The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma

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NOTE

THE USE OF VIDEOTAPED TESTIMONY OF VICTIMS IN CASES INVOLVING CHILD SEXUAL ABUSE: A CONSTITUTIONAL DILEMMA

The more afield we get, the more nervous I am that some poor innocent guy will go down the tubes.
Robert H. Lynn, Assistant County Attorney, Minneapolis

[T]he protection of children, as far as I am concerned, is as important a right. And I believe that videotaping children’s testimony is extremely important especially in the tender years.
Jeanine Pirro, Assistant District Attorney, White Plains, New York

INTRODUCTION

Reports of child sexual abuse are increasing at alarming rates. Child victims of sexual abuse not only suffer the painful mental and physical consequences of the abuse itself, but also the trauma of participating in a judicial system that seems at times to sacrifice the well-being of the victim to protect the constitutional rights of the defendant. As a result, many parents are reluctant to follow

2. Statement quoted in ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT, Sept. 1984, at 39 [hereinafter cited as TASK FORCE REPORT].
4. See generally TASK FORCE REPORT, supra note 2 (recommending various reforms designed to ease the fear the child victim experiences when testifying against his or her attacker).

Recognition of the added suffering child sexual abuse victims experience at the hands of the judicial system is a relatively recent development, however. The plight of the child victim of sexual abuse testifying against the alleged perpetrator first received attention in legal literature in Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 977 (1969). Libai’s article proposed a number of reforms to protect the child witness from “legal process trauma,” id. at 1009, including: (1) the use of specially trained “child examiners” who would have the exclusive right to question the child about the abuse during the investigatory phase of the criminal proceeding, id. at 986-1003; (2) when-
through on their initial complaint since it would subject their child
to the ordeal of telling and re-telling the details of the abuse to po-
lice officers, prosecutors, grand juries, and finally a courtroom full of
strangers as the case slowly winds through the judicial
system. At
the same time, prosecutors are frequently reluctant to proceed to trial when the only evidence against the accused is the testimony of
the child victim because young children are generally perceived as
being ineffective and unreliable witnesses.

Growing public awareness of child sexual abuse and the
problems the judicial process poses for the child victims, their par-
ents, and prosecutors led many states to alter their rules of evidence
and criminal procedure in cases involving molestation of young chil-
dren. Some states replaced statutes declaring children below a cer-
ever possible, the use of a special hearing before trial at which the child’s testimony would be
videotaped for presentation at trial so that the child could forget the abuse as soon as possible, id. at 1028-32; (3) in those cases where the child would testify at trial, the use of a special “Child-Courtroom.” Id. at 1014-25. In the “Child-Courtroom,” only the child, the judge, the
prosecutor, and the defense counsel would be present during the child’s testimony. The defend-
ant, the jury, and spectators would be seated behind a one-way mirror and the defendant
would have electronic means of communicating with counsel during the child’s testimony. Id.
at 1017.

Libai’s proposals were later endorsed and refined in Parker, The Rights of Child Wit-
proposed a “Model Act To Protect Child Witnesses” that carried Libai’s proposals beyond the
context of child sex abuse cases to all instances where a child is called to testify, including tort
actions and child custody or divorce proceedings. Id. at 643-74.

Unlike the United States, many foreign countries have long recognized that child victims
who appear as witnesses in criminal proceedings should receive special treatment. See Libai,
supra, at 986-1001. See also Reifen, Protection of Children Involved in Sexual Offenses: A
New Method of Investigation in Israel, 49 J. Crim. L., Criminology & Police Sci. 222
(1958) (discussing early Israeli reforms protecting child sex abuse victims).

5. See Libai, supra note 4, at 984; Parker, supra note 4, at 651.


7. Id. at 1, col. 1. Increasing concern about the problems of child sexual abuse
and family violence in the United States led to the appointment of the Attorney General’s Task
Force on Family Violence in 1983. The nine-member panel heard testimony from over one
thousand witnesses — victims, experts, and law enforcement personnel — during hearings held
in six major American cities. Brozan, Task Force Urges Action Against Family Violence,
N.Y. Times, Sept. 20, 1984, at A25, col. 1. The panel’s Final Report was released in Septem-
ber 1984. It contained numerous recommendations for law enforcement personnel, prosecutors,
and judges concerning the procedure that should be employed in handling family violence and
child sexual abuse cases.

Emphasizing the frightening ordeal the child victim faces in testifying, the Task Force
recommended adoption of many of the recent liberalizations in some states’ rules of evidence
and criminal procedure in child sexual abuse prosecutions. Task Force Report, supra note 2,
at 10-43. The Task Force strongly advocated the use of videotaped testimony of child sex
abuse victims at trial in lieu of live testimony in open court. Id. at 32, 39. Specifically, the
panel approved use of a procedure that had been employed in a Colorado prosecution for child

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tain age incompetent to testify with statutes leaving the determination of the child's competency to the discretion of the trial judge. Other states eliminated corroboration requirements in cases involving child sexual abuse. New exceptions to the hearsay rule were adopted which allow testimony concerning the child victim's out-of-court statements into evidence, or allow the child's testimony to be videotaped and shown at trial.

In recent years, a number of states, including Arizona, Arkansas, California, Colorado, Florida, Indiana, Kentucky, Maine, Montana, New Mexico, New York, South Dakota, sexual abuse. Id. at 137, n.10. In that case, the prosecutor obtained the defendant's consent to a procedure wherein the prosecutor, the defendant, and defense counsel sat behind one-way glass during the child's testimony while an interviewer, who wore an earpiece that allowed him to hear questions suggested by the prosecutor and defense attorney, questioned the child. The interview was videotaped for presentation at trial. Id.

8. Galante, supra note 1, at 26, col. 3. At common law, children under the age of fourteen were presumed incompetent to testify. A number of jurisdictions continue to adhere to this common law rule. However, the majority of jurisdictions have altered the common law rule by either lowering the age of presumed incompetency to ten and under, or leaving the determination of the child's competency as a witness to the discretion of the trial judge in accordance with certain stated standards. Annot., 35 AM. JUR. PROOF OF FACTS 2d 665, 672 (1983).

9. Galante, supra note 1, at 1, col. 2.

10. See infra notes 65-74 and accompanying text.


12. Statutes allowing the child's out-of-court statements into evidence at trial provide, for example, that a child's statements about the abuse made to his or her parents or physician following the attack are admissible into evidence at trial. See supra note 11. The videotape statutes, on the other hand, provide that the child's actual trial testimony can be videotaped for use at trial. See infra notes 13-26.


23. N.Y. CRIM. PROC. LAW. § 190.32 (Consol. 1986).

Texas,\textsuperscript{25} and Wisconsin,\textsuperscript{26} have enacted statutes which allow the testimony of child sexual abuse victims to be videotaped for use at various stages of the judicial process. This procedure spares the child victim the ordeal of testifying about the abuse in open court. In addition, taping the child's testimony early in the proceedings eliminates the need for the child to continually recount the traumatic details of the abuse thereby facilitating the child's recovery.\textsuperscript{27}

Although the use of videotaped testimony may significantly ease the child's burden in testifying, serious questions arise concerning the constitutionality of such a procedure.\textsuperscript{28} A videotape of a child victim's testimony is a form of hearsay.\textsuperscript{29} The admission of hearsay evidence at a criminal trial must be reconciled with a defendant's sixth amendment "right . . . to be confronted with the witnesses against him . . . ."\textsuperscript{30} In a long line of decisions, the Supreme Court has attempted to set forth standards to govern the admissibility of hearsay evidence consistent with the sixth amendment's confrontation guarantee.\textsuperscript{31} Defendants and their attorneys argue that admission of videotaped testimony of child sex abuse victims is unconstitutional because the taped testimony does not meet these standards set forth by the Court, thereby denying the defendant his sixth amendment right to confrontation.\textsuperscript{32} Prosecutors, on the other hand, argue that such videotaped testimony is a constitutionally admissible form of hearsay that satisfies the major purposes behind the sixth amendment's confrontation guarantee.\textsuperscript{33}

