

1998

Confrontation in Massachusetts: What Face to Face Really Means

Lisa Donahue

Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

3 Suffolk J. Trial & App. Advoc. 37 (1998)

This Article is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

CONFRONTATION IN MASSACHUSETTS: WHAT “FACE TO FACE”¹ REALLY MEANS

I. INTRODUCTION

In the 1980's charges of sexual abuse swept the nation.² Courts across the country were hearing cases concerning trusted teachers and day-care workers who had been charged with sexually abusing young children.³ Today, the courts are overturning many of the “mass abuse cases” of the eighties.⁴

One of the most infamous of these cases occurred in Massachusetts.⁵ In 1984, several parents alleged that their children had been abused while attending the Fells Acres Day School in Malden.⁶ Subsequently, Gerald Amirault was convicted of eight counts of rape of a child and seven counts of indecent assault and battery on a child.⁷ His sister, Cheryl LeFave, and

¹ MASS. CONST. art. XII.

² See Malcolm Gladwell, *Children's Testimony No Longer Gospel in Day-Care Abuse Cases*, THE WASHINGTON POST, Sept. 3, 1995, at A03 (chronicling many of the sensational abuse cases of the eighties); see also Review and Outlook, *Justice for the Amiraults*, THE WALL STREET JOURNAL, Aug. 30, 1995, at A10 (analyzing the Amirault case).

³ Dorothy Rabinowitz, *Unspeakable Acts*, GOOD HOUSEKEEPING, Oct. 1, 1995, at 128. In 1984, seven teachers at the McMartin School in Manhattan Beach, California, were charged with 354 allegations of child molestation. *Id.* Among those charged were Raymond Buckey and his mother, Peggy McMartin Buckey. *Id.* Before their acquittal, Raymond spent five years in prison and his mother spent two. *Id.* The original accuser was revealed to be a paranoid schizophrenic and an alcoholic. *Id.* In 1988, Kelly Michaels was convicted of molesting nineteen preschoolers at the Wee Care Day Nursery in Maplewood, New Jersey. *Id.* Ms. Michaels spent five years in prison before her conviction was overturned in 1993 when the court ruled that the children had been guided into making the accusations. *Id.* In 1993, Robert F. Kelly, the former co-owner of the Little Rascals day-care center in North Carolina, was sentenced to twelve consecutive life prison terms for molesting twelve children. *Id.* The former cook was also convicted of sexual abuse and sentenced to life in prison. *Id.* Both convictions were overturned because the judge allowed the jury to hear highly prejudicial testimony. *Id.*

⁴ *Id.*

⁵ See Dorothy Rabinowitz, *A Darkness in Massachusetts II*, THE WALL STREET JOURNAL, Mar. 14, 1995, at A14 (examining the Amirault case). See also Dorothy Rabinowitz, *A Darkness in Massachusetts III*, THE WALL STREET JOURNAL, May 12, 1995 at A12.

⁶ See *Commonwealth v. Amirault*, 424 Mass. 618, 620-21, 677 N.E.2d 652, 656 (1997) (chronicling the events prior to the Amirault's conviction). Violet Amirault was the Director of the Fells Acres Day School. *Id.* Cheryl LeFave was a teacher at the school and Gerald Amirault was the bus driver, cook, maintenance man, and general assistant. *Id.* Allegations included charges that Gerald Amirault dressed as a clown to entice the children into sexual acts and that the Amirault's had tortured animals. See Rabinowitz, *supra* note 3 (describing the Fells Acres case).

⁷ See *id.* at 619, 677 N.E.2d at 655 (listing the results of both trials).

mother, Violet Amirault, were convicted of similar charges.⁸ In August of 1995, however, Massachusetts Superior Court Judge Robert A. Barton overturned the womens' convictions holding that the state had denied the defendants' state constitutional rights to confront their accusers.⁹

Judge Barton based his reasoning on the holding in *Commonwealth v. Johnson*.¹⁰ In *Johnson*, the Supreme Judicial Court of Massachusetts outlawed a special seating arrangement used by the prosecution.¹¹ The seating arrangement had enabled the child witnesses to testify with their backs to the defendant so that the child was not further traumatized.¹² The Supreme Judicial Court stated this arrangement violated the confrontation clause in the Declaration of Rights of the Massachusetts Constitution.¹³ The same seating arrangement was challenged in the Amirault case.¹⁴

This article examines the Supreme Judicial Court's interpretation of the confrontation clause as outlined in *Commonwealth v. Johnson*.¹⁵ It also compares Article Twelve of the Massachusetts Constitution with the Sixth Amendment of the United States Constitution. It discusses the Massachusetts confrontation clause, as stated in Article Twelve of the Massachusetts Declaration of Rights. It also looks at how Massachusetts balances the interests of safeguarding the defendant's right to confront a witness, while simultaneously protecting a child witness from further trauma. Finally, this article analyzes what steps can be taken in the future to protect child witnesses in abuse cases without violating the rights of the defendant.

