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## Confrontation Clause

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satisfied the clear and convincing evidence requirement of article 65. He noted that the trial judge is in the best position to document the child witness' psychological state for purposes of determining whether he or she should testify by closed-circuit television. In this case, the judge would have upheld the defendant's conviction, noting that the trial judge documented ample evidence that the child was eligible for article 65 protection.<sup>80</sup>

## SUPREME COURT, APPELLATE DIVISION

### SECOND DEPARTMENT

People v. Henderson<sup>81</sup>  
(decided April 16, 1990)

The defendant, convicted of sodomy in the first degree, sexual abuse in the first degree and endangering the welfare of a child, asserted that her right to confront witnesses as guaranteed under both the state<sup>82</sup> and federal<sup>83</sup> constitutions was violated when the trial judge permitted, pursuant to article 65 of the state's Criminal Procedure Law,<sup>84</sup> two complaining child witnesses to testify by live two-way closed circuit television. While noting that the court of appeals recently held that article 65 contains sufficient safeguards to withstand a facial challenge on confrontation clause grounds, the second department held that as applied to the defendant, it was violative of his confrontation rights.<sup>85</sup>

Prior to defendant's trial, the court, pursuant to section 65.20 of the New York Criminal Procedure Law,<sup>86</sup> granted the prose-

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80. *Id.*, at 272-76, 551 N.E.2d at 575-78, 552 N.Y.S.2d at 82-85 (Bellacosa, J., dissenting).

81. 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dep't), *appeal denied*, 76 N.Y.2d 736, 557 N.E.2d 1194, 558 N.Y.S.2d 898 (1990).

82. N.Y. CONST. art. I, § 6.

83. U.S. CONST. amend. VI.

84. N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1991).

85. *Henderson*, 156 A.D.2d at 97, 554 N.Y.S.2d at 927.

86. N.Y. CRIM. PROC. LAW § 65.20 (McKinney 1982 & Supp. 1991).

cution's motion to hold a separate hearing to decide whether the two complaining child witnesses were "vulnerable" witnesses as defined by the provisions of article 65.<sup>87</sup> The children, a ten year old boy and eleven year old girl, were respectively five and six years old at the time of the incident.

Subsequently, a hearing was held and an expert witness, a social worker experienced in the field of child sexual abuse, testified that each child would benefit if permitted to testify through the use of two-way closed-circuit television. The expert witness based her opinion on several observations made during two separate interviews with the children. She noted that the boy "was reluctant to talk about the incident, explaining that he 'felt bad' and [that] 'it was nasty' . . . ."<sup>88</sup> She further testified that discussion of the defendant "gave [the boy] a stomach ache, and he was afraid that she was going to send monsters to get him."<sup>89</sup> Accordingly, her professional opinion was that the boy would benefit from article 65 protection on the basis that he was frightened and angry towards the defendant, that he continued to have nightmares, that the defendant was an authority figure, and that there were multiple incidents of sexual abuse.

With regard to the girl, the expert witness opined that she would also benefit from article 65 protection. While stating that she was not as vulnerable as the boy, the expert noted that the girl "was fearful of the defendant, and thinking about what the defendant did to her and what she saw the defendant do to [the boy] made her nauseous."<sup>90</sup> The expert also noted that the girl experienced sleeping and eating disorders. Based on the expert's testimony, the trial court ruled that the children should be permitted to testify by closed circuit television, outside of the courtroom setting and defendant's presence.

On appeal, the second department held that the expert testimony failed to establish, by clear and convincing evidence, that the children would likely suffer extreme mental and emotional

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87. For a discussion of these provisions *see supra* notes 39-52 and accompanying text.

88. *Henderson*, 156 A.D.2d at 94, 554 N.Y.S.2d at 925.

89. *Id.*

90. *Id.* at 95, 554 N.Y.S.2d at 925.

harm as a result of testifying in the courtroom and in the presence of the defendant.<sup>91</sup> Since this burden was not met, the court ruled that the defendant's confrontation rights provided under the state and federal constitutions were infringed upon by the trial court's grant of article 65 protection to the child witnesses.