This Note examines the content of representative statutes that allow the testimony of child victims of sexual abuse to be videotaped for presentation at trial.\textsuperscript{34} The procedures prescribed by these stat-

\begin{footnotes}
27. See Task Force Report, supra note 2, at 38; Libai, supra note 4, at 1028, 1030, 1032; Parker, supra note 4, at 653, 669; Galante, supra note 1, at 28, col. 1.
29. See infra note 65 and accompanying text.
30. U.S. CONST. amend. VI.
31. See infra notes 75-114 and accompanying text.
32. See Galante, supra note 1, at 28, col. 1. In addition, there is the question of whether the videotape statutes, even if valid under the sixth amendment of the United States Constitution where the face-to-face requirement is ambiguous, are valid under the stricter provisions of certain state constitutions that specifically call for a face-to-face encounter between the defendant and his accusers. E.g., ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; MONT. CONST. art. II, § 24; S.D. CONST. art. VI, § 7; WIS. CONST. art. I, § 7. Such an inquiry is beyond the scope of this Note.
33. See Galante, supra note 1, at 28, col. 1.
34. See infra text accompanying notes 36-63.
\end{footnotes}
utes are analyzed in order to determine whether they meet the standards set forth in the Supreme Court’s decisions concerning the constitutionality of exceptions to the hearsay rule in light of the confrontation clause.\textsuperscript{35}

I. THE VIDEOTAPE STATUTES

Since 1977, several states have enacted statutes allowing the testimony of child victims of sexual abuse to be videotaped for use at trial.\textsuperscript{36} All but one of the statutes place an age limit on the use of the videotape procedure.\textsuperscript{37} The statutes also differ in three other important respects: (1) the findings that must be made in order to have the child’s testimony preserved on videotape prior to trial; (2) the procedures that must be followed when the child’s testimony is videotaped; and (3) the findings that must be made in order to have the tape admitted into evidence at trial.\textsuperscript{38}

\begin{footnotesize}
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    \item 35. See infra text accompanying notes 143-220.
    \item 36. See supra notes 13-26 and accompanying text.
    \item 38. New York’s recently enacted videotape statute allows the taping of the child witness’ testimony for presentation to the grand jury in lieu of having the child appear at that proceeding. N.Y. Crim. Proc. Law § 190.32(2) (Consol. 1986). Unlike other states, however, New
\end{itemize}
\end{footnotesize}
A. Ordering the Taping

At least eight videotape statutes do not require that the court make a specific finding regarding the child's ability to testify at trial before ordering that the child's testimony be taped. These statutes usually provide only that the child's testimony will be taped upon request or motion by the prosecutor or victim. At least five videotape statutes provide that the child's testimony can be taped prior to trial only if the court finds that the child is likely to suffer some degree of emotional harm if required to appear in court. Both the Colorado and Wisconsin statutes suggest what types of evidence the court should consider in making this determination. Colorado's statute provides that this determination "shall be based on, but not limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child." The Wisconsin statute requires a pre-trial hearing to determine the likely effect of testifying on the child's well-being. The child is not required to testify at this hearing, nor to submit to an examination of his or her mental or emotional condition. However, the guidelines

York law has no provision for the use of such a tape at the actual trial. Id. § 190.32.


40. See statutes cited supra notes 13-26. One of these statutes provides, however, that the request or motion will be granted only "for a good cause shown." Ark. Stat. Ann. § 43-2036 (Supp. 1985). Although the New Mexico videotape statute also contains this "good cause" language, N.M. Stat. Ann. § 30-9-17(A) (1983), the district court rule implementing the statute requires "a showing that the child may be unable to testify without suffering unreasonable or unnecessary mental or emotional harm." N.M. Dist. Ct. R. 29.1(a).


45. Id. § 967.041(2).
suggest that the court consider whether the child "has manifested symptoms associated with post-traumatic stress disorder or other mental disorders."\(^{46}\)

B. The Videotaping Procedure

Most of the statutes that allow tapes to be used as evidence at trial in lieu of the child's live testimony require that the judge, the prosecutor, the defendant, the defendant's counsel, and the child victim be present at the taping, and that the defendant have a full opportunity to cross-examine the child victim witness.\(^{47}\) In fact, at least two of these statutes specify that it is the child's preliminary hearing testimony that is to be taped.\(^{48}\) Other statutes provide for a special taping session, for example, in the judge's chambers, with all of the above parties present.\(^{49}\)

Three states, Arizona, Kentucky, and Texas, apparently mindful of the child sexual abuse victim's distress at having to physically

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46. Id. § 967.041(3)(h).


confront an "attacker" during judicial proceedings, adopted a novel procedure to be used when videotaping the child's testimony. These three statutes provide that during the taping only the prosecutor, defense attorneys, operators of the video equipment, and "any person whose presence would contribute to the welfare and well-being" of the child may be present in the room during the child's testimony. The equipment operators, however, must remain hidden from the child behind a one-way screen or mirror or in an adjacent room. These statutes also provide that the defendant shall be permitted to hear and observe the child's testimony "in person," but like the equipment operators, the defendant may not be seen or heard by the child witness.

50. See Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1985); Ky. Rev. Stat. Ann. § 421.350 (Bobbs-Merrill Supp. 1984); Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1986). The three statutes are substantially identical. The Texas statute was apparently the model for the other two. Kentucky's statute was passed a year after Texas adopted its statute. Arizona, which had enacted one of the earliest videotape statutes, Ariz. Rev. Stat. Ann. §§ 12-2311 to -2312 (1978), repealed its statute in 1985 and replaced it with one that was nearly a verbatim copy of the Kentucky and Texas statutes. In 1985, Florida amended its statute to provide that "[t]he court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method." Fla. Stat. Ann. § 92.53(4) (West Supp. 1986).


52. See statutes cited supra note 51.


A recent decision of the Texas Court of Appeals upheld the admission of such a videotape at the trial of a man convicted of aggravated sexual abuse of his seven-year-old stepdaughter. Jolly v. State, 681 S.W.2d 689, 692, 697 (Tex. Ct. App. 1984) (petition for discretionary review granted). On appeal, the defendant alleged thirteen grounds of error, nine of which related to the court's admission of a videotape of an interview between the child and a child-
C. Admitting the Videotaped Testimony Into Evidence At Trial

Under most of the statutes, the findings that must be made before the videotaped testimony is admissible as evidence at trial correspond to the findings that must be made initially in order to have the child’s testimony taped. For example, statutes that do not require that the court make a specific finding regarding the child’s ability to testify at trial before ordering the taping usually provide simply that such a tape, once made, shall be admissible as evidence at trial; however, those statutes usually do not explain the circumstances necessary for admission of the tape as evidence. The Kentucky and Texas statutes, which allow the child’s testimony to be placement specialist for the Texas Department of Human Resources. Id. at 695. One of the grounds for error was that admission of the tape violated the defendant’s right to confront and cross-examine the child. Id. The court rejected this reasoning, noting that the statute specifically allows the showing of such a tape so long as the child is available to testify at trial. Id. The court pointed out that in this case the child was available to be called and cross-examined at trial, but that the defendant had not done so. Id. Two other Texas courts of appeal concurred with the Jolly decision. Tolbert v. State, 697 S.W.2d 795 (Tex. Ct. App. 1985); Alexander v. State, 692 S.W.2d 563 (Tex. Ct. App. 1985).

However, another panel of the Texas Court of Appeals found Tex. Crim. Proc. Code Ann. art. 38.071, § 2 prima facie unconstitutional. Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985). This court rejected the argument that the provision in the statute allowing either party to call the child to testify at trial saves it from constitutional infirmity on confrontation grounds.


54. See supra note 39 and accompanying text.


The two statutes providing for taping of the child’s preliminary hearing testimony upon request of the prosecutor, however, require a finding that testifying at trial will be likely to cause emotional or mental trauma to the child before the tape may be admitted into evidence at trial in lieu of the child’s live testimony. Cal. Penal Code § 1346(d) (West Supp. 1986); S.D. Codified Laws Ann. § 23A-12-9 (Supp. 1985). Likewise, Indiana’s statute requires that the court find the child unavailable to testify based upon (1) the certification of a psychiatrist that testifying would be a traumatic experience for the child, (2) the certification of a physician that the child cannot testify for medical reasons, or (3) the determination of the court that the child is incapable of understanding the oath. Ind. Code Ann. § 35-37-4-6(a)(2) (West Supp. 1985). However, the statute also provides that if the child is found unavailable to testify for any of these reasons, the videotape cannot be admitted into evidence at trial unless “there is corroborative evidence of that act that was allegedly committed against the child.” Id. § 35-37-4-6(d).

taped merely upon the request of the prosecutor, and which have the most liberal provisions regarding the videotaping procedure, provide that if the court orders the child's testimony to be taped "the child may not be required to testify in court at the proceeding for which the testimony was taken."\(^8\) The substantially identical Arizona statute, on the other hand, states that if the child's testimony is taped by order of the court prior to trial, the child "shall not be required to testify" at trial.\(^9\) It is unlikely that this slight difference in wording indicates an intent on the part of the Kentucky and Texas legislatures to allow the child to potentially be called as a witness at trial. Another section of these two statutes provides that a recording of a child victim's conversation with a third party interviewer may be admitted into evidence at trial.\(^6\) This section of the Kentucky and Texas statutes provides that if such a tape is admitted at trial, the child and the interviewer may be called to testify by either party.\(^6\)

Thus, the use of the words "may not" in the videotape section of the Kentucky and Texas statutes seems to indicate an intent on the part of those state legislatures to foreclose the opportunity of calling the child to testify at trial if the child's testimony is videotaped prior to trial pursuant to the statute. Thus, there seems to be no difference in meaning in this respect among the Arizona; Kentucky, and Texas statutes.

