PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES

A Report of the American Bar Association Child Sexual Abuse Law Reform Project

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National Legal Resource Center for Child Advocacy and Protection

Josephine Bulkley
Project Director

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A Program of the Young Lawyers Division

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Laurie S. Boerma

HOW TO OVERCOME BARRIERS AND TO DEVELOP CREATIVE AND INNOVATIVE APPROACHES IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES.

Introduction

In the past several years, the criminal justice system has experienced a startling and dramatic increase in the number of child sexual abuse cases being reported for investigation and potential prosecution. Heightened public awareness has brought about increased reporting of sexual and physical abuse both to the criminal justice system and medical-social service professionals. Mandatory reporting laws requiring all professionals who deal with children to report cases of suspected child abuse to local children and youth agencies, who in turn must report to law enforcement officials, has also contributed to the increased caseload.

Unlike any other criminal case, the prosecution of child abuse cases requires the prosecutor to have a thorough understanding of the medical and psycho-social issues of sexual abuse of children, as well as basic principles of child development. In order to avoid greater trauma to the child and family, the traditional legal approaches which work unfairly against children have to be modified.

It is the purpose of this paper to identify some of the barriers currently existing which are preventing the criminal justice system from more effectively investigating and prosecuting cases of child sexual abuse. This paper will also discuss innovative prosecutorial approaches for investigation and disposition of child sexual abuse cases.

Team approach

For many years sexual abuse of children, although a crime in all states, has been viewed as a mental disorder or in cases of intra-family sexual abuse, as a symptom of family dysfunctioning, rather than a criminal act. At the same time the law enforcement system has been seen as a punitive and retributive process lacking in sensitivity and responsiveness to the victim and family. Fortunately, the people who share these views are now in the minority. In most jurisdictions there is a recognition that child sexual abuse is a crime, and secondly, a

recognition by police and prosecutors that only by working with the other disciplines will more successful prosecution be insured with less trauma to the victim. However, the mere recognition by law enforcement and medical-social service professionals that increased cooperation among themselves is necessary will not produce a change. Key professionals in each community must take the initiative and start the process to ensure that there is collaboration among agencies. Through this cooperative effort not only are many barriers to successful prosecution eliminated, but further trauma to the child and family is minimized.

In order to establish this cooperative effort, a team approach must be developed among police, prosecutors, medical and social services professionals, and child protective service workers. In larger communities, specialized units should be established in the police department, prosecutors office, and child protective services agencies. Specific hospitals should be designated a child sexual assault centers. Standardized medical examination and social service protocols for handling child sexual abuse victims should be developed to ensure proper reporting of cases and the collecting of evidence. In smaller communities, one person in each agency should be assigned to handle all sexual abuse cases and to act as a liaison with the other agencies involved. This multidisciplinary team should meet on a regular basis to review cases and to make recommendations to improve the delivery of services to all abused children. The team must also be the catalyst to see that these recommendations are implemented.

In those jurisdictions which have established an effective team approach in the management of these cases, not only is there a higher conviction rate, but also more cases are approved for prosecution. A typical example would be an intra-family case, where the child victim reports sexual abuse to a child protective service worker. Upon referral of the case to the police the child is pressured by the family to deny such abuse. By working with the other agencies the cooperation of the victim and family can be maintained to prevent such retractions. Also, a more comprehensive statement can be elicited from the victim without having repeated interviews.

Since in the vast majority of child sexual abuse cases there is often a delay in reporting, the incident(s) to the authority, the information elicited at this initial interview is extremely important. It is based on this information that a decision to arrest is made and what charges will be filed. Another example of how the team approach results in an arrest and successful prosecution is in situations where

the police and prosecutor are hesitant to make an arrest on the word of a very young child. Often with the support and encouragement of the other members of the team a prosecutor in a potentially weak case will authorize an arrest. In addition, members of the team can be called upon as expert witnesses to testify about the dynamics of child sexual abuse and principles of child development which bear directly on the child's credibility.

In some jurisdictions, prosecutors' offices and police departments now employ on their staff trained professionals to help with the interviews of children and to work with the victim's family. In order to maintain the family's cooperation, it is essential that they be kept informed about the status of their child's case. All too frequently, once the report is made to the police, the victim's family is not kept abreast of the status of the police investigation or whether there has been an arrest. Parents need to be apprised of the long delays betweeen court proceedings which work against a quick resolution of the case. By maintaining the cooperation of the victim's family not only is the trauma associated with the criminal justice process minimized, but the victim becomes a better witness. This increases the likelihood of a conviction.

Training

Another essential ingredient for improving how these cases are handled by the criminal justice system is requiring police, prosecutors and the courts to receive special training in child development issues and in understanding the dynamics of child sexual abuse. A recommendation would be that National Association of District Attorneys as well as the various state district attorney associations include at their meetings a seminar which deals with educating prosecutors on the handling of child sexual abuse cases and related issues. Currently, the National College of District Attorneys which provides educational programs for prosecutors throughout the United States is planning to offer this spring a specialized course devoted solely to the topic of child abuse.

Unfortunately, all too often judges (and juries) are heard to say that they were unable to convict based on the words of a child alone. Judges may question why the child delayed in telling anyone of the abuse . More frequently, the fact that the child may have been pressured by other family members to retract the original statement, is misinterpreted. Since the child's testimony is often the only evidence available, establishing the credibility of the child is essential for a conviction. Although a judge is required to be an impartial arbitrator of the case, they must be included in training seminars in order to better understand the issues of child sexual abuse and its ramifications. Judges must also be made aware of the limitations on a child's ability to testify. If the criminal justice system is to play an effective role in combating sexual molestation of children, the inherent limitations on a child's performance as a witness must be recognized by the courts.

Joint interviewing

Although the concept of joint interviewing has been repeatedly recommended, the procedures for implementing it have unfortunately been adopted in very few jurisdictions. One of the major roadblocks for establishing a procedure for joint interviews is the unwillingness of the various agencies to collaborate in an atmosphere of trust and mutual respect. Through the operation of a multidisciplinary team, each agency can acquire a better understanding of one another's capabilities. There must be recognition by team members that turf fighting works only to undermine the team's goal of improving the delivery of services to all child abuse victims.

In order to implement the concept of joint interviewing, the team should designate one person who is trained in conducting interviews. It is essential that the interviewer establish a rapport with the child to help alleviate any anxiety, effectively elicit information and maintain the victim's cooperation. Since the purpose of the police investigation is to determine whether a crime has occured, their presence at the interview would be required. Also, the presence of the child protective services worker is essential in deciding whether the child is at risk and should be removed from the home. Together these two agencies should be present for the initial interview.

The process of joint interviewing is criticized by child protective services because they do not want to be seen as being aligned with the police, and by the police because they fear that the child protective worker might interfere with the course of the interview. These and other practical and philosophical issues can be overcome in the multidisciplinary team meetings.

Interview Setting

Many jurisdictions have established a special child interview room complete with toys, games and comfortable furniture. A one way mirror can be used to videotape the interview for future use or to allow a child's parents or other professionals to view the child as a witness. Standardized, special techniques for interviewing should be developed which suggest appropriate questions based on the child's developmental level. The choice of words, number and kinds of questions have to be considered and thoughtfully asked of the child. A child's short attention span and limited ability to wait or sit through an interview must be recognized.

Procedural and Evidentiary Changes

It is clear that the initial interview of the child victim, which frequently is the only evidence available, is of critical importance in initiating the criminal prosecution and achieving a successful result. It is after this interview that the child victim and family are exposed to the unfamiliar proceedings of the criminal justice system. The child victim becomes an essential participant in the stressful atmosphere of the courtroom. It is in this strange and intimidating setting that a child is expected to testify while sitting alone on the witness stand. Frequently the child is asked to use a microphone while having to face the offender who is more often than not known to the victim in a room filled with spectators. All would agree that this setting could only cause to inhibit the ability of a child victim to testify. It has become apparent that if the legal system is to effectively work to protect abused children and prevent further trauma, procedural and evidentiary reforms must be enacted.

Many states have recently enacted or proposed legislation to offer special protection for child victims by acknowledging the limitatons and special needs of child witnesses. The intent is to make the courtroom experience less threatening for the child, resulting in more successful prosecutions. In many jurisdictions laws are being proposed or have been passed allowing for the child victims testimony to be videotaped to prevent the child from having to testify at trial in an open courtroom setting. The use of closed-circuit television allowing the child victim's testimony to be taken out of the presence of the jury and the offender, has also been sanctioned.

A few jurisdictions have passed special laws changing the hearsay rules to allow into evidence, under certain circumstances, the out-of-court statements made by children. A major trend is developing to eliminate the competency requirements for child witnesses.

Although each of these reforms is aimed at minimizing further trauma to the child and at improving the ability of the criminal justice system to successfully prosecute child molesters, careful review of these forms must be made to evaluate their effectiveness. For instance, in small communities, the ability to videotape the child's testimony or present it through the use of a closed-circuit television may be impractical because of financial considerations. Also, many prosecutors feel that the live testimony of a child victim has greater greater impact on judges and juries. Since very few jurisdictions have actually passed legislation permitting the use of videotapes or closed-circuit television, it is too early to tell its effectiveness.

Other reforms such as relaxing hearsay rules to allow into evidence out-of-court statements made by children and abolishing competency requirements may permit more cases to be prosecuted but does not guarantee that there will be a conviction. The need for the child victim's testimony still is critical since frequently there is no other evidence available.

Conclusions and Recommendations

Thus, it is clear that to have effective intervention while minimizing further trauma to the child and family, all interveners -police, prosecutors, medical, social service and mental health professionals must work together. Coordinated programs will not develop without hard work and the commitment from these various agencies.

As the number of cases reported to law enforcement continue to rise, modification in the already overburdened and frequently insensitive criminal justice system must be made to improve the child victim and family's involvement with the police, prosecutors and the courts. Some modifications such as reductions in the number of interviews a child victim must be exposed to can be accomplished through the cooperative effort of all professionals involved. However, other changes which directly affect the courtroom proceedings and evidentiary matters will have to be initiated by legislative action.

Some of the improvements discussed previously which are needed to ease the trauma to the child and increase successful prosecution are in the process of being implemented or are already in place in many jurisdictions. The accomplishments of a few programs scattered throughout the United States should inspire and be the catalyst for other jurisdictions to improve their methods of investigation and prosecution.

The following recommendations suggest ways to implement the improvements discussed earlier in the handling of child sexual abuse cases by the criminal justice system:

1. Establish a task force in each state to review all present and proposed legislation which deals with the crimes and the rules of criminal procedure in the area of child sexual abuse prosecution. This task force could also function as a lobbying group to assist state legislators in proposing and passing effective child abuse legislation.

2. Set up on a statewide basis a formal network for the exchange of ideas and develop problem solving strategies for police and prosecutors. A member of this network should act as a liaison with the state task force.

3. Create a standard, videotaped training program which can be used by the various agencies to educate their staff.

Criminal and Civil Court Coordination

Naomi Post

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CRIMINAL AND CIVIL COURT COORDINATION

Naomi Post

I. OVERVIEW

In October, 1984, the Philadelphia Support Center for Child Advocates began a project aimed at reducing the potential trauma of child sexual abuse victims involved in civil and criminal courts. The project uses a multi-disciplinary approach to ensure adequate legal representation for the child, as well as to determine what action is in the child's best interest. As part of the project, we are also working to increase communication and awareness in the courts, the agencies involved, and among the general public.

The Support Center for Child Advocates is a non-profit corporation dedicated to providing essential legal and social services to abused and neglected children. The purpose of the Support Center is to break the chain of destruction that is set in motion when adults abuse or neglect children, by assuring that the rights and interests of those children are represented and protected.

The Support Center has two primary goals. The first is to deliver high quality legal and social services to abused and neglected children. The Support Center volunteer attorneys and staff social workers strive to keep children with their families to the extent appropriate and, in all cases, to develop a plan for each child with the goals of protection, rehabilitation, permanency, and a stable home free from abuse and neglect. The Support Center staff and volunteer professionals draw on the expertise of the volunteer physician, psychologist, nurse, and social service worker who make up the Center's multi-disciplinary team to develop, wherever possible, ways to prevent the unnecessary separation of families and to ensure that the societal intervention on behalf of abused and neglected children is effective.

The Center's second goal is to act as an independent voice in advocating for children's rights. Therefore, in addition to direct representation, volunteer attorneys affiliated with the Support Center and the Center's staff work closely with community groups, the judiciary and legislatures, to increase the general awareness and understanding of the tragedy of child abuse and neglect and to improve services to children and adults caught in its cycle of stress and violence.

The Support Center engages in many activities aimed toward increasing public awareness, training volunteers, and improving the representation and treatment of sexually abused

children in the legal and social systems. As an expansion of one of its activities, the Support Center has designed and implemented a year-long project aimed at reducing the potential trauma of child sexual abuse victims by providing adequate legal representation for them in civil and criminal court. The seventy-five cases targeted for representation are being selected by the Philadelphia District Attorney's Office based on the severity of the case, the lack of cooperation of the caretakers, and the involvement of the civil and criminal court systems.

II. IDENTIFICATION OF NEED

The project grew out of a group called the Law Enforcement Pilot Project, of which the Support Center is a co-coordinator. The Pilot Project consists of representatives from the Police Department, Probation, the District Attorney's Office, the County Children and Youth Agency, six major hospitals which handle a large percentage of the serious abuse cases in Philadelphia, an outpatient service agencies representative, and the Support Center for Child Advocates. The multi-disciplinary group was established in part to evaluate coordination of systems, and it has had an impact on a few cases involving the civil and criminal systems. However, it has become clear that additional activities and legal advocacy are essential to improve the situation for, and protect the rights of, sexually abused children.

In 1982, the Philadelphia County Children and Youth Agency received 3,502 reports of suspected abuse or neglect by a parent or caretaker. In the same year, Pennsylvania reported a 38.9% increase in the number of indecent assault cases and a 44.4% increase in the number of child sexual abuse cases. In Philadelphia, the District Attorney's Office prosecuted 189 cases of felony child sexual abuse. Of these, 75% involved perpetrators identified as the parent, caretaker or someone known to the child and family. It is anticipated that the number of reported sexual abuse cases will rise in the coming years due in part to increased community awareness and because amendments to the Pennsylvania Child Protective Service Act require certain types of abuse to be reported to law enforcement officials by Child Protective Service Workers. In response to the anticipated increase and the need for specialization, the Philadelphia District Attorney's Office has established a special Child Abuse Unit to prosecute cases of abuse, including sexual abuse, by a parent, caretakers or others.

The majority of these cases eventually find their way into both the civil and criminal court systems. It is at this

point and time that the very systems that are designed to protect the child and assist the family and rehabilitate the offender, begin to cause even more trauma and confusion to the child and the family. In Philadelphia, as is the case throughout the country, the lack of a court appointed advocate for the child providing representation in both systems has had, and will continue to have, a disastrous and long-term effect on the child and family.

The child sexual abuse victim, who has already been interviewed on countless occasions by medical personnel, police and Child Protective Services workers, also faces the prospect of additional interviews for investigation and preparation by District Attorneys in connection with potential criminal charges and hearings, as well as interviews by City Solicitors to prepare for Civil Dependency Court Proceedings. These interviews all occur before the actual court hearing and before any potential trauma resulting from having to testify takes place.

Another major problem directly connected to the lack of representation is that children frequently become confused or frightened and recant their earlier statements. The confusion and fear results from various factors. It is clear that the large number of strangers suddenly introduced to the child after the sexual abuse is reported can generate additional trauma. The individuals, all of whom wish to be of assistance, need information to prosecute or defend civil or criminal court actions or to determine what services should be offered to the child and family.

Another interesting phenomenon is that when criminal charges are initiated, the County Children and Youth Agency in Philadelphia will often decline to pursue the matter as aggressively as they might if there were no criminal proceeding pending. In many cases, the Agency will open the case, but refuse to either bring the matter before dependency court or to offer anything other than voluntary services until completion of the criminal trial. In those cases in which a dependency petition is filed, most civil court judges are reluctant to take action because the perpetrator often will not testify until completion of the criminal hearing, which may be held anytime from three months to a year from the initiation of the action. The District Attorney's Office, while intimately involved in the prosecution of the offender, has neither the time nor the resources to provide the remedies and services available through the civil process. The net result of the delay in civil action, and the limitation of the District Attorney's Office, is that services are generally not provided to the child or family, and the home situation is not closely monitored. The lack of therapeutic intervention and monitoring leads to a

situation where a perpetrator can re-enter the home, possibly re-abuse the child victim, or as is often the case, can with the assistance of the non-offending parent, pressure the child to recant testimony or statements given at an earlier time.

Of course, in some situations, depending on the facts of the case and the practices of the local children and youth agency and Dependency Court judges, the civil and criminal actions proceed simultaneously. However, even in these cases, there is little to no communication or cooperation between the individuals involved in each system.

The lack of communication and coordinated effort between the judicial systems often results in conflicting or vague treatment plans for the child and for the abuser who is convicted. These plans are in many cases routine with little thought given to the individual circumstances or people involved in the particular case. The effect of the plan on the child is often forgotten or ignored. The plans are rarely monitored closely and vital information about the progress being made or problems that arise is not communicated between key parties in the two systems. This breakdown in monitoring and communication is another major cause in the high rate of recidivism among sexually abusive parents. Because the treatment system is rarely effective, in many instances the "easiest" and "safest" route is taken, that is, removal of the child victim and placing him/her in foster care. This is a devastating blow for a child who has already been traumatized time and time again by both parents and by the legal/social service system.

III. GOALS AND METHODS

The problems discussed are not unique to the Philadelphia area. The Support Center, because of its regional and national reputation, often receives inquiries from various individuals and agencies seeking assistance in providing representation to, or care of, children. Nationally, there are few programs set up to ensure that a child advocate is involved to protect the child in either system, let alone both.

The goals and objectives of our project, developed in response to the problems and needs as stated above, are:

1. Ensuring protection of the substantive and procedural due process rights of child sexual abuse victims in both civil and criminal court;

2. Increasing the efficiency and effectiveness of agencies involved in cases relating to child sexual abuse,

and reducing the child victims' trauma by developing protocol and procedures for joint interviews and broader cooperation and coordination between hospitals, police, attorneys involved in criminal and civil proceedings, agency personnel and child advocates;

3. Ensuring protection of child sexual assault victims by advocating for the provision of effective rehabilitation services, prevention of unnecessary removal of the child victim from the family, and development of procedures for utilizing a coordinated criminal and civil justice system approach for reporting, diagnosis, investigation, court preparation, case follow-up, monitoring and service delivery on behalf of victims;

4. Development of methodology and procedures to be codified in written manuals for regional and national distribution, detailing steps necessary to implement a criminal and civil coordinated approach for protecting children and reducing trauma through communication and coordination of actors and agencies involved in both systems.

IV. STAFFING PATTERNS

The Support Center, as initiator of the project, is playing a central role in motivation, coordination, and legal action. The Executive Director of the Center, Naomi M. Post, is also the Project Director. She supervises the general administration of the project, oversees the staff and handling the preparation of statistics, analyses of cases, and fiscal concerns. She is also responsible for coordinating with the District Attorney in connection with selection of cases, recruitment and training of volunteers, implementing interagency and intra-agency coordination, developing written procedures and protocol, training materials, and educational and technical materials for regional and national distribution. The Social Work Supervisor at the Center is responsible for case intake and assignment. He is also responsible for direct supervision of social worker caseloads and clients. As part of his administrative tasks, he acts as a community liaison, developing new resources for victims of sexual abuse, and he also assists the director in developing training materials for regional and national distribution. The three Center social workers are responsible for providing social service support to volunteer attorneys representing project children, assuming primary responsibility for investigating sexual abuse allegations, identifying protective and therapeutic needs of the client, family and abuser, while utilizing their expertise with dealing with abused children to assist the District Attorney in preparing child witnesses.

The volunteer attorneys are responsible for providing direct legal representation to abused children in civil and criminal hearings. In cooperation with the staff social worker assigned to the case, they conduct independent investigations, develop resources and recommendations, negotiate settlements with other parties, and coordinate the efforts of civil and criminal courts to ensure that orders and dispositions are consistent and designed to meet the needs of the child victim and family.

V. EVALUATION OF PROJECT

The project has sub-contracted with an independent evaluation, Dr. Christine Kenty of the University City Science Center, for the purpose of assessing the project's impact. Dr. Kenty has established a record of research and evaluation in the fields of law enforcement, human services and child advocacy, and is familiar with the Support Center, as well as other advocacy agencies, the judiciary, the District Attorney's Office and the child welfare system. Her evaluation will utilize both quantitative and qualitative methods to evaluate the coordination process and its impact both on the civil and criminal systems and on the children and families who come into contact with them. Using methods of structured interviewing, systematic observation, review of documents and in-depth case studies, Dr. Kenty will examine the development of the coordination process, the procedures devised to facilitate smooth criminal and civil court interaction, client stress-reduction, the quality of legal representation provided by the project, and the range and depth of training activities. Her evaluation will provide the perspective for the participants in the project, as well as assess the impact of the project on the community and on the Philadelphia system of handling child sexual abuse.

VI. PRELIMINARY RESULTS

So far, most of our results have been in the area of general advocacy for the children and in training and coordination. We have held several seminars and training sessions, and are planning many more. We have trained forty new volunteer attorneys to act as advocates for the children in civil and criminal court.

(a) Training

Each volunteer attorney is required to participate in a day long training session prior to accepting a case. The

session is designed to supply background information on the special needs of sexually abused children, while providing an overview of the laws and regulations governing child abuse and methods of coordinating the systems. A physician with expertise in the area of child abuse and child sexual abuse provides a slide presentation on special medical concerns and evidence. A psychologist addresses the issue of abuse in general, while detailing the social and psychological dynamics of abusive families. The chief of the Child Abuse Unit of the District Attorney's Office provides a general overview of criminal law and methods of working with the District Attorney's Office. The Deputy Director of the City Solicitor's Office, the legal representatives of the Department of Human Services, provides a comprehensive review of the Department's roles and responsibilities. Support Center volunteer attorneys and staff provide an overview of the statutes, regulations, and the team approach to the problem. After the session, volunteer attorneys are provided a comprehensive manual to assist them in their representation of children.

Mini-sessions are also periodically offered to provide volunteer attorneys with additional information regarding issues relevant to representing abused children. In March, a mini-session is being held to teach volunteer attorneys ways to advocate successfully for their clients while working directly with the District Attorney's Office. To increase judicial awareness, we are planning a comprehensive training session for judges. On the legislative end, we have been asked to speak before City Council about the lack of expertise on child sexual abuse in the Department of Human Services. We will suggest to the Council that they hire a consultant to increase the agency's knowledge in this area.

(b) Coordination

To facilitate the flow of information between agencies, one contact person has been identified at each hospital, the District Attorney's Office, the Police Department, and the Department of Human Services. The Support Center acts as a central liaison for all agencies. Also in the area of cooperation and coordination, several area hospitals, the local Police Department, and the District Attorney's Office have agreed to conduct joint interviews of sexually abused children; we are still soliciting the cooperation of the Department of Human Services.

The Support Center also began to investigate long standing problems relating to the handling of sexual abuse cases. It was noted that some children were subjected to two different gynecological examinations if the first examination

occurred at one of the local hospitals. The reason for duplicative procedures was that the local hospital staff members were not trained to conduct thorough examinations, so children seen at that facility had to be re-examined by other pediatricians at more experienced hospitals. The Support Center arranged for a meeting with hospital staff, the head pediatrician, the District Attorney, a representative from a more experienced hospital and the Support Center. As a direct result of that meeting, personnel at the less experienced hospital were trained to conduct thorough examinations and the need for a second examination was eliminated.

Since it was the Support Center's opinion that this problem, as well as a lack of protocol, existed in many hospitals, the Support Center conducted a training session which was designed to provide basic information and ongoing technical assistance to area hospitals. The session was held in January and was attended by approximately thirty representatives from various hospitals.

VII. CASE REPRESENTATION

Since October, we have taken on thirty of the targeted seventy-five cases, and have been successful in protecting the children from their alleged abusers. In some cases in which the alleged perpetrator has re-entered the home, we have had the children removed from the home. In other cases, we have obtained protective orders on behalf of the mothers and children to keep the alleged perpetrators out of the home. We are also working with the Department of Human Services (D.H.S.) to help them be more aggressive in their rendering of services to families in which sexual abuse has occurred.

For example, in one case, the Support Center was appointed by a criminal court judge to represent three minor children, ages seven, five and four, who were allegedly sexually abused by their stepfather. The appointment was made after the initial preliminary hearing.

The Support Center volunteer attorney and social worker immediately commenced a comprehensive investigation. Contacts were made with the Sex Crimes Unit of the Police Department, the hospital where examinations of the children were conducted, the District Attorney's Office and the family. The Support Center also compiled all documents related to the charges, medical evidence and previous hearings. It was noted that during the preliminary hearing, the judge issued a protective order prohibiting the defendant from having contact with the children or their mother.

During the home investigation, it was discovered that the alleged perpetrator was once again living in the home and that the mother was unwilling to request that he leave. It was also discovered, through discussions with the therapist with whom the alleged perpetrator was consulting, that he felt absolutely no remorse, and that efforts of rehabilitation were not successful. The children were recanting their earlier statements, despite the detailed, graphic reports previously given to the police and hospital personnel.

The Support Center determined that since the mother was not cooperating, the children were at risk and attempts to enforce the protective order would be futile. The Support Center immediately contacted the Department of Human Services social worker and worked with that agency to obtain a Temporary Restraining Order from Civil Court to remove the children from the home. The Support Center then represented the children in civil proceedings which resulted in them being placed in a foster home and which required that the Department provide therapeutic services for the entire family.

At this time, the mother is beginning to show progress in therapy sessions and she is becoming aware of the harm suffered by her children by the original abuser, the continued contact with the alleged perpetrator and the pressure placed on the children to recant. The children continue to receive therapy and the Support Center is working closely with the District Attorney's Office to prepare them to testify.

In another case, a fourteen year old girl was allegedly molested by her mother's paramour. During their initial investigation, the Support Center volunteer attorney and social worker discovered that the mother was intimidated by the paramour and that she had been physically abused by him on several occasions. They also discovered that he had forced his way back into the home and refused to leave.

The Support Center immediately petitioned the court to request a protective order for the client. After the order was signed, the social worker arranged for support services for the mother and child, and for closer monitoring by the Department of Human Services. Although the client initially recanted her version of events because of pressure from her mother's paramour, she is receiving support through therapy and from the Support Center social worker, and is willing to testify against the defendant.

VIII. CONCLUSION

To date, the Support Center has identified some major

obstacles to improving coordination of efforts and providing aggressive representation. In connection with coordination, a recurring problem appears to relate to the issue of turfism, that is, an unwillingness to defer to another agency's expertise and an inability to allow another person to control any aspect of case investigation and/or case management. The Support Center continues to attempt to confront and resolve these problems by working closely with participants in the Law Enforcement Pilot Project.

Another major problem appears to relate to the fact that, in general, criminal court judges appear to be unfamiliar with either the unique problems experienced when the victim of sexual abuse is a child or the valuable contribution a volunteer attorney or child advocate can bring to a proceeding. Judges who are less accustomed to the child having an attorney often limit the role of the advocate and are often inflexible and overly concerned about the defendant's rights. In addition, they frequently draw incorrect conclusions regarding the issues commonly confronted. For example, many judges tend to discredit a child witness because of delays in reporting, the lack of trauma or injury, or occasions when a child may recant and then decide to testify. It is clear that extensive training, as well as increased exposure to child advocates, is essential to sensitizing judges to the rights and needs of child victims.

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A Discussion of Evidentiary and Procedural Problems and Methods for Improving Child Sexual Abuse Prosecutions, and Special Approaches with Pre-School Age Victims

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A DISCUSSION OF EVIDENTIARY AND PROCEDURAL PROBLEMS AND METHODS FOR IMPROVING CHILD SEXUAL ABUSE PROSECUTIONS, AND SPECIAL APPROACHES WITH PRE-SCHOOL AGE VICTIMS

Traditional methods of prosecution are essentially useless in dealing with child victims of sexual assault. Intrinsic within the prosecutor's approach must be his or her final goal; are we seeking to simply punish the offender or are we looking to rehabilitate both abuser and abused? The crime of sexual assault is the one offense where the State lacks an eager witness. The child victim of sexual assault compounds this problem. The younger the child, the greater the problems which result.

The court systems traditionally treat children as adults. A pervasive attitude exists in our courtrooms of trying to fit children into adult molds. As prosecutors, we tend to initially misconceive the abilities of children by expecting them to act, talk and walk as adults in a system designed solely for adults. This essential flaw is the source of the major evidentiary and procedural problems facing the prosecutor today. The expectation that an offended child will rush forth to point out his or her molester, indeed the whole concept of the spontaneous/excited declaration by a victim, largely does not apply in cases of child sexual assault, especially in cases of incest. Children by nature are reluctant to come forward with information, and are therefore, inconsistent in their statements and often will go so far as to actually retract allegations they have made. For the prosecutor attempting to charge and successfully prosecute an offender, this can create the ultimate nightmare.

We, cannot expect children to "formally confess" to the crimes that have been committed against them. As such, we need to drastically change our procedural and evidentiary methods in dealing with these victims. In Miami there are in excess of a thousand reported cases of child sexual assault every year. Essentially, the system makes inadequate provisions for their needs. Procedurally, the average rape victim is put through a multitude of interviews before a case is concluded. Obviously, it is absurd to expect a four-year old to (a) undergo such a procedure and (b) successfully weather it. While we, expect children to be competent and credible in their statements, we go further and mistakenly assume that they can be consistent over and over again. Essentially, four-year old children will present many inconsistencies in their testimony, depending on by whom, where and when they are being interviewed. The essential procedural problem, therefore, is to minimize the number of interviews a child must endure while at the same time allowing all those who need to interview that child access to same.

Procedurally, in Dade County, we have twenty-six police agencies attempting to work together; the major ones being Metro-Dade and the City of Miami, and some of the larger local municipalities having their own sexual battery detectives. A major procedural problem remains the coordinating of investigations within police departments, and then coordinating with agencies such as HRS, the Child Protection Team, the

Guardian Program, the Rape Treatment Center, etc. To accomplish this goal we must still resolve the basic conflicts and goals of these agencies.

An essential factor in all prosecutions must be the stage at which a case enters the State Attorney's Office. In Dade County, we have separate juvenile and felony Courthouses. As a result, cases entering the system from HRS may initially enter Juvenile court on a dependency action and then be transferred to felony court. Alternatively, a street arrest may result in initial felony screening and then a later transfer to Juvenile. In Dade we advocate a vertical prosecution system, and as such encourage local police departments to contact us on investigations that may result in felony charges as soon as possible. As a result, we seek to accomplish two major procedural goals.

1. The prevention of arrest without purpose.

2. The full and complete preparation of a case completing all investigations prior to making an arrest.

Unfortunately, because of the varying degrees of training for each local municipality, there is great disparity between agencies in their cooperation with our office.

Obviously, a major procedural problem that arises beyond the given limited abilities of a child witness must be the cooperation of that witness' family and relatives. The family caN act as a buffer for the child and create an appropriate liaison and reinforcement. Without family backing and/or adequate support, it is likely that such a child will recant his or her version of events. This becomes a major problem in incest cases where the offender or offenders in question may be that same needed family support. Beyond the attitudes of the victim and given witnesses, child sexual abuse often presents a basic problem of no other corroborating evidence. Without obvious physical injury we are generally faced with a one on one situation. As a result, polygraphs of defendants are regularly employed in making charging decisions. Obviously, there are forms of evidence which are not usuable in court which do influence prosecutions. Non-usuable repeated statements by victims and the use of demonstrative evidence through anatomically correct dolls can greatly aid a child in expressing him or herself on appropriate levels.

The level and/or type of prosecutions contemplated directly effects a given case. If a juvenile judge is contemplating declaring a child dependent and taking him or her from a custodian mother, it can cause great problems in a felony prosecution against a father. Conversely, leaving a child with the person being investigated as a potential abuser creates parallel problems. Frankly, the strength of a given case also determines the level of charges. Obviously, initial charging should reflect our intended disposition on a given case situation. The expected punishment and/or rehabilitation of a

given offender must come into play in this regard and therefore a basic character profile, if you will, of the given offender must enter into any charging and/or prosecution decision.

Child abuse, as a pressing social issue has logically generated a good deal of recent media interest. The interest unfortunately may clash with a family's desire for privacy. As a result, knowing media involvement on a given case and predicting that same media's continued involvement must weigh on the prosecutor's actions.

