. Get a whipping. Then you go to the devil (Inaudible) fire (inaudible) stick his head up.

* * * * * * *

Q. Now, who is this that has the trouble with the devil? (TH 18)

A. Huh?

Q. Who has trouble with the devil?

A. Nobody.

Q. Well, why did you tell me about the - - -

A. (Inaudible)

Q. But who has trouble with the devil?

A. Nobody, I said. (TH 19)

* * * * * * *

Q. You ever made up a story about anything?

A. Huh-uh. (Negative).

Q. Anything at all?

A. I made a school story.

* * * * * *

Q. A school story at book time? (TH 20)

A. Yes.

* * * * * *

Q. Was that something that was real or made up?

A. It's real. That's all. (TH 21)

After this "testimony", counsel discussed with the Court the need to take a videotape deposition of Rosalind, as the competency of the witness could not be established with the defendant present. The Commonwealth made no request that the Court attempt to determine the competency of Rosalind outside of the defendant's presence.

Contrary to the Commonwealth's Statement of the Case, the Commonwealth had already submitted its motion to use videotape testimony pursuant to KRS 421.350 (TR 27); the motion was scheduled to be heard at the competency hearing. At the hearing, the Court ordered the attorneys to brief the Constitutionality of KRS 421.350.

Even though defendant's counsel had addressed the issue at the July 20, 1984 hearing, the Commonwealth chose not to argue in its brief that it had the right to bar the defendant from the competency hearing, or that the videotape could be used in place of live testimony for the Court to determine competency. The trial Court held the statute to be unconstitutional and sustained defendant's motion to exclude the testimony of Rosalind Carson (TR 50-55 and App. 4).

The Court also ruled that KRS 421.350 was a procedural law such that the legislature had invaded the province of the judiciary branch of government in violation of Sections 28 and 109 of the Kentucky constitution (TR 50-55).

This appeal was filed under KRS 22A.020, which authorizes interlocutory appeals so long as the proceedings in the case are not suspended. Defendant has been denied his motion for a trial date pending this appeal, and although the issue of

a speedy trial is not before this Court at the present time, defendant continues in his objection to the suspension of the trial pending disposition of the present questions.

ARGUMENT

I.

THE TRIAL COURT'S OPINION CORRECTLY HOLDS THAT KRS 421.350 VIOLATES A DEFENDANT'S RIGHT OF CONFRONTATION UNDER THE KENTUCKY AND UNITED STATES CONSTITUTIONS.

The right of an accused in a criminal proceeding to confront and cross-examine the witnesses against him face-to-face is a cornerstone of the American judicial system. The Sixth Amendment of the United States Constitution guarantees the right "to be confronted with the witnesses against him." Section Eleven of the Kentucky Constitution more specifically guarantees the right "to meet witnesses face to face." The trial Court properly held that the use of KRS 421.350, which allows the videotape filming of an infant witness in a sex abuse trial while the witness is unaware of the presence of the defendant behind a screen or mirror, violates those important constitutional rights.

The Supreme Court of the United States has consistently interpreted the right to confront witnesses to include face-to-face testimony before the jury. The case of Mattox v. United States, 156 U.S. 237,242-243, 39 L.Ed. 409,411, 15 S.Ct. 337(1895) which is the forerunner in a long line of these cases, discusses the use of depositions at trial as opposed to personal testimony as follows:

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against a prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection of a witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

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A. KRS 421.350 denies the jury the best available observation of the witness.

The Commonwealth has of course argued that the main purpose of confrontation is to allow an accused an opportunity to adequately cross-examine the witnesses. While this may be the case, it should not be seriously doubted that another important and intended purpose is to require a face-to-face meeting so that the jury can best judge the credibility of the witness. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2537, 65 L.Ed. 2d 597 (1980).

When a jury considers the testimony of a child witness, it may place far greater importance on the behavor of the child than the actual words spoken, and thus the need for face-to-face confrontation is enhanced. The nature of five year olds is such that one must give the jury the best opportunity available to observe the child. For example, it is well recognized that the attention span of the child is far shorter than that of an adult. This makes it much more likely that a child will not be concentrating on the questions asked, but

will be looking at items across the room and thinking about what her puppy dog may be doing, what she had for lunch, for instance, or any number of inconceivable topics.