Usually, those statutes requiring an initial finding of emotional or mental trauma before the child's testimony can be videotaped also impose such a requirement at the time of trial before the tape can be admitted into evidence.\(^6\)

Of the five videotape statutes requiring a finding of emotional harm to the child either before the deposition is taped or before the tape is admitted into evidence at trial, four explicitly link such a finding to unavailability within the meaning of the state's hearsay rule by providing that the tape can be admitted under the prior testi-

mony hearsay exception.63

II. THE SUPREME COURT'S CONFRONTATION DECISIONS

A. Tension Between Exceptions to the Hearsay Rule and the
   Confrontation Clause

The major Supreme Court decisions regarding the requirements of the confrontation clause raise the question of what types of hearsay can be admitted into evidence against a defendant in a criminal trial without violating the sixth amendment right to confrontation.64 The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted."65 Hearsay evidence has generally been regarded as untrustworthy and unreliable because the declarant was most likely not under oath at the time the statement was made, and is not present at trial to be cross-examined regarding the statement.66 In addition, admission of such an out-of-court statement deprives the jury of the opportunity to observe the declarant's demeanor.67 Thus, hearsay evidence has traditionally been held to be inadmissible at trial.

Not all hearsay evidence is inadmissible at trial, however. At common law, numerous exceptions to the general prohibition against hearsay evidence developed, and the modern trend is toward acceptance of a greater number of hearsay exceptions.68 For example, the Federal Rules of Evidence recognize twenty-nine exceptions to the hearsay rule.69 Some exceptions to the hearsay rule are allowed despite the fact that the declarant is available to testify at trial.70 Such hearsay statements are said to "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."71 Other hearsay exceptions are allowed only if it is shown that the declarant is

63. CAL. PENAL CODE § 1346(d) (West Supp. 1986); COLO. REV. STAT. § 18-3-413(4)
(Supp. 1984); N.M. DIST. CT. R. 29.1(b); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp.
1985).

64. In Pointer v. Texas, 380 U.S. 400, 403 (1965), the Supreme Court incorporated the
sixth amendment confrontation right into the due process clause of the fourteenth amendment.

65. Fed. R. Evid. 801(c).


67. Id.

68. 31A C.J.S. Evidence § 193 (1964).


70. Fed. R. Evid. 803.

71. Fed. R. Evid. 803 advisory committee note.
In these situations the hearsay evidence, "if of the specified quality, is preferred over complete loss of the evidence" due to the unavailability of the declarant. It is this latter group of exceptions to the hearsay rule that present the most difficulty in terms of confrontation, since there is by definition no way to procure the declarant’s presence at trial.

Although the Supreme Court has repeatedly stated that the values protected by the hearsay rules and the confrontation clause are not identical, the Court has noted that confrontation eliminates the major dangers associated with hearsay evidence:

Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

The problem of reconciling the numerous hearsay exceptions with the dictates of the confrontation clause has troubled the Supreme Court. On its face the confrontation clause seems to preclude the admission of any hearsay evidence in a criminal proceeding. The Court, however, wary of “constitutionalizing” the hearsay rule and its multiple exceptions, has rejected such an interpretation of the confrontation clause as too extreme and probably not intended

72. FED. R. EVID. 804.
73. FED. R. EVID. 804 advisory committee note.
74. California v. Green, 399 U.S. 149, 161 (1970). In Green, the Court found that the confrontation clause was not violated by the admission of prior inconsistent statements of a witness made out of court, where the witness was present and testifying at trial. Id. at 164.
75. In Green, the Court noted that it would be erroneous to view the confrontation clause as "nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." Id. at 155. See also Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.").
78. See California v. Green, 399 U.S. 149, 155 (1970). See generally Read, The New Confrontation-Hearsay Dilemma, 45 S. CAL. L. REV. 1, 2 (1972) (arguing that the Court's identification of the right of cross-examination as the core value protected by the confrontation clause can be seen as giving the hearsay rule "constitutional dimensions" since the right of cross-examination is also the core value protected by the hearsay rule).
by the Framers. Thus, under certain circumstances the Court has found that the admission of hearsay evidence does not violate the confrontation clause. The Court's failure, however, to set forth a definitive theory reconciling the hearsay rules and the dictates of the confrontation clause has been widely criticized. The Court acknowledged this criticism in its most recent confrontation decision but concluded that "no rule [would] perfectly resolve all possible problems" and refused to set forth such a definitive theory.

**B. What Are the Essential Elements of Confrontation?**

1. Face-to-Face Meeting Between the Defendant and His Accusers. — The Supreme Court has never stated that face-to-face confrontation between the defendant and his accuser is required at all times and under all circumstances. In its decisions the Court has recognized that the right to such a confrontation is not absolute and can be waived or forfeited. Nevertheless, the Court has stated that the confrontation clause "reflects a preference for face-to-face confrontation at trial." The Supreme Court's earliest decisions interpreting the confrontation clause emphasize the usefulness of face-to-face confrontation as a vehicle for testing the veracity of witnesses. For example, in *Mattox v. United States*, the first major Supreme Court decision interpreting the confrontation clause, the Court concluded:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, 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 recol-

**Note:**


80. *Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980).*

81. *Id. at 56.*

82. *Id. at 68 n.9 (quoting Natali, *Green, Dutton, and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L. J. 43, 73 (1975)).*

83. *See, e.g., Illinois v. Allen, 397 U.S. 337 (1970) (An accused party can be removed from the courtroom during trial for disruptive behavior without violating his right to confrontation.); Diaz v. United States, 223 U.S. 442 (1912) (An accused party not in custody can waive his right to be present at trial.).*

84. *Ohio v. Roberts, 448 U.S. 56, 63 (1980). In the case of videotaped testimony "the issue becomes whether the accused has the right to 'eyeball-to-eyeball' confrontation." Galante, *supra* note 1, at 28, col. 2.*

85. *See Dowdell v. United States, 221 U.S. 325 (1911); Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895).*

86. *156 U.S. 237 (1895).*

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lection and 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.\textsuperscript{87}

In \textit{Mattox}, the defendant argued that his right to confrontation was violated by the admission into evidence of the testimony of a then deceased witness who had appeared and been cross-examined at the defendant's first murder trial. The defendant was convicted at this first trial, but the conviction was overturned on appeal. The Court noted that although one could argue that a criminal defendant should never be denied face-to-face confrontation with the witnesses against him,\textsuperscript{88} in certain instances the confrontation right would not bar the admission of evidence of an unavailable witness where "public policy" or the "necessities of the case" require otherwise.\textsuperscript{89} The Court pointed to the traditional admissibility of dying declarations as such an instance.\textsuperscript{90} The Court concluded that here, since the defendant had the full benefit of confrontation with the witness at his first trial, the confrontation clause did not bar admission of the testimony from the prior trial. According to the Court, "[t]he substance of the constitutional protection is preserved to the prisoner \textit{in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination}."\textsuperscript{91}

\textsuperscript{87.} \textit{Id.} at 242-43 (emphasis added).
\textsuperscript{88.} \textit{Id.} at 243.
\textsuperscript{89.} \textit{Id.} See \textit{Chambers v. Mississippi}, 410 U.S. 284, 295 (1973) ("[T]he right to confront and to cross-examine . . . may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.").
\textsuperscript{90.} \textit{Id.} at 243-44.
\textsuperscript{91.} \textit{Id.} at 244 (emphasis added). Four years later, in \textit{Kirby v. United States}, 174 U.S. 47 (1899), the need for face-to-face confrontation with available witnesses was once again emphasized. \textit{Id.} at 55. The defendant in \textit{Kirby} was charged with knowingly receiving property stolen from the U.S. government. \textit{Id.} at 48-49. In order to prove that the property Kirby was charged with possessing had been stolen, the government introduced the convictions of the three persons who had been found guilty of stealing the property—a method of proof approved by the statute under which Kirby had been charged. \textit{Id.} at 49. The Court found this provision of the statute unconstitutional. \textit{Id.} at 54-55.