Additionally, a basic lack of follow-up resources, basic monies available to adequately investigate and prosecute these cases, inadequate networking of resources and appropriate representation of given victims all effect the quality and quantity of the varied case situations presented by local police agencies. When these factors are taken in conjunction with the laws apparent intransient attitude towards child victims, the prosecutor in these kinds in cases has a long and slow uphill climb.

To improve the present procedural limitations facing the prosecutor, essentially we must realize that an inter-disciplinary approach is needed in dealing with child sexual assault victims; beyond and above our own limited needs in terms of the child's testimony against an offender. A simple method of improving coordination is to maximize the readily available services of local guardian ad/litem programs thus providing the child with at least a coordinated reference and information point. The single interview system obviously minimizes the child's trauma and maximizes the consistency of information obtained. In this light Dade County is presently funding a new child abuse center. Its purpose is to centralize all agencies thereby bringing those agencies to the child at one location instead of making the child go through a variety of interviews and locations. Dade County is advocating the use of specialized child interviewers to promote the effective interviewing of a child immediately after the reported incident. The center will be staffed not only with interviewers but also appropriately trained law enforcement personnel and representatives from all health and social related agencies including the Rape Treatment Center, as Child Protection Team, the Department of Health and Rehabilitative Services and also qualified psychologists equipped with the skills to then provide follow-up care and treatment. Central within this system must be the use of videotaping which allows a single interview to be disseminated amongst all necessary parties.

Another procedural alternative being provided in Dade County today is a Diversion Program. Diversion is an experimental project presently confined soley to incest cases. This is an effort to treat rather than punish offenders. The system removes what would have otherwise been a potential captital rape prosecution from the Courts and places the offender in a treatment program along with the whole family. Essentially the

program requires non-violent first offenders, requires a waiver of speedy trial, and a formal statement of admission which is useable against a given defendant, should he fail to seek and complete appropriate treatment. Should the treatment be appropriately completed, an offender who is initially charged would then have all charges against him or her nolle prossed.

Videotaping is becoming an evidentiary tool in Dade County. Its advantages are obvious; as well as lessening the trauma to a victim it also allows more cases to be successfully pursued where children do not have to be taken into a full Court setting. The problem it presents is simply the clash it then creates with the defendant's right of confrontation. Under chapter 90.90 of the Florida Statutes any party can move for the recording of a child victim's testimony if a substantial likelihood of harm is presented by testimony in open court. The problem of the defendant's right of presence in a small videotaping room may actually increase the trauma to a child. Obviously the Courts must litigate this hurdle in upholding the spirit of videotaped testimony. A number of out-of-state decisions upholding Article 1 Section 16 of the Florida Constitution which protects the defendant's rights to confront adverse witness at trial are now being argued in Florida Courts. See for example Ohio vs. Roberts, 448 U.S. 56, 65 L. Ed. 2nd 597 (1980), Davis vs. Alaska, 415 U.S. 308, 39 L. Ed. 2nd 347 (1974), United States vs. Benfield, 593 Fed. 2nd 815 (1979).

Florida is one of the few full discovery states in the union and as a result, all potential state witnesses are subject to defense deposition in advance of trial. We are presently wrestling with the use of videotapes for desposition and trial purposes. Essentially the situation requires placing the child in a room, taking that child's deposition and then immediately thereafter taking that child's trial testimony. At least the courts have been favorable in determining that there is no right of confrontation at deposition. See State vs. Dolan 390 So2d 407 (5th DCA 1980), in which the Court held that a balancing test should be used. The videotaping of initial interviews for charging purposes provides a permanent record for the prosecutor. The very permanency of that record however being a discoverable item and therefore binding the victim to a given statement, can be a problem.

In support of videotaped testimony and in support of limiting interviews Florida Senate Bill #138 now requires each Chief Judge of each Judicial Circuit to provide by order a reasonable limit on the number of interviews that a child victim should have to go through. Essentially this will increase the use of videotaping and at the same time may put controls upon the deposing of those same victims.

The basic fragmented nature of statutes as applied in Florida in the past has caused immense problems. Essentially there is a need for a consolidation of available statutes relating, specifically to children. This was recently partially

accomplished in Florida Senate Bill #138 in which clear definitions were given as to victim's age, available punishments, and as to specific sexual offenses based upon familial custody of victims. In addition a body of proposed statutes are presently pending within the State of Florida. Because of the sensational nature of a variety of day care related cases however most of these statutory changes relate to day care centers. While obviously important within themselves these make up only a small precentage perhaps two to three precent of the reported cases that arise. There is a pressing need in Florida for a full revision of the laws relating to incest which remains the largest precentage of cases going through the system.

For evidentiary purposes, in the case of Williams vs. State at 110 So.2d 660 (Florida 1959) the Supreme Court recognized that relevant testimony regarding similar fact evidence would be admissible in given case situations. Specifically relevancy in terms of motive, intent, common scheme, or plan, identity or preparation would be the test to admit prior acts of a defendant. The use of "Williams Rule" testimony as it has become known in Florida, is a major tool for the prosecutor in child sexual assault cases, because of the somewhat fluid nature of children's testimony, and the general ongoing nature of acts against a given child. With the filing of a notice of Williams Rule testimony an unpredictable victim's statement on the stand, can be controlled. Additionally for charging purposes filing one count of Captial Rape and a Williams Rule Notice is often far easier as a charging decision than filing a multitude of counts over a number of years. Essentially the Williams Rule Notice will allow the introduction of prior acts without necessarily having to prove them all up as separate offenses. Examples of situations involving Williams Rule testimony in child abuse and sexual battery cases on children can be found in Mayberry vs. State 430 So.2d 908 (3rd DCA 1982). Hodge vs. State 419 So.2d 346 2nd DCA 1982). Cotita vs. State 381 So.2d 1146 (1st DCA 1980). Potts vs. State 472 So.2d 822 (2nd DCA 1983), Owens vs. State 361 So.2d 224 (1st DCA 1978), Espey vs. State 407 So.2d 300 (4th DCA 1981) and Jones vs. State 398 So.2d 987 (4th DCA 1981).

Another useful tool in Florida is the use of prior consistent testimony in Court. According to rule 7.02 of the Florida Evidence Code a statement will not be considered hearsay if the declarant testifies at time of trial, is subject to cross examination concerning the statement and the statement is consistent with that person's testimony and offered to rebutt a charge against him or her of improper influence motive or recent fabrication. In simple terms, therefore if the defense attorney attacks a child victim it is possible that that child's prior consistent statement may be of use in trial. To go one step further Florida Statute 90.803 (5) provides that prior statements of a victim may also be used as actual substantive evidence where a variety of standards are met; essentially if the testimony was recorded and the testifying victims memory cannot be refreshed by reading the statement to him or her.

Chapter 918.16 of the Florida Statutes now provides for the clearing of court rooms in the event of testimony by a sex offense victim under the age of sixteen (16). This does not go far enough in its limitations in that it allows all revelant persons to still be in the courtroom including the media. We have had unsucessful litigation with the press in Florida regarding their access to court cases and use of information from them. Chapter 794 of the Statutes however, does prohibit the publishing or broadcasting of names of any rape victims within media publications. This has been constitutionally challenged in a number of situations.

Senate Bill 138 of the 1984 Session in Florida specifically restablishes and expands the control of reference in rape trials to a victims prior chastity and/or specific sexual activity. It also specifically holds that in the case of minor victims consent cannot be used as a defense in court. These provisions do provide some building blocks upon which to limit the evidentary cross-examination of minor abuse victims.

The State of Florida has no minimum age of competency. Indeed every person is considered competent as a witness. (See Fla. Statue 90.601) The trial judge's sound descretion is the only test as to whether a child has sufficient mental capacity and sense of moral obligation to testify. Essentially a child's intelligence rather than age is the principal test of competency See Hall v. State 267 So2d 881 (2nd DCA 1972) Davis v. State 264 So2d 31 (3rd DCA 1972). According to Williams v. State 400 So2d 471 (FLA 1981) a child must have sufficient intelligence to receive just impressions of facts regarding that to which he or she is to testify and sufficient capacity to relate them correctly. A child does not need to understand the penalty for committing perjury (See Harrold v. Schluep 264 So2d 431 (4th DCA 1972). Indeed in the court's discretion a young child may testify without actually taking an oath, if the court has determined that the child understands the duty to tell the truth. F.S. 90.605 (2).

Assuming that a prosecutor is able to get past the initial hurdles of competency there are a number of pre-trial matters which are current subjects of frequent litigation. Examples include the frequent supoenaing by defense attorneys of victim's for their own clients bond hearings. It is hoped that the Chief Judge's power to limit statements may preclude the calling of child witnesses by defense counsel at Motions for Bond. The limited ability of children to grasp time span causes the ongoing problem of providing defense counsel with an adequate statement of particulars. A number of cases have spoken to this problem in Florida and have essentially held that the State can only provide that which is available to it in terms of time. See for example York v. State 432 So 2d 51 (Fla. 1983), Baker v. State 428 So 2d 684 (Fla. 2 DCA 1983). Another frequent tactic for a defense attorney is to move for a psychological or pyschiatric evaluation of a child victim or witness in sexual assault cases. Essentially the case law in Florida now holds that such a motion

is without basis. (See Raid v. State 403 So2d 436 Fla. 3rd DCA 1981).

A variety of statutory revisions are presently being recommended by the Dade County State Attorney's Office. These proposed improvements to the system would include the following:

1. A tender years exception to the hearsay rule allowing out of court statements by a child victim of sexual abuse to be admitted as substantial evidence.

2. With the confrontation problems in video-taping the use of videotapes without the defendant's presence is a pressing problem. Perhaps a modified form of taping using close circuit television within the taping session would answer the need to preserve the confrontation clause.

3. Providing discovery through means other than direct deposition of the victim seems to be a future essential if prosecutions of child victim's cases are to adequately to go forward.

4. The basic excited utterance exception to the hearsay rule as it now stands needs to be expanded relaxing the present Florida standards and allowing for later "Inherently reliable" statements to come in as a hearsay exception. Essentially it is impossible to expect an incest victim to immediately rush off and report the act of incest.

5. An existing hearsay exception, F.S. 90.803 (4), admits statements made for the purpose of medical diagnoses or treatment. Presently the statements made to a rape treatment doctor can qualify under this exception. The Dade County State Attorney's Office sees no reason why similar statements made to a psychologist or psychiatrist should not also qualify as statements for medical diagnoses or treatment.

6. The child sexual abuse accommodation syndrome also is an area that needs expansion. Some courts are now recognizing the expertise of diagnosing a syndrome in children that results from sexual assault, essentially accounting for the comflicts, retractions and/or denials made by a legitimate victim of sexual assault. Such an amendment in Florida would recognize the ability of an appropriate psychaitrist or psychologist to evaluate a child and determine whether that child's behavior is consistant with this syndrome, and therefore allow for testimony, as to the victim's condition being consistant with a sexually abuse child.

7. Essentially placing the burding of proving a child not competent would push the court's discretion towards qualifying more children in open court. Essentially the competency of the child being a jury issue as opposed to a pre-trial means of removing a child's testimony would allow more of these cases to go to the jury.

The pre-school victim of sexual assault is obviously a special problem and simply magnifies the previous issues. The need to minimize the trauma coupled with the need to establish a long term clear trust relationship with that victim is all the more apparent, as are the evidentiary hurdles and the system's failure to cater to such victims. The one advantage that the pre-school child may have is simply not that that child cannot lie, but that they cannot lie convincingly. The pre-schooler's inability to formulate the abstract concepts of sexual assualt and maintain them for a variety of statements including open court testimony means that such a child's statements are inherently reliable. To allow experts to testify in this regard is an essential feature if the very young are to be adequately protected. For the prosecutor these cases present the need for special care. Essentially using appropriate child development experts to conduct interviews of such children can be a major asset. Obviously somebody who can speak a three year old's language and understand it, is in a far better position to communicate with that child appropriately than any given prosecutor. Again the use of a guardian can be most effective with very small children not only in explaining to the child what will and can occur in a given case but also in maintaining a relationship with the child, with the court system, familiarizing the child with the court room setting and essentially developing a necessary rapport with the minor in order to present the case appropriately in court. Pre-schoolers also often show evidence of sexual assault which is of no value in court. Essentially such features as excessive nightmares, lost appetite, difficulty in urinating, frequent infections, total withdrawal, inappropriate sexual play with themselves, etc., are all features outside of the given case which a prosecutor should inquire into to determine whether a pre-schooler may or may not be a victim. Obviously the expanded use of dolls will allow the non verbal child to communicate.

Also the use of drawings and the appropriate expertise in interpreting those same drawings maybe of great value to the prosecutor in evaluating his or her given case situation. A continued contact with that child's family and having that family keep a record of the child's latest statements while not with the prosecutor can provide a wealth of information in terms of the child's continuing disclosure.

Essentially as the victims that come through the prosecution system get younger the problems of successfully prosecuting those who offend against them increase. The child's age simply expands the hurdles that a prosecutor must cross in order to sucessfully prove that a defendant committed a crime beyond and to the exclusion of a reasonable doubt. Evidentiary and procedural methods can correct many of the glaring problems. However, until the courts learn to cater to the children instead of catering solely to adults there will remain the continuing injustice of victimization of those who cannot express the wrongs that are being done to them.

Today's society does not find child sexual abuse logical. Essentially society is insulted by the concept of a father having sex with his four year old daughter. The very nature of disclosure by these victims, in terms of pushing them into disclosure, the conflicts that they make in their testimony and the extent of disclosure, grate directly against the precision demanded by today's legal system.

The child's fear, suppression, and secrecy, and often personal shame prevent a clear concise disclosure of events. While the videotape can be supremely honest in recording that childs verbal and non verbal behavioral evidence, if misused, it can be a great defense tool. Essentially, however, until we as lawyers conform our procedures to children we will continue to inadequately serve their needs. The system will have to change one step at a time. By raising some of the problems and hopefully suggesting some of the answers, it is apparent that we need a new balance controlling the benefit we give our youth and limiting the rights of the accused.

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Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues

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Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues

by

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I. Introduction

The last few years have brought the public to a state of awareness, often bordering on hysteria, concerning child sex abuse. As new scandals uncovered throughout the country are reported in the media, more and more concerned citizens look to prosecutors and legislatures to take meaningful steps in response. Prosecutors have duly replied by bringing more cases. Legislatures have in turn considered and in many cases adopted new statutory definitions of child sex abuse. Critical for our purposes, legislatures have also considered and in many cases adopted new evidentiary rules designed both to facilitate prosecution of child sex abuses cases and to reduce the trauma experienced by alleged victims of child sex abuse brought on by the litigation process itself.

Reform of the rules of evidence comes in two basic forms. First, to create a hearsay exception applicable in child sex abuse prosecutions making admissible out of court statements of the victim under certain prescribed circumstances. Second, to permit the videotape recording of the statement or deposition of the child to be played at trial instead of eliciting viva voce testimony or when such testimony is unavailable. Both brands of reform proposal have many variations.

The purpose of this paper is to explore the constitutionality under the Confrontation Clauses of several of the proposed or enacted reforms. In the process, the wisdom of the particular reform will be commented upon and, where appropriate, suggested modifications set forth.

II. Children's Out of Court Statements

A. Hypothetical Case

A four year old girl, Alice, is left in the custody of her mother's live-in boyfriend, Sam. Eight hours after being returned to her mother's care, the little girl is asked by her mother how she enjoyed her time with Sam. In her reply, Alice tells her mother that the boyfriend had touched her, pointing to her genital area. After calling the police Alice's mother takes her to the emergency room for an examination. A police officer

interviews the child later in the day at her home. Alice tells both the doctor and the police officer that "Sam rubbed his hand up and down on me right here", pointing to her genitals.

For Alice's out of court statements to be admissible in a criminal prosecution of Sam, the statements, being hearsay, must meet the requirements of a hearsay exception as well as satisfy the requirements of the Confrontation Clause.

B. Hearsay Exceptions

At common law and under rules of evidence modelled on the Federal Rules of Evidence, various traditional hearsay exceptions must be considered as possibly permitting introduction of one or more of Alice's statements. However, barriers to admissibility exist with respect to each of the potential avenues of admissibility that most likely cannot be overcome.

The hearsay exception for a present sense impression, Fed. R. Evid. 803(1) -- "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," obviously does not apply to a statement made no earlier than eight hours after the event perceived.

The excited utterance hearsay exception, Fed. R. Evid. 803(2) -- "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," offers more possibility even though Alice's initial statement was made so long after the event. The requirements for admissibility under this exception are: (1) the occurrence of an event or condition sufficiently startling to produce a spontaneous and unreflecting statement, (2) a statement made while under the influence of the startling event or condition and, (3) a statement relating to the startling event or condition. Accordingly, lapse of time between the startling event and the out of court statement, although relevant, is not dispositive. Nor is it dispositive that Alice's statement was made in response to her mother's inquiry. Rather these are factors which the trial court must weigh in determining whether the offered testimony falls within the Fed. R. Evid. 803(2) exception. Other factors to consider include the age of the declarant, the physical, mental, and most importantly emotional condition of the declarant, the characteristics of the event and the subject matter of the statement. In order to find that Fed. R. Evid. 803(2) applies, it must appear that the declarant's condition at the time was such that the statement was spontaneous and impulsive rather than the product of reflection and deliberation. Although courts have been exceedingly liberal in child sex abuse cases in judging the requirements of Fed. R. Evid. 803(2) to be satisfied, it is doubtful, at best, that the Alice's calmly delivered statement in response to her mother's inquiry eight hours after the event would be so treated.

Alice's statement made to the doctor in the emergency room must be evaluated against the hearsay exception for statements made for purposes of medical diagnoses or treatment, Fed. R. Evid. 803(4) -- "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Two barriers to admissibility exist. First, the fact that Sam was the person who is alleged to have rubbed Alice's genital area is not pertinent to medical diagnosis or treatment unless the possibility of removing Alice from the threat of future sex abuse is considered medical treatment. Second, the reliability of hearsay statements made for purposes of medical diagnosis or treatment rests on the assumption that the declarant is aware of the importance of telling the truth to a doctor in order to secure proper medical care. Whether Alice at age four was so aware is problematic.

The statement to the police officer, whether as contained in his report or as testified to at trial, does not meet the requirements of any traditional hearsay exception. The police officer's report does not satisfy Fed. R. Evid. 803(8) not only because it involves a matter observed by a police officer but also because there is no second level hearsay exception applicable to Alice's statement itself. This later observation also, of course, would preclude the police officer from testifying to Alice's statement at trial.

Alice's statement to the police officer, and to the same or even possibly a greater extent her prior two out of court statements, may possess the indicia of trustworthiness of being (1) a statement of an embarrassing fact one would not normally convey unless true and (2) a cry for help. There is, however, no traditional common law hearsay exception for a cry for help disclosing an embarrassing event. The closest the common law comes is the notion of a prompt complaint in a rape or sex abuse case admitted to corroborate the in court testimony of the complainant. Traditionally prompt complaint evidence is limited to the fact of the complaint thereby excluding any reference to either the name of the offender or the details of the offense. Each of Alice's statements can also be said to possess trustworthiness by virtue of relating an event a four year old girl is not likely to realize can happen between an adult male and a young girl. While not as probative as a statement such as, "He put his wee wee in my mouth. It got real big and exploded", Alice's statement describing Sam rubbing her genitals is not something a young girl is likely to know a grown man may enjoy doing. There is, of course, no traditional hearsay exception for statements describing events the declarant is not likely to know are either possible or likely to occur without having experienced them.

In the hypothetical case of Alice, it is thus not only possible but very likely that none of her three out of court statements made between eight and twenty-four hours of the alleged sex abuse will fall within a traditional hearsay exception. In that event in the Federal Court and at least eighteen states resort may be had to the "other [hearsay] exception" of Fed. R. Evid. 803(24) or 804(b)(5). Fed. R. Evid. 803(24) and 804(b)(5) are identical with the exception that Fed. R. Evid. 804(b)(5) requires in addition that the declarant of the out of court statement be unavailable at trial. Both rules otherwise provide as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 803(24) and 804(b)(5) each contain five express requirements, all of which must be determined by the court to have been satisfied, Fed. R. Evid. 104(a), before the statement may be admitted:

1. **Equivalent Trustworthiness.** The most significant requirement is that the statement possess "circumstantial guarantees of trustworthiness" equivalent to that of statements admitted under one of the traditional hearsay exceptions specified in the first twenty-three exceptions contained in Fed. R. Evid. 803 and the first four exceptions contained in Fed. R. Evid. 804(b). In evaluating the trustworthiness of a prior statement, the court will look to several criteria: certainty that the statement was made which should include, where appropriate, an assessment of the credibility of the person testifying in court to the existence of the statement; assurance of personal knowledge of the declarant of the underlying event or condition; practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event or condition [obviously inapplicable to Fed. R. Evid. 804(b)(5)]; and finally, an ad hoc assessment of trustworthiness based upon the totality of the surrounding circumstances including corroborating and inconsistent facts and an assessment of credibility of the declarant, considered in light of the class-type exceptions to

the hearsay rule supposed to demonstrate such characteristics. Relevant factors bearing upon the ascertainment of trustworthiness include (1) the declarant's partiality, i.e., interest, bias corruption, or coercion, (2) the presence or absence of time to fabricate, (3) suggestiveness brought on by the use of leading questions, and (4) whether the declarant has even recanted.

2. **Necessity.** Introduction of the hearsay statement must be necessary in the sense of being more probative on the point for which offered than any other evidence which the proponent may reasonably procure. Whether a particular effort to obtain alternative proof of a matter may reasonably be demanded must, of course, depend upon the fact at issue considered in light of its posture in the total litigation. If Alice were to testify fully at trial to the events involving Sam, the "necessity" for the introduction of her out of court statement to the same effect may be brought into question. Were this to occur, circumstances surrounding the prior out of court statements such as being relatively promptly made, being made when recollection was fresh, being unsolicited, being uninfluenced by interviews with attorneys in connection with preparation of litigation, being a call for help, etc. will foster admissibility.

3. **Material Fact.** The requirement that the statement be offered as evidence of a material fact probably means that not only must the fact the statement is offered to prove be relevant, Fed. R. Evid. 401, but that the fact to be proved be of substantial importance in determining the outcome of the litigation.

4. **Satisfaction of Purpose of Rules.** The requirement that the general purposes of the rules of evidence and the interests of justice be best served by admission of the statement into evidence is of little practical importance in determining admissibility.

5. **Notice.** The notice in advance of trial requirement, while generally enforced, may be dispensed with when the need for the hearsay statement arises on the eve of trial or in the course of trial, if no prejudice to the opponent is apparent. One method used to avoid prejudice is to grant a continuance to the opponent to prepare to meet or contest introduction of the hearsay statement.

Several states have enacted hearsay exceptions applicable solely in prosecutions for sex abuse designed to permit the admissibility of out of court statements of child victims when the equivalent circumstantial guarantee of trustworthiness demanded by Fed. R. Evid. 803(24)and 804(b)(5) are present. Like the other reliable hearsay exceptions of the Federal Rules of Evidence, admissibility pursuant to these hearsay exceptions is not based upon a categorical assessment of trustworthiness that accompanies each of the traditional hearsay exceptions enumerated in Fed. R. Evid. 803(1)-(23) and 804(b)(1)-(4). Rather the state statutes require a particularized showing that the child's

statement describing prohibited sexual contact possesses equivalent guarantees of trustworthiness to that possessed by hearsay statements admitted pursuant to such categorical hearsay exceptions.

Washington, for example, in accordance with a recommendation put forth originally by the National Legal Resource Center for Child Advocacy and Protection, enacted RCW 9A.44.120 which provides as follows:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Kansas has also enacted a hearsay exception based upon a particularized finding of indicia of trustworthiness applicable not only in criminal proceedings but elsewhere as well. K.S.A. § 60-460(d)(d) provides as follows:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay and inadmissible except: . . . (dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:
>
> (1) the child is alleged to be a victim of the crime, a deprived child or a child in need of care; and

(2) the trial court finds after a hearing on the matter that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

Kansas has also enacted a hearsay exception applicable generally in both civil and criminal proceedings permitting the introduction of statements of unavailable declarants relating to a recently perceived event or condition upon a particularized showing of trustworthiness. K.S.A. § 60-460 (d)(3) provides as follows:

A statement (1) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (2) which the judge finds was made while the declarant was under the stress of nervous excitement caused by such perception, or (3) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by the declarant and while his or her recollection was clear, and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

C. Confrontation Clause

To be admitted in a criminal prosecution of Sam the out of court statements of Alice must not only satisfy a hearsay exception, the statements must satisfy the Confrontation Clause as well. The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The defendant's right to confront witnesses is not absolute. If it were, all out of court statements of an unavailable witness meeting the requirements of a hearsay exception, possibly other than former testimony, would be inadmissible. Analysis of the Confrontation Clause and its relationship to the hearsay rule and its exceptions is facilitated by differentiating out of court statements of witnesses who give testimony in court from out of court statements of witnesses who do not give testimony at the

trial of the accused. We may for the sake of convenience speak of the former group of witnesses as testifying witnesses and the latter group as available but not appearing witnesses and unavailable witnesses.

1. Testifying Witnesses

In our hypothetical, let's assume that Alice is found competent to testify at trial. With respect to any given fact, Alice when called at trial can testify inconsistently with her prior out of court statements, testify consistently with such statements, claim not to recall the event or condition in question, or be unable a unwilling to give testimony in open court. If she fails to recall or is unable or unwilling to testify, she is in fact unavailable.

(a) Prior inconsistent statement. If Alice testifies inconsistently with her prior out of court statements, the prosecution may seek to introduce her prior statements not only to impeach her credibility but as substantive evidence as well. When offered for the truth of the out of court assertion, each statement must meet a hearsay exception. If the particular statement does not meet either a traditional hearsay exception or an available hearsay exception for other reliable hearsay, the statement may meet the hearsay exception now provided in some jurisdictions for prior inconsistent statements. Unfortunately Alice's statements would not meet the hearsay exception for prior inconsistent statements contained in the Federal Rules of Evidence. Rule 801(d)(1)(A), for reasons that are irrelevant in the present context, rather than creating a hearsay exception states that a statement is "not hearsay" and thus not barred by the rule against hearsay, when the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Since Alice's statements made following the incident were not made under the prescribed circumstances, the hearsay rule would bar substantive introduction at trial. California, on the other hand, provides in Section 1235 of the Evidence Code for the admissibility of all prior inconsistent statements of testifying declarants.

The constitutionality of the admissibility of prior inconsistent statements under Section 1235 of the California Evidence Code as substantive evidence not barred by the hearsay rule was considered by the United States Supreme Court in California v. Green. John Green was convicted of supplying marijuana to Melvin Porter, a minor. Both at a preliminary hearing and in an oral unsworn statement to police officer Wade, Porter identified Green as his supplier. At trial, however, Porter was evasive and uncooperative, claiming he could not recall who supplied him the marijuana because he was under the influence of LSD at the time of the transaction. The trial court

admitted both prior statements under Section 1235 of the California Evidence Code which provides that a witness's prior inconsistent statements are admissible as substantive evidence if the witness has an opportunity at trial to admit, deny, or explain the statements. The California appellate courts reversed the defendant's conviction on the ground that his right of confrontation had been violated by the admission of the prior statements as substantive evidence. The United States Supreme Court, upholding the constitutional validity of Section 1235, vacated the judgment of the California Supreme Court.

To analyze whether the admission of the oral unsworn statement made to police officer Wade violated the Confrontation Clause, the Supreme Court identified the three purposes of confrontation: to ensure that the witness gives his or her statement under oath; to provide an opportunity for cross-examination; and to allow the jury to assess the demeanor of the witness making the statement. Conceding that a prior out of court statement might be made under circumstances having none of these protections, the Supreme Court nevertheless found that each of the purposes of confrontation would be satisfied when the declarant testified at trial:

> [A]s far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury.
>
> Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.
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> * * *
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> . . . The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement.

Accordingly the Supreme Court concluded that prior inconsistent statements satisfying the requirements of Section 1235 do not run afoul of the Confrontation Clause. For a prior inconsistent statement to be admitted under the rule, the declarant must be under oath, subject to cross-examination and redirect examination before the jury regarding the statement; the jury can evaluate such responses.

In Green the Supreme Court specifically declined to decide the question of the admissibility of the prior statement to police officer Wade, because at trial Porter did not affirm, deny, or explain the truth of the prior statement but instead

testified to a lack of recollection of the underlying event. This raised the issue whether defendant was "assured of full and effective cross-examination at the time of trial." The Supreme Court explained:

> Whether Porter's apparent lapse of memory so affected Green's right to cross-examine [at trial] as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question. . . . Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue.

(b) Prior consistent statement. If Alice testifies at trial in accordance with her prior statements, under Green admissibility of Alice's prior consistent statements would clearly not run afoul of the Confrontation Clause provided, of course, Alice is made available to be cross-examined with respect to such statements. Admissibility of Alice's prior consistent statements under the rules of evidence, however, might prove more difficult. At common law and under the Federal Rules of Evidence, for reasons having to do with an assessment of probative value of prior consistent statements in light of various trial concerns such as misleading the jury and waste of time, prior consistent statements are admissible only when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, Fed. R. Evid. 801(d)(1)(B). The express or implied charge will usually arise during cross-examination. It can, however, sometimes surface initially during the presentation of the opponents case in chief. This limited window of admissibility makes introduction of Alice's prior consistent statements at trial somewhat problematic.

An avenue of admissibility for Alice's prior consistent statements possibly available at common law but not under the Federal Rules of Evidence is the doctrine of prompt complaint. As previously mentioned, under the traditional common law prompt complaint doctrine when a witness testifies at trial accusing someone of a sex offense, the fact of a prompt complaint to the occurrence having been made by that witness, absent details including the naming of the offender, is admissible when testified to by the declarant or someone who heard the statement to corroborate the testimony. The theory of admissibility is that the evidence of prompt complaint rebuts the natural inference that would be drawn by the trier of fact on its own of fabrication from failure to promptly complain; a prompt complaint would be expected if the sex abuse really happened.

2. Not Appearing and Unavailable Witnesses

In exploring application of the Confrontation Clause to not appearing and unavailable witnesses, it is helpful to consider the two categories simultaneously. Part of the reason for considering them together is their interrelationship. Part of the reason, probably the most important part, is that the Supreme Court has developed doctrine in these areas at the same time relying, naturally enough, upon cases involving one factual circumstance in discussing the application of the Confrontation Clause to the other factual circumstance.

In California v. Green, as introduced above, the United States Supreme Court was called upon to decide the admissibility of preliminary hearing testimony of an unavailable witness, the court treating Porter's alleged lapse of memory as constituting unavailability for the purpose of addressing the question. Noting that Porter was under oath at the preliminary hearing and that Green had the right to cross-examine Porter at the time, the court held that substantive admissibility of Porter's preliminary hearing testimony did not violate the defendant's right of confrontation:

> We also think that Porter's preliminary hearing testimony was admissible as far as the constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel -- the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.
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> * * *
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> . . . In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing -- the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State. . . . As in the case where the witness is physically unproducible, the State here

> has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green.

As indicated by the foregoing quotation, Green requires "an opportunity to effectively cross-examine and merely providing an opportunity to cross-examine at the preliminary hearing is not per se adequate opportunity." Ordinarily, however, unless the defense was limited by "unusual circumstances," the opportunity for cross-examination provided in the typical preliminary hearing will be found to have been sufficient. Obviously the question of an adequate opportunity to conduct cross-examination would arise if a child witness capable of direct examination falls apart and answers incoherently, inconsistently, claims lack of recollection, or answers not at all when asked questions on cross-examination , even calmly presented simple questions in child understandable language.

Decisions interpreting Green have generally agreed that the question is whether the defense had the opportunity to cross-examine effectively, not whether defense counsel actually engaged in an extensive cross-examination. Nevertheless, the matter is not totally without doubt. In Ohio v. Roberts, the United States Supreme Court held that Green permitted admission of preliminary hearing testimony of an unavailable prosecution witness who had been called by the defense at the preliminary hearing and examined as if called as a hostile witness. Although defense counsel in Roberts had not formally asked that the witness be declared hostile and that he be allowed to cross-examine, that is, lead and impeach, his questions had been the functional equivalent of cross-examination. The Supreme Court noted that counsel in his "direct examination" had challenged the witness's perception of events and her veracity and had not been limited "in any way" in this line of questioning. The result was, as in Green, a "substantial compliance with the purposes behind the confrontation requirement." However, the Supreme Court added that in light of the facts before it there was no need to determine whether Green applied when a defense counsel had not actually engaged in extensive questioning of the witness.