⁸ *Id.* Cheryl LeFave was convicted of three counts of rape of a child and four counts of indecent assault and battery on a child. *Id.* Violet Amirault was convicted of two counts of rape of a child and three counts of indecent assault and battery on a child. *Id.* at 620, 677 N.E.2d at 655.

⁹ MASS. CONST. art. XII. See Review and Outlook, *supra* note 2 (chronicling the events leading up to the release of the Amirault's). In 1997, the Supreme Judicial Court of Massachusetts reinstated the convictions of Violet Amirault and Cheryl LeFave, however, it was not disputed that the women were denied the constitutional right to confront their accusers. See William F. Doherty, *Psychology Professor Cross Examined on Fells Acres Testimony*, THE BOSTON GLOBE, Feb. 19, 1988, at B2; see also Amirault, 424 Mass. at 632, 677 N.E.2d at 662 (confirming that the Amirault's constitutional rights were violated). Following the ruling by the Supreme Judicial Court, Amirault and LeFave were granted a new trial because their lawyer did not object to the seating arrangement. *Id.*

¹⁰ 417 Mass. 498, 631 N.E.2d 1002 (1994).

¹¹ *Id.* at 499-500, 631 N.E.2d at 1004.

¹² *Id.* at 499-500, 631 N.E.2d at 1004-05.

¹³ *Id.* at 499-500, 631 N.E.2d at 1004.

¹⁴ See *Commonwealth v. Amirault*, 424 Mass. 618, 621-22, 677 N.E.2d 652, 656-657 (1997) (describing the seating arrangement).

¹⁵ *Johnson*, 417 Mass. at 499-505, 631 N.E.2d at 1004-07.

II. CASE IN CHIEF

In *Commonwealth v. Johnson*, James E. Johnson was convicted of two counts of rape by force of a child under the age of sixteen.¹⁶ The victims in the case were the two minor daughters of Johnson's girlfriend.¹⁷ Johnson was sentenced to concurrent nine to ten year prison terms on each indictment.¹⁸

Prior to trial, the judge heard arguments by the Commonwealth requesting an unusual courtroom seating arrangement.¹⁹ The Judge allowed the motion for the special seating arrangement despite objections from the defense.²⁰ The defense claimed the seating arrangement violated the defendant's right to confront a witness against him as required by the Sixth and Fourteenth Amendments of the United States Constitution and Article Twelve of the Declaration of Rights in the Massachusetts Constitution.²¹

The seating arrangement allowed the child witness to testify facing the jury with her back to the defendant.²² The witness sat in a chair near the court reporter's table, facing the jury, while the attorney asking questions sat between the jury and the witness.²³ As a result of the seating arrangement, the defendant could not see the face of the witness.²⁴

On appeal, the case was transferred to the Supreme Judicial Court on its own initiative.²⁵ In a decision written by Chief Justice Liacos, the court held that Article Twelve "contains an indispensable element of face to face

¹⁶ *Id.* (holding Johnson was in violation of MASS. GEN. LAWS ch 265 § 22A (1992)).

¹⁷ *Id.* Johnson's girlfriend, the mother of the two children, was indicted and convicted for being an accessory to rape after the fact. *Id.* at n.1. Her trial was consolidated with Johnson's, but she was not a party to the appeal. *Id.*

¹⁸ *Commonwealth v. Johnson*, 417 Mass. 498, 499, 631 N.E.2d 1002, 1004 (1994).

¹⁹ *Id.* at 500, 631 N.E.2d at 1004.

²⁰ *Id.* at 500-01, 631 N.E.2d at 1004-05. The Judge allowed the seating arrangement without hearing any evidence regarding the necessity of the arrangement and without making any specific findings of the needs of the individual witnesses. *Id.* The Judge stated that the ages of the witnesses lead him to his decision. *Id.* at 501 n.2, 631 N.E.2d at 1005 n.2. He also examined the defense's motion regarding the two children's reservations about testifying before the defendant. *Id.* at 500-01 n.2, 631 N.E.2d at 1005 n.2.

²¹ *See id.*, at 500-01 & n.3, 631 N.E.2d at 1004-05 & n.3 (outlining the defense's argument and details of the special seating arrangement); U.S. CONST. amend. VI (asserting the right to confront a witness). *See also* U.S. CONST. amend. XIV. (asserting that the bill of rights applies to the states). *See also* MASS. CONST. art. XII (granting the right to face to face confrontation in Massachusetts).

