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# Constitutional Law-Sixth Amendment- Confrontation Clause-Missouri Approves Closed Circuit Television for Transmission of Expert Testimony in a Trial for a Municipal Ordinance Violation

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than the power to regulate under the commerce clause.<sup>58</sup> However, the 1974 amendments were not held inapplicable to the states due to any lack of affirmative power in Congress to reach the terms of employment of state employees. The constitutional limitation in *National League of Cities* prohibits certain federal regulation in spite of the broad reach of the commerce power. It could be argued that the same limitation would operate to bar spending conditioned in such a way as to displace the state functions identified in *National League of Cities* as "essential to their separate and independent existence."

The recognition by the Court that Congress' commerce power is subject to a "state sovereignty" limitation is a significant step toward the preservation of the vitality of our federal system of government. Although the boundary line around the "integral functions" of state and local government is not absolutely defined, identification of the issue in this type of case as being intergovernmental immunity rather than the reach of the commerce power should provide a framework for the further protection of the dual nature of American government. It may be no accident that *National League of Cities* comes at a time when the prevailing political mood contains "anti-Washington" feeling generally directed at the centralized decision-making of the federal bureaucracy. This constitutional limitation safeguards the continued ability of the states to engage in independent decision-making in certain areas of activity. The importance of that ability to the prevention of the abuse of power by the federal government has been recognized, not only in the current political mood, but by the authors of the Constitution.<sup>59</sup>

ANDREW SEE

**CONSTITUTIONAL LAW—SIXTH AMENDMENT—  
CONFRONTATION CLAUSE—MISSOURI  
APPROVES CLOSED CIRCUIT TELEVISION  
FOR TRANSMISSION OF EXPERT  
TESTIMONY IN A TRIAL FOR A MUNICIPAL  
ORDINANCE VIOLATION**

*Kansas City v. McCoy*<sup>1</sup>

Defendant McCoy was charged with violation of a Kansas City, Missouri, municipal ordinance prohibiting the possession of marijuana. Upon conviction in a municipal court, he appealed to a circuit court and obtained a trial de novo. A crime laboratory expert testified that the substance that

58. *United States v. Butler*, 297 U.S. 1, 65 (1936).

59. *The Federalist* No. 51, at 227 (C. Beard ed. 1948) (J. Madison).

1. 525 S.W.2d 336 (Mo. En Banc 1975).

defendant possessed was marijuana. This testimony at both trials was given by closed circuit television, the witness being in the crime laboratory. The expert in the laboratory could see and hear both the judge and questioning counsel; the judge (there was no jury) and counsel in the courtroom could see and hear the expert.<sup>2</sup> Although defendant waived cross-examination of the expert,<sup>3</sup> he objected to the testimony on grounds that it violated the Confrontation Clause of the sixth amendment. Testimony was received over his objection<sup>4</sup> and he was convicted in circuit court.<sup>5</sup> The Missouri Supreme Court affirmed on appeal, holding that the testimony did not violate the Confrontation Clause.<sup>6</sup>

*McCoy* is the first appellate approval in the nation of a prosecutor's use of closed circuit television (CCTV) at trial. CCTV offers several advantages to a prosecutor.<sup>7</sup> Taxpayers' money is saved because witnesses employed by the state do not have to sit in the courtroom through days of trial to give testimony. They can be called to testify at the proper time where they work. Because CCTV can bring the trial to the witnesses, prosecutions do not have to be defaulted because a witness is out of the jurisdiction of the court.

There are disadvantages in using CCTV. Some of these directly affect what the fact finder sees. Inherent in the television process is lack of fine detail<sup>8</sup> and distortion of the subject being televised.<sup>9</sup> The narrow scope of the camera limits what the viewer can see<sup>10</sup> and makes the cameraman an editorialist.<sup>11</sup> Attention span is decreased when watching television.<sup>12</sup> Addi-

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2. *Id.* at 337.

3. *Id.* at 338.

4. *Id.* at 337-38.

5. *Id.* at 337. *McCoy* was given a thirty-day municipal farm sentence.

6. *Id.* at 339.