Six months after it decided Green, the United States Supreme Court held in Dutton v. Evans, that the defendant's right of confrontation was not violated by the substantive admission under a Georgia coconspirator hearsay exception of an out of court declaration of a nonappearing but available witness. Three men, Wade Truett, Venson Williams, and Alex Evans, were charged with the murder of three police officers. Truett was granted immunity

in return for his testimony, and Williams and Evans were indicted for the murders and tried separately. At Evans's trial there were 20 prosecution witnesses, but the most damaging testimony came from Truett. He testified that he, Williams, and Evans were stealing a car when the three police officers confronted them; they seized a gun from one officer and used that gun to murder all three. Another witness at Evans's trial, a man named Shaw, testified that he and Williams had been fellow prisoners when Williams was being held prior to arraignment. Shaw said that when Williams returned to the cell after arraignment, he asked him how he made out in court. According to Shaw, Williams responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Although Williams was available to either side, he was not called to testify at Evans's trial. Defense counsel objected to Shaw's testimony on the grounds that it was hearsay and that it violated Evans's right of confrontation.

The trial court admitted the testimony pursuant to a Georgia statutory coconspirator hearsay exception and overruled the confrontation objection. Defense counsel then cross-examined Shaw at length. Evans was convicted, and the Georgia courts upheld that conviction on direct appeal. A federal district court denied Evans's writ of habeas corpus, but the Fifth Circuit reversed, holding that admission of Shaw's testimony under the Georgia coconspirator hearsay exception violated Evans's right of confrontation.

In a five-to-four decision, the Supreme Court reversed. Justice Stewart, writing the plurality opinion, first carefully reminded that the Confrontation Clause was not a codification of the common law rule of hearsay and its exceptions, nor did the Confrontation Clause render all hearsay inadmissible. He also rejected with little difficulty the defendant's argument that because the Georgia coconsiprator hearsay exception did not conform to the federal exception it was constitutionally invalid. Stewart identified the issue as whether the "mission" of the Confrontation Clause was satisfied:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." California v. Green.

In Green, the court remanded for a determination whether the declarant's lack of recollection at trial "so affected" the defendant's opportunity to cross-examine that the defendant was deprived of his right of confrontation. In Evans, the defendant had no opportunity to cross-examine the declarant, who was physically absent from trial, not just possibly practically unavailable. According to Stewart, however, the issue was no

longer the existence of an opportunity for full and effective cross-examination but whether the "trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." Although Stewart's opinion is abstruse, he appears to have looked to the criteria of certainty of making, indicia of trustworthiness, and probative impact in determining whether the jury in Evans had such a satisfactory basis.

Stewart first found that the jury had a satisfactory basis for evaluating whether Williams actually made the statement to Shaw. Shaw was present in court and defense counsel effectively cross-examined him on the question of whether he actually heard Williams make the statement. According to Justice Stewart, the opportunity to cross-examine the reporting witness, while the witness is under oath, in the presence of the ultimate trier of fact, is a sufficient guarantee of certainty of making.

Stewart next found that Williams's statement possessed those indicia of trustworthiness "widely viewed as determinative" of when a statement should be placed before a jury without confrontation of the declarant. The statement contained no express assertion of past fact and consequently carried on its face a warning to the jury against giving the statement more than the little probative value it deserved. Williams's personal knowledge of the facts surrounding the murder was well established. There was little likelihood that Williams had faulty recollection of the crime, and the circumstances under which the statement was made negated any motive to misrepresent. Although Green had quoted Wigmore to characterize cross-examination as "the greatest legal engine ever invented for the discovery of truth," Justice Stewart in Evans summarily dismissed as "wholly unreal" the possibility that cross-examination of Williams would have aided the jury in determining whether his statement, though made, might have been untrustworthy.

Justice Stewart's plurality opinion in Evans is exceptionally unclear about the standard a court should apply to determine the constitutional admissibility of an out of court declaration by a not appearing witness. Stewart's concern was that the trier of fact have a satisfactory basis for evaluating the truth of the prior statement. He looked to the indicia of trustworthiness possessed by the statement, the certainty with which the making of the statement was established, and the importance of the statement in the litigation, but he failed to advise lower courts of the proper weight to be accorded each of these factors. For example, it is not apparent whether Justice Stewart intended an evaluation of incremental probative value to be an independent criterion in the confrontation analysis he announced or whether he was merely stating that any error in admitting Williams's statement was harmless. Moreover, even if incremental probative value is a relevant criterion, Stewart's opinion leaves unclear whether all hearsay statements that are

crucial to a case must be excluded or whether necessary hearsay may nevertheless be admitted if indicia of trustworthiness are adequately established.

This question was answered in Ohio v. Roberts. In Roberts the defendant was charged with forgery of a check in the name of Bernard Isaacs and with possession of stolen credit cards belonging to Isaacs and his wife. At a preliminary hearing defense counsel called Isaac's daughter Anita to establish that she had permitted the defendant to use her apartment and to attempt to elicit from her an admission that she had given the defendant the checks and the credit cards without informing him that she did not have permission to use them. The daughter denied giving the defendant the items. The government issued five subpoenas to Anita for four different trials. She was not at her residence and did not appear at trial.

After the preliminary hearing, defense counsel resigned to accept an appointment as municipal county judge. New counsel appeared at trial. The defendant testified that Anita had given him her parents' checkbook and credit cards. The state, on rebuttal, offered the preliminary hearing transcript of Anita's testimony relying on the Ohio evidence code, which permits the use of preliminary examination testimony of a witness "who cannot for any reason be produced at trial." At a voir dire hearing, the trial court determined that Anita was unavailable because no one was aware of her whereabouts.

The Ohio Court of Appeals reversed the defendant's conviction, holding that the state had made insufficient efforts to seek Anita's whereabouts. The Ohio Supreme Court affirmed the reversal on a different ground, after first declaring that the trial court could reasonably infer from testimony at voir dire that due diligence could not have procurred the attendance of Anita. The Ohio Supreme Court found the transcript inadmissible because the mere opportunity to cross-examine at a preliminary hearing "did not afford constitutional confrontation for purposes of trial." Since defense counsel at the preliminary trial did not have Anita formerly declared hostile and thus subject to cross-examination, that is the right to lead and impeach, the lack of actual cross-examination violated defendant's confrontation rights.

On appeal the United States Supreme Court reversed the Ohio Supreme Court and found the preliminary hearing testimony admissible. The United States Supreme Court reasoned that with respect to former testimony the Confrontation Clause establishes a preference for a face to face confrontation. Thus the prosecution must produce the declarant or establish the unavailability of the declarant. Moreover, with respect to every hearsay statement, whether or not crucial to a case, of both an available or unavailable witness, the hearsay statement must possess "indicia of reliability" to be admitted. Pursuant to Green indicia of reliability are obviously present with respect to the

prior consistent and inconsistent statements of a witness testifying at trial by virtue of the declarent being under oath, before the trier of fact, subject to cross-examination. As to the not appearing and unavailable declarant, the Supreme Court continued:

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Mattox v. United States. . . . This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," California v. Green, ..., and "stem from the same roots," Dutton v. Evans. . . . It also responds to the need for certainty in the workaday world of conducting criminal trials.
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> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

The Supreme Court found that the "direct examination" of Anita afforded such "indicia of reliability" since defense counsel, even though Anita had not been declared hostile, had in fact explored the witness's perception of events and her veracity in detail. The court found no substance in the contention that confrontation was violated because of the change in attorney.

The Supreme Court delineated several important doctrines in Roberts. Although declining to "map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions," the Supreme Court stated without qualification that sufficient trustworthiness can be "inferred without more" with respect to evidence falling squarely within a "firmly rooted" hearsay exception. The common law hearsay exception for former testimony, Fed. R. Evid. 804(b)(1) is clearly among the "firmly rooted." In fact, each of the hearsay exceptions specifically denominated in Fed. R. Evid. 803 where unavailability is not required, Fed. R. Evid. 804 requiring unavailability (with the possible exception of statements against penal interest, Fed. R. Evid. 804(b)(3)), and Fed. R. Evid. 801(d)(2) dealing with admission of a party-opponent are similarly clearly within the "firmly rooted." The Supreme Court also provided for the admission of statements not falling within a "firmly rooted" hearsay exception if such statements possess "particularized

guarantees of trustworthiness" equivalent to the circumstantial guarantees of trustworthiness possessed by the statements admitted pursuant to the firmly rooted traditional hearsay exceptions. Notably, the court's language parallels exactly the requirements of Fed. R. Evid. 803(24), 804(b)(5) and both the Washington and Kansas statutes previously discussed. Pursuant to each rule, evidence can be admitted only if it possesses "equivalent circumstantial guarantees of trustworthiness" to the "firmly rooted" hearsay exceptions. Thus evidence properly admitted pursuant to any of these or similar hearsay exceptions also meets the requirements of the Confrontation Clause.

The quotation from Roberts set forth above contains the disturbing indication that a hearsay statement falling within a hearsay exception contained in Fed. R. Evid. 803 may be admitted against the criminal defendant "normally" only if the government produces the declarant so he can be subjected to cross-examination at trial, or, if not produced, the government has made a sufficient showing that the declarant is not available to testify. Presumably production would include making the declarant available to be called by the prosecution for direct examination at the option of the accused and subjected to cross-examination by the defendant concerning the hearsay statement. Taken literally, almost every hearsay exception in Fed. R. Evid. 803 would require a showing of unavailability or the production of an available declarant when offered against the accused.

Several factors indicate that the Supreme Court had no such radical change in practice in mind. First, the foregoing indication in Roberts was made in the context of a discussion of the former testimony hearsay exception, Fed. R. Evid. 804(b)(1), a hearsay exception which itself requires unavailability. In addition, the casualness displayed in making the comment with respect to unavailability generally in the context of a hearsay exception requiring unavailability belies any intention to make a radical change in the law. Moreover and more importantly, as Roberts itself states, while the Confrontation Clause "normally requires" a showing of unavailability, "competing interests . . . may warrant dispensing with confrontation at trial," and that requiring face to face confrontation may give way to "considerations of public policy and the necessities of the case." The opinion also indicates that a demonstration of unavailability or production of the declarant is not required when the utility of confrontation is remote. In this context, it is interesting to note that generally speaking neither the state courts, the United States Courts of Appeals, nor the leading commentators on the Federal Rules of Evidence have construed Roberts as ushering a radical change. For example, United States v. Yakobov holds that evidence of the absence of a public record may be introduced against the criminal defendant under Fed. R. Evid. 803(10) without production of the available records custodian or any other available witness. Finally, it is suggested that any reading of the Roberts "normally requires" language as mandating

a requirement of unavailability or production with respect to almost every hearsay statement admissible pursuant to Fed. R. Evid. 803 offered against the criminal defendant is completely out of character with other decisions of the Supreme Court including Evans itself.

While it is thus very clear that an available declarant must not always be made available before a prior hearsay statement meeting either a traditional firmly rooted hearsay exception or possessing equivalent particularized guarantees of trustworthiness may be admitted in evidence in satisfaction of the Confrontation Clause, it is abundantly clear that the "normally requires" language of Roberts applies to prior statements of alleged victims of sexual abuse accusing the defendant of the offense being tried. If the Confrontation Clause means anything, it must mean the right of the defendant to confront complaining "witnesses against him" who are available to testify. None of the exceptions alluded to by the Supreme Court in Roberts justifying nonproduction of an available declarant would or should apply to Alice's statements accusing Sam of rubbing his hand on her genitals.

3. Synopsis

As developed in Green, Evans and Roberts, all prior out of court hearsay statements of a witness who is called at trial and testifies to an event or condition whether inconsistent or consistent with the witness's in court testimony satisfy the Confrontation Clause. If the witness is available but not appearing, certain hearsay statements meeting a traditional firmly rooted hearsay exception or on a particularlized basis shown it be sufficiently trustworthy may nevertheless be admitted where the utility of confrontation will be remote or the competing interests of public policy and the necessities of the case warrant. However, a hearsay statement in the "normal" case, which certainly includes out of court statements of alleged victims accusing the defendant of committing the crime for which on trial, is admissible under the Confrontation Clause only if the available declarant is produced at trial. Hearsay statements of unavailable declarants are admissible provided they meet the requirements of a firmly rooted traditional hearsay exception. If not, hearsay statements of an unavailable declarant must be shown to possess particularized guarantees of trustworthiness equivalent to the circumstantial guarantees of trustworthiness possessed by statements admitted pursuant to the firmly rooted traditional exceptions.

D. Proposed Hearsay Exception

A statement by a child when under the age of ___ describing an act of sexual contact performed with or on the child by another is admissible in evidence in criminal proceedings, civil proceedings, and dependency and deliquency proceeding in juvenile court if:

(1) The child testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement

(a) is consistent with the child's testimony and is one of initial complaint, or

(b) (i) is inconsistent with his testimony, and

(ii) was made by a child possessing personal knowledge of the sexual conduct described, and

(iii)(1) is proved to have been made under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or

(2) the statement is proved to have been written or signed by the child, or

(3) the making of the statement is acknowledged to have been made either (a) by the child in his testimony in the present proceeding or (b) by the child under oath subject to the penalty of perjury at a prior trial, hearing, or other proceeding or in a deposition, or

(4) the statement is proved to have been accurately recorded by a tape recorder, video-tape recorder, or any other similar electronic means of sounds recording, provided further

(iv) there is adequate corroborative evidence introduced at trial of the act of sexual contact described in the statement, or

(2) The testimony of the child is unavailable at the trial or hearing and the statement

(a) was made by a child possessing personal knowledge of the sexual conduct described,

(b) the statement possesses circumstantial guarantees of trustworthiness equivalent to that possessed by statements admitted pursuant to a firmly rooted hearsay exception, and

(c) the proponent of the statement notifies the adverse party of his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance

of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, provided further,

(d) there is adequate corroborative evidence introduced at trial of the sexual contact described in the statement.

1. Trustworthiness.

The proposed hearsay exception for children's statements describing sexual contact draws upon various common law and emerging statutory hearsay exceptions.

Rule 1(a) constitutes a modification of the common law doctrine of prompt complaint. Under proposed Rule 1(a), the initial complaint of the child victim of prohibited sexual contact is admissible as substantive evidence on direct examination. The initial complaint need not be "prompt"; delay in making the complaint does not affect admissibility. Instead delay is to be weighed in assessing the credibility of the witness.

The proposed Rule 1(a) also resolves an emerging problem courts have had concerning the scope of admissibility of victim complaint evidence: whether it should be limited to the fact of the complaint or should instead encompass details including the name of the assailant. Rule 1(a) would simply allow all details actually contained in the initial complaint to be admitted as substantive evidence. The common law has already moved significantly in this direction. Increasingly courts are allowing more background details and some are now admitting the identity of the assailant. Permitting admissibility of all details actually contained in the initial complaint gives the jury, at the end of the victim's direct examination, a more complete picture of what actually transpired. When only the mere fact of the complaint is admitted, the jury receives very little useful information pertaining to the weight they should give the complaint. By allowing admissibility of all details actually stated at the time of initial complaint, the proposed rule would give the fact-finder the maximum amount of information with which to assess the credibility of the initial complaint evidence as well as the overall credibility of the child witness.

While proposed Rule 1(a) would allow both the fact of the complaint and its details, it would limit admission to the initial outcry only. The initial complaint would be the earliest prior statement and thus the most useful in assessing the credibility of the victim. Any subsequent complaint would be considered inadmissible hearsay unless it properly meets the requirements of one of the remaining subsections of the proposed rule, the excited utterance hearsay exception, the requirements

for a prior consistent statement, or is admissible under another hearsay exception or definition of "not hearsay" contained in the Federal Rules of Evidence.

The child victim of prohibited sexual contact must testify at trial in a manner consistent with the content of the initial complaint and be subject to cross-examination. If for any reason the child were to fail to so testify at trial, for example, by either being physically unavailable, by failing to recall the event, or by testifying to a version that differs from the alleged initial complaint, the initial complaint would fail to meet the requirements of proposed Rule 1(a). The presence of the witness in court under oath, subject to cross-examination, coupled with consistency of the witness's in-court testimony with the witness's statement of initial complaint, clearly justifies substantive admissibility.

Proposed Rule 1(b) constitutes a modification of Fed. R. Evid. 801(d)(1)(A) expanding significantly, but with limitation, the substantive admissibility of prior inconsistent statements. Fed. R. Evid. 801(d)(1)(A) now provides for the substantive admissibility of inconsistent statements given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Rule 1(b) would extend admissibility to permit introduction of prior inconsistent statements that almost certainly were made and for which an effective opportunity exists at trial to examine the witness to expose and counteract any impropriety, such as coercion, deception, or subtle influences, that may have occurred in the taking of the statement. Proposed Rule 1(b), assisted by the requirement that the child possess personal knowledge of the sexual conduct described, thus adequately ensures both that the prior inconsistent statement was made and that the trustworthiness of the prior inconsistent statement can be explored at trial; at the same time, proposed Rule 1(b) excludes the most untrustworthy declaration, the unacknowledged oral statement. In addition, proposed Rule 1(b) requires that the prior inconsistent statement is admissible only if adequate corroborative evidence of the act of sexual contact described in the statement is introduced. The significance of the corroboration requirement will be discussed later in connection with proposed Rule 2 dealing with the prior statement of an unavailable child.

Certain other provisions of the proposed Rule 1(b) deserve specific mention. Current Rule 801(d)(1)(A) does not permit substantive admissibility when a witness at trial acknowledges the making but denies the truth of the inconsistent statement; in contrast, subsection 1(b)(iii)(3)(a) of the proposed rule would give substantive admissibility to this inconsistent statement. In addition, subsection 1(b)(iii)(3)(b) of the proposed rule provides the possibility of substantive admissibility for a prior oral statement, the making of which the witness had acknowledged while testifying at a prior trial, hearing, other proceeding, or deposition, even if the witness had denied its truth at that

time. Thus subject to the requirement of personal knowledge, if a witness at the current trial had earlier appeared at one of these formal proceedings and there had acknowledged that he or she had made a particular oral statement, under the proposal the statement would be admissible substantively in the present trial if it is inconsistent with the witness's present trial testimony, even if the witness now states that he or she never made the prior oral statement and that it was untrue.

Proposed Rule (1)(b)(iii) requires that the statement be "proved" to have been made whenever the witness refuses to acknowledge making it. Introduction of evidence sufficient to support a jury finding that the witness made the out of court statement is inadequate. Rather, the litigant seeking to use a prior inconsistent statement that the witness has not admitted making as substantive evidence must initially satisfy the court that it is more probably true than not true that the statement was in fact made. Since an in court declarant who denies making a prior inconsistent statement will necessarily be testifying under oath, the proposal is justified in imposing a greater requirement of certainty that he or she made the statement --accomplished by placing on the proponent of the out of court declaration the burden of proof of more probably true than not true -- than governs the admission of other disputed writings. Such direct testamentary contradiction is often not present with respect to authentication of writings admitted pursuant to the doctrine of conditional relevance. Given the nature of the prior inconsistent statements that fall within the proposed rule, it is probable that the witness will seldom deny making the statement, although the possibility of forged signatures on or alterations in prior written or recorded statements creates a potential for dispute over whether such statements were made. Ultimately, the decision about whether the statement was made rests with the jury.

Although proposed Rule 1(b) requires that the proponent prove that it is more probably true than not that the statement alleged to be that of the declarant was the exact statement the declarant wrote, signed, or recorded, the proponent of the prior statement should not be required to bear this burden of proof regarding other contested matters relating to the statement. Special problems of distortion through subtle wording variations, complete omissions, or fabricated additions in the preparation of the statement followed by uncritical signing, and subtle influence, appeal to the declarant's desire to please another person, and so on are to be resolved and can be adequately resolved by the jury after it has heard such allegations presented by the in court declarant and explored during the cross-examination of the person who obtained the prior statement. The jury, consistent with its traditional function, is assigned the task of judging the credibility of each witness and of deciding what in fact occurred when the prior statement was allegedly made. However, if the child asserts that a prior statement was made involuntarily, under the proposed rule the proponent of the

statement would be required to convince the judge that it is more probably true than not true that the statement had not been the product of coercion.

In summary, proposed Rule 1(b) increases to the extent justified by concern for certainty of making and circumstantial guarantees of trustworthiness the breadth of prior inconsistent statements that would be substantively admitted when the declarant is available for cross-examination. The proposed rule also provides police officers and prosecuting attorneys the opportunity easily and promptly to preserve a prior statement of a child witness by video or tape recording the child witness's oral statement or by having the witness either prepare a handwritten statement or execute a written statement prepared for the witness's signature.

Proposed Rule 2 provides for the substantive admissibility of prior statements of a child describing an act of sexual contact performed with or on the child by another where the child's testimony is unavailable at trial when (a) the child is shown to possess personal knowledge of the sexual conduct described, (b) the statement is shown to possess circumstantial guarantees of trustworthiness equivalent to those possessed by statements admitted pursuant to a firmly rooted hearsay exception, (c) advance notice of intent to offer the statement is given, and (d) adequate corroborative evidence of the sexual conduct described in the statement is introduced at trial. Proposed Rule 2 conforms generally with the proposal of the National Legal Resource Center for Child Advocacy and Protection as incorporated by Washington RCW 9A. 44.120. A specific requirement of personal knowledges is added. A notice provision is borrowed from Fed. R. Evid. 804(b)(5). The requirement of trustworthiness has been reworded to more nearly parallel Fed. R. Evid. 804(b)(5) and Roberts. The requirement of corroboration of the act of sexual contact has been retained.

Whether sufficient particularized guarantees of trustworthiness accompany a given child's hearsay statement obviously turns on the facts at hand. Generally speaking in conducting this inquiry under Fed. R. Evid. 803(24) and 804(b)(5) courts have looked to several criteria: certainty that the statement was made which should include an assessment of the credibility of the person testifying in court to the statement; assurance of personal knowledge of the child of the underlying event; practical availability of the child at trial for meaningful cross-examination concerning the underlying event [obviously not applicable to Fed. R. Evid. 804(b)(5)]; and finally, an ad hoc assessment of trustworthiness based upon the totality of the surrounding circumstances including corroborating and inconsistent facts and an assessment of credibility of the child, considered in light of firmly rooted traditional exceptions to the hearsay rule supposed to demonstrate such characteristics. Relevant factors bearing upon the ascertainment of trustworthiness include (1) the child's partiality, i.e., interest, bias,

corruption, or coercion, (2) the presence or absence of time to fabricate, (3) suggestiveness brought on by the use of leading questions coupled with an evaluation of the relationship of the child and the questioner considered in light of surrounding circumstances, (4) the age of the child, (5) the nature of the sexual contact, (6) the relationship of the child and the accused, and (7) whether the child has ever recanted. Of particular importance in determining trustworthiness of a young child's hearsay statement is whether the child is likely, apart from the incident occurring, to possess the knowledge of sexual matters needed to fabricate or imagine the sexual contact described. Also important is whether the child's statement describes an embarassing fact one would normally not relate unless true as well as whether the child's statement is a cry for help.

Washington statute RCW 9A.44.120 similarly requires looking at the time, content, and circumstances of the statement. Kansas statute KSA 60-460(d)(3) demands consideration of whether the statement was made by the declarant at a time when the matter had been recently perceived by the declarant and while his or her recollection was clear, and whether the statement was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort. Kansas statute KSA 60-460(d)(d) prescribes in its search for particularized guarantees of trustworthiness that consideration be given to whether the child was induced to make the statement falsely by use of threats or promises.

The Supreme Court of Washington's decision in State v. Ryan, lists the following factors, originally set forth in State v. Parris, as relevant in the search for particularized guarantees of trustworthiness: "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness." In applying the factors to the case at hand the fact that the statement was made initially to only one person was considered important. Of critical importance, however, to the court in Ryan in finding that the statements were inadmissible was the fact that the mother solicited the statements after having learned of the possibility that sexual contact had occurred. Implicit in the court's reasoning is that children for various reasons are susceptible to suggestion from persons they love and or have authority over them.

> Applying the Parris factors to the circumstances of the present case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have. Second, all the record reveals about the

character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

Application of the foregoing factors will very often permit introduction of initial statements describing an act of sexual contact performed with or on the child by another as well as additional statements made during the time period that immediately follows. However it is extremely doubtful that many statements describing sexual contact made subsequent thereto for the purposes of investigation to a police officer, social worker, attorney or someone specially trained in the interviewing of children, whether or nor videotaped, will be found to possess equivalent circumstantial guarantees of trustworthiness. The normal timing of such an interview, its investigative function, and the fact the child will usually have made several earlier statements relating to the alleged sexual contact all militate against admissibility. Such investigatory statements are somewhat analagous to grand jury testimony which has received a checkered response when offered under Fed. R. Evid. 804(b)(5). Preservation of the child's testimony against the possibility of unavailability at trial can be accomplished by having the child testify subject to cross-examination at a preliminary hearing or by means of a deposition to perpetuate testimony discussed later in this paper.

2. Corroboration.

The requirement that the statement not only be found to be sufficiently trustworthy but furthermore be adequately corroborated by evidence introduced at trial as to the existence of the sexual contact described is an important feature of proposed Rule 2. The requirement of adequate corroborative evidence is imposed with respect to prior inconsistent statements, Rule 1(b), as well.

Corroboration of the sexual contact as a separate requirement to admissibility of a hearsay statement is mandated by neither considerations underlying the hearsay rule and its exceptions nor the Confrontation Clause as delineated in Roberts. Corroboration is related to the due process concern that a trier of fact may be too willing to convict an accused, i.e., find that the state has satisfied its burden of proof

beyond a reasonable doubt, on the basis of evidence of alleged out of court statements of children describing socially repugnant sexual contact. The requirement of corroboration, in addition, implicitly recognizes that judges may be too willing to send such cases to the jury.

Let's take a worst case scenario. Assume that Alice is unavailable at trial on the basis of inability to recall the events in question. Assume further that no corroboration exists, i.e., the medical examination reveals no abnormalities, no physical evidence is found at the scene, no other eyewitness is located, and Sam does not confess. Neither evidence of lustful disposition where admissible nor expert witness testimony relating to the credibility, character, or disposition of either the child or defendant should be considered as the type of corroborating evidence of the act of sexual contact required by the rule. Alice's mothers testimony at trial, if believed, supports a finding of equivalent circumstantial guarantees of trustworthiness. The mother claims Alice, relatively near the time of the event, volunteered the statement describing the sexual contact. Alice's statement described sexual contact a girl of four probably would not realize could be enjoyable to an adult male. Alice's statement may have disclosed events embarassing to her. It is difficult to say, however, under the circumstances that Alice's statement was a cry for help. No apparent motive to fabricate on the part of Alice or her mother is disclosed during cross-examination. The question thus posed is whether a criminal defendant can be convicted of the serious crime of child sex abuse on the basis solely of an out of court declaration of a unavailable child. It is suggested that due process demands a "No" answer.

One may assert that the concern with convicting the accused on the basis of the out of court statement is a question of sufficiency of evidence and not one of admissibility. While true in theory, in light of the current hysteria over the recent revelation of the extent of child sex abuse, courts and juries are likely the convict if given the opportunity. The requirement of adequate corroboration thus serves as an appropriate screening device. This undue tendency to convict is likely to be exascerbated by the apparently emerging practice of permitting expert witnesses to testify for the prosecution in support of the child's testimony. In addition, the requirement of corroboration would assist prosecutors in dismissing cases that should not be brought by providing an explanation for the dismissal to be given to interested individuals.

To illustrate assume that Alice is examined by a psychologist six days after the incident. She gives the psychologist the same account of the story she had given previously to her mother, the doctor and the police officer. However at trial Alice testifies that Sam never touched her in her genital area. She further testifies that she was confused by everyone's questions and just wanted to tell them what they seemed to want to hear. She also says she didn't know it would get Sam into so much

trouble. The prosecution now seeks to buttress its case through expert testimony. A consulting psychologist who never saw Alice testifies that the delay in reporting the incident to her mother was normal and common for children that have been sexually abused by a family member. The psychologist who examined her then testifies that his examination of Alice revealed that Alice exhibited the classic indicators of child sex abuse syndrome, that a child who exhibits such a syndrome is truthful, and that on the basis of his examination of Alice he is of the opinion that her out of court statements are truthful. Moreover, the expert testifies that young children generally do not lie about graphic portrayals of sexual activity. Finally, a third psychologist, who also never saw Alice, testifies that recantation is extremely common in sex abuse cases involving persons living together. This expert offers his opinion that the child often has guilt feelings concerning the family disruption that his or her complaint has caused. The expert thus becomes a third voice telling the jury that it should believe the child's earlier accusation. While court authorization of such expert testimony is not yet wide spread and while undoubtedly three separate experts would rarely be permitted to testify for the prosecution in the same case, the impact of even one such expert on the trier of fact could be an overwhelming appeal to the jury to follow its own inclinations and convict. Thus the suggestion of imposition of the adequate corroboration requirement with respect to Rule 1(b) relating to prior inconsistent statements as well.

III. Closed Circuit Television, Videotape Statement, Videotape Deposition, and Child's Courtroom

Videotaping may be employed to preserve any statement made or testimony given by the child. If the statement of the child is admissible pursuant to a hearsay exception including the rule proposed in the preceeding section should it be enacted, the videotape, once authenticated, serves as an alternative means of introduction of the child's statement into evidence. Thus instead of hearing a witness testify to what the child said or having a transcript read, the videotape of the child speaking would be shown to the jury without regard, for example, to whether the videotaping was of a statement made to the child's doctor admitted under Fed. R.Evid. 803(4), or was a videotape of prior testimony admitted upon a finding of the child's unavailability at trial under Fed. R. Evid. 804(b)(1).

A controversy does not exist concerning the use of videotape as a means of presenting admissible hearsay statements of child declarants. A controversy does exist over the use of closed circuit television, videotaped statements, or videotaped testimony with respect to children. The controversy involves two different suggestions. First, to alter procedures now associated with the admission of former testimony, Fed. R. Evid. 804(b)(1), with respect to child witnesses in litigation involving sex abuse. Second, to change the configuration of trial testimony itself if the child actually testifies. Both suggestions repre-

sent attempts to respond to what is perceived as a need to permit a child to present his or her version of the events in question without face to face confrontation with the defendant either at that time or at any time. The underlying premise is that the child would suffer severe trauma or emotional distress if called to testify in the presence of the accused in the traditional trial setting and that it is both advisable and constitutional to avoid face to face confrontation between accused and child by means of closed circuit television, a videotaped statement, or videotaped testimony. In addition, advocates of videotaping in advance of trial argue that the procedure reduces the number of times a child must repeat the event in question this further reducing the adverse impact on the child.

The constitutionality and propriety of avoiding or modifying the traditional face to face confrontation between accuser and accused varies depending naturally enough upon the modified procedure being suggested. Fortunately, it is possible to discuss the use of closed circuit television and videotaping to reduce or eliminate the potential effects of trauma or emotional distress suffered by the victim arising from live testimony face to face with the accused in the courtroom depending upon the availability or unavailability of the child victim. Only Confrontation Clause issues will be addressed; free press and public trial concerns must await another day.

A. Available Child

1. Ex Parte Videotaped Statement

As developed earlier, the Confrontation Clause as interpreted in Roberts, requires the production at trial of a complaining witness when available as a condition for admissibility of the witness's out of court statements. The right of the defendant to confront available complaining witnesses against him stems from the trial of Sir Walter Raleigh. Sir Walter Raleigh was convicted of treason after a trial by affidavit without ever being able to confront his accusers. Not only did the government fail to produce live witnesses, Sir Walter Raleigh was not able to summon witnesses on his own behalf. To remedy the situation, our founding fathers gave us the the Confrontative Clause and Compulsory Process Clause of the Sixth Amendment of the Constitution: "the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

In an attempt to address the problem of trauma faced by child witnesses when testifying on direct examination face to face with the accused in open court, Texas enacted a statute, Art. 38.071(2), which provides for the ex parte videotaping of the statement of a child victim and for the admissibility of such videotape statement in open court provided that "the child is available to testify."

Sec. 2 (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

Note that the prosecution need not call the child during its case in chief at any time in order for the ex parte statement of the child to be admissible. All that is required is that the child be made available to the accused for the accused to call and examine, presumably cross-examine although subsection (b) seems to indicate otherwise, if he chooses to do so. The Texas statute is apparently based upon the notion that as long as the declarant of a hearsay statement is available to be called by the accused and examined at trial the right of confrontation is satisfied.