²² *Johnson*, 417 Mass. at 500, 631 N.E.2d at 1005.

²³ *Commonwealth v. Johnson*, 417 Mass 498, 500, 631 N.E.2d 1002, 1005 (1994).

²⁴ *Id.*

²⁵ *Id.* at 499, 631 N.E.2d at 1002.

confrontation of witnesses appearing at trial," therefore, the seating arrangement violated the defendant's constitutional rights.²⁶

III. RATIONALE BEHIND THE RIGHT TO CONFRONT

The Sixth Amendment of the United States Constitution grants the criminal defendant the fundamental right to confront any and all witnesses.²⁷ Article Twelve of the Massachusetts Constitution also guarantees the right to confront one's accusers.²⁸ The rationale behind the confrontation clause is to promote the truth and veracity of the witness.²⁹ It is generally accepted that a witness is less likely to lie if he is forced to swear under oath to tell the truth, testify in a courtroom, and testify in front of the defendant.³⁰ Face to face confrontation enables the jury to assess the credibility of the witness.³¹ It is a widely held belief that confrontation is especially important in cases involving sexual abuse and rape, because oftentimes it is one person's word against another's.³² The right to confront gives the defendant the opportunity to observe the witness; however, it does not require the witness to actually look at the defendant.³³ In addi-

²⁶ *Id.* at 503-04, 631 N.E.2d at 1006.

²⁷ See U.S. CONST. amend. VI which states in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witness against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. *Id.* (emphasis added)

²⁸ MASS. CONST. art. XII. Article Twelve states in pertinent part: "every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witness against him *face to face*, and to be fully heard in his defense by himself, or his counsel at his election." *Id.* (emphasis added).

²⁹ See *Commonwealth v. Bergstrom*, 402 Mass. 534, 541-42, 524 N.E.2d 366, 371 (1988) (noting that confrontation likely encourages truthfulness in a witness); see also *Commonwealth v. Sanchez*, 423 Mass. 591, 596-97, 670 N.E.2d 377, 381 (1996) (assessing whether allowing a child witness to testify at a table frustrated the purpose of the confrontation clause); *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (acknowledging that confrontation significantly affects "recollection, veracity and communication").

³⁰ *Bergstrom*, 402 Mass. at 541-42, 524 N.E.2d at 371.

³¹ See *id.* at 542-43, 524 N.E.2d at 372 (stating the significance of the right to physical confrontation); see also *Coy v. Iowa*, 487 U.S. 1012, 1019-23 (1988) (holding that a screen placed between the defendant and the witness defeated the purpose of the right to confront and violated the Constitution); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (outlining the core values behind the confrontation clause).

³² See *Commonwealth v. Joyce*, 382 Mass. 222, 229, 415 N.E.2d 181, 186 (1981) (stating that the right to cross examine in a rape case may be the last chance for the defendant to present a defense); see also *Sanchez*, 423 Mass. at 596-97, 670 N.E.2d at 380-81 (noting the importance of allowing the jury to assess the demeanor of a child witness); *Bergstrom*, 402 Mass. at 550, 524 N.E.2d at 376 (finding that videotaped testimony did not afford the jury the chance to adequately observe the child witness in a child rape case).

³³ See, e.g., *Commonwealth v. Kater*, 409 Mass. 433, 446, 567 N.E.2d 885, 892-93

tion, the trial judge has discretion to alter the proceedings to accommodate a particular witness.³⁴

IV. THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Sixth Amendment guarantees the defendant the right to cross examine witnesses.³⁵ This right is limited by the traditional hearsay exceptions involving an unavailable witness who was already subject to cross examination.³⁶ In *Coy v. Iowa*,³⁷ the Supreme Court held that the trial court had violated the defendant's right to confrontation when a screen was placed between the witness and the defendant.³⁸ During testimony the defendant could barely see the witness and the witness could not see the defendant at all.³⁹ Chronicling the history of the right to confront, the Supreme Court held that face to face confrontation was at the "core of the values furthered by the confrontation clause," but stopped short of making face to face confrontation mandatory.⁴⁰ The court left open the possibility of an exception.⁴¹

Thereafter, in the landmark case of *Maryland v. Craig*,⁴² the United States Supreme Court noted that face to face confrontation was always

(1991) (holding defendant's right to confrontation was not violated when witness refused to look at the defendant); *Commonwealth v. Conefry*, 410 Mass. 1, 14, 570 N.E.2d 1384, 1391 (1991) (noting the witness had the right to avoid eye contact and that the defendant's ability to see the witness' profile was sufficient to satisfy the confrontation clause); *Commonwealth v. Tufts*, 405 Mass. 610, 614-16, 542 N.E.2d 586, 589-90 (1989) (holding a defendant's confrontation rights were not violated when he could see the witness by bending slightly); see also *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986) (holding that the Kentucky constitution does not guarantee "eyeball to eyeball" confrontation).