Additionally, while on the surface the videotape statute purports to identically transmit an image to the jury which it would otherwise see in person, common sense shows that this cannot be so, under the current state of the art. First, the projected image on the screen is by nature onedimensional. Second, the camera operator will have the function of focusing and zooming in and out on the witness and the surroundings, a function jurors automatically perform on their own. If the camera zooms in on the child's face, the jurors will be unable to observe her entire body, including hand and leg movements. The opposite effect is also to be expected if the camera is focused on the entire person. The camera cannot allow the jurors to see whatever objects or persons the child may be looking at during any particular answer, and more importantly the jurors cannot watch the inevitable coaxing and nonverbal cues offered by those persons. We must not forget the persons allowed in the room under the statute include the Commonwealth Attorney and "any person whose presence would contribute to the welfare and well-being of the child." Particularly with the failure of the statute to protect against leading questions, it is conceivable that a person out of view of the camera could assist the child in every answer necessary to sustain the Commonwealth's burden of proof.

(B) KRS 421.350 lessens witness reliability by depriving the face-to-face meeting.

Another important factor to be considered in the analysis of this videotape procedure is the obvious effect of a witness looking at, or choosing not to look at, the accused. Although the Commonwealth claims this factor to be insignificant, the case of Herbert v. The Superior Court of the State of California, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850, 853 (1981) holds otherwise.

> "By allowing the child to testify against the defendant without having to look at him or be looked at by him, the trial court not only denied the right of confrontation but also foreclosed an effective method for determining veracity."

The Herbert case did not involve the use of videotape equipment, but a seating arrangement in the courtroom where the defendant and the witness were separated by a wall. There, the witness was a five-year old girl who was unable to testify in the presence of the defendant. The Commonwealth had argued, as it has here, that the essential purpose of confrontation is to secure the opportunity of cross-examination. Even though the witness was of the same tender age of five, the Court ruled that the right to confrontation involved much more, citing California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L.Ed. 2d 489, 497:

> "In this context, confrontation; '(1) insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of the truth; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury

assessing his credibility.'"

While it is certainly not fashionable to challenge the veracity of a child, as the Commonwealth is obligated to prove the guilt of a defendant beyond a reasonable doubt, we must consider the possibility that a child is lying, confused or exaggerating. The certainty of a child's testimony may best be gauged by his or her ability to look at the defendant while telling the story. The Commonwealth is apparently unwilling to accept this reality, but the Herbert Court saw it as being a critical element of confrontation:

> "A witness's reluctance to face the accused may be the product of fabrication rather than fear or embarrassment." Id. at 855.

The Commonwealth apparently relies on the theory that any reluctance to look at the witness would be the result of fear or embarrassment. This theory was not supported by any professional proof at the competency hearing, and it is just as likely that Rosalind's reluctance may be the fear or embarrassment of lying in front of the only other person who could possibly know whether her story was true. It is plausible that her silence is attributed to a realization that her fabrication will finally be confronted, rather than supported and developed through her teacher and mother, those persons upon whom she most relies for support. The provisions of KRS 421.350 allow for the videotape substitute in place of face-to-face confrontation without any requirement that the Commonwealth prove any good cause or necessity, clearly a requirement which should

be satisfied before depriving a person of his constitutional rights.

In the case of State v. Sheppard, 484 A. 2d 1330 (New Jersey, 1984), upon which the Commonwealth heavily relies, the State proved beyond doubt that the particular ten-year-old witness in question there was less likely to testify accurately in person because of fear, guilt, anxiety and trauma. There, the State utilized a "forensic psychiatrist with substantial credentials relating to trial proceedings as well as medical matters", Id. at 1332, who had interviewed the child in regard to the proposed testimony. (This Court will recall that the Defendant herein moved for such an examination of Rosalind, but with the objection of the Commonwealth, the motion was overruled.)