The Texas statute raises many difficulties, the most important of which is its unconstitutionality under the Confrontation Clause. The only reason we lack a United States Supreme Court decision squarely on point declaring the procedures provided for in the statute a violation of the Confrontation Clause is the

simple fact that no one has been bold enough to pursue the statute's approach in the face of the history of the clause, its language, and the Supreme Court decisions touching on the subject.

The reaction of the public to the trial of Sir Walter Raleigh was against the exact abuse the Texas statute seeks to reimpose - trial by ex parte affidavit. The Confrontation Clause ensures that available complaining witnesses first be called and examined by the prosecution in open court and second be subjected to cross-examination by the accused. The Compulsory Process Clause gives the accused the right to present evidence in his favor-- its purpose is not to permit the accused to present and examine witnesses against him. The language of the Sixth Amendment makes this perfectly clear:

> Confrontation Clause: "The accused shall enjoy the right ... to be confronted with the witness against him." The clause is "to be confronted with" which requires presentation of evidence by the prosecution. The clause does not merely say "to confront" which could more easily be interpreted to mean cross-examination only.
>
> Compulsory Process Clause: "To have compulsory process for obtaining witnesses in his favor." The clause is "witnesses in his favor" which means witnesses tending to establish his innocence. The clause does not state "witnesses against him" as apparently contemplated by the Texas statute.

The decisions of the Supreme Court bearing upon this point are in full accord. In Mattox v. United States, decided in 1895, the court said:

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

The court in 1899 again considered the right of confrontation in Kirby v.United States:

> The record showing the result of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their

> guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused - charged with a different offense for which he may be convicted without reference to the principal offender - except by witnesses who confront him at the trial upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

Over the years in many decisions the Supreme Court has been called upon to decide cases involving questions of unavailability of the declarant and the admissibility of hearsay statements of unavailable declarants. Roberts represents the latest of this long line of discussions. In each such case the Supreme Court has premised its discussion upon the firm principle that the Confrontation Clause requires that an available complaining witness be produced by the prosecution, examined by the prosecution, and presented for cross-examination to the defendant. The judge and jury observe the witness's and the accused's demeanor thoroughout. In this long line of decisions there is not even the slightest hint that the abuse perceived in the use of ex parte affidavits in the trial of Sir Walter Raleigh as reflected in the Sixth Amendment permits the prosecution to introduce an ex parte affidavit provided merely that the complaining witness is available to be called by the accused at trial.

In light of the foregoing assessment of the unconstitutionality of the admissibility of ex parte videotape statements at trial as provided for in the Texas statute, other concerns arising from the statute will be addressed only in passing. First, it is difficult to see how the Texas statute serves to reduce trauma from face to face confrontation given the accused's right to call the child to the witness stand at trial. Second, the videotaped statement can be made after the witness has been prepared on many occasions by the prosecution with respect to his or her version of the critical events -- the statute provides only that the prosecuting attorney can't be present at the videotaping session. The videotape can thus be equivalent to seeing the final commercial after several aborted earlier filming attempts. Finally, if defense counsel decides to run the risk of incurring the wrath or the jury simply for calling the child to testify, cross-examination of a child with respect to a videotape statement prepared under such circumstances would be extremely difficult. Not knowing for sure whether the child at trial, if given an opportunity, would testify in conformity with the prepared statement creates a serious dilemma for opposing counsel. If opposing council takes the child through the events once again and the child says the same thing, the position of the accused may be hurt significantly. Is it surprising that defense attorneys in Texas do not often call the child to the witness stand? If the child testifies inconsistently, or claims not to recall, a more fundamental problem arises. Is the child's videotaped statement still substantively admissible or is the

theory of admissibility limited solely to prior consistent statements? Under the Confrontation Clause analysis of Roberts, the videotaped statement of an unavailable witness must be ruled inadmissible unless shown to possess sufficient indicia of trustworthiness, an unlikely event considering the surrounding circumstances including the statement's preparation in anticipation of litigation.

2. Absence of Face to Face Confrontation

Various alternatives have been suggested which would permit the prosecution to elicit the testimony of the child witness under circumstances that shield the child witness from face to face confrontation with the accused. Cross-examination by the attorney for the accused is assured. No showing is required that the testimony of the child is or would be unavailable at trial.

(a) The Alternatives

(i) The Children's Courtroom. A special courtroom could be built that would permit the jury and judge to see the child witness and the defendant but not permit the child witness to see the defendant. The use of a one way glass or television monitors would permit the accused to see the witness. The special courtroom would have other modificiations designed to assist children in testifying such as elimination of the imposing judicial bench and the isolated witness stand.

(ii) Closed Circuit Testimony. Texas statute, Art. 38.071(3), provides that the testimony of a child may be projected into the courtroom by means of closed circuit television. The attorneys for the parties along with appropriate technicians accompany the child as does any person needed by the child to contribute to his welfare during the giving of the testimony. The judge, jury, and most importantly the accused remain in the courtroom. Presumably the defendant would be provided a means to communicate with his attorney during the examination. No finding by the court of unavailability of the child to testify in the presence of the accused by reason of trauma to the child resulting from a face to face confrontation is required. Texas statute, Art. 38.071(3), states as follows:

> Sec. 3. The court may on the motion of the attorney of any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorney for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons

> operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant.

The physical layout can be altered as suggested in Hochheiser v. Superior Court to place the image of the defendant before the child:

> According to the parties, the physical layout will include the following: Each of the two minors to be called as a prosecution witness will testify separately in a small anteroom (probably the jury room) with the only other persons present in that room being a parent, as a supporting adult, and the court bailiff. The judge, jury, defendant, both counsel, the court clerk, court reporter and the public (including the press) will be in a separate courtroom. Both the courtroom and anteroom will have television cameras and three television monitors for viewing. The three television screens and the courtroom will face the judge, the well in front of counsel table, and the jury box. The three screens in the anteroom will show the defendant, the trial judge and the attorney who is examining the witness. Apparently a single image of the testifying minor and supporting parent will be televised. The voices of those in the anteroom will simultaneously be transmitted as the examination is conducted.

Notice that the Texas statute provides for the attorneys to be in the room with the child while the procedure suggested in Hochheiser has the attorneys in the courtroom asking questions over the closed circuit television.

(iii) Videotape Deposition. An alternative procedure is to videotape the testimony of the child witness in advance of trial employing the technology and using a layout similar to either of those discussed above. The child would testify subject to cross-examination outside the presence of the accused who would be in contact with his attorney at all times. The videotape of the deposition, possibly including pictures of the defendant, would be shown at trial. The child would not be required to testify at trial. Texas statute, Art. 38.071(4) and (5), provides as follows:

> Sec. 4. The court may on the motion of the attorney for any party order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under Section

3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(3) each voice on the recording is identified; and

(4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken.

(b) Evaluation.

The use of a children's courtroom raises the problem of absence of face to face confrontation at any time between the accuser and accused. The use of closed circuit television or videotaping of the child's deposition raises in addition to the question of face to face confrontation, a question concerning distortion, exclusion of evidence, and status conferral variations in credibility. All three procedures also raise a concern that the presumption of innocence may be affected by the juries evaluation of the circumstances that required such a drastic alteration of procedure.

(i) Face to Face Confrontation. Whether a face to face meeting is part of the right of confrontation guaranteed by the Sixth Amendment was thoroughly addressed in United States v. Benfield. Benfield involved the admissibility of a videotaped deposition. The accused was not only excluded from the deposition room itself, the witness was apparently not advised that the accused was in the building and in communication with his attorney. Relying on Mattox v. United States, Kirby v. United States, Dowdell v. United States and Synder v. Massachusetts, the Eight Circuit concluded as follows:

> After carefully considering the sixth amendment, applicable case law, and this record, we are satisfied that the rights of Benfield were abridged by the above

> procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. Mattox, Kirby, Dowdell and Snyder, ... all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgment of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.

Hochheiser v. Superior Court is in accord:

> It would appear from a careful reading of the cases that physical confrontation is an element of Sixth Amendment guarantees. For example, the Mattox court states: [T]he primary object of the [Confrontation Clause] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection of sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

As Benfield and Hochheiser indicate, our adversary system as reflected in the Confrontation Clause rests upon an assumption that "recollection, veracity and communication are influenced by face-to-face challenge" and that the trier of fact is assisted in determining credibility by observing this face to face confrontation. Our day to day experience in life indicates that these assumptions are valid - people are much more careful and sincere when accusing someone face to face than when spreading a rumor.

(ii) Effect of Closed Circuit Television and Videotaped Deposition. Problems associated with the use of closed circuit television or a videotaped deposition to present the testimony of a child witness were addressed in Hochheiser:

> Moreover, there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen. [T]here may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence. *** For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways, ... Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor . . . . [A]nd off-camera evidence is necessarily excluded while the focus is on another part of the body. . . . Thus, such use of closed circuit television may affect the jurors' impressions of the witness' demeanor and credibility. . . . Also it is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status. *** Such considerations are of particular importance when, as here, the demeanor and credibility of the witness are crucial to the state's case.

While it can, of course, be argued with some force that testimony presented via closed circuit television or on videotape is in fact less persuasive than live testimony in the average case, the possibility of enhancement of credibility in any given case nevertheless certainly exists.

(iii) Presumption of Innocence. Use of a special courtroom, closed circuit television or videotaped deposition preserving the child witness's testimony are each accompanied by the risk of the jury giving weight to the procedure employed itself in deciding guilt or innocence. What is a jury to think about the child testifying outside of the physical presence of the accused? Why is the defendant shielded in open court from the child? Why is the defendant in the courtroom and the child testifying live on closed circuit television? Even with respect to the videotaped deposition where the absence of face to face confrontation between the child and defendant is less likely to be perceived by the jury, isn't the jury likely to draw certain inferences from the variation from normal courtroom procedure itself? Is it possible to draft a jury instruction that is not duplicitous to discourage the jury drawing this inference? Should

we tell the jury that it is the unfamiliar public setting that makes it impossible for the child to appear before them even when one knows it is primarily or exclusively an unwillingness or inability to face the accused or concern over the effects of confronting the accused that resulted to the child's absence? If the jury does conclude that the reason the child is not testifying live before them is to avoid making the child look upon the accused while testifying, isn't the jury from that fact alone likely to infer guilt? Hochheiser states:

> [T]he presentation of a witness' testimony via closed-circuit television may affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence.

(c) Conclusion.

The absence of face to face confrontation between the defendant and a child witness who has not been shown to be unavailable to testify in the accused's presence at trial is unconstitutional.

B. Unavailable Child

Having determined that the Confrontation Clause demands face to face confrontation in open court between the accused and a child witness who is available to give viva voce testimony at trial, it is time to address two very difficult questions. First, what circumstances including potential trauma or emotional distress to a particular child that might arise from face to face confrontation with the accused in open court renders the child's testimony unavailable? Second, if potential trauma or emotional distress to a particular child makes the child unavailable, if the child is unable or unwilling to testify in open court before the accused, or if the child is otherwise unavailable, would the child's direct testimony outside the accused's physical presence presented in court through the use of closed circuit television, a videotaped deposition or by means of a special child's courtroom, subject to cross-examination, deny the defendant his Sixth Amendment right to confront witnesses against him?

1. Unavailability of Testimony

A witness's testimony may be unavailable at trial for any one of many reasons.

(a) Competency.

Every witness including, of course, a child witness, must be competent before he or she will be permitted to testify. Fed. R. Evid. 601 eliminates all grounds of witness incompetency with respect to a claim or defense as to which federal law provides

the rule of decision except those specifically recognized in the Federal Rules of Evidence. Included in the grounds of incompetency not recognized are age, religious belief, mental incapacity, color of skin, moral incapacity, conviction of a crime, marital relationship, and connection with the litigation as a party, attorney, or interested person. Such matters long ago regarded as grounds of incompetency, survive in most instances as avenues of impeachment of the witness. In the great majority of respects, Fed. R. Evid. 601 merely reflects the common law as it has developed with respect to the competency of witnesses.

The only general competency requirements specified in the Federal Rule of Evidence are contained in Fed. R. Evid. 603 which requires that every witness declare that he will testify truthfully by oath or affirmation and Fed. R. Evid 602 which requires that the witness possess personal knowledge. Together these rules require that (1) the witness have the capacity to accurately perceive, record and recollect impressions of facts (physical and mental capacity), (2) the witness in fact did perceive, record and can recollect impressions having any tendency to establish a fact of consequence in the litigation (personal knowledge), (3) the witness be capable of understanding the obligation to tell the truth (oath or affirmation), and (4) the witness possess the capacity to express himself understandably, where necessary with aid of an interpreter, Rule 604 (narration). Accordingly, before a witness will be permitted to testify, evidence must be introduced sufficient to support a finding of personal knowledge, Fed. R. Evid. 602, i.e., that the witness actually observed, received, recorded, recollects and can narrate impressions obtained through any of his senses having any tendency to establish a fact of consequence, and the witness must declare by oath or affirmation that he will testify truthfully, Fed. R. Evid. 603. No other personal qualifications of a witness are required. No mental qualification is specified. The Advisory Committee's Note reasons that standards of mental capacity have proved elusive, few witnesses were actually disqualified, and moreover that a witness wholly without mental capacity is difficult to imagine. However, while mental incapacity is not a specified ground of incompetency, testimony of a witness whose mental capacity has been seriously questioned may still be excluded on the grounds that no reasonable juror could possibly believe that the witness in fact possesses personal knowledge, Fed. R. Evid. 602, and/or understands the duty to tell the truth, Fed. R. Evid. 603.

Competency of a witness to testify thus requires a minimum ability to observe, record, recollect and recount as well as an understanding of the duty to tell the truth. Where the capacity of a witness has been brought into question, the ultimate question is whether a reasonable juror must believe that the witness is so bereft of his powers of observation, recordation, recollection and narration as to be so untrustworthy as a witness as to make his testimony lack relevancy. Such a test of competency

has been characterized as requiring minimum credibility. The tendency is increasingly to resolve doubts as to minimum credibility of a witness, including a child witness, in favor of permitting the jury to hear the testimony and judge the credibility of the witness for itself.

(b) Other Reasons

The testimony of a competent witness may nevertheless be unavailable for any of the reasons set forth in Fed. R. Evid. 804(a):

> Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant -
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2),(3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

The definition of unavailability contained in Fed. R. Evid. 804(a) provides five alternatives, each alone sufficient to meet the requirement. The thrust of the alternative definitions of unavailability is upon the unavailability of the testimony of the witness which includes but is not limited to situations in which the witness is not physically present in court.

Rule 804(a)(1) provides that a witness exempt from testifying concerning the subject matter of his statement on the grounds of privilege is unavailable. An actual claim of privilege must be made by the witness and allowed by the court before the witness will be considered unavailable on the basis of

privilege. Fed. R. Evid. 804(a)(2) provides that one who persists in refusing to testify concerning the subject matter of his statement despite an order of the court that he do so is unavailable. Silence resulting from misplaced reliance upon a privilege without making a claim, or in spite of a court denial of an asserted claim of privilege, constitutes unavailability under this subsection. Fed. R. Evid. 804(a)(3) provides that a witness who testifies to a lack of memory of the subject matter of his statement is unavailable. A witness may either truly lack recollection or for a variety of reasons, including an unwillingness or inability to confront the defendant face to face, feign lack of recollection. In either event the witness is unavailable to the extent that he asserts lack of recollection of the subject matter of the prior statement, even if the witness recalls other events. Fed. R. Evid. 804 (a)(4) provides that a witness unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity is unavailable. Death is the most obvious basis; mental illness or physical disability of a serious nature are equally compelling. In criminal matters, if the reason for the government's witness's unavailability is only temporary, considerations underlying the Confrontation Clause may require resort to a continuance. In both civil and criminal cases, where the testimony of the witness is critical, the trial court should consider carefully the option of granting a continuance.

Fed. R. Evid. 804(a)(5) provides that in both civil and criminal cases, a declarant is unavailable if his presence cannot be secured by process or other reasonable means. In criminal cases the Confrontation Clause also requires that the government make a good faith effort to obtain the presence of the witness at trial going beyond the mere showing of an inability to compel appearance by subpoena before prior testimony may be introduced as a substitute for testimony. Whether the government has shown good faith in attempting to first locate and second procure the witness's attendance by process or voluntarily by reasonable means must be determined on a case-by-case basis after careful review of the particular facts and circumstances.

In addition Fed. R. Evid. 804(a)(5) requires that it be shown that the testimony of the witness cannot be procured by process or other reasonable means before a hearsay statement may be admitted as a hearsay exception pursuant to Fed. R. Evid. 804(b)(2), (3) or (4). The requirement of an attempt to obtain the testimony of the witness by deposition or otherwise as a prerequisite to a finding of unavailability imposed by Fed. R. Evid. 804(a)(5) is not applicable to either Fed. R. Evid. 804(b)(1), former testimony, or Fed. R. 804(b)(5), other exceptions.

(i) Severe Psychological Injury. With respect to unavailability based upon mental illness or infirmity, Fed. R. Evid. 804(a)(4), the question becomes when, if ever, should potential trauma or emotional distress to a child witness be such

as to be considered a sufficient showing that the child is "unable to testify at the trial . . . because of . . . then existing . . . mental infirmity."

Several state legislatures have responded to this query in similar fashion. A Florida statute, Section 918.17, "requires a finding that there is a substantial likelihood" that a child victim of sexual abuse "would suffer severe emotional or mental distress if required to testify in open court." A Maine statute, Title 15, § 1205, provides for unavailability if the trial court finds "that the emotional or psychological well being of the person would be substantially impaired if the person were to testify at trial." Finally, California Evidence Code § 240 declares a witness unavailable on the grounds of physical or mental illness or infirmity when expert testimony "establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma." An expert witness is defined for this purpose to include physicians, surgeons, and psychiatrists.

Whether a finding that the child witness, if required to testify face to face in open court, would suffer severe emotional or mental distress, substantial emotional or psychological impairment, or substantial trauma is sufficient to constitute unavailability under the Confrontation Clause is uncertain but doubtful. More is probably required.

Persons who testify in open court often suffer some emotional distress. Many if not most rape victims suffer severe emotional distress or trauma while testifying. Presumably so do many other groups of victims. "Unavailability" requires more than merely showing the possibility of emotional distress or trauma, even more than showing a likelihood that such emotional distress or trauma will be substantial or severe. Unavailability based upon mental illness or infirmity was said in People v. Stritzinger to require a finding that the present or likely to be incurred mental illness or infirmity renders the witness's testimony "relatively impossible." In determining whether the emotional distress or trauma now present or likely to be suffered by the child witness testifying as to acts of prohibited sexual conduct as a result of face to face confrontation in open court with the accused is such as to be distinguished from the emotional distress or trauma often suffered by witnesses so as to render the child witness "unavailable" to testify -- "relatively impossible" for the witness to testify on the basis of the likelihood of severe psychological injury --, Warren v. United States, suggests looking at the following factors:

> [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3)

> the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping [child sex abuse] or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.

Applying the foregoing standard, it is extremely unlikely that either the Florida, Maine or California statutes as currently written will often come into play for a very simple reason. The Maine statute provides that upon a finding of unavailability, prior recorded testimony of the child witness subject to cross-examination by the accused becomes admissible. California provides similarly as to preliminary hearing testimony only. Florida sanctions the taking and admissibility of a videotaped deposition. Notice, however, that all three statutory schemes provide that the defendant be present when the testimony of the child is taken. It seems to follow that it should be a relatively rare event when the difference between the taking of the child's testimony face to face with the accused in open court is "relatively impossible" but that it was "relatively possible" for the child to testify face to face with the defendant at a prior hearing, former trial, preliminary hearing or even the less stressful being less public pretrial perpetuation deposition.

(ii) Refusal or Lack of Recollection. A child witness may be unavailable because the child is unwilling or is unable to testify in open court whether or not in the accused's presence even though requested by the court to do so. On other occasions a child placed in the unfamiliar court surroundings simply falls apart and forgets what it is that happened. In each instance the child's testimony is unavailable.

2. Procedures

Let's return to Alice. Assume that Alice had at one time confronted Sam with her accusation. This may have occurred either at the time of her initial statements of complaint or sometime during the period the criminal complaint was under investigation. Assume further that Alice later told the state's attorney or the child psychologist working with her that she will not say that Sam rubbed her on her genitals if Sam is present. The child psychologist is prepared to say only that forcing her to testify face to face with Sam in the court may cause some short term distress but that it is unlikely given her age to be terribly severe or long term. The child psychologist believes that while the entire incident may have long term repercussions for Alice, it is unlikely that face to face confrontation will add significantly to the long term affects in comparison to

testifying subject to cross-examination outside Sam's presence. Of course, if Alice had never confronted Sam with her accusation, the likelihood of the psychologist opining that it is "relatively impossible" for Alice to testify would increase. Given the lack of hard clinical evidence as to the long range effect of testimony in open court face to face with the accused, it is suggested that even if the psychologist were to so testify, the court should declare the child unavailable because of the potential for severe psychological injury only when the court finds by clear and convincing evidence that the criteria set forth constituting "relative impossibility" have been satisfied.

If the prosecution wants Alice declared unavailable for face to face confrontation on the basis of the likelihood of severe psychological injury making her testimony "relatively impossible," an evidentiary hearing should be held in advance of trial at which expert testimony would be offered. Alice may or may not be required to testify. A presumption in favor of Alice testifying seems warranted. If the court finds Alice unavailable, a statute or court rule should provide the prosecution the opportunity to take a videotaped perpetuation deposition employing the procedures previously discussed. The alternative of employing closed circuit television or having Alice testify in a children's courtroom at trial should also be considered. If the prosecution wants Alice declared unavailable on the basis of her unwillingness or inability to testify in open court with Sam present, an evidentiary hearing at some time will also be required. Query, should the court put Alice in the same room as Sam in advance of trial or outside the jury's presence and see if Alice will refuse to testify at the dress rehearsal or should the court rely upon her statement to that effect and the testimony of appropriate experts? It is suggested that an evidentiary hearing to test Alice's actual unwillingness or inability to testify in Sam's presence will most often be appropriate.

If the prosecution believes that Alice may not be both willing and able to testify in court in Sam's presence and do so without suffering severe psychological injury, an alternative procedure of substantial merit is simply to have the court on motion of the prosecution order a perpetuation deposition. The perpetuation deposition testimony would be offered by the prosecution at trial if Alice was stipulated to be unavailable by the parties, found in advance of trial to be unavailable by the court, or proves unavailable for any reason when called to testify in Sam's presence at trial. Presumably the prosecution would not request such a conditional perpetuation deposition order unless it believed the probability great that face to face presence in open court will cause a deterioration in the child or the child's testimony. The deposition would obviously create an opportunity for the defendant's lawyer to test his cross-examination. Moreover, the deposition would serve to impeach if the child testified differently at trial. Since the prosecution would naturally desire to avoid both results, it is likely the request for a conditional perpetuation deposition would be made only when

the chance of deterioration at trial but not during a non-confrontation deposition are great. Accordingly, it is suggested that the perpetuation deposition should be available on motion as a matter of right without requiring the prosecution to make a specific showing of cause. The motion procedure rather than mere notice is suggested so as to keep the court advised as to the circumstances surrounding Alice's testimony and to provide the court an opportunity to participate in structuring the procedures to be followed at the videotaped perpetuation deposition.

What about Sam's rights? If the court were to hold a pretrial hearing or permit the taking of perpetuation deposition to determine what Alice will do both in Sam's presence and the process discloses that Alice is truly unavailable, shouldn't Sam nevertheless be entitled to have the prosecutor present Alice in open court to be observed by the jury? In the absence of a pretrial finding of unavailability based upon "relative impossibility" because of the potential severe psychological injury, even if Alice will say nothing when questioned by the prosecution, shouldn't Sam have the right to confront Alice in open court? Conversely, if a pretrial hearing determines that Alice will not testify meaningfully in open court in Sam's presence, shouldn't Sam have the right to have her declared incompetent to testify and thus barred from taking the witness stand at all? In short, if Sam and his attorney believe that jury speculation as to the event giving rise to Alice's demonstrated unwillingness or inability to testify at trial will be extremely prejudicial -- the jury will infer that the event must have occurred for Alice to be so scared, Sam should have the right to bar Alice's testimony if a pretrial rehearsal shows her to be unavailable. On the other hand, if Sam and his attorney do not fear jury speculation but prefer to let the jury see Alice on the stand, close up and personal, the right to confront witnesses mandates that Sam have that privilege.

3. Admissibility

(a) Confrontation. If the witness is declared unavailable at trial for any reason, such as lack of recollection, unwillingness or inability to testify, or severe psychological injury may a perpetuation deposition or other testimony in the same proceeding given subject to cross-examination by the attorney for the accused admissible pursuant to a statutory hearsay exception applicable in child sex abuse prosecutions be admitted in evidence under the Confrontation Clause if the defendant at the time of taking was denied face to face confrontation? Similarly, can the court order the child to testify on closed circuit television or in a child's courtroom once it has been determined that the child's viva voce testimony in court face to face with the accused is unavailable?

Answer: almost always if not always "Yes".

It is suggested that if Alice is truly unavailable as unavailability has been discussed, then the introduction into evidence of Alice's testimony given absent face to face confrontation with the defendant at the perpetuation deposition or other formal hearing in the same proceeding is almost always if not always permissible under the Confrontation Clause. Under Roberts, since Alice is unavailable, we should analyze Alice's testimony as hearsay. This is true even if Alice is testifying via closed circuit television or live in a child's courtroom -the absence of face to face confrontation with the accused mandates this result. As a hearsay statement of an unavailable declarant, confrontation is satisfied only if the Alice's testimony bears adequate indicia of reliability. Roberts informs further that reliability can be inferred without more when the hearsay evidence falls within a firmly rooted traditional hearsay exception. While Alice's testimony possesses almost all the aspects of former testimony, Fed. R. Evid. 804(b)(1), the absence of face to face confrontation precludes resort to former testimony as an avenue of admissibility under the "firmly rooted" hearsay exception prong of Roberts. Accordingly, Alice's testimony must be shown to possess particularized circumstantial guarantees of trustworthiness equivalent to that possessed by a hearsay statement admitted pursuant to a firmly rooted hearsay exception.

Applying this criteria, Alice's testimony should be found to satisfy the Confrontation Clause. Alice is testifying under oath subject to full cross-examination. Alice's demeanor is available to the jury either live, by closed circuit television or on videotape. The defendant's demeanor could and should also be made available to the trier of fact. Oath, cross-examination and demeanor are strong indicia of reliability. In addition, if Alice will still testify, a television picture of Sam could be projected for her to view while she testifies. While not constituting physical confrontation face to face, this procedure would add another circumstantial guarantee of trustworthiness. Moreover, various other factors providing equivalent circumstantial guarantees of trustworthiness previously mentioned in the discussion of the admissibility of other reliable hearsay under Fed. R. Evid. 803(24) and 804(b)(5) are present with respect to Alice's testimony such as absence of motive to fabricate, non suggestive inquiry, embarassment, cry for help, etc.

More generally, while whether oath, demeanor of the victim and cross-examination are alone enough to establish equivalent circumstantial guarantees of trustworthiness may be open to debate, a "Yes" answer is suggested. If the foregoing is combined with display of the demeanor of the accused to the trier of fact, and projection of the accused's image before the child victim during the child's testimony, a "Yes" answer is strongly indiciated and extremely advisable. Treating these procedures as alone adequate would avoid practical problems associated with evaluating other indicia of trustworthiness especially when the

child testifies live over closed circuit television or in a child's courtroom. If additional indicia are ultimately required, a pretrial hearing may be beneficial to determine admissibility. The presence of at least some such indicia with respect to the great majority of statements of a victim describing prohibited acts of sexual contact performed with or on the child by another will in combination with oath, demeanor and cross-examination almost always mandate a "Yes" determination as to the presence of an adequate particularized showing of equivalent circumstantial guarantees of trustworthiness.

(b) Corroboration. Since Alice is unavailable for Confrontation Clause purposes, should the additional requirement of adequate corroborative evidence of the act described in her testimony be appended. Expert witness's may testify explaining why Alice is unwilling or unable to testify, or can't or won't recall and that Alice told the truth during her testimony outside Sam's presence. Nevertheless, the circumstances of Alice's testimony so closely parallels viva voce testimony at trial that traditional notions for evaluating the sufficiency of the evidence to sustain a verdict of guilty should prevail. It is suggested that the additional requirement of adequate corroborative evidence of the acts described in the testimony of the unavailable child witness should not be imposed.

4. Summary and Suggestion

With respect to establishing unavailability, current statutes and rules should be amended to provide specifically for unavailability based upon the potential of severe psychological injury to a child witness if forced to face the defendant in open court. Supporting commentary should make clear, however, that the appropriate standard is "relatively impossibility" and that the factors set forth in Warren v. United States should be taken into consideration.

Statutes and rules should also be amended to provide for the use of closed circuit television or a child's courtroom for the eliciting of testimony in child sex abuse prosecututions when the child witness is unavailable for any reason for face to face confrontation but available to give testimony in such an alternative setting. Provision should be made for the projection of the demeanor of both child witness and defendant before the trier of fact. Provision should also be made for the projection of the image of the defendant before the child witness to be employed where the witness is willing and able to testify under such circumstances and where such projection will not cause severe psychological injury.

Statutes and rules relating to perpetuation depositions should be modified to provide for the taking and videotaping of a perpetuation deposition of child witnesses in sex abuse prosecutions employing the foregoing procedures suggested for the taking of testimony outside the physical presence of the defen-

dant. The taking of a perpetuation deposition should be made available to the prosecution on motion without requiring a showing of cause. Given the advantage a deposition provides to the accused should the child in fact be available at trial, imposition of a specific showing of likelihood of unavailability does not appear warranted. Of course, the court must be assured that the child witness is truly unavailable at trial before permitting the deposition to be introduced.

Admissibility of closed circuit testimony, testimony in a child's courtroom, or videotaped testimony at a perpetuation deposition or other formal hearing taken absent physical face to face confrontation requires a search in each instance for particularized guarantees of trustworthiness. Statutes and rules should be amended to provide for the admissibility as an exception to the hearsay rule of a perpetuation deposition or other testimony taken in a child sex abuse prosecution in the absence of the physical presence of the accused when the child witness proves unavailable at trial if particularized guarantees of trustworthiness equivalent to the circumstantial guarantees of trustworthiness possessed by statements admitted pursuant to a firmly rooted hearsay exception are shown to exist. It is suggested that it will be the unusual case where equivalent particularized guarantees will not be able to be shown. It is in fact very likely that oath, demeanor either live, on closed circuit, or on videotape, and cross-examination if combined with projection of the defendants image before the child witness create adequate indicia alone. Consideration should certainly be given to providing for admissibility solely on this basis. If a showing of additional indicia of trustworthiness is deemed necessary by the drafters of the statute or rule, the foregoing indicia may be combined with the indicia of trustworthiness presently considered in association with Fed. R. Evid. 803(24) and 804(b)(5).

To the extent that the perpetuation deposition or other hearing is modified to take into account differences asserted to be important in examining children, the less likely equivalent particularized guarantees of trustworthiness based on oath, demeanor and cross-examination alone will satisfy the Confrontation Clause. For example, if the defense attorney is not permitted in the room with the child but must ask questions by giving them to a psychologist or other designated expert who first converts the question into "children's talk" and then presents it to the child, it is more likely that particular circumstantial guarantees of trustworthiness will not be found to exist. Cross-examination envisions cross-examination by counsel selected by the accused confronting the witness. Alteration from this expectation bears the risk of an enhanced probability of a finding of inadmissibility. If such modified procedures are deemed beneficial, the statute or rule creating the appropriate hearsay exception should require a finding of equivalent guar-

antees of trustworthiness based upon those factors now considered relevant in deciding admissibility of a hearsay statement under Fed. R. Evid. 803(24) and 804(b)(5).

IV. Conclusion

The outcry of the public to disclosures of wide spread child sex abuse can be addressed effectively within the established boundaries of the Confrontation Clause. State legislatures can and should enact new hearsay exceptions designed specifically to cope with the question of the admissibility of out of court statements of child sex abuse victims. New procedures for securing the testimony of the child witness both at and prior to trial may and should be created to respond to the frequent inability to procure viva voce testimony from a child victim when placed face to face with the accused in open court.

