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KANSAS ASSOCIATION FOR JUSTICE

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The Loneliness of the Kansas Constitution

By Daniel E. Monnat & Paige A. Nichols

***Daniel E. Monnat** of Monnat & Spurrier, Chtd., has been a practicing criminal defense lawyer for the past 35 years in his hometown of Wichita, Kan. A cum laude graduate of California State University, San Francisco, he received his J.D. from the Creighton University School of Law. Monnat frequently lectures throughout the United States on a variety of criminal defense topics and has been listed in The Best Lawyers In America for two decades. He has also been listed as one of the top 100 Super Lawyers for Kansas and Missouri for 2009.*

Monnat is a past two-term president of the Kansas Association of Criminal Defense Lawyers, a former member of the Board of Directors of the National Association of Criminal Defense Lawyers, a member of the KsAJ Board of Governors and Executive Committee, a graduate of the Gerry Spence Trial Lawyer's College, a Fellow of the American College of Trial Lawyers and the Litigation Counsel of America.

***Paige A. Nichols** has been writing motions and appellate briefs on behalf of criminal defendants for over 17 years. She received her J.D. from Northeastern University in Boston, and an LL.M. in criminal law from the University of Missouri–Kansas City. She lives and works in Lawrence, Kan.*

[G]iven the right research and arguments, a Kansas court will one day recognize the differences between the state and federal confrontation clauses, and conclude that the Kansas clause is more protective.

Editor's note: This is part 2 of The Loneliness of the Kansas Constitution. In part 1, published in the September 2010 Journal, the authors encouraged litigants and the courts to adopt a more robust independent state-constitutional jurisprudence. In this installment, they walk readers through the process of constructing a state constitutional argument.

Introduction

Your client's criminal trial is pending and the prosecutor has notified you that she intends to obscure the face of an important witness at trial, or to present the testimony of a child complainant or a laboratory technician via closed-circuit television or Internet-based videoconferencing. You have read the federal cases, and you are not sure whether you can win a federal constitutional argument that trial testimony, by an obscured or remote witness, would violate your client's Sixth Amendment confrontation rights. But what about the Kansas constitution?

Might you make an alternative argument that the confrontation clause in the Kansas Bill of Rights is even more protective of face-to-face, unobscured, in-the-same-room-as-the-accused cross-examination than its federal counterpart? This article will suggest a few ways a lawyer might go about answering that question and presenting the state constitutional claim to a Kansas court.

Admittedly, the Kansas appellate courts have previously assumed that state and federal confrontation rights are coextensive.[1] But we believe that given the right research and arguments, a Kansas court will one day recognize the differences between the state and federal confrontation clauses, and conclude that the Kansas clause is more protective.[2] And while we focus here on the Kansas confrontation clause, our hope is to inspire similar research into the meaning and independent force of whichever Kansas constitutional provision may be relevant in your case.

Text

The starting point for any constitutional analysis is, of course, the text of the provision at issue. While a textual difference is not necessary to justify reading a state constitution differently from the federal constitution,[3] it certainly helps. The

Kansas Bill of Rights § 10	Sixth Amendment
"In all prosecutions, the accused shall be allowed . . . to meet the witness face to face."	"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

text of the confrontation clause in the Kansas Bill of Rights differs from its federal counterpart in one essential way. It guarantees not just confrontation, but "face to face" confrontation (see table above).

Whether this difference matters depends in part on how the United States Supreme Court has interpreted the federal right. If the Sixth Amendment were viewed as *implicitly* guaranteeing face-to-face confrontation, then it would be harder (although not at all impossible) to argue that the Kansas constitution's *explicit* guarantee weighed in favor of interpreting the state provision more protectively. But the High Court has declared that the Sixth Amendment expresses only a "preference" for face-to-face confrontation, subject to exceptions in certain cases.[4] Given the plain language of the Kansas provision, we can argue that the Kansas framers intended not simply to prefer, but rather to guarantee a certain manner of confrontation. And thus our textual reading suggests that—unlike the federal constitution—the Kansas constitution protects face-to-face confrontation rights *without exception*.