[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . 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.\textit{Id.} at 55.

Twelve years later in \textit{Dowdell v. United States}, 221 U.S. 325 (1911), the Court interpreted the confrontation provision of the Philippine Bill of Rights that had been modeled on
2. Adequate Opportunity For Cross-Examination. — Mere face-to-face confrontation between the defendant and his accusers, however, is not enough to satisfy the dictates of the confrontation clause. In fact, the Supreme Court's decisions seem to identify the right to cross-examine witnesses as the essential element of confrontation. For example, in *Douglas v. Alabama*, the Court found a violation of the defendant's right to confrontation where the prosecution read into evidence a purported confession of the defendant's alleged accomplice in a murder. On the witness stand, the accomplice had refused to answer any questions invoking his fifth amendment privilege against self-incrimination, thus making it impossible for the defendant to cross-examine him. Emphasizing the cross-examination purpose behind the confrontation clause, the *Douglas* Court noted that "an adequate opportunity for cross-examination may satisfy the [confrontation] clause even in the absence of physical confrontation."

Failure to provide an adequate opportunity for cross-examination also led to a finding of infringement of confrontation rights in *Pointer v. Texas*. In *Pointer*, the Court found that the defendant's right to confrontation was violated where the prosecution introduced at trial the preliminary hearing testimony of a subsequently unavailable witness and the defendant, who was without counsel at the preliminary hearing, did not cross-examine the witness.

Similarly, in *Davis v. Alaska*, the Court held that the defendant's right to confrontation was violated where a state statute prohibited him from impeaching the witness' credibility with the latter's prior juvenile offender conviction. Once again, the Court strongly emphasized the cross-examination purpose behind the confrontation clause.
The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.  

C. When Does the Admission of Hearsay Statements of an Unavailable Witness Violate the Confrontation Clause?

As noted earlier, the most troublesome cases involving the interaction between the hearsay exceptions and the confrontation clause involve the admission into evidence of hearsay statements of an out-of-court declarant who is unavailable to testify at trial. Hearsay exceptions allowed despite the unavailability of the declarant are few. Such hearsay statements deny both the opportunity for face-to-face encounter and cross-examination at trial and are carefully scrutinized by the Court.

The last major Supreme Court decision concerning the confrontation clause was Ohio v. Roberts. In that case the defendant was being tried for forgery and use of stolen credit cards. At his preliminary hearing, the daughter of his alleged victims testified that she had not given the defendant permission to use her parents' credit cards or checks. At the defendant's trial, the daughter's whereabouts

100. Id. at 315-16 (quoting 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940) (emphasis in original)).
101. See supra notes 72-74 and accompanying text.
102. For example, under the Federal Rules of Evidence, the declarant is unavailable where he:
(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 . . . by process or other reasonable means.
Fed. R. Evid. 804(a).
Rule 804(b)(5) is a “catchall” provision which “provide[s] for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions.” Fed. R. Evid. 803 advisory committee note.
104. 448 U.S. 56 (1980).
were unknown, even to her parents, and the state introduced her preliminary hearing testimony into evidence against the defendant. The defendant objected that this violated his right to confrontation. The Ohio Court of Appeals\textsuperscript{106} and the Ohio Supreme Court\textsuperscript{106} agreed with the defendant and overturned his conviction. The Supreme Court reversed, ruling that defendant's right to confrontation had not been violated.\textsuperscript{107}

In \textit{Roberts}, the Court noted the widespread commentary in legal literature concerning the Court's approach to the confrontation/hearsay problem up to that point.\textsuperscript{108} While eschewing the desirability of a definitive theory reconciling the confrontation clause and the hearsay rules, the Court stated that "a general approach to the problem [was] discernible."\textsuperscript{109} Under the "approach" announced by the Court in \textit{Roberts}:

\begin{enumerate}
\item[(105)] \textit{Id.} at 60. The Ohio Court of Appeals reversed on the theory that the prosecution had not made the "good faith" effort required under Barber v. Page, 390 U.S. 719, 724-25 (1968), to conclude that the witness was unavailable.
\item[(106)] \textit{Id.} at 60-61. The Ohio Supreme Court rejected the court of appeals' contention that the prosecution had failed to make a "good faith" effort to produce the witness. Rather, it ruled that the defendant's right to confrontation had been violated because the daughter had been the defendant's witness at the preliminary hearing, and was thus not subject to his cross-examination.
\item[(107)] \textit{Id.} at 67-77.
\item[(108)] \textit{Id.} at 66 n.9. The Court's decision in \textit{Roberts} followed by ten years its last previous encounter with the confrontation/hearsay controversy in Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion). The Court's decision in \textit{Dutton} capped a string of confrontation decisions that had begun five years earlier in Pointer v. Texas, 380 U.S. 400 (1965), where the Court incorporated the sixth amendment confrontation right into the due process clause of the fourteenth amendment. After the Supreme Court's decisions in the cases between \textit{Pointer} and \textit{Dutton}, it appeared that the hearsay statements of an unavailable witness were admissible against a defendant in a criminal trial only if the prosecution made a "good faith" effort to produce the witness at trial and either (1) the defendant had been afforded an adequate opportunity to cross-examine the witness at the time the statement was made, or (2) the statement was of a type long recognized as admissible despite the absence of the witness, e.g., dying declarations. See \textit{Read}, supra note 78, at 8-11.
\item[(109)] \textit{Id.} at 87-90. The \textit{Dutton} decision evoked much critical commentary from legal scholars who felt that clear, consistent guidelines were needed in this area. \textit{See generally \textit{Roberts}}, 448 U.S. at 66 n.9 (discussing some of the critical commentary directed at the Court's confrontation decisions).
\end{enumerate}
[W]hen 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."

Nevertheless, in a footnote citing its last previous decision on the confrontation/hearsay problem, Dutton v. Evans, the Roberts Court noted that a showing of unavailability is not always a prerequisite to the admissibility of hearsay statements of an unavailable witness. In Dutton, the Court determined that the prosecution did not have to establish the unavailability of the declarant since "the utility of trial confrontation [was] remote."

III. IS THE USE OF VIDEOTAPED TESTIMONY AT TRIAL CONSTITUTIONAL?

A. The Case Law

Although the Supreme Court has yet to consider the question of whether the use of videotaped testimony in a criminal prosecution violates the defendant's right to confrontation, the question has been addressed in numerous lower court decisions. These decisions al-

110. Id. at 66.
111. Id. at 65 n.7.
112. 400 U.S. 74 (1970) (plurality opinion).
113. Roberts, 448 U.S. at 65 n.7.
114. Id. See Dutton, 400 U.S. at 87-89. "[T]he possibility that cross-examination of [the witness] could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." Id. at 89.
115. United States v. King, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1970) (Videotaped depositions of two of the defendant's unindicted co-conspirators introduced into evidence at trial. Witnesses unavailable to testify at trial because they were incarcerated in Japan.); State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976) (en banc), cert. denied, 431 U.S. 921 (1977) (Videotape testimony of pathologist admitted into evidence at defendant's trial for murder. Witness unavailable to testify at trial because he was scheduled to be out of the country.); State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1982) (Videotaped testimony of the child sex abuse victim admitted into evidence at defendant's trial. Child found to be unavailable to testify at trial because it was likely that she would become uncommunicative if called to testify before the jury.); People v. Ware, 78 Cal. App. 3d 822, 144 Cal. Rptr. 354 (Ct. App. 1978) (Videotaped preliminary hearing testimony of victim of robbery and sexual assault admitted into evidence at defendant's trial. Witness unavailable to testify at trial because she had returned to her home in Spain.); People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (Ct. App. 1974) (Videotaped preliminary hearing testimony of witness who helped conceal the bodies of two murder victims admitted into evidence at defendant's trial for...
most unanimously approve the use of videotaped depositions of unavailable witnesses at trial. The approving courts have analogized videotaped depositions to preliminary hearing or prior trial testimony,\textsuperscript{116} which has long been considered constitutionally admissible at trial if the witness is truly unavailable to appear in person.\textsuperscript{117} In fact, the courts considered a videotape of an unavailable witness' testimony preferable to reading a transcript of the same testimony to the jury.\textsuperscript{118}

Most of the videotape statutes operative in cases of child sexual abuse were enacted only recently.\textsuperscript{119} Therefore, there are very few