New hearsay exceptions and new procedures taking advantage of video technology can and must comply with the Confrontation Clause as interpreted by the Supreme Court in Mattox, Green, Evans and Roberts. Radical alterations, such as permitting introduction of ex parte videotaped statements of a child witness provided the child is available to be called by the defendant, are neither necessary nor constitutional. Evidentiary problems thought by some to be unique to child sex abuse prosecutions must not be employed to weaken the constitutional protections granted the accused. Face to face physical confrontation between witness and accused is required if the mandate of the Confrontation Clause is to be satisfied through the production of an available witness. If face to face confrontation is truly not possible and the witness is thus properly considered unavailable, then the Confrontation Clause provides for the admissibility of the declarant's hearsay statements if shown to possess adequate indicia of trustworthiness.

Strict construction of unavailability must be maintained. The Confrontation Clause's strong preference for production before the jury of the complaining witness under oath, subject to cross-examination, face to face with the defendant testifying in a public courtroom accusing the defendant of the crime charged must not be shunted outside even with respect to crimes alleged against children. The seriousness of the offense charged should make us more not less inclined to secure the defendant his or her full constitutional protections.

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Videotaped Interviews with Child Abuse Victims

Steve Chaney

VIDEOTAPED INTERVIEWS WITH CHILD ABUSE VICTIMS
The Search for Truth Under a Texas Procedure

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> "Truth is the ultimate quest. This is the proper interest of the prosecution, the defense, the jury, the judge and all of our society in all judicial proceedings. Philosophically, it may be argued that truth is not an absolute. If so, that conclusion does not diminish the premise. Truth, though unattainable in all of its labyrinthic extremities, must always be the judicial goal. It is the purpose undergirding our rules of evidence." State of New Jersey vs. George R. Sheppard, Superior Court of New Jersey Law Division - Criminal Burlington Docket I 0822-12-83, August 29, 1984.

The videotape statute in Texas, Section 38.071 Texas Code of Criminal Procedure went into effect August 29, 1983. Its purpose was to provide a balance between the defendant's right to be tried on reliable, credible evidence and the abused child's right to receive protection from the State and a right to be heard in a setting that does not produce additional trauma to the child.

The Texas procedure provides three methods of obtaining the child's testimony. Section 2 allows the videotaping of a pretrial interview with the child not attended by an attorney for either the defendant or the state. This section was intended and should be viewed as an exception to the general rule that hearsay is not admissable. However, there are of course many exceptions to the general hearsay rule - res gesti, business records, dying declarations, etc. In each of these execptions, the social policy of admitting this testimony or evidence which is believed to have special indicia of reliability outweighs a strict constructionist approach to the defendant's right to confrontation. If the eight prerequisites to the admission of a videotape are adhered to as set forth in the Texas Videotape Statute, then the social policy of this State says that this testimony should be admitted in order to afford some protection to a significant class of citizens - abused children.

Section 3 provides for remote live broadcast of the child's testimony into the courtroom. Section 4 provides for a deposition of the child to be

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Note: There is no central repository for information in this State on the use and success of the procedures for videotaping an abused child. The information for this paper was obtained by the author based on his personal knowledge having helped to write the new procedure and interviews with prosecutors and judges in various parts of the State.

videotaped. In Section 2 the child must be available to be called as a witness for cross-examination. Section 3 and 4 prohibit the child from being called into the courtroom if these Sections are used.

A. Making a Section 2 Tape:

Since the effective date of the Texas videotape procedure thousands of videotapes have been made. Most of the larger counties quickly assembled the necessary equipment and began taping abused children. In Fort Worth (Tarrant County) videotaping had been done for a couple of years before the effective date of the statute and this experience was shared with other agencies and within the Department of Human Resources.

The equipment is not expensive - a video camera and recorder - less than $2000.00. Some agencies have purchased the equipment and many have had equipment donated by civic or charitable organizations. The real problem has been to find or to train qualified child interviewers. Many counties have yet to make their 1st videotape because of this limitation.

1. The Interviewer: Who makes the tape depends more on who possesses the interviewing skills than than any other factor. Most often the tapes have been made by the Department of Human Resource's sexual abuse investigators. (Note that the tape's use is not limited to sexual abuse cases but can be used in cases of physical abuse or any offense in which a child is a victim.) Tapes have also been made by Rape Crisis agencies, police departments, District Attorney's Child Abuse investigators and child psychologists and psychiatrists. There was no requirement put in the Texas Procedure as to who makes the tape to allow for this flexibility.

The interviewer needs to have the combined skills of interviewing children together with the knowledge of what is required to make a criminal case in court. Since the tape cannot be made by two people there has to be cross-training so that the interviewer has both the knowledge of the police and the interviewing skills.

2. Setting: The videotaping should occur in a sterile setting, which is purposely devoid of stimulation. A room should be dedicated for this purpose where the equipment is always set up. It is helpful to have a one-way mirror to an adjoining room so the interviews can be monitored by a police detective, a child's relative, or other appropriate person. Above all, the room should be isolated from distracting noises.

3. Preparation: The interviewer should obtain as much information as possible about the alleged event. This is done in a variety of ways, such as talking to the person who reported to the police or DHR, the non-abusive parent or siblings. No information should be elicited from the child victim about the abuse before the on-tape interview. This prevents the argument that the child was rehearsed by the interviewer. Generally a child who is able to talk about the abusive event will be most spontaneous during the 1st interview and that is the one that should be captured on tape.

Props may be used for the interview, particularly the anatomically correct dolls. These dolls are most helpful in identifying body parts by children of all ages and for demonstration by children age 6 and up as to what happened to the child. Children younger than age 6, may be comfort-

able using the dolls for demonstration, but will frequently use their own body for demonstration as the use of the dolls require some abstract thinking.

Some interviewers prefer to have the child seated on the floor, others, a school type chair or a couch. The child should be made comfortable but their ability to move off-camera should be limited. The camera needs to be focused to frame all of the child as close up as possible, to capture body language as well as facial expression. The interviewer does not need to be in the picture. The interviewer should also operate the equipment to limit who is in the room to the interviewer and the child. Therefore, the camera is preset to a particular location.

4. Interview: The interviewer is trying to solicit specific information about an incident. He is trying to obtain everything the child knows about the incident without contaminating that information in the process. The interviewer needs to be familiar with what conduct is required to constitute a criminal offense. Questions such as where the event occurred are important not only to provide the context in which the abuse occurred but to establish venue for the legal system. The idea is that this tape will answer all the questions that might likely be asked in court so the child may not have to testily later.

Since the abusive event is not something the child may discuss on his own or in a direct manner, it is up to the interviewer to seek this information. But herein lies a delicate balance and a point of frequent court and prosecutor frustration. How do you lead or direct the child to discuss the traumatic and embarrassing specifics of the event without asking a question "calculated to lead the child to make a particular statement" as used in the Texas Statute?

All witnesses are permitted to be lead to some extent and children even more so. What is prohibited by the statute could be called "gross leading" i.e., putting the words and maybe the ideas in the child's mouth and mind.

First, the child's testimony is not very convincing if the interviewer is making all the statements and the child is merely answering yes or no. The problem with children as witnesses is that they are likely to want to agree with an authority figure - they want to please. Second, that part of the tape or maybe all of the tape will be held inadmissible by the court depending on how the judge interprets the statute. Some Judges have deleted only the leading questions and answers, while in some cases the whole tape was suppressed, generally, because of many leading questions.

There is a solution. If you are lucky to have a child that begins to talk on his own about the abuse - quit asking questions and just listen. If you do have to ask questions, always give the child an option on how to answer. For example, to ask a child "Did John pull your pants down?" is leading but better than "John pulled your pants down, didn't he?". The best question however is "Did John pull your pants down or did you pull them down - what happened?".

Ask the questions as if you don't really know the answer, because you may really not know until the child tells you himself.

The interviewer should have a composed flat response to the child's answers. There is a tendency to want to show empathy and support for the child. Statements such as "What John did to you was wrong", "We want to protect you", "You did the right thing by reporting this", etc. are appropriate statements to make to the child after the tape has been made but are not appropriate on a tape to be played at the defendant's trial.

B. Once the Tape is Made - How is it Used

1. Prevent Reinterview: It is difficult for the child to talk about abuse. Repeatedly having to talk about the abuse can frustrate and even traumatize the child. Repeated tellings of the abuse are also less reliable - the child either begins to suppress information, embellishes the information or begins to answer the way he thinks the interviewer wants him to answer. A well conducted first interview tape is probably more reliable to a judicial fact finder than a child whose testimony has been rehearsed by repeated interviews and preparation for trial. The tape should be made available to police investigators, family courts, District Attorneys, Grand Juries, the defendant and his attorney during plea bargaining and any other use that can prevent the child from having to undergo the interview again. The child may feel that simply by having to repeat the story so many times that no one believes him. This is the wrong message to send to an abuse victim who will probably feel internal and external pressure to recant anyway.

2. Plea Bargaining: Plea negotiations may take place either before or after indictment. The video tape's most frequent use and benefit is at this stage. The tape may have been played for the defendant when first arrested. It has been an aid in obtaining confessions. If he hasn't seen the tape before, a tape of a communicative child professionally interviewed, will convince most defendants and their attorney that a trial might not be in their best interest. This, of course, prevents the child from having to be called to court completely and generally results in a quicker disposition of the case than without the tape. If the tape is of poor quality, it may have the opposite effect, however. The case will appear weak and the prosecutor may feel compelled to prepare and call the child as a witness during trial and the tape may be used to impeach the child by the defense. This is particularly true if the child was not communicative on tape but was later reinforced by therapy and can now tell about the abuse.

3. Trial: Each of the major counties (Texas has 254 counties) has used the tape in trial before a jury on a number of occasions. Most prosecutors still prefer to call the child as a witness if the child can handle the experience and it doesn't do additional damage to the child. It has been reported that most juries would rather have the child as a witness than just the tape. That is understandable, but in some cases the reason for the tape would deny the jury any testimony.

Most of the trial cases where the tape has been used have resulted in a conviction but several have resulted in a finding of not guilty. The tape

is a valuable tool to protect the child victim and enhance the prospect of successful prosecution but it does not overwhelm juries and stampede them in a rush to judgment. The state wins most of the cases tried to a jury and the videotape will probably not affect the percentage won. It will make some cases prosecutable that would otherwise be dismissed.

I am not aware of any trial judge that has ruled the tapes inadmissible on constitutional grounds but a number of tapes have been ruled inadmissible in whole or in part because the questions were too leading. One judge suggested the state should call the child as a witness and only use the tape if the child became unresponsive in the courtroom. The Statute does not require this procedure nor was it required by the court but it is a good practical suggestion. The Judge also stated that if the child was able to give live testimony, that portion of the tape that covered the same information would not be admissible on direct as it would be bolstering the child's testimony. It still could be used to rehabilitate if the child's testimony that was impeached - as a prior consistent statement.

Surprisingly, in a number of cases where the tape was used and the child made available to the defense for cross-examination the defendant chose not to question the child. This was true in the one case to have been decided by an appellate court Jolly vs State 681 SW^2 689(Tex.App.14th Dist. 1984).

Even though Section 2 requires that the child be made available as a witness for cross-examination, the child does not necessarily have to be called into the courtroom. The court may utilize the provisions of Section 3 or 4 to comply with this provision of Section 2. In other words, the court may require or allow the defense attorney and the state's attorney to videotape a deposition of the child to comply with the child being "made available".

4. Recanting: Recanting is a major problem for the legal system. Recanting is an expected reaction of an abused child who has reported the abuse, although this is not well understood or accepted by the legal community. Only an enlightened legal system, when confronted with a recanting child, asks the next question "why is the child recanting" and seeks an answer to that question. Most prosecutors believe that the videotape has a major benefit in this area. If the child later recants, even at the time of trial, the case can still be prosecuted by using a good tape and psychological experts to explain the recanting symptoms. The fact finder is confronted with two opposing statements from the child and often the tape statement containing sufficient detail elicited by non-leading questions is the more compelling evidence.

5. Unsworn testimony: The child's testimony on a Section 2 tape will be unsworn. An oath is no guarantee of trustworthiness by any witness - a good percent of sworn witnesses lie anyway. Children of tender years who cannot reason abstractly and can not qualify to take an oath should still be allowed to relate how they were abused - what factually happened - an ability they may possess. Since the Texas procedure does not require the child to be sworn when making a Section 2 tape, the general requirement that all witnesses be sworn may not be applicable.

Interviewers are taught to first establish the young child's level of development at the beginning of the interview. In fact, a form of oath, although not official, will often be given on the tape- i.e. are you going to tell or have you told what really happened.

6. Support of Child to Family: The tape once made has many uses, one of which is to convince the child's family that abuse has really occurred. The non-offending parent may have difficulty in accepting the fact that abuse has occurred. In cases of inter-family abuse, the child will often provide more information to the trained interviewer than to a family member. The tape can allow the child to speak to family members just as it allows the child to speak to the judge or jury in the courtroom. The result should be an increased support for the child from the family when the abused child is in great need of that support. The abused child's family as well as the greater society needs to face the reality of child abuse.

7. Therapy of Defendant: Before a child abuser can begin a successful treatment program, they must recognize and accept what they have done. Of course not all child abusers are susceptible to treatment. Most child abusers who are treatable will initially deny the abuse to others and sometimes to themselves. The tapes have been successfully used in therapy to force the abuser to confront this issue.

C. Section 3 & 4 of 38.071

Section 3 & 4 tapes have not been used very often. I found two uses of Section 4 tape and none of Section 3. I would suspect that this is because the Section 2 tape has so many applications and is being routinely made in each child abuse investigation and because a much more elaborate set-up is required for a Section 3 or 4 tape.

Conclusion:

The Texas Videotape procedure will not solve all child abuse cases. It is a tool to aid in the protection of children and to minimize their trauma in our efforts to prosecute child abusers. It is better evidence than some other evidence that is admitted as an exception to the hearsay rule.

The taping of what the child has said will provide more reliable evidence to both clear as well as convict the accused. It is a valuable social, as well as legal tool.

Art. 38.071. Testimony of Child Who is Victim of Offense

Sec. 1. This article applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under Chapter 21, Penal Code, as amended, or Section 43.25, Penal Code, as amended, alleged to have been committed against a child 12 years of age or younger, and applies only to the statements or testimony of that child.

Sec. 2. (a) The recording of an oral statement of the child made before the proceeding begins is inadmissible into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

Sec. 3. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

Sec. 4. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(3) each voice on the recording is identified; and

(4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken.

[Acts 1983, 68th Leg., p. 3828, ch. 599, § 1, eff. Aug. 29, 1983.]

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A Comparative Analysis of Nine Recent State Statutory Approaches Concerning Special Hearsay Exceptions for Children's Out-of-Court Statements Concerning Sexual Abuse with Emphasis on What Constitutes Unavailability and Indicia of Reliability under Ohio v. Roberts and Other Decisions

G. Joseph Pierron

A COMPARATIVE ANALYSIS OF NINE RECENT STATE STATUTORY APPROACHES CONCERNING SPECIAL HEARSAY EXCEPTIONS FOR CHILDREN'S OUT-OF-COURT STATEMENTS CONCERNING SEXUAL ABUSE WITH EMPHASIS ON WHAT CONSTITUTES UNAVAILABILITY AND INDICIA OF RELIABILITY UNDER OHIO V. ROBERTS, AND OTHER DECISIONS

With the expanded awareness of child abuse in general, and child sexual abuse in particular, has come the realization of our legal system's shortcomings in dealing with the peculiar evidentiary problems that child victims can present.[1] Although prosecution may often not be the best avenue to take in dealing with sexual abuse, especially in incest cases,[2] it is sometimes a necessity. The central issues to be addressed in this paper arise out of the oftentimes fragile nature of the key person in the prosecution - the child victim.

At trial, a child victim may be incapable of presenting testimony in open court subject to meaningful cross-examination due to legal or physical/mental disabilities. This raises twin concerns. If a child's true relation of what occurred is unheard because of the frailty of truth's vessel and inappropriate restrictions placed on the admissability of the evidence, justice may not be done. Conversely, if our rules of evidence are statutorily modified or judicially re-interpreted too broadly, accused persons may not receive fair trials and innocent people may be convicted on the basis of unreliable evidence.[3]

At least nine states have recently passed legislation modifying evidentiary restrictions on the admissability of child victims hearsay statements regarding sexual abuse. This paper will attempt to give a concise view of those special hearsay exceptions with particular emphasis on the issues of "unavailability and reliability."

CONSTITUTIONAL BACKGROUND

The United States Supreme Court in the case of Ohio v. Roberts[4] has established general guidelines which must be considered when evaluating whether a particular statute allowing hearsay statements comports with constitutional protections afforded to accused persons.

The facts in Roberts are very much different from

situations wherein child hearsay statements concerning their sexual abuse are usually offered. Notwithstanding these substantial factual differences, Roberts does provide us with general constitutional principles applicable to this question.

As Roberts points out, although the Confrontation Clause of the Sixth Amendment reflects a preference for face-to-face confrontation at trial with the right of cross-examination, the total abrogation of hearsay in criminal cases would be a result "long rejected as unintended and too extreme."

As Justice Blackmun stated in the Court's opinion at pages 64-66:

> "This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all. . . hearsay 'exceptions.'" California v. Green, 399 U.S. at 162. But a general approach to the problem is discernible." . . .
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> "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." (cites omitted).
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> "[If a witness is unavailable,] . . . the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' Synder v. Massachusetts, 291 U. S. at 107."
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> "The principle recently was formulated in Mancusi v. Stubbs:
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> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' (cite omitted) and to

'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' (cite omitted). It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability.'" (cite omitted). . . .

"Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases the evidence must be excluded, at least absent a showing of particularized guarantees of truthworthiness."

The court cited Barber v. Page, 390 U. S. at 719, (1968), Mancusi v. Stubbs, 408 U.S. 204, (1972), California v. Green, 399 U.S. 149 (1970), and Berger v. California, 393 U.S. 314, (1969), in support of their decision. All of these cases dealt with the use of previously elicited courtroom testimony at a later trial.

Of particular applicability to the question of statements by child-victims is the case of United States v. Iron Shell, 633 F.2d 77 (8th Cir., 1980). Iron Shell was accused of sexually assaulting a nine year old child. The child testified at trial. In addition, her statements concerning her assault made to a police officer fifteen and forty-five minutes after the assault were found to be constitutionally admissible under the "excited utterance" exception. The Court found that trial courts are given great latitude in ruling on the admissibility of the evidence. The Court ruled that the admitted hearsay statements had sufficient indicia of reliability, citing the Roberts case.

Also cited by the Iron Shell case was the earlier case of U.S. v. Nick, 604 F.2d 1199. (9th Cir., 1979). In Nick a three year old boy was sexually assaulted. His mother noted that the child's pants were unzipped and also observed "white stuff" in the youngster's clothing. The mother asked the child whether Nick had done anything to him and the child responded, "Yeah, Eneas (Nick) stuck his tutu in my butt." The child also stated that Nick had hurt him and made him cry. The following day a physician examined the child and found physical evidence consistent with penetration of the child's rectum. The physician testified about the child's description of the assault. Expert testimony identified the stains on the child's clothing

as semen. The trial court ruled that the child's statements to his mother and to the physician were admissible hearsay.

The boy was concededly too young to be called as a witness. Citing Dutton v. Evans, 400 U.S. 74 (1970), the court held that the availability of cross-examination was not the sole criterion by which to test the admissibility of hearsay over Confrontation Clause objections:

> "In this context, the essential Confrontation Clause issue is whether the admissible hearsay, under all of the circumstances, has a very high degree of reliability and trustworthiness and there is a demonstrated need for the evidence. The availability of cross-examination is simply one of the means by which the quality of reliability is tested.
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> "Both the Confrontation Clause and the hearsay rule are based, among other things, upon a belief that some kinds of relevant evidence should not be admitted unless the probative value of the evidence and its trustworthiness under all of the circumstances substantially outweigh the risks of unreliability that are assumed to flow from the inability to test the declarant's credibility, memory, perception, and ability to communicate in the courtroom in which the testimony is received. The exceptions to the hearsay rule found in the Evidence Code, largely, but not entirely adopting common law exceptions, are designed to facilitate the admission of probative evidence and, at the same time, to minimize the risks of unreliability.
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> "In a criminal trial, probative evidence, otherwise admissible, may nevertheless be excluded to protect the constitutional values that are deemed to weigh more heavily in the scales of justice. The values adhering in the Confrontation Clause cannot be effectively preserved by any mechanical application of the hearsay rule. The question in each case must be whether a particular hearsay declaration, otherwise admissible, has such great probative value as evidence of a material fact and such a high degree of trustworthiness under all of the circumstances that its reception outweighs any risk to a defendant that unreliable evidence may be received against him, the deficiencies of which he cannot adequately test because he cannot cross-examine the declarant." (Id. at 1203)

Although Nick was decided several months prior to Roberts, it echoes all of the concerns expressed there in a context relating to sexual abuse of a child too young to testify. Nick is a good benchmark to determine the constitutionality of specific statutes pertaining to this area.

In summary, these cases establish that hearsay will be allowed in evidence in criminal trials, notwithstanding the confrontation clause, if it bears sufficient indicia of reliability to balance out the lack of opportunity to cross-examine. The court can infer reliability if the evidence falls within a "firmly rooted hearsay exception." Otherwise, "particularized guarantees of trustworthiness" must be shown. Additionally, the party offering the statement must clearly establish that the declarant is unavailable for trial, despite reasonable efforts to obtain the declarant's presence.

TRADITIONAL HEARSAY EXCEPTIONS INVOLVED IN ABUSE CASES

As established in Roberts, evidence falling within a "firmly rooted hearsay exception" has a much greater chance of being considered sufficiently constitutionally reliable for triers of fact to consider. Due to the differing approaches that the statutes of the fifty states and the Federal Code have taken in the area of hearsay, a brief review of the most common established exceptions that might be used in a sexual abuse case is appropriate.

1. The "complaint of rape" exception. Some states allow the admission of a complaint of rape (sexual assault) by the victim to another as corroboration to rebut a presumption of silence which may be inconsistent with the occurrence. This exception is sometimes given broad scope when applied to children due to their reticence in reporting a wrong done to them.

2. The "statement of physical or mental condition" exception. These statements, which are usually made to medical personnel, help establish the physical fact of the occurrence of the sexual assault and, again, are sometimes interpreted very broadly when applied to children.

3. The "excited utterance" and other "res gestae" exceptions. This refers to statements made either at the

time of the occurrence or soon thereafter when the declarant was under the stress of a nervous excitement caused by the perception triggering the statement. 7.

4. The "necessity" exceptions. Kansas has adopted Kan. Stat. Annot. 60-460(d)(3) which allows testimony to be admitted when the judge finds the declarant is unavailable as a witness and the subject matter of the declaration had been recently perceived by the declarant while his recollection was clear and was made in good faith prior to the commencement of the action with no incentive to falsify or to distort. This is an expanded "excited utterance" exception, passed perhaps to avoid the torturing of the "excited utterance" exception to produce just results. Such torturing is common in child abuse cases. 8.

5. The Federal Rules "residual" exception. This exception is a catch-all provision which tacitly admits that there may be hearsay evidence that is reliable, although it does not fall under the traditional exceptions. 9.

6. The "previous statement of witness present" exception. This allows into evidence the previous statements of a person who is present at the hearing and available for cross-examination with respect to the statement made by the declarant and its subject matter. 10.

With these exceptions in mind we will next discuss the twin pillars of admissability for hearsay: unavailability and reliability.

UNAVAILABILITY

There are two different ways of viewing the question of unavailability: actual physical unavailability and testimonial unavailability.

The second edition of McCormick's Handbook of the Law of Evidence sets out eight factors which should satisfy the requirement of unavailability. As enumerated in §253, they are death, absence, physical disability, mental incapacity, failure of memory, exercise of privilege, refusal to testify, and supervening disqualification. In addition to this McCormick states: "In principle probably anything which constitutes unavailability in fact ought to be considered adequate."

A person who is dead or absent (not due to the actions of the party claiming unavailability) is obviously physically unavailable. The other categories are unavailability due to medical, emotional or legal impediments which make the declarant just as unavailable in any practical testimonial sense. A declarant may even be partially unavailable if he is present and able to testify directly on some, but not all, aspects of the case. In such cases, his previous knowledge may be "refreshed" or otherwise recalled through various processes.

States frequently define unavailability.[11] The legislatures and the courts may give broad or narrow interpretations to the term "unavailable". Due to the brief nature of this paper, we will consider the two categories of unavailability that are most likely to arise in cases of child sexual abuse. These are (1) the incompetency of the child to be a regular witness due to his inability to understand and take an oath, or to express himself concerning the matter so as to be understood by the judge and jury, or to remember the events fully; and (2) unavailability due to the trauma that the child would likely suffer if subjected to a full court proceeding.

If persons are disqualified as witnesses due to their inability to take an oath or express themselves they are not available as witnesses.[12] Courts have frequently resorted to leading questions and relaxation of normal requirements of formality so that a child could present his story.[13]

Some state statutes hold that it is not necessary for a child witness to know the obligation of an oath or its effect. However, at common law and under other statutes these understandings are necessary. (See C.J.S. Witnesses §63) In any event, to be a witness there usually must be a showing that the child is capable of receiving "just impressions" of the facts and relating them truly. This requirement would not apply to admissible hearsay unless a condition of admissibility was the child being available as a witness.

It must be remembered that unavailability due to testimonial incompetency also relates to the question of reliability, since the unavailability here is caused by the lack of a requirement for being a witness. This highlights the conceptual problem we deal with in the area of hearsay.

Strictly speaking, reliable hearsay is reliable regardless of the availability of the declarant. If the declarant is available there is an obvious policy presumption in favor of requiring the declarant to testify. But unavailability does not make the statement less reliable. It only precludes the use of one test -- cross-examination. However, as was stated in Roberts, the lack of opportunity to use this test can be balanced out by showings of reliability. Therefore, the fact that a child is not qualifiable as a witness may also be overcome by similar showings of reliability in the proffered statements.

If, as is often the case, the child has forgotten the incident, the child is similarly unavailable. The loss of memory due to time lapse is common among children. This should not, however, bar the consideration of previous statements. As was stated in McCormick, supra, §251, page 602:

> "An additional persuasive factor against the orthodox rule [that direct testimony is superior to hearsay] is the superior trustworthiness of earlier statements, on the basis that memory hinges on recency. The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is."

The second source of unavailability refers to the trauma that a child may experience in testifying about sexual assaults and undergoing cross-examination. This "second victimization" is frequently discussed by courts and social scientists.[14]

Notwithstanding the fact that personages as diverse as the Chief Justice of the United States and Mr. T have publicly expressed their concern over the possible trauma that child victim witnesses may suffer, there are still significant constitutional issues which would make unavailability due to fear of trauma a difficult proposition. U.S. v. Benfield, 593 F.2d 815 (8th Cir., 1979), casts doubt on the ability to use video tape depositions of adults who are suffering psychiatric difficulties arising out of the crime about which they are to testify. In Benfield the court stated:

> "Here the defendant was not allowed to confront the witness face-to-face and the witness was apparently

> unaware that her testimony was being monitored by the defendant. While we do not doubt the truthfulness of Patricia Cade or that she has suffered a terrible ordeal, the accuracy of her perception of the events during the kidnapping and her recollection of the expression of those events was crucial to the government's case. The partial confrontation allowed was inadequate to test those features of her testimony." (Id. at 821, 822.)

While the court seemed to be shutting the door on such procedures, in footnote No. 4 at page 817, they indicated that there should have been an additional showing of the witness' mental condition and availability on the trial date. Whether this means the court might have ruled differently had they been more convinced of the victim's incapacity is not known. It is also unclear what ruling would result from a situation where a child victim would be so terrified as to be unable to testify as opposed to being just very frightened. In Rice v. Marshall, 709 F.2d 1100 (Sixth Cir., 1983), the court indicated that an adult who was apparently frightened into silence was unavailable and his apparently reliable statement to police implicating Rice in a murder was allowed into evidence. However, Rice apparently was somehow involved in the intimidation which the Court saw to be significant. (See also People v. Rajas (1975), 15 Cal.3rd. 540, 125 Cal.Rptr. 357, 542 P.2d 229).

The California Supreme Court has indicated in People v. Stritzinger, 668 P.2d 738, 746, 747 (1983) that unavailability of a witness (whose testimony had been previously elicited at a preliminary hearing) due to fear or emotional trauma must be established either by expert testimony or the witnesses' own express refusal to testify at trial. The expert opinion must establish not only an illness or infirmity prevents the declarant from testifying, but also that this condition renders it "relatively impossible" for the witness to appear. The express unwillingness to testify by the witness must also be demonstrated by serious attempts to compel the giving of testimony.

The applicability of this case to a very young child whose testimony has not been previously elicited in court is uncertain.

Clearly, we do not contemplate a situation where only lip service is paid to the Confrontation Clause. A strong

argument can be made, however, that the Sixth Amendment is not violated if a psychologically incapacitated child is ruled to be unavailable as a witness, just as in the case of a physically incapacitated child. Inquiries would have to be made by the court to insure that the child was actually so disabled as to be unable to testify without serious damage as suggested in Stritzinger.

Indiana's new child victim statute, which will be discussed later, allows such statements if there is other corroborative evidence that the act against the child occurred.

RELIABILITY

The second leg of the Roberts requirements is that the hearsay statements bear the indicia of reliability. Many courts and legislatures view the statements of children concerning their sexual abuse to be inherently reliable, as young children are unlikely to fabricate graphic accounts of sexual activity because such activity is beyond the realm of their experience.[15] This feeling is held by many professionals involved in the area of child sexual abuse, although the research in the area is very scanty.[16] This would appear to satisfy the Roberts requirement of reliability.

In order to help test the reliability of such a hearsay statement certain obvious factors should be considered, including the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made, and any reasons there might be for the child to speak falsely. One court has stated that expert testimony concerning the truthfulness of children's testimony should be allowed.[17] This might be inappropriate as it would open the door to a battle of experts over truthfulness and honesty which is traditionally a jury question.

If reasonable the child should be offered as a witness. But, if reliable hearsay is what is to be presented, other approaches might be used to provide the triers of fact with as many yardsticks to measure the reliability of the hearsay testimony as possible, short of full and formal presentation of the child as a sworn witness subject to cross-examination. These could include the use of video taped depositions and interviews, or a simple presentation of the child in court not under oath, but as an autoptic preference in addition to any out-of-court statements.[18] These approaches might also be considered for corroborating

any courtroom testimony of the child.

As Skoler pointed out in his article (supra, at pp. 47-48), without this flexibility we could reach a situation where hearsay statements of child victims might be admitted while possibly more reliable video taped depositions, complete with cross-examination, might be excluded. We could avoid this seemingly inconsistent result by acknowledging the value of both, depending on the circumstances. Once the basic reliability and admissability of the hearsay is determined, any reasonable tools to test its credibility should be considered. A deposition or other such tool would not then be a way to avoid confrontation, but would instead be a procedure to minimize the dangers of admissible hearsay.

A full hearing by the judge out of the hearing of the jury is necessary to determine both unavailability and reliability. A full record should be made concerning the above mentioned factors so they can be subject to review if necessary.

THE NEW STATUTORY APPROACHES

The nine statutory changes under discussion are, what Judge Blackmun described in Roberts as, a process ". . . building on past decisions, drawing on new experience, and responding to changing conditions." We are observing the great engine of federalism working in the area of legal experimentation with child victim statements. While we are not navigating in totally uncharted waters, there is an element of unsureness in our direction. 17.

It can be assumed that legislatures will attempt to do their best in balancing the needs of law enforcement with the requirements of constitutional guarantees. A legislative finding of reliability and the allowing into evidence of certain child hearsay statements will be granted due deference by the courts. But the final determination of whether a particular exception to the hearsay rule comports with the Confrontation Clause must rest with the courts. Although Nick and Iron Shell indicate some federal acceptance of variations on the excited utterance exception, we actually have only limited guidance from the Supreme Court through Roberts and Green as to how far the Court is willing to go in balancing the need for the admission of certain types of hearsay with the demands of the Confrontation Clause.

Nine states have recently enacted legislation that deserves notice and comment: Washington,[20] Kansas,[21] Illinois,[22] Minnesota,[23] South Dakota,[24] Indiana,[25] Colorado,[26] Iowa[27] and Utah.[28]

Illinois has separate provisions dealing with criminal and juvenile hearings. The criminal provision reads as follows:

> "Sec. 115-10. In a prosecution for a sexual act perpetrated upon a child under the age of 13. . . the following evidence shall be admitted as an exception to the hearsay rule:
>
> "(1) testimony by such child that he or she complained of such act to another; and
>
> "(2) testimony by the person to whom the child complained that such complaint was made in order to corroborate the child's testimony."

