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SENATOR
PATRICK M. RODEY
3271 MONTCLAIRE COURT
ANCHORAGE, AK 99503



SENATE MAJORITY LEADER
CHAIRMAN
SENATE JUDICIARY COMMITTEE
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SENATE SPECIAL COMMITTEE
ON BANKING

ALASKA STATE LEGISLATURE

POUCH V
JUNEAU, ALASKA 99811

(907) 465-3717

March 8, 1982

Mr. Paul Conger
Department of Public Safety
Pouch N
Juneau, AK 99811

Dear Paul:

I have recently received the attached fiscal note from your department. There would appear to be no actual fiscal impact on your department since the testimony would be recorded under the auspices of the court system, not Public Safety.

I suggest you have your analyst review the bill again.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin K. Bruce", written over a horizontal line.

Kevin K. Bruce

KKB/ds

cc: Representative Barnes, House Judiciary
Senator Parr

I. - REQUEST

Bill/Resolution No. CS for Senate Bill No. 485 (Judiciary)

Title "An Act permitting...videotaping of testimony...sexual offenses."

Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Public Safety

Program Category Affected Administration of Justice

BRU, Program, Or Subprogram(s) Affected Alaska State Troopers

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES	-0-	.1	.1	.1	.1	.2
500 EQUIPMENT		36.0				10.0
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	36.1	.1	.1	.1	10.2

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	36.1	.1	.1	.1	10.2
FEDERAL FUNDS						
OTHER (Specify Source)						

FULL TIME						
PART TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The Division review of the potential impact of this Bill upon its operations indicates the needs to provide videotape equipment in each of the five Alaska State Trooper detachments located throughout the State. Each location would require a portable color camera and recorder plus accessories totalling approximately \$7,200.00. Partial replacement of the equipment would be estimated to be needed by FY'87, assuming the Bill became effective in FY'83. The commodities noted above would cover the estimated cost of the video cassette tapes.

IV. DATE March 1, 1982

PREPARED BY Francis C. Allan

AGENCY Department of Public Safety

Origin Legislative Finance

PHONE 269-5691

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (rev. 12/81)

1 PROPOSED COMMITTEE SUBSTITUTE

2 SENATE BILL 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An act permitting the videotaping of, or the exclusion
7 of the public during, testimony of young victims of
8 sexual assaults; and changing Rule 804, Alaska Rules of
9 Evidence relating to exceptions to the hearsay rule."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA: *(Better of Intent)*
Senate Task 02/1

11 * Section 1. DECLARATION OF LEGISLATIVE PURPOSE. The legislature finds
12 that the public interest in enhancing and protecting the health and safety of
13 children requires the vigorous prosecution of persons alleged to have com-
14 mitted sexual assaults against young children. The legislature recognizes
15 that the testimony of the victim of the alleged assault is usually required
16 in order to successfully prosecute and that there is a substantial likelihood
17 that the child victim will suffer severe emotional distress, humiliation, and
18 psychological damage if required to testify in open court at trial. The
19 legislature further finds that fear of this distress by the child or his
20 parents, discourages the reporting, investigation and prosecution of sexual
21 assaults against children. The legislature finds that this severe emotional
22 distress to the child victim can be substantially decreased, although not
23 eliminated, by the videotaping of the testimony of the child or the exclusion
24 of the public from the courtroom while the child testifies in person. The
25 legislature concludes that these practices will encourage the reporting,
26 investigation and prosecution of sexual assaults against children, and result
27 in the greater protection of the physical and emotional welfare of young
28 children and the reduction of sexual assaults against children in the future.

29 * Sec. 2. AS 12.45 is amended by adding new sections to read:

1 Sec. 12.45.047. VIDEOTAPING OF TESTIMONY BY YOUNG VICTIMS OF SEX-
2 UAL ASSAULT. (a) Upon application by the prosecuting attorney and
3 notice to the defendant, the court shall order that the state be per-
4 mitted to videotape the testimony of a child who is the alleged victim
5 of a crime for which sexual penetration or sexual contact as defined in
6 AS 11.81.900(b)(51) and (52) is an element of the offense and who is 16
7 years of age or younger at the time of the videotaping. ^{under}

8 (b) The trial judge shall preside at the videotaping proceeding
9 and shall rule on all questions as if at trial. The defendant shall be
10 afforded all rights applicable to defendants during trial, including the
11 right to an attorney and the right to confront and cross-examine the
12 witness.

13 (c) Videotaped evidence taken in accordance with this section is
14 admissible in evidence in the criminal trial of a defendant charged with
15 a crime or crimes for which sexual penetration or sexual contact as de-
16 fined in AS 11.81.900(b)(51) and (52) is an element of the offense.

17 Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY BY
18 YOUNG VICTIM OF SEXUAL ASSAULT. (a) After notice to the defendant, the
19 state may apply to the court for an order excluding the public from the
20 courtroom during the testimony of a child who is the alleged victim of
21 a crime for which sexual penetration or sexual contact as defined in
22 AS 11.81.900(b)(51) and (52) is an element of the offense. The order
23 shall be granted if the court finds that the child is 16 years of age or
24 younger at the time of the trial.

25 (b) In the event the public is excluded from the trial during the
26 testimony of a child victim, immediately following the conclusion of the
27 child's testimony, the content of the testimony shall be made available
28 to the public upon request. The content of the testimony shall be made
29 available in the form of a taped or written transcript.