³⁴ See *Commonwealth v. Sanchez*, 423 Mass. 591, 597, 670 N.E.2d 377, 381 (1996) (upholding judge's decision to allow child witness to testify at small table instead of the witness box). In *Sanchez*, the defendant was accused of sexually abusing a child under the age of sixteen. *Id.* at 592, 670 N.E.2d at 378. The Judge allowed the witness to sit at a table during testimony with the attorney asking the questions at the table with her. *Id.* at 595-96, 670 N.E.2d at 380.

³⁵ U.S. CONST. amend. VI.

³⁶ See *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (finding that videotaped testimony prepared without the defendant's involvement violated the defendant's right to confrontation). See also *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (holding refusal to allow the defendant to cross-examine a key witness violated his constitutional right to confront); *Coy*, 487 U.S. at 1020-22 (1988) (finding a screen placed between the witness and the defendant violated the defendant's rights to confrontation).

³⁷ *Coy v. Iowa*, 487 U.S. 1012 (1988).

³⁸ *Coy*, 487 U.S. at 1020-22.

³⁹ *Id.* at 1015.

⁴⁰ *Id.* 487 U.S. at 1015-22. The court traced the right to confront back to Roman law. *Id.* at 1015-16.

⁴¹ See *Id.*, at 1020 (noting the possibility of an exception to the confrontation clause to further an important public policy).

⁴² 497 U.S. 836 (1990). In *Craig*, the defendant had been convicted of sexual assault and battery of a child. *Id.* at 840. The judge allowed the six year old witness to testify via

preferable, but in limited circumstances an exception may be made.⁴³ The Court held that the state's compelling interest in protecting the well-being of a child witness sufficiently justified an exception to the confrontation clause.⁴⁴ The Court allowed a child witness to testify via one-way closed circuit television after a case specific determination of necessity.⁴⁵ After *Craig*, individual states had to determine whether their state constitutions would allow this type of exception to the confrontation clause or whether actual face to face confrontation was essential.

V. ARTICLE TWELVE OF THE MASSACHUSETTS CONSTITUTION

The Constitution of the Commonwealth of Massachusetts was the first state constitution to explicitly guarantee a defendant the right to meet his accuser "face to face".⁴⁶ In *Commonwealth v. Bergstrom*,⁴⁷ the Supreme Judicial Court of Massachusetts distinguished Article Twelve of the Massachusetts Declaration of Rights from the United States Constitution by stating that the phrases "to meet" and "face to face," as used in the Massachusetts Constitution, required more than simply allowing the defendant to see and hear the witness.⁴⁸ Consequently, the court held that the testimony via one-way closed-circuit television in this case violated the defendant's rights under Article Twelve.⁴⁹ The court's decision acknowledged exceptions to face to face confrontation, but limited them to the traditional hearsay exceptions and to situations involving "unique interests."⁵⁰

closed-circuit television after determining that the child would suffer emotional trauma if forced to testify in the courtroom in front of the defendant. *Id.* at 843. The child, the prosecutor, and the defense attorney were in one room while the judge, the defendant, and the jury were in another room. *Id.* at 841. The defendant was always in communication with his attorney. *Id.* at 842.

⁴³ *Id.* at 847. The Court held that the confrontation clause may be satisfied without face to face confrontation if necessary to further some important public policy and an indicia of reliability exists. *Id.* at 847-50. The Court also specifically stated that a state's interest in protecting minor victims of abuse may outweigh a defendant's right to confront his accuser. *Id.* at 853.

⁴⁴ *Id.* at 853.

⁴⁵ *Id.* at 855-56.

⁴⁶ *Commonwealth v. Bergstrom*, 402 Mass. 534, 542 n.9, 524 N.E.2d 366, 371 n.9 (1988). See also MASS. CONST. art. XII (articulating the defendant's right to confront); see *supra* note 29 (quoting Article Twelve of the Massachusetts constitution).

⁴⁷ *Bergstrom*, 402 Mass. at 535, 524 N.E.2d at 367.

⁴⁸ See *id.* at 551-54, 524 N.E.2d at 377-78 (holding the use of testimony by closed-circuit television outside the presence of the defendant violated Article Twelve). *Bergstrom* was charged with raping his minor daughters. *Id.* at 535, 524 N.E.2d at 367. On appeal he claimed that his state constitutional rights were violated when his daughters were permitted to testify on video outside of his presence. *Id.* at 540, 524 N.E.2d at 370.

⁴⁹ *Id.* at 547, 524 N.E.2d at 374.