This is apparently a codification of the old "complaint of rape' exception.

The juvenile proceeding would allow:

> "(c) Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect."

This provision is fairly broad in that it would allow any hearsay statements by the child victim concerning his abuse or neglect to be admitted into evidence. It is somewhat restricted, however, in that if the statements are uncorroborated and not subject to cross-examination, they cannot in themselves support a finding of abuse or neglect. What level of corroboration is necessary is unclear.

The Iowa juvenile provision reads as follows:

> "A report, study record or other writing, made by the department of Human Services, a juvenile court officer, a peace officer or a hospital relating to

a child relating to a proceeding under the provision shall be admissible notwithstanding any objections to hearsay statements contained therein, provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian or custodian. The circumstances of the making of the report, study record or other writing including the makers lack of personal knowledge may be proved to affect its weight."

This extremely broad provision reflects the philosophy of giving finders of fact in child protection proceedings greater discretion in evaluation of evidence than is allowed in criminal proceedings.

The Washington statute was passed in 1982 and was the apparent model for the Minnesota, South Dakota, Utah and Indiana statutes, which are essentially identical. The Washington statute reads as follows:

"A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

"(1) The Court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

"(2) The child either:
"(a) Testifies at the proceedings; or
"(b) Is unavailable as a witness; Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

"A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement."

Indiana requires the child to be present at the hearing which determines whether the "time, content and circumstances of the statement provide sufficient indications of reliability; . . ."

Indiana also provides that a child can be found unavailable as a witness because:

> "(i) A psychiatrist has certified that the child's participation in the trial would be a traumatic experience; (ii) A physician has certified that the child cannot participate in the trial for medical reasons; or (iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath."

This very progressive position on unavailability is somewhat restricted by the further condition which requires corroborative evidence that the act against the child occurred before such evidence can be admitted. The provision is not restricted to only sex crimes.

Kansas also passed a child-victim hearsay exception in 1982 upon which the Colorado statute was apparently modeled. The Kansas statute reads as follows:

> "(dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:
>
> "(1) The child is alleged to be a victim of the crime, a deprived child or a child in need of care; and
>
> "(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.
>
> "If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the

age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor."

The Washington and Kansas statutes share similar provisions. Certain differences, however, should be noted:

First, the Washington exception requires that the child victim be under ten years of age and applies only to incidents of sexual contact. The Kansas statute is not limited to sexual abuse, but includes other forms of abuse and has no age limit except those contained in the criminal or juvenile statutes describing whom is being protected by the statute.[27]

Second, the Washington statute provides that when the child is unavailable as a witness, the hearsay statement may be admitted only if there is corroborative evidence of "the act". This would seem to require the necessity of either physical evidence of abuse or the evidence of another competent witness, or possibly other hearsay statements of the victim that are admissible under another exception. Kansas requires no corroboration for the evidence to be admitted, but requires that the jury be particularly admonished as to what factors are relevant in their weighing of the child's statement.

It is this writer's position that the Kansas approach, which does not require corroboration, is the correct one. Although corroboration is certainly something for the judge or other trier of fact to consider in evaluating testimony, it should not be determinative of its bare admissibility. If such testimony is reliable in itself, its bare admissibility should not be denied because of a lack of other factors making it more reliable. Very few crimes require corroboration of the victim's testimony.

In child abuse cases corroboration should be considered a factor in the weight to be given the testimony. If the circumstances of the case make an uncorroborated statement so insubstantial that it lacks the indicia of reliability required by Roberts, it can be excluded on that ground. Even without corroboration, a child's description of what occurred may be totally convincing and deserving of our belief, or at least the jury's consideration.

Finally, the Washington statute provides that if the child testifies at the proceedings, previous statements may be admitted after a showing of their reliability. Kansas does not have this provision as K.S.A. 60-460(a) already provides for the admission of previous statements made by a person present and available to testify.

Both statutes, either implicitly or impliedly, adopt the requirements of Roberts. Washington sets out the necessity of notice to the defendant, whereas Kansas has a separate criminal procedure code.[30]

Although some commentators have expressed doubt as to the constitutionality of these two statutes,[31] both have been found constitutional by state appellate courts which have reviewed them.[32]

As noted earlier, many states have adopted the substance of the Federal Residual Hearsay Rule. A strong argument can be made that these states are free to adopt under the residual exception the substance of the Washington and Kansas statutes. Prior to the adoption of the above mentioned Colorado child victim exception statute, the Supreme Court of Colorado in the case of W.C.L., Jr. v. People, 685 P.2d 176 (1984), stated that it would be desirable to adopt the Federal Residual exception as it would make the admission of child victim complaints of sexual abuse admissible. The court found such testimony to be reliable, but under the State of Colorado law at that time felt that it had no alternative but to reject the testimony of a four year old victim of sexual abuse whose statements were found not to fall under the excited utterance or medical diagnosis hearsay exceptions as codified in the Colorado Rules of Evidence.[33]

Skoler, in his article at page 8, expresses reservations about the usefulness of a federal type residual exception as opposed to a specific child victim exception. He points to the requirement of the proffered statement being "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Such a requirement is not onerous. Often there is little or no evidence on the point which can be procured when child victim statements are offered. That is why the statements are needed.

While Roberts does suggest a possible difference between established "firmly rooted" exceptions and new exceptions, this could be as much a problem under the alternative Washington/ Kansas rules as it would be under the residual exception. Additionally, the special hearings and findings required under the Washington/Kansas rules could be used with the residual exception to establish the higher level of trustworthiness that is required.[4]

There is, of course, no sure way to predict how the United States Supreme Court will rule in regard to not only the Washington/ Kansas statutes, but even the more traditional exceptions, such as excited utterance. However, Iron Shell, Nick, the actions by the seven state legislatures in adopting the substance of the Washington/Kansas rules, and the thus far favorable reaction to these statutes by state appellate courts, give us some reason to believe that these exceptions will pass constitutional muster.

RELATED CONSIDERATIONS

It is important that trial courts follow the procedures set out in the statutes prior to admitting the testimony. Presumedly, exculpatory statements by the child victim should be as admissible as incriminating statements. Further research, beyond the clinical anecdotal impressions of professionals working with child victims, would be helpful in buttressing the professionals' widely held opinion that such testimony is reliable, or at least reliable enough to be admitted into evidence. We should remember that no evidence is totally reliable and that juries have long been recognized as effective weighers of testimony.

CONCLUSION

It is to be hoped that if states adopt the Washington/ Kansas approach, that additional relevant, material and probative evidence will be available to triers of fact in child abuse cases which is now excluded. The safeguards included in these statutes allow them to meet the requirements of the Confrontation Clause. In appropriate cases, where these exceptions would apply, their existence would serve the ends of justice and spare children who have been abused from a second victimization.

FOOTNOTES

1. Child Sexual Abuse and the Law, National Legal Resource Center for Child Advocacy and Protection, American Bar Association (J. Bulkley 4th ed. 1983).

2. Giaretto, Humanistic Treatment of Father-Daughter Incest, 1 Child Abuse and Neglect 411 (1977).

3. For an excellent survey of this topic area, see Skoler, New Hearsay Exceptions For a Child's Statement of Sexual Abuse, 18 J. Mar. L. Rev. 1 (1984) and Child Sexual Abuse and the Law, supra.

4. 448 U.S. 56 (1979).

5. See, State v. Halstead, _____ N.W.2d _____(Iowa, 1984).

6. See, Goldade v. Wyoming, 674 P.2d 721 (1983).

7. See, People v. Miller, 373 N.E.2d 1077 (Ill., 1978).

8. See, People v. Gage, 62 Mich. 271, 28 N.W. 835 (1886) in which there was a three month time lapse between the event and the utterance.

9. Fed. R. Evid. 803 (24). "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under the exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." Nine states have adopted this exception or an equivalent formulation. See 4 Weinstein's Evidence 383, 384.

10. See State v. Jones, 204 Kan. 719, 466 P.2d 283 1970) and People v. Breitweiser, 349 N.E. 2d 454 (Ill.,

1976).

11. See Kan. Stat. Ann. 60-459(g).

12. See Kan. Stat. Ann. 60-417.

13. See State v. Jones, supra.

14. See Globe Newspaper Co. v. Superior Court (Burger, J. dissenting), 457 U.S. 596, 612-620, Melton, Procedural Reforms to Protect Child Victim Witnesses in Sex Offenses Proceedings, in Child Sexual Abuse and The Law, Note 1 at 184, Parker, Child Witnesses, supra, note 1 at 643.

15. State of South Dakota v. McCafferty, 356 N.W. 2d 159 (1984), Soto v. Territory, 94 P.1104 (Ariz., 1908); People v. Miller, 373 N.E.2d 1077 (1978), Lancaster v. People, 615 P.2d 720 (1980), Love v. State, 219 N.W.2d 294 (1974), and Iron Shell and Nick, supra.

16. See Pierron, The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements, 52 Journal of the Kansas Bar Assoc., 88 at 92.

17. See State v. Halstead, supra, at II and State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

18. Pierron, supra, at 93, 94.

19. "Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine. Signals from the Supreme Court point in different directions, the views of commentators differ, and while the subject is as potentially vast as the hearsay doctrine itself, benchmarks in the form of authoritative decisions are few and far between." 4 D. Louisell & C. Mueller, Federal Evidence, §418 at 123 (1980).

20. Wash. Rev. Code Ann., §9A. 44.120 (Supp. 1982).

21. Kan. Stat. Ann., § 60-460(dd).

22. Ill. Ann. Stat. ch. 37 §704-6(4)(c)(Smith-Hurd 1984); 1983 Ill. Laws 1067 §115-10.

23. 1984 Minn. Laws 595.02(1)(s); 1984 Minn. Laws 595.02(3).

24. S.D. Codified Laws Ann. §19-16-38 (1984).

25. Ind. Code Ann. §35-374-6 (Burns 1984).

26. Colo. Rev. Stat. §13-25-129 (1983).

27. Iowa Code Ann. §232.96(6).

28. Utah Code Ann. §76-5-411 (1983).

29. For example, Kan. Stat. Ann. 21-3503, classifies certain sexual acts with a child under the age of sixteen years as being a felony.

30. Kan. Stat. Ann. Chapter 22.

31. McNeil, The Admissibility of Child Victim Hearsay in Kansas, A Defense Perspective, 23 Washburn L. J. 265 (1984); Yun, A Comprehensive Approach To Child Hearsay Statements in Sex Abuse Cases, 83 Columbia L. Rev. 1745 at 1766 n. 189 (1983); Frank, Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception, 7 University of Puget Sound L. Rev. 387 (1984).

32. State v. Pendleton, 691 P.2d 959, 10 Kan. App. 2d 26 (1984), State v. Ryan, 691 P.2d 197 (Wash., 1984), State v. Slider, 688 P.2d 538 (Wash., 1984).

33. I have been informed by a representative of the Attorney General's office of the State of Colorado that the state will soon adopt the residual rule, in addition to its present child victim exception.

34. Slider, Id. at 543.

35. See Ryan, supra, where the trial court apparently failed to conduct a hearing to determine unavailability and reliability.

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An Analysis of the Legal Issues Involved in the Presentation of a Child's Testimony by Two-Way Closed-Circuit Television in Sexual Abuse Cases

Karen Kallman Coppel

AN ANALYSIS OF THE LEGAL ISSUES INVOLVED IN THE PRESENTATION OF A CHILD'S TESTIMONY BY TWO-WAY CLOSED-CIRCUIT TELEVISION IN SEXUAL ABUSE CASES

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INTRODUCTION

Recently, there has been an expansion of victims' rights in criminal proceedings. This paper proposes an advancement of protections for children in sexual abuse cases, without sacrificing any of a defendant's constitutional rights.

Many children may suffer severe emotional or mental trauma if compelled to testify in a traditional courtroom setting. The use of videotaping testimony prior to trial, or the use of closed-circuit television at trial, may substantially lessen these risks.

This paper analyzes the use of closed-circuit television to present the testimony of a child in a sexual abuse trial.

PROCEDURE

The trial would be conducted in two separate rooms, joined as one, through the use of closed-circuit television to provide two-way audio and visual confrontation.

Present in the first room, the "defendant's room," would be the judge and/or jury, the defendant, the defense attorney, the prosecutor, the court clerk, the court reporter, and any other parties deemed necessary or appropriate by the judge. The second room, the "child's room," would contain the child victim or witness, a parent or other friendly party, if deemed appropriate by the judge, and an impartial court observer appointed by the judge who could later testify if any allegations of coaching of the child were made.

Each room would contain cameras and television monitors to provide simultaneous broadcasting of the proceedings. The number of cameras and television monitors would depend on the size of the rooms and the number of occupants. However, the minimum number would be two cameras and two television monitors in each room.

One television monitor in the "child's room" would broadcast

a full-view picture of the "defendant's room" and the second monitor would present a close-up of the examining party (the judge, the prosecutor, or the defense attorney). One television monitor in the "defendant's room" would simultaneously broadcast a full-view picture of the "child's room" and the other monitor would show only the child so that the parties would be able to more closely observe the child's demeanor while testifying.

The parties in each room would be able to see and hear the events as they occur as if there were only one room.

DISCUSSION OF LEGAL ISSUES

Courts throughout the United States have been sensitive to the needs of juveniles. Chapter 39 of the Florida Statutes provides numerous protections for the juvenile respondent, including the provision for a "fundamentally fair hearing in language understandable, to the fullest extent practicable, to the child before the court."[1] It is time these protections are extended to child victims and witnesses as well, particularly in sexual abuse cases.

Section 918.17 of the Florida Statutes provides for the videotaping of the testimony of a child victim or witness in a sexual abuse case, to be presented in lieu of live testimony at trial, upon a finding that there is a "substantial likelihood that such victim or witness would suffer severe emotional or mental distress if required to testify in open court."[2] In Washington v. State,[3] a Florida Appellate Court permitted the videotaping of a victim under the age of eleven upon a showing[4] that the victim was under a "severe emotional strain." This demonstrates that courts are beginning to recognize the unique requirements of some children in a courtroom setting.

Other states have become sensitive to the need for protection of children in sexual abuse cases, and have provided statutory and case law to address these issues. In August of 1984, in State of New Jersey v. Sheppard, Superior Court Judge Martin L. Haines granted the State's motion for the simultaneous viewing of a sexual abuse victim's testimony from a separate room from the defendant.[5]

In that opinion, Judge Haines refers to the statutory authority of other states to illustrate the various approaches to this problem, which include:

> CALIFORNIA[6]
>
> In California, for example, preliminary hearings may be videotaped and the taped testimony presented at a later trial.

ARIZONA[7]

Permits videotaped testimony of a minor witness in the presence of the court, the defendant, defendant's counsel, the prosecuting attorney or plaintiff and plaintiff's counsel for presentation to the jury at a later time as evidence.

MONTANA[8]

Videotaped testimony of a child victim is permissible as evidence even though the victim is not in the courtroom when the videotape is admitted into evidence. The judge, prosecuting attorney, victim, defendant, defendant's attorney, and such other persons as the court deems necessary shall be allowed to attend the videotaped proceedings.

NEW HAMPSHIRE[9]

In cases where the victim is under 16 years of age, the victim's testimony shall be heard in-camera unless good cause is shown by the defendant. The record of the victim's testimony is not to be sealed, and all other testimony and evidence produced during the proceeding shall be public.

NEW MEXICO[10]

Upon a showing that a child victim may be unable to testify without suffering unreasonable and unnecessary emotional or mental harm, out-of-court videotaping of her testimony is permitted. (No mention of confrontation.)

COLORADO[11]

An out-of-court statement made by a child describing any act of sexual contact performed with that child which is otherwise inadmissible as evidence, is admissible in criminal proceedings in which the child is the victim of an unlawful sexual offense. The court must find that the statement is reliable and the child must either testify at the proceeding or be unavailable.

WASHINGTON[12]

Same as Colorado's statute except that, when

the child is unavailable, there must be other corroborative evidence of the act.

TEXAS[13]

The "visual and aural" recording of the pre-trial statement of a child is admissible at trial if no attorney for either party is present when the statement was made and the child is available to testify. Other conditions are listed. If the statement is admitted into evidence, either party may call the child to testify and the opposing party may cross-examine. Statute also permits testimony of a child by closed-circuit television from a room outside the courtroom. The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant. In addition, the statute permits a like arrangement for recording the child's testimony before trial and its later showing in court.

Closed-circuit television provides an even wider range of protections for the defendant's rights than presented by videotaping prior to trial, since the child's testimony would be presented simultaneously with the proceedings. The defendant may still argue that presentation of the child's trial testimony through the use of closed-circuit television violates his constitutional right of confrontation as provided in the Sixth and Fourteenth Amendments to the Constitution of the United States;[14] however, this position can be refuted by well-established legal precedent.

In Ohio v. Roberts,[15] the Court held that "the underlying purpose of the Confrontation Clause is to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence."[16] The emphasis has been placed on a preference for face-to-face confrontation at trial but that the "primary interest secured by [the provision] is the right of cross-examination."[17]

In both California v. Green and Ohio v. Roberts, the United States Supreme Court has outlined the essential elements necessary to satisfy the defendant's right of confrontation. They are:

1. That the witness be under oath;
2. That the accused be represented by counsel;
3. That there be an opportunity to cross-examine the witness;
4. That the proceedings be conducted before a judicial tribunal;

5. That it be equipped to provide a judicial record of the proceedings.[18]

The use of closed-circuit television safeguards all of the elements and purposes of the Confrontation Clause as outlined in the aforementioned cases, including the right to face-to-face confrontation of the accused with the witnesses. Unlike the cases cited where the witness' prior testimony was offered at trial, the use of closed-circuit television provides live testimony at trial via cameras and monitors from room to room. There is no provision in the Constitution which requires any degree of physical proximity in face-to-face confrontation.

The United States Supreme Court has indicated, on separate occasions, that the emphasis should be on the right of cross-examination as opposed to physical confrontation, and further that even without physical confrontation, an adequate opportunity for cross-examination may be sufficient.[19] Therefore, there is no merit to a defense argument that closed-circuit television denies a defendant's right to face-to-face confrontation of a child in court.

Although the "privilege to confront one's accusers and cross-examine them face-to-face is assured to a defendant,"[20] the Supreme Court has held that "nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless or the benefit but a shadow."[21]

Even in 1895, the Supreme Court recognized that "the law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[22] Certainly the rights of a child victim or witness should not be sacrificed for the illusory benefit to the accused, of a physical presence in the room. The Mattox court further recognized the need for exceptions to constitutional provisions as long as there was no interference with the spirit and intent of the law. "A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant."[23]

As recently as 1980, in Ohio v. Roberts, the Court recognized "that competing interests, if closely examined, may warrant dispensing with confrontation at trial."[24] The Court reiterated the Mattox principle holding that "general rules of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[25]

Traditionally, courts adopt a balancing test "to determine whether the potential detrimental effect upon the witness

outweighs the interest or benefit to the defendant."[26] A Minnesota Appellate Court held that such a test was appropriate when analyzing competing interests between the protection afforded an accused child sex abuser and that required for the child victim or witness. "The burden of young sex victims should be made lighter, not more onerous, not only to ensure that sex abusers are fully prosecuted, but to aid in the victims' recovery from this traumatic experience."[27] This philosophy is consistent with the intent of the Florida Legislature in enacting Florida Statute 918.17 and Section 7 of Florida Session Law 84-86. The defendant's right to confront witnesses against him is not diminished by the use of closed-circuit television and clearly should be outweighed where a child would suffer serious emotional or mental distress if compelled to testify in a traditional courtroom setting.

In United States v. Benfield,[28] a videotaped deposition of the victim's testimony was made for use at trial. The defendant viewed the proceedings from another room on a monitor, but the victim was unaware of his presence in another room and was unable to see or hear him. The United States District Court of Appeals, Eighth Circuit, held that this was only one-way or "partial confrontation"[29] and as such was a violation of the defendant's rights. Nevertheless, the inference is clear that if there were two-way participation, this would satisfy the constitutional requirements of the Confrontation Clause.

The Benfield court cautioned that "today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure, or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming."[30] The court held that "a videotaped deposition supplies an environment substantially comparable to a trial."[31] The court's only apparent objection was to the lack of two-way confrontation between the child and the defendant. Since closed-circuit television provides all of these elements plus live testimony at the time of trial, this procedure should be permitted.

In rejecting a Sixth Amendment argument by the defense, the Missouri Supreme Court approved the use of two-way closed-circuit television to allow testimony by an expert witness.[32] Although this case did not deal with the testimony of a victim in a sexual abuse case, it recognized that providing testimony through an electronic medium meets the requirements of the Confrontation Clause.

As previously indicated in the Sheppard decision, many states have enacted statutes providing for videotaped testimony of children in sexual abuse cases. Nonetheless, in almost all states, there is no statutory authority for the presentation of

this testimony via closed-circuit television. Recently, a California Appellate Court narrowly held that the trial court "exceeded its authority"[33] by granting the State's motion to permit the victims to testify at trial through the use of closed-circuit television since there was no legislative authority for this procedure. Although California has a provision for the use of videotaped testimony at trial there is none for the use of closed-circuit television at trial.[34] Caution should therefore be exercised when attempting to use this method of presenting children's testimony in sexual abuse cases. To overcome these objections, better practice would suggest that each state enact closed-circuit legislation in conjunction with their videotaping statutes.

CONCLUSION

Courts have recognized through the years that a literal interpretation of the Constitution need not be strictly adhered to when technological advancements supply the intent and spirit of the rights guaranteed. The framers of the Constitution in providing for face-to-face confrontation, did so in the context of a traditional courtroom setting. Now, modern technology provides face-to-face confrontation via closed-circuit television. The defendant need not relinquish any fundamental or substantial rights in order to afford this much-needed protection to children who testify in court in situations where their mental or emotional well-being is at risk. Therefore, the law should recognize and allow for this development in courtroom testimony.

FOOTNOTES

1. Florida Statute 39.09(1)(b).
2. Florida Statute 918.17(1).
3. Washington v. State, 452 So. 2d 82 (Fla. App. 1 Dist., 1984).
4. Id. at 83.
5. State of New Jersey v. Sheppard, _____ N.J._____ (1984).
6. Id. See also: Cal. Penal Code §1346 (West Supp., 1984).
7. Id. See also: Aris. Rev. Stat. Ann. §12-2312 (1982).
8. Id. See also: Mont. Cod. Ann. 46-15-401 (1983).
9. Id. See also: N.H. Rev. Stat. Ann. 632-A:8 (1983 Supp.).
10. Id. See also: N.M. Stat. Ann. §30-9-17 (1982 Supp.).
11. Id. See also: Colo. Rev. Stat. 613-25-129 (1983 Supp.).
12. Id.
13. Id. See also: Tex. Cod. Crim. Proc. 38.071.
14. Pointer v. Texas, 381 U.S. 400, 403-405, 85 S.Ct. 1065, 1067-1068, 13 L.Ed. 2d 923.
15. Ohio v. Roberts, 100 S.Ct. 2531 (1980).
16. Id. at 2539.
17. Id. at 2537, citing to California v. Green, 399 U.S. 149, 157 (1970) and Douglas v. Alabama, 380 U.S. 415, 418 (1965).
18. California v. Green, 90 S.Ct. 1930, 1938 (1970) and Ohio v. Roberts, 100 S.Ct. 2531, 2540 (1980).
19. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974) and Douglas v. Alabama, 380 U.S. 414, 85 S.Ct. 1074, 13 L.Ed. 2d 934. (1965).
20. Snyder v. Commonwealth of Massachusetts, 54 S.Ct. 330, 332 (1934).
21. Id.

22. Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337,340 (1895).

23. Id.

24. Ohio v. Roberts, 100 S.Ct. 2531, 2538 (1980) and Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed. 2d 297 (1973).

25. Id.

26. State v. Dolen, 390 So. 2d 407 (Fla. App. 5 Dist. 1980).

27. Moll v. State of Minnesota, 351 N.W. 2d 639, 644 (Minn. App. 1984).

28. United States v. Benfield, 593 F.2d 815 (U.S. Dist. Ct. App., 1979).

29. Id. at 822.

30. Id. at 821.

31. Id.

32. Kansas City v. McCoy, 525 S.W. 2d 336 (Mo. 1975).

33. Hockheiser v. Superior Court, _____ Cal. App. 3d _____(1984).

34. Cal. Penal Code §1346 (West Supp. 1984).

Presence, Compulsory Process, and Pro Se Representation: Constitutional Ramifications Upon Evidentiary Innovation in Sex Abuse Cases

Wallace J. Mlyniec

PRESENCE, COMPULSORY PROCESS, AND PRO SE REPRESENTATION; CONSTITUTIONAL RAMIFICATIONS UPON EVIDENTIARY INNOVATION IN SEX ABUSE CASES*

By Wallace J. Mlyniec and Michelle Dally**

Since the demise of wager by battle, wager of laws, and inquisition, trials have been the essential method of dispute resolution in Anglo-American jurisprudence. By the Seventeenth Century in England, this trial consisted of three cardinal elements: an accused, an accuser and an arbiter.[1] The purpose of each in the system appears quite simple. The accuser accuses; the accused defends; and the arbiter, either judge or jury in a public forum, listens to both and to those in their behalf and determines who is telling the truth.

A myriad of rules, each designed to affect specific goals, have been engrafted upon this essentially simple system. These exceptions, however, have been grudgingly carved out and face to face confrontation before an arbiter in a public place still remains the hallmark of anglo-American dispute resolution, especially in criminal cases.[2]

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* This article does not explore all of the issues arising under the confrontation clause. To the extent that the rights to be present during cross examination involves many of the same issue as the right of confrontation, the resolution of both issues may be identical.

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1 Blackstone, writing in the eighteenth century, referred to the constituent parts of the trial as the actor, (one who complains of an injury done); the reus, (one who is called upon to make satisfaction); and the judex, (one who ascertains the truth, applies the law and secures the remedy). 3 Blackstone, Commentaries at 25. While he used these terms in discussing private wrongs, they applied to criminal law as well even though the King in theory became the accuser. See generally, 4 Blackstone, Commentaries; see also, 9 Holdsworth, History of the English Law.

2 These rules developed gradually throughout the seventeenth century, and solidified in the eighteenth with the abolition of laws declaring parties themselves incompetent to testify.

Various procedures have been recently used in an attempt to alter this practice. Technological developments such as closed circuit television, video tape and sophisticated mirrors have made it possible to avoid face to face contact yet not completely alter the experience produced by the more traditional setting.[3] New evidentiary rules have also been developed which serve to admit evidence even in the absence of the actual possessor of the information.[4] These innovations have become more popular as courts grapple with the need to obtain evidence from young or emotionally distraught witnesses, especially in cases involving sexual contact or violence. While the technological methods merely alter the experience, the rule changes seek to eliminate completely the traditional encounters.

Most challenges brought by defendants in criminal cases to court rulings regarding these innovations have been based on the Sixth Amendment right to confront and cross examine one's accusers. This, however, is but one avenue of attack. Even if these innovations are able to withstand challenges brought under the confrontation-cross examination theory of the Sixth Amendment, other guarantees within the United States Constitution must be considered before one can say with any assurance that the innovation is permissible and that it will achieve its purpose.

Two constitutional rights seldom explored in this context are a defendant's right to be present during all phases of his trial and his right to compell the production and testimony of witnesses on his behalf. The first could limit the use of any of the technological innovations and some of the newly formulated evidentiary rules. The second could conceivably defeat all of the innovations. Finally, the right to pro se counsel, guaranteed by the Sixth Amendment, must be considered before a prosecutor requests a technologically produced substitute for the court room encounter.

This paper will analyze those rights, consider their impact upon sex abuse cases and attempt to assess how courts should rule on these issues.

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3 At least 14 states have such statutes. Whitcomb, "Assisting Child Victims in the Courts: The Practical Side of Legislative Reform," Papers From A Note -- Policy Conference on Legal Reforms in Child Sexual Abuse Cases, (1985).

4 At least nine states have created new hearsay exceptions. Id.

THE DEFENDANT'S RIGHT TO BE PRESENT AT HIS TRIAL

The right to be present at one's own criminal trial has long been held to be an indispensable feature of the criminal justice process. The right existed at common law, is sometimes part of state constitutions,[5] is found in most state criminal

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5 This article addresses issues involving the United States Constitution only. Eighteen state constitutions contain the words "face to face" when discribing the defendants right to be present. Deleware Constitution (revised and updated, issued September, 1983) Art. 1, Bill of Rights §7; Illinois Constitution (revised and updated, issued September, 1984) Art. 1, Bill of Rights §8; Indiana Constitution (issued January, 1984) Art. 1, Inherent and Inalienable Rights, §13; Kansas Constitution (revised and updated, issued May, 1983) Bill of Rights §10; Kentucky Constitution (revised and updated, issued September, 1983) Bill of Rights §11; Ohio Constitution (revised and updated, issued September, 1983) Art. 1, Bill of Rights §10; Oregon Constitution (issued, January, 1984) Art. 1, Bill of Rights §11; Pennsylvania Constitution (revised and updated, issued April, 1984) Art. 1, Declaration of Rights §9; Tennessee Constitution (revised and updated, issued October, 1982), Art. 1, Declaration of Rights §9; Wisconsin Constitution (revised and updated, issued December, 1982) Art. 1, Declaration of Rights §7. The other eight have limiting language that applies the face to face language to only those witnesses against the accused: the accused shall have the right to meet the witnesses against him face to face. Arizona Constitution (revised and updated, issued September, 1984) Art. 2, Declaration of Rights §24; Massachusetts Constitution (revised and updated, issued August 1982) Declaration of Rights §XII; Missouri Constitution (revised and updated, issued December 1982) Art. 1, Bill of Rights §18(a)(b); Montana Constitution (revised and updated, issued September 1984) Art. II, Declaration of Rights §24; Nebraska Constitution (revised and updated, issued May, 1983) Art. 1, Bill of Rights §11; New Hampshire Constitution (revised and updated, issued September 1984) Bill of Rights, Art. 15; South Dakota Constitution (revised and updated, issued September 1984) Art. VI, Bill of Rights §7; Washington Constitution (revised and updated, issued December 1982) Art. 1, Declaration of Rights §22. The Mississippi Constitution has a serious caveat concerning the right to public trial: Art. III, §26, right to exclude all but "necessary" persons in rape

(Footnote continued)

codes or rule books and has gradually been recognized as having constitutional stature. Although its constitutional underpinnings were slow to develop, by 1933, Mr. Justice Roberts could say that

> Our traditions, the Bill of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states unite in testimony that the privilege of the accused to be present throughout his trial is the very essence of due process.[6]

The right appears to have taken on constitutional dimensions first under the due process clause of the Fourteenth Amendment. In 1884, the Supreme Court considered a challenge to a conviction based on the absence of the defendant from portions of the jury selection process. Although the Court's decision in Hopt v. Utah[7] was based solely on a territorial statute guaranteeing the defendant's right to be present at his trial, the Court said that the absence of the defendant during the selection of the jury, in contravention of the territorial statute, would violate due process of law as required by the United States Constitution.[8] In dicta the Court went on to say that the stages requiring the defendant's presence were those between the empanneling of the jury and those involving the reception of the verdict.[9] Between Hopt and Snyder v. Massachusetts, several other cases regarding the presence of the defendant came before the Supreme Court. Most, however, concerned the due process ramifications of failing to comply with a state statute, as in Hopt,[10] or involved the right to

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5(continued)
and other trials.
This language may create an even greater right than that found in the United States Constiution. Eg. Commonwealth of Kentucky v. Willis, 84 C.R. 346 (Fayette Cir. Ct. 1985).

6 Snyder v. Massachusetts, 291 U.S. 97, 128 (1933) (Roberts dissenting).

7 110 U.S. 574 (1884).

8 Id. at 579.

9 Id. accord, Diaz v. United States, 223 U.S. 442 (1912).

10 E.g., Diaz, n.9, supra.

presence at stages not generally associated with the ascertainment of guilt.[11] Notwithstanding Hopt's original limitations, it began to be cited for the more expansive proposition that due process of law requires the presence of the defendant at every stage of the trial.[12]

In Snyder, Justice Roberts and his three dissenting colleagues thought it beyond question that the Fourteenth Amendment guaranteed that nothing be done in a criminal proceeding in the absence of the defendant after the indictment was returned.[13] The majority was also willing to assume that the Fourteenth Amendment guaranteed the presence of the defendant but chose to limit its application to those stages of the trial where the defendant's presence had a reasonably substantial relationship to the fullness of the opportunity to defend against the charges.[14] Thus they found no need for Snyder to be present during a jury view of the scene of the crime, saying that his absence did not render the trial unfair or unjust.