The pshychiatrist in the Sheppard case learned of frequent incidents of sexual abuse by the child's father for several years, and a fear that the stepfather would kill her if she revealed his activities. The psychiatrist reasoned that as the child had been the subject of abuse by a relative, a feeling of ambivalence developed as to whether she wanted him to be convicted. She would feel guilt along with the potential satisfaction of sending her stepfather to prison, and based on this factor, the psychiatrist felt a video arrangement, for that particular witness, would be more likely to produce accurate testimony.

It is interesting to note that the Sheppard Court distinguished the Herbert case on facts that are not distinguishable in the present case. The Sheppard Court noted that in the Herbert case there was no record showing that the child's conduct required the arrangement. There was no record of

intimidation of the witness by the defendant in Herbert, and no oath taken by the witness. The Sheppard Court did note that in Herbert the defendant could not see the witness, a problem avoided by KRS 421.350. The critical factor, however, is whether the witness can see the defendant. Were that not the case, (to borrow the Commonwealth's example) a blind defendant could never be afforded his constitutional right to confrontation. The present facts more closely resemble Herbert than Sheppard, and the same logic should also apply.

Leslie Willis objects in this appeal to the consideration by this Court of the "probable long-range emotional consequences" of in-court testimony, consequences which the forensic psychiatrist in the Sheppard case apparently proved to the satisfaction of that Court. The Commonwealth in this case failed to introduce any proof as to the long term consequences of the testimony of Rosalind Carson (or any other child) in open Court and did not request that the Court take judicial notice of any such "fact". The Sheppard psychiatric opinion was based on a detailed evaluation of the witness, and findings that the child was "well-oriented, with a sound memory, and no evidence of psychotic-thought disorder, hallucinations or delusions." Id. at 1332. A review of the transcript of the competency hearing on July 20, 1984 reveals the need for a full psychiatric examination of Rosalind before such a conclusion could be reached about her. The Commonwealth objected to Defendant's motion for

such an examination, and has failed to prove these long-term consequences. Particularly with the lack of proof in the record that Rosalind would be harmed by live testimony, it could not be concluded that her interests outweigh the serious infringement on the right of confrontation. The Supreme Court of the United States has considered the possible harm to a juvenile under cross-examination and has concluded that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." Davis v. Alaska, 415 U.S. 308, 319, 94, S.Ct. 1105, 39 L Ed. 2d 347 (1974). Without proof of harm to Rosalind, the right to face-to-face must prevail.

Appellee would finally report to this Court that a Texas Appellate Court has recently held a similar videotape statute to be unconstitutional on the grounds discussed herein. The two cases involved are Long v. State, No. 05-84-00181-CR (Tex. App.-Dallas) 6/4/85 and Powell v. State, No. 05-84-00646-CR (Tex. App. -Dallas) 5/28/85, and are not yet available. Appellee would request leave of this Court to file a supplemental brief if the Court so desires when the cases are actually published.

(C) Exceptions to the right of confrontation only apply if the witness is unavailable.

The Commonwealth finally cites the exceptions to the right of confrontation which have developed over the years. It cites Lawson, Kentucky Evidence Law Handbook for the general proposition that the right of confrontation may be satisfied

if the witness is unavailable and there are circumstantial guarantees of trustworthiness. Depositions have been allowed in criminal trials, but only upon a showing of unavailability. RCr 7.12 states that in such circumstances, the Court shall impose such specifications "as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant." The Rule clearly recognizes the independent rights of personal confrontation and cross-examination, a distinction the Commonwealth attempts to avoid. RCr 7.10 does not mention "unavailability" or inability to testify as grounds for the use of a deposition; it requires that the witness be "unable to attend" the trial or hearing. Particularly with no psychiatric proof to the contrary, it is clear that Rosalind is able to attend a trial. The other "exception" cases cited by the Commonwealth deal with waiver, business records, dying declarations, and res gestae, none of which are issues in this appeal.

II

THE PROVISIONS OF KRS 421.350 VIOLATE A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE KENTUCKY AND UNITED STATES CONSTITUTIONS.

Section Eleven of the Kentucky Constitution provides that in all criminal prosecutions, the accused has the "right to be heard by himself and counsel."