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\textsuperscript{116} See, e.g., State v. Reid, 114 Ariz. 16, 28, 559 P.2d 136, 148 (1976) (en banc), cert. denied, 431 U.S. 921 (1977); State v. Hewett, 86 Wash. 2d 487, 545 P.2d 1201 (1976) (en banc) (Videotaped deposition of alleged victim admitted into evidence at defendant's trial for robbery. Victim was an officer of a merchant ship and was scheduled to sail for Japan before trial.). \textit{Contra} Stores v. Alaska, 625 P.2d 820 (Alaska Sup. Ct. 1980) (Videotaped deposition of examining physician of rape victim erroneously admitted into evidence at defendant's trial. Court held that the prosecution failed to adequately demonstrate the witness' unavailability.). People v. McDowell, 88 A.D.2d 522, 449 N.Y.S.2d 981 (Sup. Ct. 1982) (mem.) (Videotape of conditional examination of complainant in defendant's trial for robbery erroneously admitted where prosecution had not attempted to procure the complainant's presence at trial. Complainant was an agent of the armed forces stationed in Germany. Court did not pass on the constitutional issue because the prosecution did not make the good faith, diligent effort required by the criminal procedure law for admitting a conditional examination of a witness into evidence.). People v. Lambert, 94 Misc. 2d 636, 405 N.Y.S.2d 599 (Sup. Ct. 1978) (Court denied motion by prosecution to have the testimony of an eyewitness preserved on videotape for use at trial. Held that the criminal procedure law did not grant the court discretion to take testimony other than by stenographic means.).


\textsuperscript{118} See cases cited supra note 116.

\textsuperscript{119} See supra text accompanying note 36.
reported decisions concerning their use. Only one case, State v. Melendez, considered the question of whether admitting videotaped testimony into evidence at trial pursuant to such a statute violated the defendant's right to confrontation. In Melendez, the defendant was convicted of molesting his six-year-old daughter. Prior to trial, pursuant to Arizona's original videotape statute and over the defendant's objections, the trial court granted the prosecutor's motion to have the child's testimony videotaped for use at trial. The child's testimony was taped in the presence of the defendant, the defendant's attorney, the prosecutor, and the judge on December 31, 1981. The trial commenced on January 6, 1982. On appeal, the court rejected the defendant's argument that his right to confrontation was violated by admission of the videotaped testimony, relying solely on an earlier decision by the Arizona Supreme Court approving the use of a videotaped deposition of an unavailable witness in a criminal prosecution.

In that earlier decision, State v. Reid, the Arizona Supreme Court found that the trial court had properly admitted the videotaped testimony of a pathologist at the defendant's trial for murder. The pathologist, who had examined the body of the murder victim, was scheduled to be out of the country at the time of trial. The Reid opinion stressed that the pathologist's testimony related primarily to purely foundational matter. The supreme court ex-

120. See State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1982) (Admission of videotaped deposition of child sex abuse victim at trial did not violate the defendant's right to confrontation.); State v. Lee, 277 Ark. 142, 639 S.W.2d 745 (1982) (Arkansas videotape statute mandates admission of videotaped deposition of child sex abuse victim at trial in lieu of live testimony once it has been made.); Washington v. State, 452 So. 2d 82 (Fla. Dist. Ct. App. 1984) (Florida videotape statute construed not to require expert testimony to establish need to videotape child's testimony.); Tolbert v. State, 697 S.W.2d 795 (Tex. Ct. App. 1985) (Admission of videotape of interview of social service worker with child sex abuse victim not violative of defendant's right to confrontation since statute provides that both the child victim and third party interviewer may be called by either party to testify at trial.); Alexander v. State, 692 S.W.2d 563 (Tex. Ct. App. 1985) (same); Jolly v. State, 681 S.W.2d 689 (Tex. Ct. App. 1984) (same); Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985) ( Provision of Texas videotape statute allowing tape of child victim's conversation with a third party interviewer into evidence at trial held to be prima facie unconstitutional.).

121. 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1982).

122. ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1978).

123. 135 Ariz. at 392, 661 P.2d at 656.


125. Id.

126. Id. at 29, 559 P.2d at 149.

127. Id. at 27, 559 P.2d at 147.

128. Id. at 28, 559 P.2d at 148.
pressly reserved decision on the question of whether the videotaped testimony of the victim of a crime could be admitted into evidence at the defendant's trial on those charges consistent with the right to confrontation.\textsuperscript{129} In fact, the language of the opinion strongly suggests that the court would have decided differently if that had been the case.\textsuperscript{130} Despite this apparent limitation, the court in \textit{Melendez} had no difficulty in concluding that the admission of the videotaped deposition of the child victim was consistent with the rationale of \textit{Reid}.\textsuperscript{131}

The \textit{Melendez} court ignored the \textit{Reid} court's hesitance to approve the use of videotaped testimony of such a crucial witness as the defendant's alleged victim. Instead, it focused on language in the \textit{Reid} opinion setting forth a balancing test to be used by the trial court in determining the propriety of admitting videotaped testimony.\textsuperscript{132} The \textit{Reid} court instructed trial courts to weigh the defendant's right to confrontation against the extent of the need of the witness to be away at the time of trial.\textsuperscript{133} The supreme court stated that such factors as the witness' occupation and the nature of his testimony were relevant in striking this balance.\textsuperscript{134} However, the \textit{Reid} court concluded that a witness should not be permitted to testify via videotape if his absence would be prejudicial to the defendant or prosecution.\textsuperscript{135} Absent a showing of prejudice or lack of good faith, the supreme court held that admission of such testimony was within the discretion of the trial court.\textsuperscript{136}

The \textit{Melendez} court found no abuse of discretion by the trial court in balancing the competing interests of the defendant and the child victim in that case. The court noted that a clinical psychologist had testified "to the likelihood that [the child] would become uncommunicative if called to testify" at trial\textsuperscript{137} and that the child had expressed fear at the thought of testifying before a jury.\textsuperscript{138} The court further noted that both the defendant and his counsel were present at the taping and that the defendant had an opportunity to cross-

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 29, 559 P.2d at 149.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Melendez}, 135 Ariz. at 392-93, 661 P.2d at 656-57.
\item \textsuperscript{132} \textit{Id.} at 392, 661 P.2d at 656.
\item \textsuperscript{133} \textit{Reid}, 114 Ariz. at 29, 559 P.2d at 149.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Melendez}, 135 Ariz. at 392, 661 P.2d at 656.
\item \textsuperscript{138} \textit{Id.}
\end{itemize}
The court concluded that the defendant's constitutional right of confrontation was not violated by the trial court's use of "modern technology to meet the special needs of [the] witness" under the circumstances.140

The Melendez opinion did not expressly apply the Supreme Court's Ohio v. Roberts test141 for determining whether the hearsay statements of an unavailable witness were admitted into evidence at trial in violation of the defendant's sixth amendment right to confrontation. Rather, the court viewed the decision to admit the videotape of the child's testimony as being totally within the discretion of the trial court, and refused to overturn the trial court's decision absent a showing of prejudice or lack of good faith.142 While the court's decision to tape the child's testimony and allow its admission into evidence at trial may have been correct, a better approach would have been for the court to set forth more explicit guidelines to be used by trial courts in determining whether the admission of such testimony at trial is constitutionally permissible.

B. Are Videotaped Depositions of Child Sex Abuse Victims Constitutionally Admissible Hearsay?

1. Unavailability. — Under the Court's "approach" in Ohio v. Roberts,143 the videotaped testimony of a child sex abuse victim is constitutionally admissible hearsay only if the prosecution first establishes that the child is unavailable to testify at trial.144 The Federal Rules of Evidence and most state evidence codes provide that a witness can be found unavailable to testify at trial due to a "then existing physical or mental illness or infirmity."145 If such an infirmity or illness is established to the satisfaction of the court, and the witness' testimony was given at a prior trial, preliminary hearing, or deposition, and the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," the prior recorded testimony is admissible at trial despite the unavailability of the witness.146

The burden of proving that a hearsay declarant is unavailable

139. Id. at 393, 661 P.2d at 657.
140. Id.
141. See supra text accompanying note 110.
142. Melendez, 135 Ariz. at 392-93, 661 P.2d at 656-57.
144. Id.
145. See, e.g., FED. R. EVID. 804(a)(4) (emphasis added).
146. FED. R. EVID. 804(b)(1).
as a witness is on the prosecution. In assessing whether or not a witness is unavailable to testify at trial due to mental illness or infirmity, courts generally require expert medical testimony to establish the existence of such a condition. The cases suggest that the expert's evidence must demonstrate that the existing mental infirmity renders the witness unable to testify at trial due to the likelihood of severe, perhaps permanent, injury if the witness is forced to testify in open court. The sufficiency of the proof necessary to establish witness unavailability is generally within the discretion of the trial court. Case law indicates that the prosecution has the burden of proof by a preponderance of the evidence on the issue of unavailability.