⁵⁰ *Id.* at 545, 524 N.E.2d at 373. See also *Commonwealth v. Bohannon*, 385 Mass. 733, 742-43, 434 N.E.2d 163, 169 (1982) (holding that prior testimony by an unavailable witness is admissible if it has an indicia of reliability); *Commonwealth v. DiPietro*, 373 Mass. 369, 379-80, 367 N.E.2d 811, 818 (1977) (allowing admission of previous testimony

The Supreme Judicial Court of Massachusetts follows the traditional guidelines of constitutional construction holding that the language used in the constitution is to be "interpreted in a sense most obvious to the common understanding at the time of its adoption."⁵¹ Every word is presumed to have been chosen for a reason and no words are ignored or held to be meaningless.⁵² The court presumes that the framers of the Massachusetts Declaration of Rights, read previously adopted state constitutions before drafting the Massachusetts Declaration of Rights.⁵³ Therefore, any differences between the Massachusetts Constitution and constitutions previously adopted are considered to be purposeful.⁵⁴

In *Johnson*, the Supreme Judicial Court went further than it did in *Bergstrom* and held that face to face confrontation of a witness was mandatory under Article Twelve.⁵⁵ The court paid special attention to the fact that the framers chose to use the words "face to face."⁵⁶ This directly contradicted the Supreme Court's interpretation of the Sixth Amendment

by defendant's wife after her assertion of the marital privilege); *Commonwealth v. Slavski*, 245 Mass. 405, 416, 140 N.E.2d 465, 468 (1923) (recognizing the public record exception to face to face confrontation). See also *Murphy v. Superintendent, Mass. Correctional Inst., Cedar Junction*, 396 Mass. 830, 832, 489 N.E.2d 661, 663 (1986) (finding prison inmates do not have the right to confront fellow inmates in prison disciplinary proceedings); *Commonwealth v. Pennellatore*, 392 Mass. 382, 388-90, 467 N.E.2d 820, 824-25 (1984) (holding witness' right against self incrimination is paramount to defendant's right to confrontation). The Supreme Court, however, in *Maryland v. Craig* stated that an important public policy may call for an exception to the confrontation clause. *Craig*, 497 U.S. at 837. See *supra* note 44 (outlining the holding in *Maryland v. Craig*).

⁵¹ See *Attorney General ex rel. Mann v. City of Methuen*, 236 Mass. 564, 572-73, 129 N.E. 662, 664-65 (1921) (stating that a constitutional amendment must be interpreted as the words were commonly understood at adoption). See also *Opinion of the Justices*, 365 Mass. 655, 657, 311 N.E.2d 44, 45 (1974) (holding that constitutional language must be interpreted so that all those entitled to vote may understand); *Lincoln v. Secretary of the Commonwealth*, 326 Mass. 313, 317, 93 N.E.2d 744, 747 (1950) (interpreting constitutional requirements for an initiative petition); *Yont v. Secretary of the Commonwealth*, 275 Mass. 365, 366-67, 176 N.E. 1, 2 (1931) (applying a constitutional amendment regulating the use of a referendum petition); *Raymer v. Trefry*, 239 Mass. 410, 412, 132 N.E. 190, 191 (1921) (interpreting a constitutional amendment regarding income taxes).

⁵² See *Town of Mt. Washington v. Cook*, 288 Mass. 67, 70, 192 N.E. 464, 465 (1934) (interpreting a constitutional amendment regarding procedures required to file a referendum); *Opinion of the Justices*, 332 Mass. 769, 777, 126 N.E.2d 795, 800 (1955) (analyzing the meaning of Article Ten of the Declaration of Rights).

⁵³ *Commonwealth v. Bergstrom*, 402 Mass. 534, 541, 524 N.E.2d 366, 371 (1988) (quoting Larkin, *The Right of Confrontation: What's Next?*, 1 TEX. TECH. L. REV. 67, 75-76) (1969).

⁵⁴ *Id.* at 541, 524 N.E.2d at 371. Many previously adopted state constitutions merely used the words "to be confronted with" or "to confront", while the framers of the Massachusetts Constitution were the first to explicitly state that the defendant had the right to "meet a witness against him face to face". *Id.* at 541, 524 N.E.2d at 371.

⁵⁵ *Commonwealth v. Johnson*, 417 Mass. 498, 503, 631 N.E.2d 1002, 1006 (1994).