KRS 421.350 does not provide procedures for instantaneous private communication between defendant and his attorney. It allows the attorney to be present in the room

for questioning, but bars the defendant, and makes no provisions for communication during this questioning. The denial of this right to communicate during questioning of a witness, clearly a critical stage of the proceeding, is unconstitutional.

It has been held that the right to effective assistance of counsel is denied when the ability of a defendant and his attorney to confer during overnight recess in order to make strategic decisions as to the case is impaired. Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330 47 L. Ed. 2d 592, (1976). Failure to provide for unobtrusive communication during the testimony of a witness is no less prejudicial.

The plot thickens when the defendant attempts to assert his constitutional right to cross-examine the witness himself. He is allowed to proceed without counsel if he voluntarily and intelligently elects to do so. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562, (1975). The Kentucky Constitution specifically guarantees the defendant the right "to be heard by himself and counsel." One cannot imagine a more appropriate case for the defendant (in this case a man who has known the child for most of her life) to talk to the child in a cross-examining form, to try to persuade her to tell the jury what really did or did not happen. If the child refuses to look at him or is unresponsive to his questions, the jury can form its own conclusions.

KRS 421.350 attempts to protect a defendant's

right to confrontation by allowing his attorney to be present during the "testimony". In the instance wherein the defendant opts to proceed pro se, he would be entitled to personally confront and cross-examine the child, but is barred as the defendant from the room. In this scenario, the defendant must elect whether to exercise his right to effective assistance of counsel or to personally confront the witnesses against him. Whatever his decision, there has been a constitutional violation. In comparable circumstances, the United States Supreme Court has held it "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 976, 19 L. Ed. 2d 1247 (1968).

III.

THE PROVISIONS OF KRS 421.350 DO NOT SATISFACTORILY INSURE THE COMPETENCE OF EVIDENCE PRESENTED TO THE JURY.

The provisions of KRS 421.350 apparently apply to any child twelve years or younger who is the alleged victim of certain specified sex abuse crimes. Not only does it presume that the live testimony of all of such children would be sufficiently detrimental to outweigh the risk of depriving an accused of face-to-face confrontation, it also presumes each child to be competent to testify as a witness.

It is clear this Court has long recognized the fact that because of age and background, some children (or adults) are incompetent to testify in a court proceeding.

Whitehead v. Stith, 268 Ky. 703, 105 S.W. 2d 834 (1937). According to that case, a Court should look to intelligence and a sense of obligation to tell the truth in determining whether the child is competent.

It is submitted that the competency hearing held in this case on July 20, 1984 revealed the incompetence of Rosalind Carson in terms of both intelligence (undeveloped narratory skills) and a sense of obligation to truthfulness. While the issue of competence lies in the discretion of the trial judge, the statute in question seemingly establishes the competence of all children twelve years or under who are victims of sex abuse.

Whether the defendant has a right to be present in a competency hearing is another question which must be answered in determining the constitutionality of KRS 421.350. To allow a child to "testify", through a videotape deposition or otherwise, the Court must find the child to be a competent witness. The right of an accused to be present at every stage of his trial is set forth in both the Constitution and RCr 8.28. Although it does not appear that Kentucky Courts have dispositively ruled on the defendant's right to be present at a competency hearing, it would appear that such a right exists.

The Court of Appeals held in Powell v. Commonwealth, Ky., 346 S.W. 2d 731, 734 (1961), that a Court's receiving of a jury verdict in the defendant's absence violated his constitutional right to be present at the trial with his

counsel. The Court in that case cited Temple v. Commonwealth, 14 Bush 769, 29 Am. Rep. 442, which stated:

> "The right to be heard by himself and counsel necessarily embraces the right to be present himself and to have a reasonable opportunity to have his counsel present also at every step in the progress of the trial .... The presence of the accused is not mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witness against him, but also with his triers." (Emphasis Added)

See also Carver v. Commonwealth, Ky., 256 S.W. 2d 375 (1953).

The right to be present at an inquiry hearing for the purpose of ascertaining facts upon which a Court will base evidentiary rulings has also been upheld. See Hill v. Commonwealth, Ky., 474 S.W. 2d 95 (1971).