Kansas history

Why did the Kansas framers adopt the "face to face" language in Section Ten, instead of simply adopting the language of the Sixth Amendment? It would strengthen our argument if we had evidence that the framers deliberately rejected the federal language for fear that it was underprotective. Few of us have the training or patience to perform such historical research. Fortunately, many resources are now available online from, among other collections, the Kansas Historical Society.[5] A day or two spent following links from the KHS site can be quite fascinating and rewarding. For instance, we can quickly learn that one of the rejected Kansas constitutions, Lecompton (the second constitution), which would have followed the federal proslavery example, included a confrontation clause similar to the federal clause.[6] But the face-to-face guarantee appeared in both the Topeka constitution (the first constitution) and the Wyandotte constitution (the final constitution).[7]

This discovery raises the question why, after the Lecompton drafters introduced the federal-like confrontation language, Kansans ultimately rejected that language in favor of an explicit face-to-face guarantee? Was this simply part of a wholesale rejection of the Lecompton proslavery constitution? Or did it arise from a more specific concern about confrontation rights?

In hopes of answering this question, we might turn to the Kansas Constitutional Convention (a reprint of the Wyandotte Constitutional Convention's proceedings and debates), which is now available online in a searchable pdf format.[8] Unfortunately, searches of the entire 771-page document for instances of "face to face," "the accused shall be allowed," and "confronted with the witnesses" shed no light on the subject. There appear to have been no recorded discussions of the confrontation clause or mention of the Lecompton (or federal) confrontation language.

Without more in-depth historical research (which may or may not be fruitful), our best historical argument appears to be that Kansans were clearly familiar with the federal language, and yet adopted a confrontation clause that on its face appears more protective. Had our founders wished to align the Kansas clause with the federal one, they could easily have adopted the Lecompton language in the Wyandotte constitution. And we have learned one other useful thing: The historical record we have reviewed thus far does not contain any evidence *conflicting* with our theory that the Kansas confrontation clause should be read independently of, and as more protective than, its federal counterpart.

Kansas cases

As was pointed out in Part I of this article, the Kansas Supreme Court only began interpreting the Kansas constitution in lockstep with the federal constitution after the 1960s—that is, after the United States Supreme Court began to hold that states were bound by selected provisions of the federal Bill of Rights.[9] This pattern holds true as to the confrontation clause. In 1965, the United States Supreme Court decided *Pointer v. Texas*, holding that the Sixth Amendment's confrontation guarantee "is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[10]

Of course, the *Pointer* court said nothing about how the Kansas (or any other state's) confrontation clause was to be enforced. Nonetheless, not long after *Pointer*, the Kansas Supreme Court began interpreting the two clauses in lockstep, and eventually our Court of Appeals concluded that our explicit "face to face" *guarantee* was subject to the same exceptions as the federal implicit "face to face" *preference*.[11]

How might the Kansas confrontation clause have evolved absent this federal influence? A Westlaw search for "face to face" in Kansas cases predating *Pointer* finds no hint of anything but an absolutist position when it came to the "face to face" requirement. In other words, confrontation—when it was required—had to be conducted in the defendant's physical presence. One case expressing this position is *State v. Tomblin*, decided in 1897.[12]

Defendant Tomblin was charged with financial crimes, and his lawyer deposed an out-of-state witness before trial. The trial court allowed the State to introduce the deposition at trial. On appeal, the Kansas Supreme Court held

that admission of the deposition violated Tomblin's state constitutional right to confrontation. The Court noted that the defendant had not been "personally present" during the deposition, and concluded that even though he "had caused the deposition to be taken… he still had the right to insist on confronting every witness who should testify against him at the trial, face to face. This constitutional guaranty is one of the most important safeguards to the citizen when charged with crime, and no court has any right to abridge or deny it."[13]

What, exactly, did "face to face" mean in 1859?

We have assumed so far that face-to-face has a certain meaning: within a reasonable visual proximity, facing each other openly, while physically present in the same space. It is a type of confrontation that by definition cannot be satisfied when the witness' actual face is obscured or not even in the room. But words and phrases can change over time, and so at some point we may wish to confirm what the phrase meant when the Kansas framers adopted it.

For this project, we might turn to online sources like OneLook and Bartleby.com.[14] OneLook is a one-stop search engine that will, according to the site, look for a word or phrase in 1,062 indexed dictionaries. A search for "face to face" yields results in several modern dictionaries and one result in a dictionary published somewhat contemporaneously with the adoption of the Kansas constitution. The 1898 Dictionary of Phrase & Fable defines "face to face" exactly as we understand it today: "In the immediate presence of each other; two or more persons facing each other. To accuse another 'face to face' means not 'behind his back' or in his absence, but while present."[15]

Bartleby.com, an Internet publisher of "literature, reference and verse," is another useful source. Here one can discover many mid-1800 literary instances of "face to face," including at least two appearances in David Copperfield (originally published in 1850), both times to mean nothing less than in each other's physical presence—literally face to face.[16]

Will this research make a difference to the outcome of the argument? Perhaps not, but at least we are better prepared to respond if our opponent questions the historical meaning of the phrase.[17]

Other states

Kansas is not the only state whose confrontation clause appears to be more protective than the federal clause. By one author's count, there are eighteen other states whose constitutions explicitly guarantee (or at one time guaranteed) "face to face" confrontation.[18] The courts of several of those states have held that, at least in some contexts, this textual difference merits viewing the state constitution both separately and more protectively.[19] The Kansas courts often look to other states for persuasive authority, and we should not hesitate to invoke the helpful opinions of courts interpreting constitutional language similar to our own.