In *Warren v. United States*, the defendants appealed their convictions on multiple counts, including armed rape, and argued that their right to confrontation had been violated by the admission at their second trial of the prior trial testimony of one of their victims. The defendants claimed that the trial court erred in admitting the victim's prior trial testimony because the prosecution had not introduced enough evidence to support a finding of psychological unavailability. The District of Columbia Court of Appeals disagreed. Although the court acknowledged that the "precise quantum of evidence" sufficient to meet the witness unavailability standard is difficult to establish, it pointed out that the standard was clearly met in this case where both the psychiatrist called by the prosecution and an independent psychiatrist appointed by the trial court found that testifying again would cause severe, perhaps permanent, psychological harm to the witness.
The Warren court noted that only two courts had previously approved this type of witness unavailability. The court pointed out, however, that both the Federal Rules of Evidence and the Uniform Rules of Evidence provide for witness unavailability on the grounds of "mental illness or infirmity." The court proposed the following factors as guidelines for determining whether a witness is psychologically unavailable to testify: "(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 or terrorist act." The court stated that these factors should be considered in light of the nature of the crime and the past psychological history of the witness.

Like the Warren court, the Appellate Division of the New York Supreme Court, in People v. Lombardi, admitted the prior trial testimony of a rape victim on the grounds that there was substantial evidence that the victim would suffer severe psychological problems if she was forced to testify at defendant's second trial. The court's conclusions were based in part on the testimony of the victim's psychiatrist. Apparently the victim's mental health was so seriously affected by the crime and her appearance at the defendant's first

"the sense of panic and the return of depressive symptoms were so strong that she could not even conceive of reentering the courtroom or even being questioned in a more private setting about what she had been through."

Id. at 828-29 n.16. The psychiatrist concluded:

[T]here is great risk in pressuring [the victim] to testify again. She is very likely to suffer an intensification of the psychological injury she had previously sustained, the probability of panic states and serious emotional depression being very high. Further, it is likely that should she be forced to testify, the resultant psychological injury would be severely incapacitating over an extended period of time, perhaps even permanently.

Id. at 829 n.16.

The court appointed psychiatrist found that the victim was "suffering from a narcissistic personality disorder substantial enough to be considered a mental defect, and was vulnerable to transient psychosis as a result of stress." Id. at 829. The psychiatrist concluded that "there would be a small but very real risk that she would become temporarily psychotic as a result of testifying" and that "in her case the suffering would be greater than one would ordinarily see."

Id.

156. Id. at 827.
157. Id. at 828.
158. Id. at 830 n.18.
159. Id.
161. Id. at 701, 332 N.Y.S.2d at 750.
trial that she unsuccessfully attempted suicide.\textsuperscript{162}

Similarly, in \textit{People v. Gomez},\textsuperscript{163} the California Court of Appeals held that in order to establish the unavailability of a witness on the grounds of mental illness or infirmity the prosecution must show that the illness or infirmity "exist[s] to such a degree as to render the witness's attendance, or his testifying, relatively impossible and not merely inconvenient."\textsuperscript{164} However, the court declined to specify the type of illness that must be shown or the degree of severity required, leaving these issues to the discretion of the trial court.\textsuperscript{165} In \textit{Gomez}, two psychiatrists testified regarding the effects an appearance in open court would have on a fifteen-year-old sexual abuse victim who had since been confined to a state hospital with serious mental disorders.\textsuperscript{166}

Thus, although courts have been willing to admit prior testimony of rape victims on unavailability grounds where there is compelling evidence of probable psychological harm to the victims if forced to testify in open court, expert medical testimony seems to be required to support a finding of psychological unavailability. In a later case, \textit{People v. Williams},\textsuperscript{167} the California Court of Appeals, relying on \textit{Gomez}, found that the admission into evidence of the prior trial testimony of the victim in the defendant's second trial for rape was erroneous. Despite the testimony of the judge from the first trial, the police officer who interviewed the victim shortly after the attack, and two friends of the victim concerning the mental and physical effects that testifying at the first trial had on the victim, the court found that there was not an adequate showing of psychological unavailability. The \textit{Williams} court assumed that the prosecution had to demonstrate the witness' unavailability by a preponderance of the evidence.\textsuperscript{168} The court concluded:

\begin{quote}
In the absence of \textit{medical} testimony such as was introduced in \textit{Gomez}, there was no credible evidence presented in the case at bench to support a finding that . . . [the victim] would suffer any substantial impairment to her mental or physical health — either permanently or for any significant period of time.\textsuperscript{169}
\end{quote}

\begin{thebibliography}{99}
\bibitem{162} Id. at 701, 332 N.Y.S.2d at 750-51.
\bibitem{163} 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (Ct. App. 1972).
\bibitem{164} Id. at 230, 103 Cal. Rptr, at 84.
\bibitem{165} Id.
\bibitem{166} Id. at 228-29, 103 Cal. Rptr. at 82-83.
\bibitem{167} 93 Cal. App. 3d 40, 155 Cal. Rptr. 414 (Ct. App. 1979).
\bibitem{168} Id. at 51, 155 Cal. Rptr. at 419.
\bibitem{169} Id. at 54, 155 Cal. Rptr. at 421 (emphasis in original).
\end{thebibliography}
Thus, the court found that the victim’s “mental, emotional and physical condition rendered her ability to testify merely inconvenient and not ‘relatively impossible.’” The court emphasized the fact that the victim’s prior symptoms of emotional disturbance after her prior testimony had subsided and that she now seemed happy. The court thus concluded that any effects of testifying had only been temporary in nature. The court found that in light of the fact that the victim’s credibility was a crucial issue in the trial she should not be excused from testifying in person.

In light of the above decisions, the possibility of severe, perhaps permanent, mental or emotional injury to the child sex abuse victim as a result of testifying in open court would render the child unable to testify at trial on the grounds of a then existing mental illness or infirmity. In such cases, the child’s videotaped testimony should be admissible at trial under the prior recorded testimony exception to the hearsay rule. However, the videotape statutes should require the prosecution to introduce expert medical testimony at the pre-trial hearing to determine whether the child is likely to be unavailable to testify at trial. Testimony of family members and others close to the child and other factors such as the child’s age, the nature of the crime, and the number of times the child will be required to testify should also be weighed by the court. The court should deny the motion to tape the child’s testimony unless the prosecution proves the likelihood of trial unavailability on the grounds of mental illness or infirmity by a preponderance of the evidence. A blanket rule allowing the videotaping of the child abuse victim’s testimony, without

170. Id. (emphasis in original).
171. Id. at 55, 155 Cal. Rptr. at 421-22. The California Supreme Court relied on the reasoning in Gomez and Williams in finding that the preliminary hearing testimony of a minor sex abuse victim was erroneously admitted at defendant’s trial for child molestation. People v. Stitzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983) (en banc). In Stritzinger, there was no expert medical testimony that the victim was unable to testify due to an existing mental infirmity. Id. at 516, 668 P.2d at 746, 194 Cal. Rptr. at 439. The victim’s mother testified that the child was hospitalized and undergoing psychotherapy at the time of trial. The court acknowledged that neither Gomez nor Williams explicitly require expert medical testimony for a finding of unavailability under the state’s evidence code. Id. at 518, 668 P.2d at 747, 194 Cal. Rptr. at 440. Nevertheless, such expert medical testimony is required, in order to determine that the “existing . . . mental illness or infirmity” renders the witness unable to testify. Id. Such a determination, the court reasoned, would require expert testimony “as to the likely effect of the court appearance on the . . . health of the witness.” Id. The court concluded that “[t]he mother’s understandably protective testimony was therefore insufficient as a matter of law for this critical purpose.” Id. at 518, 668 P.2d at 747, 194 Cal. Rptr. at 440.
a prerequisite finding that testifying in open court would result in unusually severe emotional or mental trauma is probably unconstitutional. As one observer has noted, "'[a]ny court proceeding is traumatic' for every victim."\textsuperscript{178}

Requiring the prosecution to prove unavailability by a preponderance of the evidence will facilitate the courts' efforts to reconcile society's desire to accommodate the special needs of some child victims and the defendant's constitutionally guaranteed right to confrontation. The prosecution will most likely be required to introduce expert medical testimony regarding the risk of injury to the child, rather than relying solely on the testimony of understandably protective family members and friends. As a result, the child's testimony would be taped only if the prosecution demonstrates a real need for such a protective procedure in each case.