In any event, the Commonwealth waived any claim it may have had to bar Leslie Willis from the July 20, 1984 competency hearing. There was no motion or request made for Willis to be barred from the hearing, even after Rosalind indicated that she did not want him to be there. Willis strongly urges that this case is a good example of the fallacy of KRS 421.350 which presumes the competence of the child witness, a fallacy which supports the Opinion of the Fayette Circuit Court that the statute denies the defendant his constitutional right to confrontation.

IV.

THE PROVISIONS OF KRS 421.350 (5) WHICH DENY THE DEFENDANT THE RIGHT TO CALL THE CHILD TO TESTIFY VIOLATE HIS CONSTITUTIONAL RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR.

KRS 421.350 (5) reads as follows:

> "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."

This restriction clearly violates the right of a defendant to present evidence by calling witnesses. This right is specifically stated in Section Eleven of the Kentucky Constitution: "... to have compulsory process for obtaining witnesses in his favor." It was also recognized in Mitchell v. Commonwealth, 225 Ky. 117, 7 S.W.2d 823 (1928), in which the Court considered the prejudice and public excitement which the crime therein had aroused. We would be remiss to ignore the public furor aroused by charges of sexual abuse of a child, and the difficulties of maintaining the presumption of innocence of the sex abuse defendant.

As public awareness of the problem of sex abuse of children continues to grow, it becomes increasingly difficult to avoid the stigma of guilt which an accused faces. To deprive a defendant of his right to call the child to testify could reinforce the stigma, as the jury would sense that the defendant is afraid to call the child as a witness. An admonition to the jury explaining that the law does not require the live testimony of the child creates an impression in the jury's mind that the mere physical presence of the defendant would have an adverse effect on the child's ability to testify or on her emotional well-being. Such an admonition would be in derogation of the defendant's constitutional right to a presumption of innocence. Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976).

V.

THE TRIAL COURT CORRECTLY HELD THAT KRS 421.350 IS AN UNCONSTITUTIONAL INFRINGEMENT BY THE LEGISLATURE ON THE INHERENT POWERS OF THE JUDICIARY TO PRESCRIBE RULES OF PROCEDURE FOR THE COURTS OF THE COMMONWEALTH.

Section 27 of the Kentucky Constitution describes the distribution of Government powers for the Commonwealth as follows:

> "The powers of the Government of the Commonwealth of Kentucky shall be divided into three distinct departments and each of them be confined to a separate body of magistracy, to-wit; Those which are legislative, to one; Those which are executive, to another; and those which are judicial, to another."

These separate departments are expressly forbidden from encroaching on the constitutional functions of other departments by Section 28 which provides:

> "No person or collection of persons, being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances herein expressly directed or permitted."

The powers granted by the Constitution to the Judiciary are vested in a Court of Justice, headed by the Supreme Court. Ky. Const. Section 109. Its power to prescribe rules of procedure for the Courts of the Commonwealth is specifically stated in the Constitution. Section 116 states that "The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissions and other Court personnel, and rules of practice and procedure

for the Court of Justice . . ."

The Judicial Branch "must be and is largely independent of intrusion by the Legislative Branch". Brown v. Barkley, Ky., 628 S.W. 2d 616, 623 (1982). The provisions of KRS 421.350 which prescribe the rules of procedure for videotaping a deposition of an infant witness to present as evidence in a sex abuse trial is such an unconstitutional intrusion by the Legislature.

The Commonwealth first argues, without authority, that the procedures of KRS 421.350 (3) and (4) are left to the discretion of the trial Court such that there is no invasion of judicial powers. This argument in and of itself proves the procedural nature of the statute, and also ignores the mandate of Section 116 of the Kentucky Constitution which grants the Supreme Court (not the trial Courts) the exclusive authority to prescribe rules of procedure for the Courts. Further, counsel is unaware of any substantive law which may be applied only in the discretion of a trial Court.

The Commonwealth then argues that as this Court has upheld competency statutes, dead man's statute, privilege statutes, judicial notice and the like, KRS 421.350 should also stand. The examples it cites, however, are misplaced because they deal with the substantive issue of the nature of evidence which may be introduced in Court, not the procedure by which evidence will be introduced. They have nothing to do with the specific procedures to be utilized by a Court in accepting evidence, no provision for placement of attorneys

and defendant in or around the Courtroom, no limitations as to who may question a witness, or to who may see or hear a witness.