The majority in Snyder also suggested that the right to be present had its roots in the Sixth Amendment guarantee of confrontation as well as in the Fourteenth Amendment.[15] This was not the first time the Supreme Court had intimated this belief. As early as 1892, in Lewis v. United States,[16] the Court spoke of the right to be present as entwined with the right to be confronted by witnesses and accusers.[17] Similarly, in Diaz v. United States, a Phillipine statute requiring the defendant's presence at trial was considered to be the equivalent of the Sixth Amendment right to confront one's accusers.[18] Such sentiments were echoed after Snyder as well as before.[19]

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11 E.g., Schwab v. Berggren, 143 U.S. 442 (1892).

12 E.g., Dowdell v. United States, 221 U.S. 325 (1911).

13 Snyder, 291 U.S. at 129.

14 Id. at 105.

15 Id. at 106.

16 146 U.S. 370 (1892).

17 Id. at 373.

18 Diaz v. United States, 223 U.S. at 455, 56. See also, Valdez v. United States, 244 U.S. 432 (1916).

19 E.g., United States v. Hayman, 342 U.S. 205 (1952).

The most recent cases have not clarified the source of the right. In Illinois v. Allen,[20] the majority speaks unequivocably about the relation between the confrontation clause and the right to be present.[21] The concurring opinion, however, also mentions the due process clause.[22] In Rushen v. Spain,[23] the plurality accepted the right to be present as fundamental without stating its source[24] while the concurring justice related it to the Sixth Amendment.[25]

A distillation of these cases suggests that the right of the defendant to be present at his trial is very important but subject to some limitations. It is related to the Sixth Amendment during the stages in which the accuser and his witnesses are confronted and it is related to the Fourteenth Amendment during other stages wherein the defendant's presence is substantially related to the fullness of the opportunity to defend or where his absence would render the trial unfair or the outcome unjust. While absence at some stages may be deemed de mininus and therefore harmless, absence that impacts on the Sixth Amendment confrontation right may be inherently suspect.[26] Finally, like most rights, the defendant's presence can be waived or forfeited in certain circumstances.[27]

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20 397 U.S. 337 (1970). In Allen, the defendant was physically removed from the courtroom after repeated incidents of disruptive behavior. The Supreme Court held that such removal was warranted and the right to presence was not violated in such a circumstance.

21 Id. at 538.

22 Id. at 350.

23 464 U.S. 114, 104 S.Ct. 453 (1983). In Rushen, a juror spoke at length to the trial court judge about a possible personal prejudice. Neither the defendant, nor counsel from either side was present during the discussion. After defendant's conviction the ex parte communication was discovered and the conviction appealed on that ground. The Supreme Court remanded, holding that a blanket rejection of "harmless error" as applied by the lower court was error.

24 Id. at 116.

25 Id. at 461-62.

26 Id. at 461-62 n.8 (Stevens concurring).

27 Diaz, supra, n.18; Allen, supra, n.20.

Lower courts have been equally inconsistent in their constitutional analyses of the defendant's right to be present at his trial. Since the right is generally enforced, few cases have arisen where the defendant was prohibited from attending a part of his trial. None can be found where he was totally absent against his will from the in-trial examination of a government witness. The issue of presence most often arises when the defendant has been absent during a discussion on a matter of law. In United States v. Gore,[28] for example, the defendant was absent during an evidentiary hearing on the admissibility of a co-defendant's confession. The court rejected the defendant's challenge suggesting that his presence did not bear a substantial relation to his opportunity to defend.[29] While most courts adhere to this pattern for resolving questions about presence during arguments regarding matters of law, they are quick to say that even at these hearings, the defendant's presence is required if it can be useful.[30] Thus, courts have found error when the defendant was absent during a hearing to determine the admissibility of the testimony of a prosecution witnesses[31] because it was conceivable that the witness's statements could have shown inconsistencies of which only the defendant would be aware[32] and where his presence may have caused his wife, testifying as a prosecution witness, to invoke her spousal right not to testify.[33] Challenges based on the defendant's presence at rulings on the competency of witnesses have also produced contrary results depending on the judge's perspective on the relation between the defendant's presence and his opportunity to assist in his defense during that stage of the proceeding.[34]

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28 130 F.Supp. 117 (W.D. Ky. 1955).

29 Id. at 119.

30 E.g., United States v. Sinclair, 438 F.2d 50, 52 (5th Cir. 1971).

31 State v. Howard, 57 Ohio App.2d 1 (1978).

32 Id. at 10.

33 Brown v. State, 372 P.2d 785, 789 (Alaska 1962)

34 Compare, State v. Ritchey, 107 Ariz. 552 (1971) and Moll v. Minnesota, 351 N.W.2d 639 (Minn. App. 1984) (refusal to permit presence during competency examination of young child) with United States v. Ashe, 478 F.2d 661 (D.C. Cir. 1973) (approving the continued presence of the defendant during the hearing).

Thus the defendant will be permitted to be present during pretrial competency determinations of child witnesses if it is necessary to insure a meaningful opportunity to defend.

The preference for face to face contact is implicated whenever the Court or legislature directs that technological innovations be used to alter a traditional court room setting in order to protect an alleged victim of sexual abuse. This alteration can occur in several ways. The court can order that testimony be produced on closed circuit television during the course of the trial. The court can order that pre-recorded testimony be preserved on video tape for later use. The court can also use a system whereby parties are separated by two-way mirrors and voices are amplified. Each of these has several variants. The examinations may take place with the witness, lawyers, defendant and judges present and the jury absent but viewing the proceedings electronically. The court could also order that the defendant view the proceedings electronically, either with or without the jury doing so. The court could remove the victim from the presence of all other people, while providing electronic visual and aural access. Finally, any separation of the constituent parts of the trial could be accompanied by both electronic visual and aural contact with the others by the child witness or by aural contact alone. To avoid violating the defendant's right to presence, the electronic alteration must not substantially interfere with the right to confront one's accusers, must not destroy the fullness of the opportunity to defend and must not create an unfair trial or unjust outcome. Finally, the vehicle for protection must be closely tailored in order to prevent overbroad sweeps.[35]

State courts have ruled on some of these issues. In Herbert v. Superior Court,[36] the court disapproved of taking testimony in a way that permitted the defendant to hear but not see the witness. In Herbert, the court referred to prior statements by the Supreme Court that indicated a preference for physical face to face contact with a witness.[37] In disapproving of the practice employed by the Superior Court,

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35 Globe Newspapers v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982).

36 117 Cal. App. 3d 661 (1981).

37 See, Mattox v. United States, 156 U.S. 237, 244 (1895) ("the advantage he has once had of seeing the witness face to face"); Kirby v. United States, 174 U.S. 47, 55 (1899)("witness . . . upon whom he can look while being tried"); Dowdell v. United States, 221 U.S. 325, 330 (1911) ("only such witnesses as meet him face to face at the trial").

the California Court of Appeals noted that in some real but undefined way, recollection, veracity and communication are influenced by a face to face challenge.[38] In United States v. Benfield,[39] the Eighth Circuit refused to uphold the admission of a prerecorded video-taped deposition of an adult rape victim. The tape was produced outside of the defendant's presence and the victim was unaware that he was close by. The defendant was permitted to observe the proceeding on a monitor and to contact his lawyer with a buzzer. When contacted the lawyer was permitted to leave the room and consult with his client. The appellate court disapproved of this process believing that the absence of face to face contact could have affected recollection, veracity and communication.[40]

In Hochheiser v. Superior Court,[41] the California Court of Appeals refused to sanction technological innovation in a molestation trial in the absence of specific legislative authority. They went on to say that even if closed circuit television could be used in some cases, a generalized belief in psychological trauma is insufficient to show the need for it in a specific case. Citing Globe Newspapers, the court indicated that before an innovation could be used to safeguard a minor witness, there must be a basis in fact spelled out in terms of the nature of the damage, its degree and its potential duration before the balance could be struck to the detriment of a defendant.[42]

On the other hand, the New Jersey Superior Court has upheld the use of closed circuit television when the damage to the child is clearly shown.[43] The court permitted the child's testimony to be recorded where the prosecutor and defense attorney were in a room near the courtroom with the child while the judge, jury and defendant remained in the courtroom but viewed and listened to her testimony through monitors. The defendant and his lawyer were in constant audio contact. The Court distinguished Benfield because of the contemporaneousness

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38 Herbert v. Superior Court, 117 Cal. App. 3d at 666.

39 593 F.2d 815 (8th Cir. 1979).

40 Id. at 821.

41 161 Cal. App. 3rd 777, 208 Cal. Rptr. 273 (1984), affd. ____ Cal. ____ (1985).

42 Id. at ___.

43 State v. Sheppard, 484 A.2d 1350 (N.J. Super. 1984).

of the testimony.[44] It further found no violation of the Sixth Amendment right to presence. The Court focused on the right to cross-examine and found that the procedure did not eliminate a meaningful opportunity to exercise the right.

While the cases are seemingly contrary, they do present some basis for assessing when the right to be present will not be violated by the use of technological innovation. First, there must be a particularized showing of need to protect the child witness. The need can be based on actual trauma or perhaps intimidation. Second, the procedure chosen must not deny the defendant a meaningful opportunity to confront his accusers, assist in cross-examination and otherwise assist in his defense. It would appear that an in-trial contemporaneous closed-circuit television process is preferable to a pre-trial pre-recorded video tape process which preserves the testimony for later viewing. The lawyer should be in the same room as the witness and defendant must be in communication during the examination. The jury should be able to view both the defendant and the witness and defendant must be able to see and hear the witness. If all of these occur, the only difference between the innovation and normal encounter is the inability of the witness to see the defendant and the existence of the innovation itself. Both Herbert and Benfield support the proposition that face to face physical confrontation between the witness and the defendant and public appearance of the witness before the jury is necessary to preserve the psychological impact which for years has been regarded as a guarantee of veracity. It is possible to speculate that physical separation of the witness from the defendant accompanied by dual closed circuit television would clearly approximate the traditional encounter and therefore not violate the defendant's right to presence. Proponents of separation, however, generally seek to insulate the child from the defendant completely. While people and courts have differed as to the effect of this factor on the right to be present, an analysis based on the full scope of the Fourteenth or Sixth Amendment guarantee of presence suggests that in specific cases where need is clearly shown, no violation of the defendant's rights will occur if the above procedure is fully implemented. Since no rights are violated by the admission of a transcript of previously cross-examined testimony of an unavailable witness,[45] no rights should be violated when an available witness is cross-examined in a slightly altered courtroom. A similar argument could be made to place the lawyers in a

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44 Id. at 1057-64.

45 Ohio v. Roberts, 448 U.S. 56 (1980).

separate room as well. Although physical face to face contact is important and may have a psychological effect on reliability, it does not seem to be essential to a meaningful opportunity to confront. Thus the right to be present during the cross-examination is not violated. The absence of any of the above conditions, however, lessens the ability of the defendant to protect himself from unfounded accusations and probably violates the Constitution.

Courts should nonetheless be reluctant to use these innovations. Recent experience has shown that children are susceptible to altering the truth when placed under certain pressures. Peer reinforcement and improper motives or procedures by investigating personnel can affect the subsequent testimony of a witness.[46] Further, even supporters of technological innovations have suggested that the medium of television can alter the impact of a trial on a witness as well as the jury's perception of the reliability of that testimony.[47] For at least three hundred years our current trial format has insured that the innocent are not convicted. That is a laudable goal in a workable system. It should not easily be replaced.

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46 Goodman and Helgeson, "Child Sexual Assault: Childrens Memory and the Law," Papers From a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (1985).

47 Brakel "Video Tape in Trial Proceedings. A Technologiccal Obsession." 61 ABA Bar J. 956, (1975).

DEFENDANT'S RIGHT TO COMPULSORY PROCESS

Few rights guaranteed to a defendant by the United States Constitution have been discussed by the Supreme Court as infrequently as the Sixth Amendment right to compulsory process for obtaining witnesses. Prior to 1967, it had been referred to in only a very few cases and then, most often, in passing.[48] Its importance was nonetheless emphasized early in United States history. During the trials of Aaron Burr, Chief Justice Marshall upheld the issuance of subpoenas upon President Jefferson saying that the President, unlike the King of England, is governed by laws and the power of the Courts.[49] Jefferson complied with the subpoena and little else was said about the clause for 170 years.

In 1966, the Supreme Court discussed the clause and expanded its literal meaning. In Washington v. Texas,[50] the Court struck down a statute that prohibited co-participants in a crime from testifying on each other's behalf. In doing so, the Court extended the application of the amendment. The Court held that it not only guarantees compulsory process but also guarantees the right to the testimony of those witnesses whose presence is secured as long as the testimony is relevant, material and vital to the defense.[51]

For the next sixteen years, the Court again discussed the clause only in passing. In 1982, however, they further defined its scope. In United States v. Valenzuela-Bernal,[52] a majority of the Court ruled that a witness's testimony could be denied to the defense if the defendant could not demonstrate that it would be both material and favorable to the defense. In her concurrence, Justice O'Connor warned, however, that governmental policies that deliberately put potential witnesses beyond the reach of compulsory process could not easily be reconciled with the clause.[53]

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48 See, Westen "The Compulsory Process Clause", 73 Mich. L.R. 73, 108 (1974).

49 United States v. Burr, 25 F. Cas. 30, 35 (#14,692d) (C.C.D. Va. 1807).

50 388 U.S. 14 (1967)

51 Id. at 16.

52 458 U.S. 858 (1982). In Valenzuela-Bernal, the government had deported witnesses before the defense counsel could interview them.

53 Id. at 873 (O'Connor concurring).

Despite this fairly clear standard set forth in Valenzuela-Bernal, other statements by the Court about the presentation of a defense suggest that the right may be qualified for other reasons. In Washington, the Court noted that the decision should not be read to disapprove testimonial privileges or competency rules.[54] In Chambers v. Mississippi, a complex decision involving confrontation, compulsory process and due process considerations, the Court recognized that important rights may bow to accommodate other legitimate interests in the criminal trial process.[55] Valenzuela-Bernal also seems to reject compulsory process for witnesses whose testimony is merely cumulative.[56] If these other interests can have some affect on the right to compulsory process, Justice O'Connor's admonition regarding the government's obligations regarding the clause must be taken seriously. Thus, courts must "closely examine"[57] the asserted governmental interest and find it substantial before the defendant can be denied the right to subpoena a witness and place his testimony in evidence.

Witnesses have been denied to a defendant in various situations. Privileges have sometimes been upheld and sometimes over-ridden. The identity and testimony of informers for example, have been given to the defense but only when they were shown to be essential to the defense.[58] Testimony cannot generally be compelled from those holding a Fifth Amendment privilege.[59] The courts have generally held that while the compulsory process clause is significant, it cannot be used to force another person to give up his constitutional protections nor force the government to accomodate the interests of both

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54 Washington v. Texas, 388 U.S. at 23, n.21.

55 410 U.S. 284, 295 (1972).

56 Valenzuela-Bernal, 458 U.S. at 873.

57 Hughes v. Matthews, 575 F.2d 1250, 1258 (7th Cir. 1978).

58 E.g., Roviaro v. United States, 353 U.S. 53 (1957).

59 W. LaFave & J. Israel, Criminal Procedure, 880-82, (1985). See, e.g., United States v. Turkish, 623 F.2d 769 (2nd Cir. 1980).

people.[60] Cases involving the reporters privilege have been resolved both ways.[61] The marital privilege[62] and the attorney client privilege[63] have also been held to override the compulsory process clause.

Judicial economy has also been used as a justification for the denial of severance of joint defendants when one seeks to testify on behalf of the other but can not do so without implicating himself.[64] Only when the defendant can show that the co-defendant actually will testify in an exculpatory, noncumulative fashion so as to further the defense without unduly burdening the court will severance be granted.[65] While none of these practices has been tested in the Supreme Court since Valenzuela-Bernal, their validity has generally been upheld by lower courts.

Despite these countervailing practices, it is not difficult to see how the compulsory process clause may be invoked to defeat new statutes that create hearsay exceptions for the admission of statements made by child sexual abuse victims to other people. Indeed, at least one court has rejected a challenge to such a statute in part because the defendant did not avail himself of his right to compulsory process.[66]

It is conceivable that if such evidentiary rules are upheld upon confrontation grounds, a defendant may nonetheless invoke his right to compulsory process to subpoena the child and place her on the witness stand. In order to do so, the defendant

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60 United States v. Beene, 561 F.2d 894 (D.C. Cir. 1977).

61 Compare, State v. Rinaldo, 673 P.2d 614 (Was. App. 1983) upholding the privilege over demands for testimony based on compulsory process with In re Farber, 178 N.J. Super. 259 (1978) upholding the supremacy of the compulsory process clause.

62 E.g., United States v. Brown, 634 F.2d 819 (5th Cir. 1981).

63 E.g., Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1984).

64 E.g., United States v. Rice, 550 F.2d 1364 (5th Cir. 1977).

65 Id. at 66, 67.

66 Jolly v. State, 681 S.W.2d 689, 692 (1984).

would have to show the evidence was material, favorable to his cause and not cumulative.[67] There would of course be no trouble showing that the evidence was material. Since the victim is the sole possessor of the information and since that information is the basis of the government's case, materiality is apparent. To some extent, the notions of favorable and cumulative are intertwined. If the evidence would merely reiterate the government's case it would be cumulative and most likely not favorable. If the defendant sought to introduce new information through the witness, it clearly would not be cumulative and most likely would be favorable to the defense.

There has been very little discussion of the concept of "favorable" in the context of the compulsory process clause. Nonetheless, other areas of the law can give some guidance. In the context of the government's duty to provide favorable information to the defendant, most courts agree that evidence is favorable even if "it does no more than demonstrate that a number of factors which could link the defendant to a crime do not."[68] Favorable evidence could be derived not just from additional facts but from attacks on the credibility of a witness as well.[69]

If the defendant sought to compell the attendance and testimony of the child, it most likely would be to cast doubt upon the credibility of the child's story either through impeachment of the witness by the traditional methods or to bring to the attention of the jury other facts which could undermine prior statements admitted into evidence regarding either the identity of the perpetrator or the occurrence of abuse itself. Arguably, whenever the defendant can show that the credibility of the childs evidence can be shaken by permitting the defendant to call the victim as his own witness, it should be allowed. If he is denied, the compulsory process clause or the right of the accused to mount a defense would require the Court to fashion new rules so that the defendant could attack the credibility or secure the evidence in another fashion.

There is very little that is certain in this area. Commentators have suggested, for example, that compulsory process issues should be resolved in a manner similar to that used to resolve confrontation issues.[70] Thus, if a child is unavailable for cross-examination purposes, he or she should also be unavailable for compulsory process purposes. On the

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67 Valenzuela-Bernal, 458 U.S. at 873.

68 La Fave, supra, n.59 at 760.

69 Giglio v. United States, 405 U.S. 150 (1972).

70 Westen, see supra note 48.

other hand it may be a violation of both the compulsory process and confrontation clauses for the legislature to permit hearsay by assuming unavailability in all cases. Just as Globe Newspaper suggested that a specific showing must be made before an infringement of First Amendment guarantees is permitted, so too might the court require a particularized showing before Sixth Amendment guarantees are restricted. Nonethelesss, the protection of children is at least as important as judicial economy or evidentiary privilege. If the footnote in Washington is given full effect, such legislative prohibitions on access to child witnesses might be permissible.[71]

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71 Rape shield laws, uniformly upheld by the courts, have placed certain evidence outside the bounds of cross-examination without running afoul of either the confrontation clause or the compulsory process clause. See, People v. Arenda, 416 Mich. 1 (1982). Elimination of an issue, however, is less serious than elimination of a witness.

THE RIGHT TO PRO SE REPRESENTATION

In Faretta v. California,[72] the Supreme Court held that a criminal defendant has a constitutional right to represent himself. In so holding, the Court stated:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must "be informed of the nature and cause of the accusation" who must be "confronted with witnesses against him", and who must be accorded "compulsory process for obtaining witnesses in his favor . . . . [Thus] the right to self representation -- to make one's own defense personally -- is thus necessarily implied by the amendment.[73]

Even though the defendant may act unwisely, the Court held that his choice "must be honored out of a respect for the individual which is the life blood of the law."[74] The right is not only accorded to those who have a technical knowledge of the law. So long as the defendant is aware of the dangers of self-representation and generally knows what he is doing, he may knowingly and intelligently waive his right to counsel and proceed to defend himself.

There are a few limitations on this right. The first involves the timing of the request. In Faretta, the request was made well before the date of the trial. The Supreme Court obviously thought this was reasonable but gave no further guidance with respect to the timing of the request. A pre-Faretta ruling suggests that the request is timely if made anytime prior to the commencement of the trial;[75] other cases, however, indicate that the request must be made within a reasonable time prior to the commencement of the trial.[76] It

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72 422 U.S. 806 (1975).

73 Id. at 819.

74 Id. at 834. (quoting Illinois v. Allen, 397 U.S. 337, 350-351 Brennan J, concurring.)

75 United States v. Denno, 348 F.2d 12 (1965); see also, Chapman v. United States, 553 F.2d 886 (5th Cir. 1977) permitting the request until jury empanelment.

76 People v. Windham, 19 Ca. 3rd 121 (1977).

would appear clear, however, that if a defendant has ample time to make the request pre-trial, an in-trial request could be denied as upsetting to the orderly process of the judicial system.[77]

A second limitation is that the request for pro se representation be clear and unequivocal.[78] Vacillation in the request[79] or permitting a lawyer to do some of the in court work[80] can constitute waiver of pro se representation. While the Court may permit a lawyer to assist a defendant upon request, such hybrid representation has not been held to be constitutionally mandated.[81] Further, the Court may order hybrid representation or standby counsel over a defendant's objection so long as his assistance does not go beyond routine, clerical or procedural matters and does not interfere with the defendant's choosing between tactical alternatives, questioning of witnesses, or speaking on matters of importance.[82]

A final limitation could be derived from Illinois v. Allen.[83] If the purpose of pro se representation is to disrupt or frustrate the integrity of the court and begins to accomplish these goals, pro se counsel could conceivably be construed as forfeited. Similarly, if it's purpose is to harass or intimidate a witness, it can also be forfeited.[84]

There appears to be very little to prevent a defendant from choosing to defend himself in a sex abuse case. If the request is timely and unequivocal and made with full understanding of the consequences of such action, the Court has no choice but to

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77 Russell v. State, 270 Ind. 55, 59 (1978).

78 Faretta, 422 U.S. at 822.

79 United States v. Bennett, 539 F.2d 45, 51 (10th Cir. 1976).

80 United States v. Condor, 423 F.2d 904, 907-908 (6th Cir.), cert. denied 400 U.S. 958 (1970).

81 McKaskle v. Wiggins, ___ U.S. ___, 104 S.Ct. 944, reh. denied 104 S.Ct. 1620.

82 Id. at 952.

83 Illinois v. Allen, see supra note 20.

84 United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).

grant it. Consequently, if the prosecutor makes a pre-trial request for a technologically innovative method of taking testimony,[85] the defendant may frustrate this tactic by requesting to defend himself. Since many defendants in sex abuse cases will not be indigent, it will be possible for them to derive maximum benefit from their retained counsel even if the court does not permit active hybrid representation during the trial itself. Consequently, the prosecutor may be forced to forego closed circuit television and pre-recorded video taped testimony or subject the victim to the more intimidating process of questioning by the defendant himself.

It is unlikely that the court could find that the purpose of the request for a pro se defense is disruptive or an affront to the integrity of the court. An invocation of a constitutional right can never in itself be considered disruptive or an affront to the integrity of the judicial process. Globe Newspapers, Illinois v. Allen and Faretta would all require some specific instance of contumacious conduct before pro se counsel could be denied. It is also unlikely that the request itself could reach the level of intimidation of a witness usually associated with the forfeiture of a right. Although a threat during the act of abuse has been held to be a waiver (or more precisely, a forfeiture) of the right to confrontation,[86] most cases require a much greater and more specific showing of the relation between the the defendant's improper activities and the witness's reluctance to testify before a right can be deprived. Asserting a right cannot be equated with a threat. While the specter of questioning by the defendant himself may not be pleasant for a witness, it nonetheless cannot be construed to be misconduct per se, thus depriving him of his right.

Once questioning begins, the court does retain some discretion in controlling the examination so that the witness is not intimidated beyond that which would normally occur under the circumstances of cross examination. This control is great enough to declare the right forfeited in a particular case if the defendant goes beyond the bounds of vigorous defense and begins to intimidate the witness or impugn the integrity of the court.[87]

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85 Most courts would probably require that the prosecutor make the request pretrial.

86 State v. Sheppard, see supra note 43.

87 Such a ruling should not be lightly made. A forfeiture of the right to pro se defense may require a declaration of a mistrial. If the trial court's decision is reversed on appeal, retrial will be denied as a violation of the double jeopardy clause.

CONCLUSION

The various methods suggested for protecting child witnesses are permissible in certain circumstances if conducted in certain ways. Nonetheless, skilled defense lawyers will find many ways to challenge and overcome these practices.

Rather than spend time trying to create procedures to spare children from anxiety at the end of the process, efforts should be made to improve investigation techniques so that children will be less traumatized at the earliest stages of the process.[88] As much or more damage is done to children and to the prosecution's case by multiple interviews conducted by insensitive and untrained police and other government agents as will be done from a court appearance by the child.[89] Rather than improve the process at cost to the constitution, pretrial procedures and investigative practices should be improved first.

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88 See, Berliner and Roe, "The Child Witness: Progress and Emerging Limitations," Papers from a National Policy Conference on Legal reforms in Child Sexual Abuse Cases, (1985).

89 See, Goodman and Hegelson, supra, 46.

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Practical Issues in Avoiding Confrontation of a Child Witness and the Defendant in a Criminal Trial

David W. Lloyd

PRACTICAL ISSUES IN AVOIDING CONFRONTATION OF A CHILD WITNESS AND THE DEFENDANT IN A CRIMINAL TRIAL

David W. Lloyd

The decision to use special procedures [1] in the attempt to avoid having a child witness testify in face to face confrontation with the defendant in a criminal trial should not be made lightly. Along with broad strategic choices, there are practical problems that must be considered, for there are potential deleterious consequences for both the prosecution and the child's welfare, most notably appellate reversal necessitating a second trial. These problems cluster around legal tactical steps, costs, personnel, and logistics, but they interrelate in ways that complicate decision-making.

VIDEOTAPE

One alternative to confrontation involves the use of videotape. Three reasons are usually given for desiring its use: (1) if the child's initial account of the event is videotaped and shared with other investigating professionals and/or such other persons as have a professional interest in the child, the number of times the child will have to relate the details of the event will be sharply reduced; (2) it may induce a guilty plea if the defense attorney is convinced that the child is both competent to testify and credible; and (3) the videotape itself can be used at the trial in lieu of the child's testimony, thus reducing "trauma" to the child.

None of these purposes can be achieved if the child is reluctant to talk or doesn't disclose any facts of sexual molestation. It may be unrealistic to expect an investigator or prosecutor to watch videotape for 45 minutes just to get five minutes worth of disclosure spread throughout long pauses, interruptions, and digressions. It is likely that one or more viewers will be dissatisfied with the interviewer's technique because it does not attempt to elicit information about all of the complex issues: facts about the crime and the offender, family dynamics, the child's mental health status, etc. However, retaping the interview with additional questions or a new interviewer negates the purpose of the procedure, and the agency may be required to retain the first tape for eventual disclosure to the defense attorney. There can be disputes over ownership and use of the videotape, including demands to copy it; this can be problematic because state laws, regulations, or agency policies may prohibit copying of investigative records. There may be demands from the defense attorney to copy it, and potential disclosure to the media, which creates a loss of the child's privacy.

Theories of admissibility

In planning to use the videotape at trial in lieu of the child's testimony, the proponent of videotaping first faces a major hurdle--finding a theory for admissibility of the videotape into evidence. The videotape is obviously hearsay, inasmuch as it contains statements made out of court that are being introduced to prove the truth of the matters stated therein. While there are several exceptions to the rule against hearsay that may be

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ordinarily applicable when the child is going to testify,[2] when the videotape is being admitted in lieu of testimony there are only two general theories for admissibility:

a. The hearsay fits into a well-recognized exception (usually as an excited utterance,[3] or

b. The hearsay was made under other conditions of equivalent reliability.[4]

Unavailability

The Sixth Amendment requires that there be a determination that the witness is unavailable to testify before hearsay evidence can be admitted in lieu of the witness' testimony at trial.[5] Unavailability has generally been applied in the case law to mean geographical unavailability: the witness is beyond the power of the attorney to compel attendance due to jurisdictional limits, or has disappeared. The attorney is obligated to show good faith efforts to obtain the witness' presence through the use of investigation, subpoena power, and attempts at extradition.[6]

The witness' unavailability may be due to other reasons.[7] In one case this was due to the witness' loss of memory that resulted from the traumatic nature of the event.[8] In another, the witness had suffered a severe mental illness as a result of the event.[9] However, the evidence showing unavailability in both these cases was extraordinary; in the first case the witness attempted to testify (which is contrary to the goal of having the child avoid testifying at all) and a psychologist gave expert testimony about the nature of the memory loss the witness had suffered, while in the second case there was expert testimony as to the diagnosis of the mental illness, and lay testimony that the witness had been involuntarily committed to a mental hospital and that the mental illness continued to be present. In a similar case, the potential witness was in an advanced state of pregnancy and her physician supplied evidence that the stress of testimony could endanger her health.[10]

However, cases in which the doctrine of unavailability due to non-geographical reasons has been attempted to justify the use of hearsay have not always had success. In at least two jurisdictions mere testimony from the parent that the child is afraid of testifying is insufficient,[11] as is mere parental testimony that the child has mental health problems (including hallucinations and suicidal attempts).[12] The key factor distinguishing success from failure seems to be the presence of expert testimony on unavailability.

Expert testimony

The proponent of the videotape must therefore be prepared to justify the admissibility of expert testimony on this issue. This may be a difficult task. There is a three-pronged test for admissibility of expert testimony:[13]

a. Such expert testimony will assist the trier of fact (Some jurisdictions impose the stricter requirement that the subject of the testimony be beyond the ken of the average lay person.);[14]

b. The state of the art or scientific knowledge permits a reasonable opinion on the subject;[15] and

c. The expert has sufficient skill, knowledge, or expertise in the field to be qualified to give an opinion.

It may be difficult for the proponent to meet the second and third tests. Not every community has an expert available to evaluate the child and to testify in support of psychological unavailability, nor is the current research on child witnesses so conclusive as to permit such testimony in every case. Moreover, such a psychological evaluation is both costly (approximately $500), time-consuming (while it may take only several hours to conduct the interviews and standardize tests, it may take several weeks to get the interviews and tests performed and the results written in a report), and more than a little invasive of the child's privacy. Even worse, the expert may discover and document things about the child's psychological status that detract from his/her credibility. The prosecutor may be obligated to provide such information to the defense attorney under court rules of discovery or constitutional doctrines of due process.[16] Such an obligation thus provides the defense attorney with ammunition for an attack on the child's credibility and the reliability of the particular videotaped statement.

Competency of the child

If a satisfactory showing of unavailability has been made, there must be a showing that the hearsay statement was made under circumstances that indicate reliability. In some states [17] this requires a showing that had the child attempted to testify, the child would have been a competent witness: that is, he/she had sufficient intellect to understand and respond to questions, to remember events and be able to narrate them, to understand the difference between telling the truth and telling a lie, and an appreciation of the obligation to tell the truth at the time that the statement was made.[18] (Even if not required, such evidence may be extremely helpful in persuading the judge to admit the hearsay.)

Usually the parent can provide some testimony about the child's intellect, ability to understand questions, memory, and truthfulness. There may also be a need for expert testimony that the child is able to distinguish fact from fantasy and truth from falsehood, and that this child did not make these statements due to suggestions from another person.[19]

Reliability under a recognized exception to the hearsay rule

It is highly unlikely that a videotape made of the child's disclosure will qualify under the theory of being an excited utterance. There are two essential foundations for such admissibility: that there was so startling an experience that it could produce an utterance without conscious thought, and that the utterance was in fact spontaneous.[20] Generally, the longer the delay between the experience and the utterance, the less likely it is to be admissible because the time interval allows the startling nature of the event to dissipate and also allows the opportunity for reflection about the event.[21] In the ordinary situation of child sexual molestation, (assuming that the act or acts quality as a startling event, which is arguable) the initial disclosure will probably have resulted in at least some questioning by a trusted adult before the authorities were even notified. By the time that the investigator is ready to conduct the videotaping, it may be several hours after the event, which weakens the theoretical reliability of the statements. More importantly, it is highly likely that the child will disclose the event during the videotaping only after prompting (by words or gestures) or questions, thus weakening the foundation of spontaneity,[22] and raising the problem of suggestivity.