A preponderance of the evidence standard is also consistent with the Supreme Court's decisions concerning the burden of proof the prosecution must meet when the admissibility of evidence offered against a defendant at a criminal trial is challenged on constitutional grounds. The Supreme Court has rejected the argument that such evidence must be found admissible beyond a reasonable doubt in order to adequately safeguard the values exclusionary rules are designed to protect.\textsuperscript{174} For example, in \textit{Lego v. Twomey},\textsuperscript{175} the Court held that at a pre-trial suppression hearing to determine the voluntariness of the defendant's confession, the prosecution is required to prove, by only a preponderance of the evidence, that the defendant's confession was voluntary.\textsuperscript{176} Likewise, in \textit{United States v. Matlock},\textsuperscript{177} the government had the burden of proving that, when the police searched a defendant's bedroom without a warrant, they were justified in relying on the consent of a woman who claimed to occupy the premises jointly with the defendant. Proof of voluntary consent to the search by the defendant or a third party with common authority over the premises was necessary in order for the evidence seized to be admissible at the defendant's trial for bank robbery.\textsuperscript{178} The Court stated that the degree of the government's burden of proof on

\textsuperscript{173}. Galante, \textit{supra} note 1, at 28, col. 4 (emphasis in original).
\textsuperscript{175}. \textit{Id.} at 477.
\textsuperscript{176}. \textit{Id.} at 489.
\textsuperscript{177}. 415 U.S. 164 (1974).
\textsuperscript{178}. See \textit{id.} at 170-72.
this issue was proof by a preponderance of the evidence. The Court opined that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." In Lego, however, the Court noted that states were free to adopt a stricter standard to govern the admission of such evidence in their own courts.

Just as a confession or evidence obtained through a search without a warrant and without probable cause cannot be introduced at trial without a showing of voluntariness or consent, respectively, the prior recorded testimony of a witness is not constitutionally admissible at a criminal trial absent a showing of the unavailability of the witness. In all three situations important constitutional protections are implicated. The Supreme Court has held that a preponderance of the evidence standard is constitutionally permissible in determining the admissibility of confessions and evidence seized as a result of a warrantless search. There seems to be no reason to require a higher standard of proof regarding the likely unavailability of the child sex abuse victim at the time of trial.

The Court in Lego noted that the exclusionary rules were designed to curb constitutionally offensive conduct on the part of police. The Court concluded that it was doubtful that imposing a higher burden of proof on the prosecution in this instance would result in a sufficiently greater adherence to constitutional standards by the police in order to justify excluding such evidence from the jury's consideration in determining the defendant's guilt or innocence. The purposes of the confrontation clause are to ensure that the witness' testimony is given under oath, in the presence of the jury, and is subject to cross-examination by the defendant. These safeguards

179. Id. at 177.
180. Id. at 178 n.14.
181. 404 U.S. at 489.
182. See, e.g., Fed. R. Evid. 804(b)(1).
183. The introduction of coerced confessions at trial violates the defendant's fifth amendment right against self incrimination, U.S. Const. amend. V; warrantless searches absent probable cause or voluntary consent violate the defendant's fourth amendment right to be free from unreasonable searches and seizures, U.S. Const. amend. IV; and the introduction of prior recorded testimony at trial absent proof of the witness' unavailability violates the defendant's sixth amendment right to be confronted with his accusers, U.S. Const. amend. VI.
185. 404 U.S. at 489.
186. Id.
187. See supra note 76 and accompanying text.
are believed to affect the veracity of witnesses, thus protecting the defendant from unreliable and untrustworthy testimony. Admitting videotaped testimony of child sex abuse victims where the prosecution has proved the likelihood of unavailability at the time of trial by a preponderance of the evidence would not undermine these purposes. Imposing a higher burden of proof on the prosecution would not enhance protections for the defendant to a degree sufficient to outweigh society’s interest in protecting child sex abuse victims from the danger of severe psychological injury. At the videotaping session, the child will be sworn and subject to the defendant’s cross-examination. In addition, unlike a written transcript of prior trial or preliminary hearing testimony, a videotape affords the jury some demeanor evidence. Thus, there seems to be no reason to conclude that the Constitution requires the prosecution to establish the unavailability of the child victim witness by a more exacting standard than a preponderance of the evidence.

Once the child’s testimony is taped, the unavailability of the child witness should be presumed to continue at the time of trial. In order to justify such a continuing presumption, the taping of the child’s testimony should not occur too far in advance of trial. The elapse of only a short time between the taping and the trial will make it most unlikely that circumstances have changed sufficiently to require a new hearing on the issue of unavailability. Therefore, in a case like State v. Melendez, where the trial followed the taping by only a week, absent extraordinary circumstances, the presumption of continued unavailability should apply and no new findings need to be made on this issue by the trial court. However, in the unlikely event that information comes to light indicating that the child’s mental or emotional condition has improved sufficiently since the time of the taping to allow in court testimony, the prosecutor or defendant may make a motion to the court to hear further evidence on the issue of the child’s unavailability. This motion should be granted if the court determines there is good cause to hold a new hearing. At this second hearing, new examinations of the child should be required by each side’s experts, and testimony should relate to such

188. *Contra infra* notes 230-31 and accompanying text.
189. *Cf.* 5 J. Wigmore, *Evidence* § 1414 (Chadbourn rev. 1974) (asserting that where the cause for taking a pre-trial deposition is likely to be permanent, the cause should be presumed to continue at the time of trial and that the burden should be placed on the opponent to show that the cause has ceased).
190. 135 Ariz. 390, 392, 661 P.2d 654, 656 (Ct. App. 1982).
factors as the nature and extent of the child's recovery from the attack, and the danger that requiring in court testimony would pose for the child's continued recovery.

2. Reliability. — Under the second step of the *Roberts* test, the hearsay statement of an unavailable witness must bear certain "indicia of reliability" to be admissible at trial. If the evidence falls into a "firmly rooted hearsay exception," reliability can be inferred. If not, the evidence must be excluded absent indications of its trustworthiness. The hearsay exception for prior recorded testimony when the declarant is unavailable to testify at trial due to illness is a "firmly rooted hearsay exception," and thus, admission of videotaped testimony pursuant to this exception to the hearsay rule satisfies the reliability prong of the *Roberts* test.

In *Roberts*, the Supreme Court rejected the defendant's assertion that the Court must "undertake a particularized search for 'indicia of reliability'" before admitting the preliminary hearing testimony of an unavailable witness at trial under the prior recorded testimony exception to the hearsay rule. Rather, the Court held that the "accouterments of the preliminary hearing itself" — the fact that the witness testified under oath, that the defendant was represented by counsel, that the defendant had an opportunity to cross-examine the witness, and that the proceeding was held before a judicial tribunal — provided sufficient guarantees of trustworthiness. Videotaped testimony of child sex abuse victims recorded at a proceeding conducted pursuant to the Arizona, Kentucky, and Texas statutes, where the defendant is kept out of the view of the child during questioning arguably would not satisfy this standard since it would deprive the defendant of a face-to-face encounter with his accuser while the child is testifying.

Courts addressing the question of whether the use of videotaped depositions at trial violates the confrontation clause have been concerned with preserving the defendant's right to a face-to-face meet-

191. 448 U.S. at 66.
192. Id.
193. Id.
194. Id.
195. Id. at 72.
ing with the witness. For example, in *United States v. Benfield*, the defendant appealed his conviction for misprison of felony, arguing that his sixth amendment right to confrontation was violated by admission into evidence of a videotaped deposition of the alleged kidnap victim. The defendant watched on a monitor while the victim’s testimony was videotaped in another room. He had access to a buzzer that he could use to halt the questioning and summon his counsel for conference. The government claimed that the witness was unable to testify in the defendant’s presence because of psychiatric problems resulting from her kidnapping. The court noted that in fact it appeared that the witness was deceived as to the defendant’s presence in the building where she was being questioned and as to his ability to hear her testify. The Eighth Circuit, deciding the case prior to the Supreme Court’s decision in *Ohio v. Roberts*, relied primarily on the Court’s earliest confrontation decisions in concluding that the right to confrontation “normally” included a “face-to-face meeting at trial at which time cross-examination takes place.” The court noted that such an encounter is believed to have an effect on the veracity of the witness. The court recognized that the right to confrontation is not absolute and can be waived by the defendant voluntarily or otherwise. The court argued, however, that these narrow exceptions to the necessity for the defendant’s presence while witnesses against him are testifying should not be expanded unnecessarily.