In the event of a conflict between Rules and Statute, the Courts are bound to follow the Rules. Regarding a conflict pertaining to the procedure for jury selection, the Court of Appeals has stated:

> "The power to fix the method of jury selection is inherently one for the Court and not the legislature. 'Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the Courts. . .' Courts 'deny the right of legislative dominance in matters of this kind." Arnett v. Meade, Ky., 462 S.W. 2d 940, 946 (1971); Trent v. Commonwealth, Ky. App., 606 S. W. 2d 386, 387 (1980).

A similar logic was employed in the case of McCoy v. Western Baptist Hospital, Ky. App., 628 S.W. 2d 634 (1981) where it was held that a legislative attempt to limit the prayer for damages in a malpractice action was an unconstitutional invasion of the rule-making power of the Courts. (The Supreme Court has since amended CR 8.01, effective January 1, 1985, to prescribe such a limit.)

The principles of comity are inapplicable here as well. The Commonwealth cites O'Bryan v. Commonwealth, Ky., 634 S.W. 2d 153, 158 (1982):

> "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. . ."

The Court has superseded this statute by its establishment of RCr 7.10, RCr 7.12 and RCr 7.20. RCr 7.12 specifically requires a full protection of the Defendant's "rights of personal confrontation and cross-examination of the witness by Defendant" if deposition will be used. RCr 7.20 states the limited instances when a deposition may be used, none of which apply to KRS 421.350.

Finally, the Commonwealth contends that KRS 421.350 does not conflict with RCr 7.12, as the defendant's right of confrontation would be fully protected. Reference is made to ARGUMENT I herein as to the extent of this "full protection". The Commonwealth hopes this Court will somehow find all children age twelve or younger to be "unable to testify under normal trial conditions because of the frailties and infirmities associated with (their) tender years and the nature of the crime against (them)" (Appellant's Brief, p.19) (Sic). Reference is again made to ARGUMENT I herein.

Thus, the procedural directions the Legislature has attempted to impose on the introduction of evidence reach far beyond its power to enact substantive laws. This Court has recently discussed similar efforts on the part of the Legislature which attempt to limit the authority of the Judiciary to govern itself. In the case of Smothers v. Lewis, Ky., 672 S.W. 2d 62, 64 (1984), Chief Justice Stephens wrote for a unanimous Court as follows:

> ". . . We now adopt . . ., and once and for all make clear that a Court, once having obtained jurisdiction of a cause of action, has, as an incidental to its Constitutional grant of power, inherent power to do all things reasonably necessary to the administration of Justice in the case before it."

Because of the foregoing authorities, it is hereby requested that this Court uphold the fundamental principles enunciated in Sections 27 and 28 of the Kentucky Constitution, and rule that the provisions of KRS 421.350, which attempt to establish the procedure by which trial Courts in Kentucky will accept proof to be presented to the jury in sex abuse cases involving children twelve years or younger, are unconstitutional and should be stricken.

CONCLUSION

KRS 421.350(3),(4),(5) offends the fundamental rights of a criminal defendant under the United States and Kentucky Constitutions. If the Commonwealth were permitted to use a video tape of Rosalind Carson's testimony the defendant would be deprived of several of his basic constitutional rights, including the right to confront one's witnesses face to face, to insure the competence of evidence presented to the jury and to avail himself of the compulsory process for obtaining witnesses. Further, KRS 421.350(3),(4),(5) constitutes an improper infringement by the legislature on the inherent power of the judiciary to prescribe rules of procedure for the courts.

While society recognizes that sex abuse cases are an emotional strain on the children involved, the defense implores the court to recognize that the accused suffers the stigma of being considered a child abuser before he is ever tried. In any trial the defendant is guaranteed the right to confront and examine his witnesses face to face, and this right is particularly important to a person defending charges based on the testimony of a child. A defendant's constitutional rights cannot be taken from him because of the nature of the crime with which he is charged.

For these reasons, the trial court correctly ruled that KRS 421.350 is unconstitutional and that the witness'