Public policy

No matter how strong a constitutional argument is textually, historically, or jurisprudentially, no court will wish to adopt it if it appears contrary to the public interest. Many state courts take public-policy arguments into account when interpreting their state constitution.[20] In our case, those arguments might include both the benefits of face-to-face confrontation and the absence of any risks that can reasonably be said to outweigh the imperative of the state constitutional right.

The benefits of literal face-to-face confrontation have been recited many times but bear repeating. As the Massachusetts Supreme Court has said (explaining the value of that state's "face to face" guarantee): "The witness who faces the accused and yet does not look him in the eye when he accuses him may thereby cast doubt on the truth of the accusation."[21]

United States Supreme Court Justice Scalia has likewise emphasized that the "very object" of confrontation "is to place the witness under the sometimes hostile glare of the defendant. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."[22]

Objections to face-to-face confrontation can easily be predicted and rebutted. For instance, we can anticipate an argument that requiring state laboratory analysts to appear live in court rather than by videoconference will place too heavy a burden on the state. Our response to that claim might be to search for other states in which those analysts are made by statute or court decision to appear live, and to show that "there is no evidence that the criminal justice system has ground to a halt" in those jurisdictions.[23] Additionally, it is not clear what is so unique about analysts. If *they* may appear at trial by videoconference, why not police officers, eyewitnesses, and even the complainants themselves, until we are conducting entire trials by Skype?[24] This sort of slippery-slope argument may help demonstrate the folly of creating classes of witnesses who are exempt from face-to-face confrontation.[25]

Another objection we can anticipate is that young complainants will suffer psychological trauma if made to testify in the same room as the accused. Rebutting this argument may at first blush seem difficult (or simply distasteful). But if we are bold enough to question the premise, we may discover that it's simply not true. Our own experiences tell us that young children can be prepared to testify competently in a criminal trial, and our research confirms that their experience doing so is not necessarily damaging, and may in fact be therapeutic.[26]

In making this argument, we might also suggest alternative procedures that will help protect the young witness without depriving the defendant of face-to-face confrontation. "By way

of example, a judge may require that the environment in which a witness is to give testimony be made less formal and intimidating, and that, before and after testimony is given, appropriate courtsupervised counselling service be made available to a witness demonstrably in need of such help."[27]

As the above examples suggest, policy arguments often rely on surveys, statistical research, and social science. These arguments might be better developed in an amicus brief by a willing scholar or organization with relevant knowledge and access to the supporting research. The Kansas courts have traditionally welcomed amicus briefs,[28] and we should consider recruiting appropriate amici as part of our constitutional-litigation strategy.

Conclusion

Constructing a state constitutional argument requires a great deal of creative research and advocacy. Because our courts are so entrenched in the lockstep approach, we first have to convince them that the Kansas constitution is worthy of their independent attention.[29] We then must be prepared to address what our constitution says, what that language means, and how and why it should be interpreted in our client's favor. While some research avenues may be more fruitful for some claims than for others, we hope that the above tools will help counsel begin to lay the groundwork for a strong argument. It is, after all, our duty to help our courts see the Kansas constitutional light: "The imaginative lawyer is still the fountainhead of our finest jurisprudence."[30] ▲

ENDNOTES

1 *See State v. Blanchette*, 35 Kan. App. 2d 686, 699, *rev. den.* (2006).

2 We might also urge our courts to find the Kansas clause more protective on grounds that the United States Supreme Court appears to be retreating from the confrontation-protective position it took in *Crawford v. Washington*, 541 U.S. 36 (2004). *See Michigan v. Bryant*, No. 09-150, 2011 WL 676964, at *20-29, ___ U.S. ___ (Feb. 28, 2011) (Scalia, J., dissenting and noting that majority's ruling on confrontation question receded from *Crawford* in at least two significant ways). *See also* Part I of this article, Daniel E. Monnat & Paige A. Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Ass'n for Justice 10, 12, n.34 (2010) (noting that the Kansas Supreme Court has hinted that it might resort to state constitutionalism when the United States Supreme Court has "retreated" from a protective position previously held by that Court).