7. See generally Kornblum, *Videotape in Civil Trials*, 24 HASTINGS L.J. 9, 12-14 (1972); McCrystal, *Videotape Trials: Relief For Our Congested Courts*, 49 DENVER L.J. 463, 478-79 (1973); Comment, *VideoTape Trials: A Practical Evaluation and a Legal Analysis*, 26 STAN. L. REV. 619, 630-31 (1974). Although many of the authorities cited in this note deal with videotape trials and not with CCTV, they have application to the present case because they, too, utilize television for trial testimony, not merely for depositions. Videotape trials are trials in which all of the testimony is videotape. Testimony which is objected to and the judge sustains is deleted. After putting the testimony in a logical order, the resulting edited tape is played back to the jury. For more complete information see Doret, *Trial by Videotape—Can Justice Be Seen To Be Done?* 47 TEMP. L.Q. 228, 232 (1974); McCrystal, *supra* at 466-76; Comment, *supra* at 619-21.

8. Bermant & Jacobovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns About Videotaped Trials*, 26 HASTINGS L.J. 999, 1001 (1975); Doret, *supra* note 7, at 241-42.

9. *Hendricks v. Swenson*, 456 F.2d 503, 508 (8th Cir. 1972) (dissenting opinion); Doret, *supra* note 7, at 243.

10. Doret, *supra* note 7, at 233-34, 241.

11. *Id.* at 233-35, 245.

12. *Id.* at 248; Comment, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. LAW & SOCIAL PROBS. 336, 388 (1973); Comment, *supra* note 7, at 635.

tionally, witnesses atypically relax when faced only with a camera.<sup>13</sup>

Other disadvantages indirectly affect the fact finding process. The witness is not in a "charged" atmosphere which is said to elicit truth.<sup>14</sup> Cultural conditioning of the fact finder to the television medium psychologically influences the impact of televised testimony.<sup>15</sup> With CCTV the witness can not see the jury's reaction to his testimony.<sup>16</sup> This might be important, for instance, if the witness is unduly confident, enhancing his story with unnecessary personal observations to make it more interesting for the jury. He might be more direct and careful with his testimony if he could see that a jury had lost interest in his embellishments.

Television can hurt the court system in ways other than hindering fact determination.<sup>17</sup> For instance, the courts serve useful symbolic and ritualistic functions such as embodiment of justice that transcend one case or decision. It is possible that this function will suffer if a method of communication is used that is associated with entertainment.<sup>18</sup>

CCTV raises several constitutional problems.<sup>19</sup> Because the witness is not physically present in the courtroom, it is questionable whether the defendant is "confronted with the witnesses against him" as the sixth amendment requires. However, guidelines that have emerged from recent Supreme Court cases suggest that the Confrontation Clause does not require that the witness contemporaneously testify in the presence of the fact finder and the defendant in every instance.<sup>20</sup>

Generally, all out of court statements that have been subject to cross-examination are admissible despite a claim of denial of confrontation if the witness is unavailable for trial<sup>21</sup> or is available at trial for contemporaneous cross-examination.<sup>22</sup> In addition there is indication that out of court statements that have not been subjected to cross-examination may be admissible provided they exhibit reliability.<sup>23</sup> Therefore, observation of demeanor as

13. Bermant, Chappell, Crockett, Jacobovitch & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975, 987, 993 (1975); Comment, *supra* note 7, at 630.

14. Doret, *supra* note 7, at 244; Comment, *supra* note 12, at 388.

15. Hendricks v. Swenson, 456 F.2d 503, 508 (8th Cir. 1972) (dissenting opinion); Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1041 (1974); Bermant, *supra* note 8, 1003-04; Doret, *supra* note 7, at 249.

16. Doret, *supra* note 7, at 250.

17. See Barber & Bates, *supra* note 15, at 1041-42; Bermant, *supra* note 8, at 1003-05; Doret, *supra* note 7, at 256-58.

18. Bermant, *supra* note 8, at 1003-05.

19. See generally Barber & Bates, *supra* note 15; Doret, *supra* note 7, at 258-66; Comment, *supra* note 12, at 376-88; Comment, *supra* note 7, at 639-44.

20. The Supreme Court has always held that the Confrontation Clause did not mandate the absence of hearsay. *Mattox v. United States*, 156 U.S. 237 (1895).

21. *Mattox v. United States*, 156 U.S. 237 (1895).

22. *California v. Green*, 399 U.S. 149 (1970).