Pursuant to section 65.10 of the New York Criminal Procedure Law, a trial court must find, by clear and convincing evidence, that "as a result of extraordinary circumstances,"<sup>92</sup> a child witness will suffer severe mental or emotional harm if required to testify in court and in the presence of the defendant.<sup>93</sup> The court stated that the element of extraordinary circumstances required the trial court to determine whether this particular child witness, as opposed to all children similarly victimized, will suffer severe mental and emotional harm solely from testifying in court and in the presence of the defendant. The court added that the trial court must also find that the use of closed-circuit television would likely spare the child from this severe mental and emotional harm.<sup>94</sup>

The appellate court determined that the trial court failed to show that there were any extraordinary circumstances which would lead the complaining witnesses to be any different from any other child who was victimized by sexual abuse. The court stated that the expert witness' testimony left "the impression that she is of the opinion that all child witnesses in sexual abuse cases are vulnerable, that is, are subject to severe mental and emotional harm if forced to testify in open court in the presence of the alleged perpetrator."<sup>95</sup> The court explained that the expert believed that "all sexually abused children would benefit by testifying outside of the accused's presence and outside of the imposing atmosphere of a courtroom."<sup>96</sup> While noting that all children

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91. *Id.* at 101, 554 N.Y.S.2d at 929.

92. N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney Supp. 1991).

93. *Henderson*, 156 A.D.2d at 98-99, 554 N.Y.S.2d at 927-28 (citing N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney Supp. 1991)).

94. *Id.* at 99, 554 N.Y.S.2d at 928 (citing N.Y. CRIM. PROC. LAW § 65.20(2) (McKinney Supp. 1991)).

95. *Id.*

96. *Id.*

would clearly benefit from allowing them to testify by closed circuit television, the court determined that the expert's assessment failed to satisfy the particularization requirement set forth in *Coy v. Iowa*<sup>97</sup> and *People v. Cintron*.<sup>98</sup> In *Henderson*, because the defendant's confrontation rights were not adequately protected, the appellate court ordered a reversal of defendant's conviction and remanded the case for retrial.

People v. Costa<sup>99</sup>  
(decided April 16, 1990)

The defendant, convicted of endangering the welfare of a child, contended that his confrontation rights under the state<sup>100</sup> and federal<sup>101</sup> constitutions were violated when the trial judge, pursuant to article 65.00(2),<sup>102</sup> ruled that the complaining child witness was "vulnerable,"<sup>103</sup> thus permitting him to testify by use of two-way closed-circuit television. The court held that the defendant's confrontation rights under the state and federal constitution were violated.<sup>104</sup>

The trial court based its ruling solely on observations of the child while he testified in court and while he was present in an *in camera* conference.<sup>105</sup> The court observed that the child cried

97. 487 U.S. 1012 (1988). For a more detailed discussion of the federal law on this case, see *supra* notes 62-67 and accompanying text.

98. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).

99. 160 A.D.2d 889, 554 N.Y.S.2d 930 (2d Dep't), *appeal denied*, 76 N.Y.2d 786, 559 N.E.2d 685, 559 N.Y.S.2d 991 (1990).

100. N.Y. CONST. art. I, § 6.

101. U.S. CONST. amend. VI.

102. N.Y. CRIM. PROC. LAW § 65.00(2) (McKinney Supp. 1991); see *supra* notes 39-52 and accompanying text for a discussion of article 65 provisions.

103. *Id.* ("'Vulnerable child witness' means a child witness whom a court has declared to be vulnerable."); see *supra* notes 44-48 and accompanying text for a discussion of what constitutes "vulnerable."

104. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931.

105. *Id.* at 889, 554 N.Y.S.2d at 931. "A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACK'S LAW DICTIONARY 760 (6th ed. 1990).