3 *See State v. Dubose*, 699 N.W.2d 582, 597 (Wis. 2005) ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary."); Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses, 1–48, n.200 (4th ed. 2006) ("Differences of text, history, or other factors, though they are important in guiding an independent interpretation, are not necessary to justify one.").

4 *See, e.g., Maryland v. Craig*, 497 U.S. 836, 849 (1990) ("our precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial") (emphasis in original). Not every member of the Supreme Court agrees with this proposition. *See Craig*, 497 U.S. at 862 ("[T] he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation") (Scalia, J., dissenting). And it remains to be seen whether this proposition is still good law after *Crawford v. Washington*, 541 U.S. 36 (2004). *See, e.g.,* Marc C. McAllister, *The Disguised Witness and Crawford's Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. 481 (2010) (questioning "whether *Craig* and *Crawford* can legitimately coexist"). But as long as the Supreme Court's current jurisprudence interprets the federal clause as guaranteeing something less than "face to face" confrontation, that less-protective interpretation will lend support to any argument that the Kansas clause must be interpreted independently, and as more protective than the federal clause.

5 *See* http://www.KSHS.org. This is not to discourage lawyers from getting out of their offices and taking a stroll to the local law or other library. With apologies to all of the live librarians who have patiently helped the authors over the years, this article suggests online resources in hopes of aiding lawyers who are precluded by time or geography from visiting an old-fashioned brick-and-mortar library.

6 Lecompton Const. Bill of Rights § 8 (1857) ("In all criminal prosecutions, the accused has a right . . . to be confronted by the witness or witnesses against him."), as printed in D.W. Wilder, The Annals of Kansas 187 (1868). Excerpts from The Annals of Kansas may be read online via either http://www.territorialkansasonline.org or http://www.kansasmemory.org.

7 Topeka Const. Bill of Rights § 10 (1855) ("In any trial, in any court, the party accused shall be allowed… to meet the witnesses face to face."), as printed in The Annals of Kansas, *supra* note 6 at 92; Wyandotte Const. Bill of Rights § 10 (1859) (""In all prosecutions, the accused shall be allowed… to meet the witness face to face."), as printed in The Annals of Kansas, *supra* note 6 at 264.

8 Kansas Constitutional Convention (1859), available online at http://www.archive.org/details/kansasconstituti00kans.

9 *See* Part I of this article, *supra* note 2 at 11.

10 380 U.S. 400, 406 (1965).

11 The Kansas Supreme Court initially appeared to conclude that confrontation arguments under the newly incorporated federal constitution were of no additional consequence, because the Kansas constitution was already amply protective. *See State v. Fisher*, 222 Kan. 76, 80 (1976) ("The Sixth and Fourteenth Amendments grant no greater protection to the accused in this respect than does Section 10 of the Bill of Rights of the Kansas Constitution…"). But now the appellate courts appear to take the opposite view, finding confrontation arguments under the Kansas constitution of no additional consequence, and focusing instead on the federal constitution and cases. *See Blanchette*, *supra* note 1; *State v.*

Chisholm, 250 Kan. 153 (1992).

12 57 Kan. 841, 48 P. 144 (1897).

13 *Id*., 48 P. at 145.

14 *See* http://onelook.com and http://bartleby.com/.

15 E. Cobham Brewer, Dictionary of Phrase and Fable (1898) (accessed via OneLook and Bartleby.com).

16 Charles Dickens, David Copperfield (1950), Chapter XL, The Wanderer (describing a chance literal "face to face" encounter with a family servant), and Chapter XVIII, A Retrospect (describing standing literally "face to face" with a bully the narrator has resolved to fight).

17 The United States Supreme Court has long recognized the historical use of the phrase in reference to confrontation rights, but has not, apparently, discussed the literal meaning of the phrase. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 140-41 (1999) (observing that "[t]he right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and 16th and 17th century British statutes, cases, and treatises") (Thomas, J., concurring). This omission may suggest that the literal meaning is so obvious it needs no discussion.

18 Sarah M. Dunn, *"Face to Face" with the Right of Confrontation: A Critique of the Supreme Court of Kentucky's Approach to the Confrontation Clause of the Kentucky Constitution*, 96 Ky. L.J. 301, 317 & n.80 (2007–2008) (collecting state provisions).