⁵⁶ *Id.* at 502, 631 N.E.2d at 1005.

as stated in *Craig*.⁵⁷ Again, the Supreme Judicial Court noted the exceptions that it outlined in *Bergstrom* and held that beyond these limited exceptions, the defendant's right to confront is superior to all other considerations.⁵⁸

VI. OTHER JURISDICTIONS

The state constitutions of some other jurisdictions specifically mandate face to face confrontation.⁵⁹ For example, in *Commonwealth v. Loudon*,⁶⁰ the Pennsylvania Supreme Court held that statutes allowing testimony via closed-circuit television and the admission of videotaped depositions violated the defendant's state constitutional rights.⁶¹ The court acknowledged that the United States Constitution preferred face to face confrontation, but held that the Pennsylvania State constitution dictated face to face confrontation.⁶²

Other state constitutions that are not as explicit allow testimony by children that is not actually face to face.⁶³ For example, Connecticut's

⁵⁷ Compare *Maryland v. Craig*, 497 U.S. 836, 847 (1990) ("[a]lthough face to face confrontation forms the 'core of the values furthered by the confrontation clause' we have nevertheless recognized that it is not the sine qua non of the confrontation rights") with *Johnson*, 417 Mass. at 503, 631 N.E.2d at 1006 ("[Article Twelve] contains an indispensable element of confrontation of witnesses appearing at trial").

⁵⁸ *Commonwealth v. Bergstrom*, 402 Mass. 534, 545-46, 524 N.E.2d 366, 373-74 (1988). See *Commonwealth v. Elliot*, 393 Mass. 824, 828, 473 N.E.2d 1121 (1985) (finding that judges' rulings limiting cross-examination of rape victim violated defendant's right to confront). See also *Commonwealth v. Ferrara*, 368 Mass. 182, 183-90, 330 N.E.2d 837, 839-43 (1975) (holding denying defendant access to juvenile record of witness also deprived him of his constitutional right to confront the witness against him).

⁵⁹ See *People v. Fitzpatrick*, 158 Ill.2d 360, 367-68, 633 N.E.2d 685, 688-89 (Ill. 1994) (holding that alleged victim's testimony via close-circuit television violated state constitutional right to "face to face" confrontation). The Illinois Constitution states: "In criminal prosecutions, the accused shall have the right to . . . meet the witness face to face . . ." ILL. CONST. art. I, § 8. See also *State v. Owings*, 622 N.E.2d 948, 950-51 (Ind. 1993) (stating the state constitution is different than Sixth Amendment and requiring face to face meeting). The Indiana Constitution states in pertinent part: "In all criminal prosecutions, the accused shall have the right to . . . meet the witness face to face . . ." IND. CONST., art. I, § 13. See generally James G. Fenian, *Developments in State Constitutional Law: 1994, Criminal Procedure-Defendant's Rights*, 26 RUTGERS L.J. 1130, 1141-49 (Summer 1995) (analyzing both state and federal rights to confront a witness).

⁶⁰ 536 Pa. 180, 638 A.2d 953 (1994).

⁶¹ See *Louden*, 536 Pa. at 188, 638 A.2d at 957. On appeal, the defendant challenged the constitutionality of allowing child victims to testify through videotaped depositions. *Id.* at 186-88, 638 A.2d at 956-57. Article I, § 9 of the Pennsylvania Constitution states in pertinent part: "In all criminal prosecutions the accused hath a right . . . to be confronted with the witness against him . . ." PA. CONST. art. I, § 9.

⁶² *Id.*, at 186-88, 638 A.2d at 956-57.

⁶³ See N.Y. CONST. art. I, § 6. (granting the defendant's right to confront his accuser). Article One of the New York Constitution states in pertinent part: "In any trial in any court where the party the accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation

constitution simply states that a defendant has a right to "be confronted by the witness against him."⁶⁴ In *State v. Jarzbeck*,⁶⁵ the Supreme Court of Connecticut held that a child witness, who has allegedly been the victim of child abuse, may testify by closed-circuit television, if there is a compelling need.⁶⁶ In its decision, the court did not completely disregard the defendant's right to face to face confrontation, but simply recognized the defendant's right was not absolute and was subject to some exceptions.⁶⁷ Specifically, the court authorized videotaped testimony outside the presence of the defendant in cases involving the sexual abuse of young children.⁶⁸

The language adopted by a state's constitution, however, is not entirely indicative of how the state will rule with respect to the right to face to face confrontation.⁶⁹ For example, the Kentucky State Constitution guarantees "face to face" confrontation,⁷⁰ but in *Commonwealth v. Willis*,⁷¹ the Supreme Court of Kentucky allowed the use of one-way closed-circuit television testimony.⁷² Noting that the framers of the constitution could not have foreseen the technological advances facilitating this type of