The *Benfield* court left open the question of whether a witness might be excused from testifying in the defendant’s presence due to the brutal nature of the alleged offense, finding that the defendant’s

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198. 593 F.2d 815 (8th Cir. 1979).
199. Id. at 817.
200. Id. The Eighth Circuit noted, however, that:
The Government made only a marginal showing of [the victim's] unavailability at trial. No new evidence of her condition was presented. Instead, the Government relied on the failure of [the psychiatrist] to notify them of any improvement in her condition. An additional showing of the witness's mental condition and availability on the trial date would have been a much better practice.
201. Id. at 820-21.
204. *Benfield*, 593 F.2d at 821.
205. Id.
206. Id. at 819-20.
207. Id. at 821.
conduct in this case did not warrant such an excusal. In a footnote, the court noted that an Arizona case, *State v. Ritchey*, held that a trial court could examine the competency of a seven-year-old child abuse victim outside the defendant's presence. The *Benfield* court noted, however, that in *Ritchey*, there was no indication that the child's testimony was given outside the defendant's presence. Although disapproving the procedure employed in this case, the *Benfield* court did not prohibit the use of videotaped testimony at trial. The court suggested that its decision might have been different if the procedure had "more nearly approximate[d] the traditional courtroom setting."

The court in *Warren v. United States*, which upheld the admission of the prior trial testimony of a rape victim at trial on the grounds of unavailability due to mental illness or infirmity, distinguished the result in *Benfield*. The *Warren* court noted that the *Benfield* court did not object to the finding of unavailability, but rather reversed on reliability grounds because there was no face-to-face meeting between the defendant and the victim.

The necessity for face-to-face confrontation during questioning of the witness was also recently addressed in a similar context in a California case, *Herbert v. Superior Court*. In *Herbert*, the defendant was charged with oral copulation with a child and lewd acts upon a child. In response to the five-year-old victim's reluctance to testify, the seating in the courtroom at the preliminary hearing was rearranged so that the defendant could not see the child while she testified and she could not see him. However, the defendant and the judge, the judge and the witness, and the defendant and both counsel were in view of each other. The court held that this arrangement violated the defendant's constitutional right to confrontation.

The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the ac-

208. *Id.* at 821-22.
209. *Id.* at 821 n.10.
211. *Benfield*, 593 F.2d at 821 n.10.
212. *Id.* at 821 (emphasis added).
214. *Id.*
216. *Id.* at 665, 172 Cal. Rptr. at 851.
217. *Id.* at 671, 172 Cal. Rptr. at 855.
cused [sic] when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness's reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.\textsuperscript{218}

In light of these decisions, it appears that the reliability prong of the \textit{Roberts} test is not satisfied if the defendant is not permitted to be physically present within the child's view while the child is testifying. The Supreme Court’s decisions holding that admission of preliminary hearing testimony of an unavailable witness at trial is constitutional require that the defendant have an adequate opportunity to cross-examine the witness at the preliminary hearing. An adequate opportunity for cross-examination requires the defendant's full participation in the questioning of the witness.\textsuperscript{219} Arguably, such full participation is lacking where the defendant is forced to view the child's questioning from behind one-way glass.

Thus, a videotape procedure like that allowed in Arizona, Kentucky, and Texas, where the defendant is kept out of the view of the child while the latter is testifying,\textsuperscript{220} would probably be found unconstitutional. Although legislators and prosecutors understandably wish to spare the child victim the trauma of refacing his or her attacker, singling out accused child molesters for special treatment clearly deprives these defendants of their sixth amendment rights and jeopardizes the rights of wrongfully accused persons. While the child would probably suffer less trauma if questioned outside the defendant's presence, being questioned prior to trial in the judge's chambers instead of in open court would lessen the child's trauma while preserving the defendant's constitutional protections.

CONCLUSION

As the number of prosecutions for sexual abuse of children grows, an increasing number of children are subjected to the ordeal of testifying against their alleged attackers. The desire to spare these young victims as much trauma as possible, while bringing their alleged attackers to justice, is understandable. The recently enacted videotape statutes operative in cases involving sexual abuse of young children represent a necessary accommodation between the public's

\textsuperscript{218} Id.
\textsuperscript{219} Benfield, 593 F.2d at 821.
interest in protecting the welfare of these young victims and the defendant's constitutional protections.

In order to comply with the Supreme Court's *Ohio v. Roberts*\(^2\) decision, the trial court should not order that the child's testimony be taped unless the prosecution can demonstrate at a pre-trial hearing that the child is likely to be unable to testify at trial because of the danger of severe, perhaps permanent, emotional or mental injury. Only two videotape statutes, Colorado's\(^2\) and Wisconsin's,\(^3\) provide some guidance to the trial court regarding what factors should be considered in determining whether a child witness is unavailable to testify at trial; neither mandates the introduction of expert medical testimony on the issue. Expert medical testimony is necessary if the court is to make a knowledgeable determination regarding the likelihood of harm to the child from testifying in open court. Such testimony should prove by a preponderance of the evidence that the child is unable to testify at trial due to the likelihood of psychological injury. The pre-trial hearing on the issue of unavailability should be held as close as possible to the start of the trial. The child's unavailability should thus be presumed to continue at the time of trial. In the unlikely event that the child's psychological condition improves to such a degree that in court testimony is possible without danger of severe psychological injury to the child, the prosecutor or the defendant may make a motion requesting a new determination on this issue.

In order to satisfy the second prong of the *Roberts* test, the defendant should be physically present within the child's view while the child testifies. The right to cross-examine witnesses is the essential right protected by the confrontation clause. The defendant's physical presence within the child's view at the time of questioning is part of this right of cross-examination. If a defendant is forced to view the testimony of his accuser from behind one-way glass, his right to cross-examine a crucial witness is impaired merely because of the crime of which he is accused. Such a procedure is unconstitutional. Thus, while procedures like those adopted by Arizona,\(^4\) Kentucky,\(^5\) and Texas\(^6\) are understandable from a humanitarian point

\(^{221}\) 448 U.S. 56 (1980).
\(^{222}\) CoLO. REV. STAT. § 18-3-413(3) (Supp. 1984).
\(^{223}\) Wis. STAT. ANN. § 967.041 (West Supp. 1985).
\(^{224}\) ArIZ. REV. STAT. ANN. § 13-4252(B) (Supp. 1985).
of view, they deny the defendant an essential aspect of his sixth amendment rights.

If appropriate guidelines are followed, the defendant's constitutional right to confrontation will not be violated. Videotaped testimony taken in accordance with this suggested procedure would satisfy the major purposes behind the confrontation clause. As noted earlier, the right to confrontation serves three major purposes: (1) to insure that testimony against the accused is given under oath; (2) to give the defendant an opportunity to cross-examine the witnesses against him; and (3) to allow the jury to observe the witness' demeanor while testifying. Thus, child victims testifying on videotape should be sworn as witnesses and examined to determine competency. The defendant should be given an adequate opportunity to cross-examine the child at the videotape proceeding. One could argue that such an opportunity for cross-examination at a pre-trial hearing does not adequately protect the defendant because the introduction of the videotaped testimony at trial in lieu of live testimony deprives the defendant of the opportunity to cross-examine the witness in the context of what transpires at the actual trial. This argument need not be fatal to the constitutionality of such videotaped testimony, however. If a situation arises where evidence is introduced at trial that was unknown at the time the child's testimony was taped, the judge can call the child for further questioning.

Regarding the ability of the jury to observe the witness' demeanor, a videotape deposition would seem to clearly satisfy this purpose of confrontation. Some commentators, however, have pointed out that the camera may not be the neutral player many assume it to be. A camera focused on a witness necessarily limits the jury's ability to observe. The camera may fail to transmit subtle changes in the witness' coloring or body language that occur while the witness is testifying. Although such criticisms are undoubtedly valid, it is clear that a videotaped deposition provides the jury with some demeanor evidence, and is certainly preferable in this respect to the reading of a preliminary hearing or prior trial transcript. As

227. See supra note 76 and accompanying text.
228. See Libai, supra note 4, at 1029-30.
229. Id.
231. See Note, Or. L. Rev., supra note 230, at 574-77.
long as the court is satisfied that the video equipment was in proper working order and that the camera was not utilized to influence the appearance of the child and thereby evoke the jurors' sympathy, the tape should be admitted at trial. Used properly, such a procedure accommodates the needs of child sex abuse victims without unnecessarily jeopardizing the defendant's constitutional rights.

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