23. *Dutton v. Evans*, 400 U.S. 74 (1970). The plurality indicated that because of the circumstances, the testimony exhibited "indicia of reliability which have been

the witness contemporaneously testifies, historically one of the reasons for the Confrontation Clause,<sup>24</sup> has diminished importance.<sup>25</sup>

CCTV allows contemporaneous cross-examination of the witness. Thus, it should be at least as acceptable as hearsay that does not violate the Confrontation Clause. Because CCTV does not allow unaltered transmission of the witnesses' demeanor,<sup>26</sup> it differs from live testimony. Inability to see the demeanor of the witness is not prohibited by the Court's current interpretation of the Clause.<sup>27</sup> Therefore, CCTV should be allowable under the Confrontation Clause as a substitute for live testimony.<sup>28</sup> However, the Supreme Court has never been faced with a choice between contemporaneous testimony with observation of demeanor by a jury and contemporaneous testimony with observation of a distorted demeanor. In a case where the verdict hinged on the credibility of one witness whose testimony was presented by CCTV, the Court might find demeanor, which is used to assess credibility, much more important.

Because the witness is testifying only to a cameraman and not to the court and spectators, the sixth amendment right to public trial is possibly violated.<sup>29</sup> The Court has exclusively interpreted the clause as a prohibition of secret trials, trials that are totally isolated from the public eye.<sup>30</sup> CCTV

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widely viewed as determinative of whether a statement . . . may be placed before a jury . . . though there is no confrontation of the declarant." *Id.* at 89. *But see* *Bruton v. United States*, 391 U.S. 123 (1968). In terms of the Confrontation Clause, *Dutton* seems nearly indistinguishable from *Bruton*. However, the *Dutton* plurality distinguished *Bruton* on the basis of the importance of the testimony—testimony against the defendant was "crucial" and in *Dutton* it was not—and the fact that testimony in *Dutton* was admitted under a recognized exception to the hearsay rule and in *Bruton* it was not. 400 U.S. at 86-7. The "crucial" testimony distinction implies that if questionable testimony was "crucial," the Court could more readily find that Confrontation Clause rights were violated regardless of reliability.

24. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *accord*, *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *Barber v. Page*, 390 U.S. 719, 721 (1968).

25. *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 112 n.17, 115 (1970); Comment, *supra* note 7, at 640. *See* *California v. Green*, 399 U.S. 149, 161 (1970).

26. *See* Comment, *supra* note 12, at 381 & n.109; Comment, *supra* note 7, at 623 n.29. *But see* *Hendricks v. Swenson*, 456 F.2d 503, 506 (8th Cir. 1972); *People v. Moran*, 39 Cal. App. 3d 398, 407-08, 114 Cal. Rptr. 413, 418-20 (1974); *Hutchins v. State*, 286 So. 2d 244 (Fla. Ct. App. 1973); *State v. Hewitt*, 86 Wash. 2d 487, 490, 545 P.2d 1201, 1204 (1976); *Barber & Bates, supra* note 15, at 1035; Comment, *supra* note 7, at 623.

27. *See* note 25 and accompanying text *supra*.

28. *See* *Barber & Bates, supra* note 15, at 1035-36; *Doret, supra* note 7, at 260; Comment, *supra* note 12, at 382; Comment, *supra* note 7, at 640-41.

29. *See generally* *Barber & Bates, supra* note 15, at 1036; *Doret, supra* note 7, at 259-61; Comment, *supra* note 12, at 383-85; Comment, *supra* note 7, at 642.

30. *In re Oliver*, 333 U.S. 257 (1948). In *Oliver*, a one-man grand jury (a judge) operating in secrecy summarily convicted defendant for contempt and sentenced him to jail. The Supreme Court held that defendant's right to public trial was violated. The Court claimed that the sixth amendment was included in the Constitu-

trials are not secret trials in this sense. However, the purpose of the prohibition is to stop governmental corruptness that can go unchecked in a secreted situation.<sup>31</sup> Because the public inaccessibility to the physical presence of the witness might invite conduct which the clause protects against, such as prompting out of the camera's eye,<sup>32</sup> the CCTV process could fall within the purview of the right to public trial.