and be confronted with the witness against him . . ." *Id.* See also *People v. Guce*, 560 N.Y.S.2d 53, 56-57, 164 A.D.2d 946, 947-49 (1990) (holding child witness declared a vulnerable witness could testify via two-way closed-circuit television). See also *People v. Tuck*, 537 N.Y.S.2d 355, 356, 147 A.D.2d 899 (1989) (upholding conviction where seven year old witness testified at a table facing the jury). The North Carolina Constitution states a defendant has the right "to confront the accusers and witnesses with other testimony." N.C. CONST. art. I, § 23. See also *In the Matter of Johnny Stradford*, 119 N.C. App. 654, 660-61, 460 S.E.2d 173, 177 (1995)(allowing a child witness to testify against her alleged abuser via closed-circuit television). See also Merideth Felice Sopher, "The Best of all Possible Worlds": *Balancing Victim's and Defendants' Rights In the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 644 n.120(listing 26 states that statutorily allowed testimony via closed-circuit television in sexual abuse cases).

⁶⁴ CONN. CONST. art. 1, § 8.

⁶⁵ 204 Conn. 683, 529 A.2d 1245 (1987).

⁶⁶ *Id.* at 707, 529 A.2d at 1256.

⁶⁷ *Id.* at 693, 529 A.2d at 1250.

⁶⁸ *Id.* at 707, 529 A.2d at 1256.

⁶⁹ See N.H. CONST. Pt. 1, art. 15, which states in pertinent part: "Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself and counsel." See also *State v. Peters*, 133 N.H. 791, 794, 587 A.2d 587, 588-89 (1991) (holding that the defendant's right to face to face confrontation may yield under public policy considerations).

⁷⁰ KY. CONST. § 11. The Kentucky Constitution states in pertinent part: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process for obtaining witnesses in his favor" *Id.* (emphasis added).

⁷¹ 716 S.W.2d 224 (Ky. 1986).

⁷² *Id.* at 226. This case involved the testimony of a five year old victim of sexual abuse. *Id.* The defendant could see and hear the child witness, but the child witness could not see the defendant. *Id.*

testimony, the court held that the defendant did not have the right to force the victim to look at him.⁷³

VII. THE JOHNSON COURT'S REASONING

In *Commonwealth v. Johnson*,⁷⁴ the Supreme Judicial Court of Massachusetts specifically concentrated on Article Twelve of the Massachusetts Declaration of Rights.⁷⁵ The Supreme Judicial Court noted that the framers of the Massachusetts Declaration of Rights had the opportunity to refer to other state constitutions.⁷⁶ The court acknowledged that many of these constitutions did not contain a clause calling for face to face confrontation.⁷⁷ Despite this, the court noted, the framers of the Massachusetts Declaration of Rights chose to include this explicit and specific language.⁷⁸

The Supreme Judicial Court realized that they could not simply ignore the language of the Declaration of Rights, but had to look at the words chosen and interpret them the only way possible.⁷⁹ In so doing, the court declared that the Massachusetts Declaration of Rights required the defendant and the witness to be actually face to face.⁸⁰

The court, however, limited the face to face requirement.⁸¹ The Supreme Judicial Court stated that although the witness must be face to face with the defendant, the witness does not have to actually look at the defendant.⁸² A judge cannot force a witness to look the defendant in the eye.⁸³

The court in *Johnson* also addresses the differences between the Sixth Amendment of the United States Constitution and Article Twelve of the Massachusetts Constitution.⁸⁴ The court noted that like the Sixth Amendment, Article Twelve would be subject to some necessary exceptions.⁸⁵

⁷³ *Id.* at 230. The court stated that this method of testimony furthered the goals of the confrontation clause because it furthered the truth seeking process. *Id.* In addition, the right to confront does not mean the right to intimidate, and since the defendant could not force the witness to look at him, there was nothing constitutionally infirm about this method of testimony. *Id.* at 231. The court points out that if there was a requirement to look at the defendant, a blind person would not be eligible to testify in court. *Id.*

⁷⁴ 417 Mass. 498, 631 N.E.2d 1002 (1994).

⁷⁵ *Id.* at 501, 631 N.E.2d at 1005.

⁷⁶ *Id.*, 631 N.E.2d at 1005.

⁷⁷ *Id.*, 631 N.E.2d at 1005.

⁷⁸ *Id.*, 631 N.E.2d at 1005.

⁷⁹ *Commonwealth v. Johnson*, 417 Mass. 498, 501-02, 631 N.E.2d 1002, 1005-06 (1994).

⁸⁰ *Id.* at 502-05, 631 N.E.2d at 1005-08.

⁸¹ *Id.* at 502-03, 631 N.E.2d at 1005-06.

⁸² *Id.* at 502, 631 N.E.2d at 1006.

⁸³ *Id.*, 631 N.E.2d at 1006.

⁸⁴ *Commonwealth v. Johnson*, 417 Mass. 498, 503, 631 N.E.2d 1002, 1006 (1994).