19 *See People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994) ("Unlike its Federal counterpart . . . article I, section 8, of the Illinois Constitution clearly, emphatically and unambiguously requires a 'face to face' confrontation."), *negated by constitutional amendment as stated in People v. Lofton*, 740 N.E.2d 782, 790 (Ill. 2000); *Brady v. State*, 575 N.E.2d 981, 98688 (Ind. 1991) ("The Indiana Constitution recognizes that there is something unique and important in requiring the face-to-face meeting between the accused and the State's witnesses as they give their trial testimony."); *Commonwealth v. Ludwig*, 594 A.2d 281, 284 (Pa. 1991) ("Unlike its federal counterpart, Article 1, Section 9, of the Pennsylvania Constitution does not reflect a 'preference' but clearly, emphatically and unambiguously requires a 'face to face' confrontation."), *negated by constitutional amendment as stated in Commonwealth v. Geiger*, 944 A.2d 85, 94-95 (Pa. Super. 2008); *State v. Clark*, 964 P.2d 766, 771 (Mont. 1998) ("The framers of the Montana constitution appreciated these safeguards and saw fit to distinguish our Confrontation Clause from the United States Constitution by insuring a criminal defendant the right 'to meet the witnesses against him face to face.'"); *cf. Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 (Mass. 1988) (distinguishing Massachusetts constitution from those of other states, and holding that "[t]he Massachusetts Declaration of Rights, which was adopted after these documents, was the first to use the language 'to meet the witnesses against him face to face.' …Presumably, the framers of our State Constitution were aware of the other States' provisions and chose more explicit language to convey unequivocally their meaning.").

20 *See, e.g., State v. Williams*, 459 A.2d 641, 650 (N.J. 1983) (reading state constitution through lens of "strong public policy," among other factors); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (directing litigants making independent state constitutional arguments to brief and analyze "policy considerations," among other factors); *State v. Jewett*, 500 A.2d 233, 237 (Vt. 1985) (advising attorneys making state constitutional arguments to use "economic and sociological materials," as well as "ethical" types of arguments); *State v. Geisler*, 610 A.2d 1225, 685-86 (Conn. 1992) (holding that "economic/sociological considerations" should be "considered to the extent applicable" in construing state constitution), *abrogated on other grounds by State v. Brocuglio*, 826 A.2d 145 (Conn. 2003).

21 *Commonwealth v. Amirault*, 677 N.E.2d 652, 662 (Mass. 1997).

22 *Craig*, *supra* note 4 at 866 (internal quotation marks and citation omitted) (Scalia, J., dissenting).

23 *See Melendez-Diaz v. Massachusetts*, ___U.S. ___, 129 S.Ct. 2527, 2540-41 (2009) (rejecting similar argument based on statistics offered in amicus brief). The *Melendez-Diaz* Court held that lab analysts whose findings are introduced in criminal cases must appear at trial and be subject to cross-examination; the Court seemed to assume (but did not say) that such an appearance would be live (as opposed to electronic).

24 Justice Scalia expressed this very concern recently at oral argument in a confrontation case to be decided this term. Transcript of oral argument at 4-5, *Bullcoming v. New Mexico*, No. 09-10876 (argued Mar. 2, 2011), transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/0910876.pdf. At issue in *Bullcoming* is not whether an analyst may appear by videoconferencing, but rather whether the analyst's report may be admitted through a substitute witness.

25 *See* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 Calif. L. Rev. 1469, 1470 (1999).

26 *See*, *e.g.*, Jonathan Scher, *Outofcourt Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: a Confrontation Clause Analysis*, 47 Fam. Ct. Rev. 167 n.24 (2009) (noting that "a serious question exists as to the extent to which involvement in the legal process is traumatic for the child"); Katherine W. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. Rev. 467, 490 (2004) (reporting that "some social scientists and legal scholars believe that children may find open court testimony to be therapeutic"); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 519-20 (2004) (former prosecutor reporting that "prosecutors in many jurisdictions have learned that children can in fact be enabled to testify and be available for cross-examination"); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 Mich. L. Rev. 1709, 1724-25 (1990) (noting that "the degree to which legal proceedings traumatize children is little understood and exceptionally complex," and reporting that "psychological research suggests that some children actually benefit from testifying by feeling empowered by their participation in legal proceedings").

27 *Bergstrom*, *supra* note 19 at 378.

28 *See, e.g., State v. Limon*, 280 Kan. 275 (2005) (relying on amicus briefs from social workers and public-health organizations to examine constitutional challenge to statute in light of real-world facts); *Montoy v. State*, 279 Kan. 817 (2005) (landmark school-finance case in which Court accepted 15 amicus briefs).

29 *See* Part I of this article, *supra* note 2 at 10.

30 *Jewett*, *supra* note 20 at 237.