The requirements of procedural due process may also limit CCTV testimony in a criminal prosecution. The question is whether defendant receives a fair trial when CCTV is used.<sup>33</sup> Arguably defendant does not, because it distorts the accuracy of the visual component of input to the fact finder.<sup>34</sup> The Court has found due process violated only when the defendant has demonstrated that some procedure causes bias or at least inherently probable bias.<sup>35</sup> Given the subtle ways in which CCTV interferes with the information flow, it is questionable whether such bias can be shown.<sup>36</sup> Again, if the credibility of the testimony of a key witness against the defendant was important, the Court might find the disadvantages of CCTV as indicative of the necessary bias.<sup>37</sup>

In *McCoy* the Missouri Supreme Court limited its holding to finding that CCTV testimony by an expert witness in a prosecution for a municipal ordinance violation did not infringe on Confrontation Clause rights.<sup>38</sup> But the majority impliedly left room for expansion of the use of CCTV by not

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tion because of the distrust of secret trials made notorious by the Spanish Inquisition, the English Court of Star Chamber, and the French *lettre de cachet*. *Id.* at 268-69. See Barber & Bates, *supra* note 15, at 1036.

31. *In re Oliver*, 333 U.S. 257, 270-71 (1948). See Comment, *supra* note 7, at 642.

32. This is suggested by the *McCoy* dissent's statement:

We do know that there were four people in the room with the witness who were not shown on television, and there was no representative of the defendant there at all.

525 S.W.2d at 340. See text accompanying note 41 *infra*.

33. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955); Comment, *supra* note 7, at 639.

34. See notes 8-13, 26 and accompanying text *supra*. Alternatively, it might be found unfair that the loss of the courtroom "charged atmosphere" lessens the incentive for truth telling. See Doret, *supra* note 7, at 244.

35. *Estes v. Texas*, 381 U.S. 532, 542 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *In re Murchison*, 349 U.S. 133 (1955).

36. See Comment, *supra* note 7, at 639. *But see* *Estes v. Texas*, 381 U.S. 532, 544 (1965), where the Court stated while speaking of publically televised trials:

Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in *Murchison*, *Tumey*, *Rideau*, and *Turner*. Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed.

37. *But see* *People v. Moran*, 39 Cal. App. 3d 398, 410-11, 114 Cal. Rptr. 413, 420 (1974).

38. 525 S.W.2d at 339.

acknowledging any of its disadvantages. Instead, the majority praised CCTV as a new innovation that could "project the image and voice of man clearly and distinctly"<sup>39</sup> and would allow "examination and cross-examination of the witness as much so as if he were there in person."<sup>40</sup> In contrast, the dissent noted several disadvantages of CCTV, including having people in the room with the witness not shown on television, allowing no handling of exhibits between either counsel and the witness, and presenting altered demeanor of the witness.<sup>41</sup> The dissenters stated that the facts of the case did not clearly raise the problems of CCTV with respect to Confrontation Clause rights,<sup>42</sup> and that because the analysis of marijuana was not contested, error, if any, was harmless.<sup>43</sup> Nonetheless, the dissent pointed out, the majority opinion served as an approval of CCTV in a "test case" for the validity of its use.<sup>44</sup>

The Missouri Supreme Court's decision is constitutionally sound under the facts of this case. As the majority noted, an expert's analysis which is admitted under an official certificate exception to the hearsay rule has been found not to violate the Confrontation Clause.<sup>45</sup> As previously discussed, CCTV should be as acceptable as hearsay that is properly admissible under the Clause. Additionally, the expert in *McCoy* testified to facts that were uncontroverted.<sup>46</sup> The United States Supreme Court has indicated that unless testimony is "crucial," denial of Confrontation Clause rights could be harmless error.<sup>47</sup> Although the Court has spoken only of cumulative testimony as being not crucial,<sup>48</sup> uncontested testimony is similarly not crucial.

Because *McCoy* involved uncontested expert witness testimony, the use of CCTV passes constitutional muster. Extension of the use of CCTV beyond the circumstances approved in *McCoy*, however, should not be regarded lightly. The use of CCTV for testimony of a key prosecution witness would expose the disadvantages of CCTV and invite constitutional prohibition.

A. WAYNE CAGLE, JR.

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39. *Id.*

40. *Id.*

41. *Id.* at 340-41.

42. *Id.* at 340.

43. *Id.*

44. *Id.* at 341.

45. *Kay v. United States*, 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825 (1958); *Commonwealth v. Harvard*, 356 Mass. 452, 253 N.E.2d 346 (1969).

46. See notes 3 and 43 and accompanying text *supra*.

47. *Dutton v. Evans*, 400 U.S. 74, 87 (1970).

48. *Id.*