⁸⁵ *Id.* at 503-04, 631 N.E.2d at 1006.

Under the Sixth Amendment, however, the defendant's rights could be altered if there was a compelling state interest, but Article Twelve mandated face to face confrontation.⁸⁶

At the end of the analysis, the court emphasized its sympathy for the young victims of child abuse.⁸⁷ Even though the court recognized the need to protect victims it stresses that the protection cannot come at the expense of the defendant's fundamental right to confrontation.⁸⁸ The court pointed out that some other accommodations may be made to help the child witness if there is proof of a compelling need.⁸⁹

VIII. ANALYSIS

The Supreme Judicial Court's decision in *Commonwealth v. Johnson* has had a major impact on cases involving the abuse of young children.⁹⁰ The question is whether the Supreme Judicial Court was justified in denying children the opportunity to testify without facing the alleged abuser.

The analysis of the Supreme Judicial Court in *Johnson* was clear and concise.⁹¹ The court interpreted the words used in Article Twelve literally.⁹² The court placed significant weight on the fact that the framers specifically altered the language used in the United States Constitution and other previously adopted state constitutions.⁹³ The court held that the framers chose clear and unambiguous language, therefore, it was not within their power to alter their meaning.⁹⁴ The court sent a message that they were not willing to alter their strict interpretation of the Massachusetts Constitution no matter how compelling the reason.⁹⁵ The Supreme Judicial Court compared Article Twelve to the Sixth Amendment of the United States Constitution.⁹⁶ The court made the logical conclusion that

⁸⁶ *Id.* at 503, 631 N.E.2d at 1006.

⁸⁷ *Id.* at 504, 631 N.E.2d at 1007.

⁸⁸ *Id.*

⁸⁹ *Commonwealth v. Johnson*, 417 Mass, 498, 504, 631 N.E.2d 1002, 1007 (1994).

Among accommodations mentioned by the court were: counseling before and after testimony, making the environment in which the child testifies less formal, and allowing the child to testify sitting at a forty-five degree angle from the defendant. *Id.*

⁹⁰ See generally *Commonwealth v. Amirault*, 424 Mass. 618, 677 N.E.2d 652 (holding that the defendant's constitutional rights were violated).

⁹¹ See *supra* notes 51-58 (discussing the guidelines of constitutional interpretation followed by the Supreme Judicial Court).

⁹² See *supra* note 51 (addressing the requirement of interpreting words by their plain meaning).

⁹³ See *supra* note 54 (acknowledging that other constitutions simply require confrontation rather than face to face confrontation).

⁹⁴ *Id.*

⁹⁵ See *supra* note 49 (noting that face to face confrontation is essential under Article Twelve of the Massachusetts Constitution).

⁹⁶ See *supra* notes 39-58 (outlining the differences between the Sixth Amendment and Article Twelve).

the Sixth Amendment provides the leeway to allow an exception to the confrontation clause that Article Twelve does not provide.⁹⁷ The court properly followed a strict interpretation of the Massachusetts Constitution rather than alter its analysis to keep up with modern trends.

After *Johnson*, prosecutors are left with the question of how to protect child witnesses from the trauma of testifying. The Supreme Judicial Court clearly stated that they sympathized with these children and that accommodations must be made to assist them in the courtroom.⁹⁸

IX. CONCLUSION

Despite the fact that Massachusetts is one of the strictest states with respect to the confrontation clause, the children have not been forgotten. Other steps can be taken to help protect the children and reduce any trauma. For example the witness cannot be forced to look at the defendant.⁹⁹ Defendants must be able to see the expression of the witness, but this does not mean that are afforded the right to intimidate the witness.¹⁰⁰ Upon a showing of necessity, a prosecutor may have the witness testify at an angle so that the witness is less likely to look at the defendant.¹⁰¹ In addition, a judge is free to alter the environment to cater to the child.¹⁰²

The Supreme Judicial Court correctly chose to secure a defendant's constitutional rights by mandating face to face confrontation. Child abuse is a horrid crime, however, the courts cannot let the hysteria of the moment affect its decisions. The court's decision is necessary to ensure that an innocent defendant will not be wrongly convicted.

Lisa Donahue

⁹⁷ See *supra* note 58 (comparing the Sixth Amendment with Article Twelve).

⁹⁸ *Commonwealth v. Johnson*, 417 Mass. 498, 504, 631 N.E.2d 1002, 1007 (1994).

⁹⁹ See *supra* note 35 (discussing the limitations of the impact of the confrontation clause on the witness).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* One of the best examples is allowing a child to testify at a small table and having the attorneys sit at the table with the child during questioning. See *supra* note 38 (reviewing the decision by a judge to allow a child to testify at a small table).