It is also unlikely that the videotape will qualify as a statement made to a physician or mental health professional for purpose of diagnosis and treatment,[23] since some of the reliability of such statements is attributed to the confidentiality of the situation.

Normally such statements would not be videotaped, nor would an investigator or camera operator be present, so the normal indicia of reliability are absent.

Other indicia of reliability

If the statement fails to fit within one of the generally accepted exceptions to the hearsay rule, there must be evidence of other indicia of equivalent reliability. At a minimum there must be testimony from the parent and an expert that the child has been insufficiently experienced in sexual matters to be able to describe sexual acts from experiences other than the one(s) at issue.(24) Such evidence of reliability should obviously be supported by expert testimony that the child gave behavioral or other indicators that the field generally accepts as typical of a child who has been molested.

The need for such expert testimony again raises the issues of whether the prosecution has such an expert available, the invasiveness of the expert's evaluation, the cost (since this may require a different type of evaluation than that customarily done to discover psychological problems), and the possibility that the results will undermine the statement's reliability.

Authentication

Finally, before the videotape can be admitted into evidence, it must be authenticated. This requires the attorney to prove that the audio and video functions were functioning properly, that the operator of the equipment was both trained and experienced, that the audio and video functions depicted are authentic and accurate, that there have been no additions or deletions or substitutions, that the tape was preserved properly and without the possibility of tampering, that the tape is both clearly visible and understandable, and that the speakers depicted in the tape are identified.(25)

The major stumbling block here may be proof of a trained and experienced operator. The course in videotape filming at a private District of Columbia university costs almost $800; at a public college it is only 10% of that. It may prove more difficult to provide a professional from the agency with sufficient experience to qualify as the operator for legal purposes; it seems unlikely that an agency would have a full-time person for media services or that it would regularly engage someone on short notice to operate the equipment.

Cost

The second major hurdle facing the proponent of videotaping is the cost. A survey of audiovisual experts and merchants in the Washington, D.C. metropolitan area resulted in a recommendation for 3/4 inch videotape over either Betamax or VHS 1/2 inch systems, due to the superior technical quality for broadcast purposes, although there are new "broadcast quality" 1/2 inch tapes and equipment just entering the market. In the Washington, D.C. area such a recorder/playback machine costs approximately $2,000. A camera can cost $3,500, with the tripod costing another $150 to $250. Good quality microphones -- at least two are needed -- would cost another $100 each. The cost of a monitor to view the videotape ranges between $800 and $1,000, depending on whether the size was 19 or 25 inch diagonal. Therefore, unless discounted, the cost for the system would cost $7,000, exclusive of the cost of blank tape. It is unlikely that an agency can rent the equipment due to the unusual times of day and frequent urgency of the need for videotaping.

In addition to the cost of equipment for the recording, there is a cost for equipment for the playback in court. The D.C. experts believed that the monitor size should be 25 inches, and that there should be four of them so that the judge, jury, attorneys, and spectators/press could each view the tape. This increases the cost by at least $2400, with additional costs for cables, stands, etc. However, it is possible to rent the equipment for playback in court; this may cost $800 to $1,000.

Each interview should be on a separate videotape. Blank 3/4 inch tapes cost between $15 and $20, and since each videotape must be saved for use at court, and for possible appeal and retrial, there will be a sizeable cost for purchase and storage of videotapes. There may be costs for repairs and rental of replacement equipment.

Finally, there will be a cost for the camera operator, and any audio technician that may be necessary.

In many local jurisdictions these costs may be prohibitive unless there is a large number of sexually victimized children. In larger communities, there may be so many sexually victimized children that it would be necessary to purchase several recorders, cameras, tripods, and microphones to avoid the necessity of delaying the interview until a previous one had been completed.

Personnel

A third problem in the use of the videotape relates to the personnel involved. First, the identity of the person who asks the child the questions raises issues about the type of questions that will be asked. Police officers ask questions oriented to concrete facts: who, what, when, where, how, how frequently, who else was present, etc. Mental health professionals ask questions oriented to clinical assessment: what was done, how did the child feel about it, has the child ever felt like this before, etc. Child protective services workers may ask questions that are combinations of the two. Questions about the child's mental health may not only be inadmissible because they can potentially invade the province of the jury,(26) but may lead to answers that detract from the child's credibility. Training of the interviewer thus becomes crucial.

Second, the identity of the questioner can raise issues of confidentiality. If the questioner is a private medical or mental health practitioner, the child must consent to disclosure of the videotape to an investigator (unless the suspect is the child's parent, guardian or caretaker, where disclosure is mandatory under the state child abuse reporting law)(27). If the defense attorney learns of the existence of the videotaping, the professional may have difficulty maintaining the confidentiality of the child's conversations from defense efforts to gain access through the use of a subpoena duces tecum. If the questioner is an official agency investigator, it may be necessary under court rules of pretrial discovery to allow the defense attorney access to view it even if the tape will not be used in evidence.

Logistics

The fourth major problem in videotaping is one of logistics. The equipment is bulky; it is not likely that a child protective services worker or even a police officer will want to lug it around in an official agency vehicle to various sites, such as the child's home or a hospital. Nor is it likely, given the frequency of these investigations during the night and on weekends, that private agencies will have them readily available for use or have a room set up for taping. This means that the investigator must have a room at the agency ready for use on a regular basis, with an operator available for the taping.

Persuasiveness

The final and probably most important issue is whether the videotape will be persuasive to the factfinder. This rests on the skill of the interviewer, but it also depends on the comfort of the child in relating details that may be embarrassing and emotionally stressful. Since children respond differently to sexual victimization and to disclosure, the child may tell the facts eagerly, straightforwardly, listlessly, distractedly, angrily, tearfully, or even with apparent unconcern. The child who attempts to avoid answering the questions, who has to be prompted, or who leaves out major details, leaves a great deal to be desired as a convincing witness. (His/her performance might improve during witness conferences in preparation for testimony.)

CLOSED CIRCUIT TELEVISION

A second method for avoiding confrontation is the use of closed circuit television. Here again there are significant issues.

First, given the constitutional mandate for confrontation, a court may not believe it has authority to order this innovation over the defendant's objection. It is not yet certain that statute permitting closed circuit television (or other physical arrangements to prevent the child from viewing the defendant directly) will pass appellate scrutiny.[28] Nor is it clear that a court has inherent authority to order such an innovation.[29]

Second, assuming that the court believes it has authority to do so, the attorney proffering this approach must make a showing that it is necessary. In particular, in addition to testimony from the parent, an expert will be needed to testify about the child's emotional condition and prognosis for that condition if the child testifies under normal circumstances.[30] Assuming that an expert can be located, it may be extremely difficult to elicit such a persuasive definitive prognosis in testimony even if the expert intuitively believes that the child will be better off testifying through some other means. Once again, factors of cost, logistics, and the impact on the child's credibility arise with respect to the expert.

Third, the issue of cost arises again. It could cost between $500 and $1,000 for equipment rental in closed circuit television proceedings, depending on how many monitors and cameras are used. There should be a camera focusing on the child that transmits to monitors for the jury, the judge, the attorneys, and the spectators; to minimize constitutional objections, there should be a camera focusing on the defendant that transmits to monitors for the child, the jury, the judge, and the attorneys. This may seem a large cost for testimony that may only last one to two hours.

Fourth, logistics again arise. It will be necessary to have a room for the child close enough to the courtroom so that the equipment cables do not obstruct major passageways and so that the cost ($.65 per foot) of the cables is minimized. It will take at least an hour to set up and test the equipment and an hour to remove it; the judge may not be amenable to such disruption of the courtroom for that period of time.

PREPARATION FOR TESTIMONY

The foregoing discussion raises an interesting strategic problem. If the goal is to avoid having the child testify in confrontation with the defendant, it may be better to have the child in a somewhat anxious state about the issue of testifying. Thus the child would demonstrate the type of psychological unavailability that an expert witness could detect and testify to. Of course, if the judge does not permit the alternative to confrontation,

the child would be left unprepared for trial. Conversely, if the child is thoroughly prepared by the prosecutor and/or any victim support person (including a guardian ad litem) for confrontation, testifying, and cross-examination, there is a possibility that the child will not demonstrate psychological unavailability or the need for closed circuit TV.

It would seem that a pretrial application for such a special procedure should therefore be made as early as possible after charges are filed, for each time the child participates in court procedures there will be an inference that he/she can testify thereafter in confrontation. Such an application must be carefully researched and an appellate brief drafted for filing because there is a strong possibility that the judge will deny the application.

AN AGENDA FOR RESEARCH

In the discussion above, there was frequent mention of the need for expert testimony on various issues relating to children as witnesses. In general, the literature that recites the dreadful impact of the child's participation in court as the complaining witness in sexual victimization cases is conclusory or merely anecdotal rather than based on controlled research. The current state of knowledge about children as witnesses is very limited, focusing mainly on their competency.(31) (It is possible that if there had more research on the impact of court procedures on child victims of sexual offenses, the U.S. Supreme Court would have upheld the Massachusetts statute that excluded the press from the courtroom during a child victim's testimony.)(32)

To firmly convince both trial and appellate judges of the justice and necessity of special procedures for child witnesses, it is vital that researchers study several areas of court procedure under controlled conditions,(33) although there are ethical and methodological problems in conducting such research.

First, there is a need to study how testifying in court effects adults. Such research can begin with physiological measurements of changes in heartbeat, respiration, and other metabolic functions during testimony. It should address cognitive performance functioning before and after the testimony has been given, and should compare emotional functioning before and after testifying. Although there may be wide variations, the research should produce some baseline information on witness functioning. It is unclear whether this can be done by simulation or whether actual court procedures must be used. The latter require judicial approval.

Second, similar studies should be done with child witnesses, although the necessity for informed consent from the parent(s) may be a major obstacle.

Third, similar measures should be done using alternative models: testimony in chambers, simulated testimony by videotape, simulated testimony by closed circuit television, once again comparing results from adult and child subjects.

Fourth, there should be research on the impact of confrontation on truth-telling. Although the law holds as an article of faith that confrontation and cross-examination are the best methods of ascertaining the truth, there is no scientifically acceptable proof in research that demonstrates that these methods actually produce the truth.

Finally, there should be a special focus in the current research on the moral development of children. In particular, such research should focus on: distinguishing between truth and falsehood, loyalty to caregivers, secrecy, and the impact of violence and sexual victimization on moral development. The studies should also use preschool children as

subjects since they are increasingly reported victims of sexual molestation.

The results of all this potential research can greatly assist the development of expert testimony on child victims, and can lead to the foundation of legal innovations that bring justice to both the defendant and the child victim.

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17. Annot., Declarant's Age as Affecting Admissibility as Res Gestae, 83 A.L.R.2d 1368.

18. Johnson v. United States, 364 A.2d 1198 (D.C. App. 1976); Wheeler v. United States, 159 U.S. 523 (1895).

19. State v. Rodriguez, 8 Kan.App.2d 353, 657 P.2d 79 (1983); See, Loftus, E. and Davies, G., "Distortions in the Memory of Children," 40 J.SOCIAL ISSUES 51 (1984).

20. McCormick, supra note 3.

21. Annot., "Time Element as Affecting Admissibility of Statement of Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance," 89 A.L.R.3d 102.

22. Annot., "Fact That Rape Victim's Complaint or Statement Was Made in Response to Questions as Affecting Res Gestae Character," 56 A.L.R.2d 372.

23. McCormick, EVIDENCE, Sec. 292, at 690 (1972).

24. People in Interest of W.C.L., 650 P.2d 1302, at 1305 (Colo. App. 1982).

25. State v. Williams, 49 Wash.2d 354, at 360, 301 P.2d 769 (1956).

26. State v. Saldana, 324 N.W.2d 227 (Minn. 1982); State v. McGee, 324 N.W.2d 232 (Minn. 1982).

27. Bulkley, J., "Analysis of Civil Child Protection Statutes Dealing With Sexual Abuse," in Bulkley, J. (ed.), CHILD SEXUAL ABUSE AND THE LAW 81, at 83 (1981).

28. Herbert v. Superior Court of Sacramento County, 117 Cal.App.3d 661, 172 Cal.Rptr. 850, 19 A.L.R.4th 1286 (1981).

29. Hochheiser v. Superior Court of Los Angeles County, 208 Cal.Rptr. 273 (Ct. App. 1984).

30. See, supra, notes 8, 9, 11, and 12.

31. Loftus and Davies, supra note 18; Johnson, M. and Foley, M., "Differentiating Fact From Fantasy: The Reliability of Children's Memory," 40 J. SOCIAL ISSUES 33 (1984); Melton, G., Bulkley, J. and Wulkan, D., "Competency of Children as Witnesses," in Bulkley, J. (ed.), CHILD SEXUAL ABUSE AND THE LAW 125, at 134 (1981).

32. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Melton, G., "Child Witnesses and the First Amendment," 40 J. SOCIAL ISSUES 109, at 115 (1984).

33. See Goodman, G., "The Child Witness: Conclusions and Future Directions for Research and Legal Practice," 40 J. SOCIAL ISSUES 157 (1984).

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Expert Testimony in Child Sexual Abuse Cases

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EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

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I. INTRODUCTION

The late 1970's and early 1980's have seen a tremendous increase in the number of child sexual abuse cases in the criminal justice system. The perceived inherent weakness of these cases that often pitted a young traumatized child against a seemingly respectable adult caused many prosecutors to bolster their cases with expert testimony. This expert testimony ran the gambit from those simply testifying delays in reporting are common[1] to those testifying that in their expert opinion a particular child victim was telling the truth.[2] Several cases have finally progressed through the appellate systems in various states, and as with other evidentiary issues, decisions have varied from state to state. There are, however, enough well-reasoned cases to make some general observations and conclusions about permissible testimony for future child and sexual abuse cases.

II. GENERAL PRINCIPLES OF EXPERT TESTIMONY

In examining the admissibility of expert testimony on the dynamics of child sexual abuse, the court must apply the general rules applicable to all expert opinion evidence. The analysis is two pronged: 1) Is the evidence admissible and 2) Does the

probative value outweigh the prejudicial impact. In answering the first question regarding admissiblity, the court must first decide that the expert testimony will aid the trier of fact in evaluating and understanding matters that are not within the common experience of the jurors. If the subject matter is the one upon which the jury can use assistance, the expert must be qualified, and the state of the art must be such that there is reliability to the testimony. Having decided the subject matter is appropriate for expert testimony, that the expert is qualified, and that the science is reliable, the court must balance the probative value against the prejudicial impact.

III. THE WASHINGTON CASES

The formation of a specialized unit in the King County Prosecuting Attorney's Office to handle child abuse and sexual assault cases, as well as the proximity and close interaction of that unit with the Sexual Assault Center in Seattle, Washington, led to a great number of child sexual assault cases in which expert testimony was offered. No fewer than ten written opinions by appellate courts in Washington deal with the issue of this kind of testimony. Hence the principles and limitations of expert testimony have been more clearly delineated in Washington than elsewhere. A brief history of the theories of admissibility and appellate reactions is helpful in analyzing other cases.

Initially based on the authority of the persuasive opinion on spousal battering in Ibn-Tamas,[3] social workers from the sexual assault field were called to assist the trier of fact in understanding delays in reporting and by implication, explain how these cases could go on for years undetected. Impressive statistics clearly showing that sexual abuse was rampant and usually committed by friend or family was a helpful by-product. Reasons given for the failure to timely report these crimes included fear of reprisals, fear of being blamed, fear of terminating relationships, obeyance of parental orders, etc. Support for the admissibility of the testimony was also found in the admission of "battered child syndrome"[4] evidence in Washington.

Unfortunately for the future admissiblity of this type of expert testimony in Washington, the first case in the series to be decided, State v. Steward,[5] resulted in the focusing of the Washington courts on statistics when that was not the real value of the testimony. Steward was a child abuse homicide case in which the defendant had offered testimony that the child reacted so positively to Steward, that he could not have been the one to abuse and eventually murder the child. A general question intended to establish that because there is love displayed by or towards a parent figure, doesn't mean that person is incapable of

harm was asked of a physician expert on child abuse. Responding to the question "what kind of person usually commits child abuse" (looking for the answer "someone who loves the child but gets very angry"), the response was that "18 out of 36 cases of serious child and abuse cases involved mothers' babysitting boyfriends." This evidence was viewed by the court not as rebuttal to the defense argument that the loving relationship precluded the defendant's guilt, but rather as attempting to show statistically that because half the serious child abuse cases involve mothers' boyfriends and the defendant was the mother's boyfriend (actually her pimp), the defendant must be guilty. The court then viewed expert testimony in the first sexual abuse case, Maule,[6] in the same light. The court in Maule decided that any expert testimony that purported to address offender characteristics was fatal. Hence the conviction of Maule for abusing his eight- and five-year-old daughters was reversed because the social worker testified in the course of establishing her qualifications that the majority of child abuse cases involved a male parent figure, particularly biological fathers, in a case where the defendant was a biological father. Again the court became rather fixated on the notion the state was using the expert testimony to place the defendant in a category more likely to have abused the child than to show the dynamics of delayed reporting which are inextricably linked to the family relationship. The court also went on to

express serious reservations about the entire field of expert evidence in child sexual abuse cases, reservations they seem to have dropped in later cases.[7]

A series of unpublished but written decisions dealing with the same general subject matter affirmed convictions when experts were called upon to give an opinion whether the revelation of abuse at a particular time (always a delay) was "inconsistent with the abuse having occurred"[8] (the answer of course being "no"). Finally the Supreme Court of the State of Washington addressed the issue in State v. Petrich[9]. They found permissible the testimony of a social worker from the Sexual Assualt Center that in three years she had dealt with more than 3,000 cases of sexual abuse, that delays in reporting varied from a few days to a few weeks and that the length of the delay was related to the relationship of the parties; the longest delay being when the offender was a family member.

All of the Washington cases, including the most recent Fitzgerald[10] case involving a Boeing executive who molested three young girls from India after adopting them, preclude an expert giving their opinion that a victim or witness is telling the truth.[11] Fitzgerald was granted a new trial in January 1985 on an independent basis, however the court took the time to point out that having a pediatrician give her opinion the girls were

molested, when she had no physical findings of sexual abuse upon which to give the opinion, was tantamount to asking her to render an opinion on the truthfulness of the girls' statements. The court in Fitzgerald cites three rape trauma syndrome cases[12] in support of their holding that it is impermissible to allow an opinion on credibility as the testimony usurps the function of the jury. In a single unpublished opinion, the Washington Court of Appeals rejected rape trauma syndrome evidence as an improper usurpation of the jury's function.[13]

One can glean three general theories espoused by the courts about this evidence, and apply these theories to the Washington cases as an illustration, before applying these categories to the decisions in other states. First, clearly only the most liberal view would permit calling an expert to give an opinion as to the truthfulness or credibility of a witness. Washington courts in Petrich and Fitzgerald[14] certainly reject this view. Second, a moderate theory involves attempting to bolster the victim's testimony without a direct comment as to the victim's credibility. The language in the Washington cases, particularly Fitzgerald, indicates some hostility to even this bolstering, as arguably that was the purpose of the physician's testimony in that case. The third, most conservative position is the admission of expert testimony only to explain or rebut a

defense argument, such as the typical defense argument that a delay in reporting means the child is fabricating. This is the position probably adopted by Washington courts and is a clear baseline for admission in almost all jurisdictions. One may disagree, but this position is probably the most true to Federal Rules of Evidence ER 702 and Federal Rules of Evidence ER 703. Washington liberally admits battered woman's syndrome evidence on the part of the defendants, but then, the rules always will be different for defendants. [15]

IV. THEORIES OF ADMISSIBILITY

Application of these three general categories to other states appears a logical construct for analysis of the cases. The liberal admissibility rule is best represented by the Kim case.[16] The conservative view is best illustrated by the Tennessee approach in Curtis,[17] and the moderate position enunciated by the Washington court in Petrich.[18]

A. THE LIBERAL VIEW

The Kim case announced a rule permitting an expert, in that case a psychiatrist, to testify as to the credibility of the victim, a thirteen year old girl abused by her step-father. The psychiatrist based his opinion as to the victim's truthfulness on several factors including the consistency of the account,

emotional reactions such as fear and depression, and a negative view of sex. Other courts have also permitted the expert's opinion as to the victim's truthfulness in less clearly stated terms.[19] The Hawaii court acknowledged the dangers of this testimony: usurpation of jury's function, abdication of jury's function for determining truth-telling to the experts, battles of the experts, and the invasion of the privacy of the victim. These dangers were believed to be outweighed by the assistance to the jury of the evidence. The potential impact of their analysis is far-reaching and detrimental. As any trial attorney knows, for every expert who will say black, another will say white. If the state endorses a witness to testify as to the victim's truthfulness, the defendant will be entitled to call a witness to testify to the contrary. Not only will the defense be likely to come up with a witness to testify to the contrary, the victim will undoubtedly be subjected to repeated mental exams, psychological, psychiatric, etc., with all the attendant invasions of the child's privacy, not to mention numerous recitations of the facts of the abuse. This is obviously counter-productive. Further the Hawaii court implies that a victim of sexual abuse, like others of questionable mental status wherein expert testimony is generally accepted, is somehow mentally ill or disturbed.

In sum, the solicitation of the expert's opinion on credibility or truthfulness of the victim does not seem legally sound or practically wise.

B. THE CONSERVATIVE APPROACH

At the opposite extreme from the Hawaii view is the Tennessee approach enunciated in Curtis.[20] A four-year-old girl was a witness to the murder of her mother by a neighbor. A psychologist testified that in general children from three to eight know the difference between right and wrong and are more accurate in their statements. This testimony was ruled inadmissible in spite of the fact it would seem a suitable topic for expert testimony given the "common understanding" young children are given to "flights of fantasy".

The approach taken by the Tennessee court is unwarranted and extremely harmful to child sexual abuse cases. The implication the victim imagined or fantasized the abuse is an undercurrent in every case involving very young children. Expert testimony is needed in this area not to render an opinion the child is telling the truth but to generally describe principles of child development, and to counter the implicit defense of fabrication or imagination.

C. THE MIDDLE APPROACH

Some states have permitted expert testimony to rebut defenses implicit in these cases. Nevada in Smith[21] permitted expert testimony to explain the delays in reporting by child sexual abuse victims and the reasons therefore. This testimony appears to have come in the prosecution's rebuttal case, or at least after the victim had been cross-examined about the delays. Smith adopts the reasoning of the Oregon court in Middleton that delays in reporting of crimes are generally considered evidence of fabrication; that the jury needs expert testimony to assist them in understanding the dynamics leading a child not to report crimes against them for years. The Washington court clearly permits this kind of testimony under Petrich.[22]

A very brief reference in a California case, Dunnahoo,[23] as well as language in an unpublished Washington case,[24] imply expert testimony is admissible to explain children's reluctance to tell the truth about what happened to them. Expert testimony may be very important on this issue because children abused over a long period of time will often reveal more abuse over time, in "bits and pieces".[25] This may result in seemingly inconsistent statements with the child adding more details as the victim becomes more comfortable with interviewers and has more distance from the offender. It may also be important to explain a

readily observable phenomenon among children to minimize the amount of abuse. It is not uncommon for a defendant to reveal far more abuse than the child. The fact that many children reveal only what they need to reveal to be protected from further abuse is a common phenomenon.

In the event the offender recants his confession, experts should be permitted to explain the seemingly inconsistent, hence unreliable, statements of the child. As the Oregon court eloquently points out in Middleton,[26] recantations by children in the time between disclosure and trial are common in child sexual abuse cases for reasons that experts should be permitted to explain to the jury.[27] The court again analogizes to other kinds of crimes such as a burglary, wherein if the victim recanted their statement before trial, a jury would likely believe the complaint was fabricated. This again does not hold true for victims of child sexual abuse for a number of reasons surrounding the guilt they feel for destruction of the family, sending a loved one to jail, etc.

It appears well settled and a safe course of action for prosecutors in most states to introduce expert testimony explaining the reasons for delays in reporting, recantations, and, probably, inconsistencies in statements. Whether this testimony can be adduced in the prosecutor's case-in-chief, or whether it

can be introduced when the defense does not directly raise the issue - but you know they'll raise it in closing - varies from state to state. Questions designed to elicit the opinion from the expert that "it is not inconsistent with abuse having occurred" for the victim to have waited a year to report are safer than questions eliciting a response that a delay in reporting is "consistent with abuse." When asking the expert why it is not inconsistent, a prosecutor should be able to get all the information they need without courting error. This line of questioning is also truer to the theory of expert witness rules and the facts. The point to be made is that a delay in reporting does not mean the child is fabricating. It is not the point of the testimony that a delay in reporting is affirmative evidence the child was abused.

V. ADMISSIBILITY OF THE "CHILD SEXUAL ABUSE SYNDROME" TESTIMONY.

As the cases have been decided and the literature written, many fail to draw a critical distinction between expert testimony related to the dynamics of the relationship that may cause certain unusual events to occur (the kind of testimony discussed in part IV) and "child sexual abuse syndrome" testimony. The syndrome testimony is very different and its admissiblity much less clear. The syndrome testimony is that kind of testimony designed to show that sexually abused children exhibit certain

characteristics, a particular child victim exhibits those characteristics, therefore the child was sexually abused. Because the defense in child sexual abuse cases is usually that the crime didn't occur and the child is making it up, evidence by an expert that the child "is sexually abused" bolsters the credibility of the child.

This kind of evidence is most similar to "rape trauma syndrome" testimony in forcible rape cases. "Rape trauma syndrome" evidence has been more often rejected than accepted as appropriate evidence.[28] Again, the courts have analyzed this evidence more in terms of being offered to show that victims of rape often suffer from post-traumatic stress disorders such as nightmares, emotional reactions of fear of men, fear of leaving their home, etc.; that a particular victim has these characteristics, therefore the victim was raped (as opposed to engaging in consensual intercourse). Although this evidence may well not be a good kind of evidence to offer from a practical standpoint, as will be discussed, the analysis of the courts rejecting the evidence has frequently been poor. Frequently cited reasons for its rejection are: 1) that it bolsters the credibility of the victim; 2) that it invades the province of the jury; 3) that it is unreliable. Although the evidence does have the indirect effect of bolstering the credibility or corroborating

the testimony of the victim, most testimony in a trial, sexual assault expert or otherwise, has the same effect (or it wouldn't be offered!). The evidence does not invade the province of the jury, as they are free to reject any expert evidence, as pointed out in Middleton. Finally, the evidence is certainly no less reliable than any other type of expert testimony of mental health professionals, for instance those who testify for defendants in diminished capacity situations. They are subjectively interpreting information given by the defendant, yet we admit that testimony routinely. Thus the fact the testimony is based primarily or exclusively on self report of the client should not affect its admissibility.

The practical considerations and implications of this testimony are more important than arguing its legality. Myers[29] and Cheryl H[30] permit testimony about characteristics and traits exhibited by sexually abused children. A psychiatrist in a dependency proceeding in Cheryl H was permitted to testify the child's post-injury behavior was admissible to show she was sexually abused. This behavior consisted of observations of play therapy with anatomically correct dolls, and anxiety symptoms. The psychiatrist was permitted to testify the child played with the anatomically correct dolls in only the way sexually abused children do. In Myers a clinical psychologist who treated a

seven-year-old girl abused by her mother's live-in boyfriend was permitted to testify to "characteristics or traits" typically observed in sexually abused children, to-wit: fear, confusion, shame, guilt and that these factors often result in delays in reporting. The psychologist in Myers was also permitted to testify to her opinion the child was telling the truth, but only because the defendant "opened the door" by asking others their opinions.

The Minnesota court in Myers acknowledged the indirect effect of the testimony was to bolster the child's testimony and demonstrate the child was telling the truth, but as with the Oregon court in Middleton they felt these same dangers were true in other cases involving experts. They observed that sexual abuse of children, particularly incest, places jurors at a disadvantage because it goes on for so long and disclosure is so belated. They cite Kim and distinguish rape trauma syndrome cases on the basis children or "mentally retarded" persons present "unusual cases".

There are clear dangers in offering this kind of testimony. Again, the battle of the experts as to whether or not this event occurred by necessity requires multiple examinations of the child by each side - an unpleasant process that will frequently lead to conflicting results. If the fact the child exhibits "characteristics of an abused child" is admissible, what

about testimony the defendant does not exhibit characteristics of a molester", or the proffered testimony "he passed the MMPI" that we have all seen.

The most prudent and reasonable course of action is to avoid direct comments on credibility and character traits and artfully phrase questions about the dynamics of child sexual abuse that cause delays in reporting: shame, guilt, fear, etc. to make the same points without opening up the "battle of the experts." Abdicating the truth finding process to "experts" is a bad policy that will result in purchased decisions, and bad procedure because of the multiple psychological exams to which children will be subjected.

Footnotes

1. State v. Petrich, 101 Wn.2d 566, ____ P.2d ____ (1984).

2. State v. Kim, 645 P.2d 1330 (1982)

3. Ibn-Tamas v. United States, 407 A.2d 629 (D.C. Cir 1979).

4. State v. Mulder, 29 Wn. App 513, 629 P.2d 462 (1981).

5. State v. Steward, 34 Wn. App. 221, 660 P.2d 278 (1983).

6. State v. Maule, 35 Wn. App. 287, 667 P.2d 96 (1983).

7. State v. Petrich, 101 Wn.2d 566, ____ P.2d ____ (1984)

8. State v. Robert Grant, C.A. No. 10538-8-I (6-13-83); State v. Arturo Garza, C.A. No. 11979-6-I (12-14-83); State v. LaLonde, C.A. No. 12995-3-I (12-22-83); Contra State v. McQuade, C.A. No. 11607-0-I (8-22-83).

9. State v. Petrich, 101 Wn.2d 566, ____ P.2d ____ (1984)

10. State v. Fitzgerald, 39 Wn. App. ____, ____ P.2d ____ (1985);

11. State v. Fitzgerald, 39 Wn. App. ____, ____ P.2d ____ (1985); State v. Petrich, 101 Wn.2d 566, ____P.2d ____ (1984); State v. LaLonde.

12. State v. Taylor, 663 SW.2d 235 (Mo.-1984); State v. Keer, 305 SE.2d 535 (1983); Cornelius v. Carter, 403 NE.2d 1191 (1980).

13. State v. Thomas Freeman, C.A. No. 7830-5-I (11-24-80)

14. State v. Petrich; State v. Fitzgerald; State v. Lalonde.

15. State v. Allery, 101 Wn.2d 591, _____ P.2d _____ (1984); State v. Kelly, 102 Wn.2d 188, _____ P.2d _____ (1984).

16. State v. Kim, 645 P.2d 1330 (1982).

17. State v. Curtis, ____ Tenn. ____ (Nov. 1981)

18. State v. Petrich, 101 Wn.2d 566, ____P.2d ____ (1984)

19. Commonwealth v. Carter, 417 N.E.2d 438 (Mass. 1981).

20. State v. Curtis, ____ Tenn. ____ (Nov. 1981)

21. Smith v. State, 100 Nev. 123, P.2d (10-4-84).

22. State v. Petrich, 101 Wn.2d 566, _____ P.2d _____ (1984).

23. People v. Dunnahoo, 152 Ct. App. 3d 560, 199 Cal. Rptr. 796 (1984).

24. State v. Mitchell, C.A. No. 12040-9-I (Aug. 1984)

25. State v. Mitchell, supra

26. State v. Middleton, 294 Or 427, 657 P.2d 1215 (1983).

27. State v. Turrey, C.A. No. _____
State v. Hardison, C.A. No. 12438-2-I, 13771-9-I

28. State v. Marks, 622 P.2d 986 (1981).
Kansas case favors use
State v. Saldana, 324 N.W.2d 227 (1982)
People v. Bledsor, 104 Cal. App. 3d 267, 189 Cal. Rptr. 726 (1983).
State v. Taylor, 663 S.W.2d 235 (1984).

29. State v. Myers, 359 N.W.2d 604 (1984)

30. Matter of Cheryl H, 200 Cal. Rptr 789 (1984)