1 (c) In this section "public" means all persons except:

2 (1) the judge presiding over the trial;

3 (2) the members of the jury;

4 (3) the defendant and his attorney and an investigator;

5 (4) counsel for the state and an investigating officer;

6 (5) the parents or legal guardians of the child;

7 *Break these down* (6) a guardian ad litem ^{or attorney} for the child, or ⁽⁷⁾ an adult for whom
8 the child has developed a significant emotional attachment and who can
9 provide emotional support for the child during his testimony.

10 (7) court personnel essential for the taking of the testi-
11 mony.

(8) Add process → Folio → Awareness group

12 * Sec. 3. AS 12.35.047 added by sec. 2 of this Act has the effect of
13 changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence
14 of a child who is 16 years of age or younger at the time of the trial and who
15 is the alleged victim of any crime for which sexual penetration or sexual
16 contact as defined in AS 11.81.900(b)(51) and (52) is an element of the of-
17 fense to the list of exceptions to the hearsay rule.

18 *Awareness → Susceptibility should be attached.*

30-9-16. Testimony; limitations; in camera hearing.

Section is not unconstitutional on its face. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section not in conflict with rules. — The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P., regarding pretrial hearings. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. is to be applied in determining admissibility.

State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

There is no conflict between this section and Rule 405, N.M.R. Evid., regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section is not limited to sex by consent; rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Victim's past sexual conduct in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act [this section].

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.

It is unlawful for any person, knowing that a criminal trial, an official proceeding, or an investigation by a duly constituted prosecuting authority, a law enforcement agency, a grand jury or legislative committee, or the Judicial Qualifications Commission of this state is pending or knowing that such is about to be instituted, to endeavor or attempt to induce or otherwise cause a witness to:

- (a) Testify or inform falsely; or
- (b) Withhold any testimony, information, document, or thing.

Amended by Laws 1975, c. 75-298, § 44, eff. Oct. 1, 1975.

[See main volume for text of (2) and (3)]

Laws 1975, c. 75-298, rewrote subsec.

Index to Notes

In general 1
Indictment and Information 2

In general

There was no such crime as attempted tampering with a witness. *Hestor v. State*, App., 303 So.2d 26 (1975).
Witnesses have personal right to either invoke or not invoke Fifth Amendment and may waive such right. *Lawry v. State*, App., 330 So.2d 791 (1976).
Covering two codefendants, as part of plea bargain, to invoke Fifth Amendment rights and not give testimony, which might have been exculpatory, if subpoenaed by defendant under threat of imposition of greater sentences by court in pending cases against codefendants and under threat of prosecution for other crimes if they testified

918.15 Repealed by Laws 1980, c. 80-75, § 4, eff. July 1, 1980.

Laws 1980, c. 80-75, § 4, repealed provisions designated in Fla.St.1979 as § 918.15(1) as well as Fla.St.1979, § 918.15 as amended by Laws 1979, c. 79-336 and c. 79-344. Section 918.15 was added by Laws 1977, c. 77-312, § 4.

amounted to suppression of evidence by State and required reversal of defendant's conviction and defendant's discharge since improper plea bargain would infect new trial to same degree that it infected first one. *Id.*

2. Indictment and Information

Charge of causing witness to be placed in fear was not required to allege that defendant knew that trial proceeding or investigation was pending but was defective for failure to allege that defendant knew that victim was a witness and to allege some connection between defendant's actions and victim's status as witness. *State v. Murray*, App., 349 So.2d 707 (1977).

Information charging conspiracy to tamper with witness was not insufficient because alleged material time was period between September 9 and September 23, nor because nature and description of the "official proceeding or investigation" in which named witness was to testify were not set forth. *State v. Burkett*, App., 341 So.2d 862 (1977).

For provisions pertaining to mental competence to stand trial, see, now, § 916.12.

918.16 Sex offenses; testimony of person under age 16; courtroom cleared; exceptions

In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.
Laws 1977, c. 77-312, § 28, eff. July 1, 1977.

Law Review Commentaries
Raising issue of competency to stand trial: Procedures and consequences. *Michal H. Kapp*, 52 Fla.Bar J. 49 (1977).

Library References
Criminal Law § 636.
C.J.S. Criminal Law § 963.

918.17 Sexual battery or child abuse cases; videotaping of testimony of victims under age 12 permitted

(1) Upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape out of open court the testimony of a child 12 years of age or younger who has been the victim of a sexual battery under s. 794.011 or to videotape the testimony of a child 12 years of age or younger who has been the victim of aggravated child abuse under s.

1975

827.03 or child abuse under s. 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:

- (a) The victim of the offense is a child 11 years of age or younger; and
 - (b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.
- (2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.
- (3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

Laws 1979, c. 79-09, §§ 1 to 3, eff. May 22, 1979.

Laws 1979, c. 79-09, § 3, provides:
"Rule 3.190(J), Florida Rules of Criminal Procedure, is hereby repealed insofar as it is inconsistent with the provisions of this act."

Cross References
Motion to take deposition to perpetuate testimony, see Criminal Procedure Rule 3.190(J).

CHAPTER 919. CONDUCT OF JURY

919.01 to 919.22 Repealed by Laws 1970, c. 70-339, § 180

For superseding provisions contained in 1972 Florida Rules of Criminal Procedure, see, now, Rules 3.370, 3.391 et seq.

CHAPTER 921. SENTENCE

Sec. 921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement (New).	Sec. 921.241 Felony judgments; fingerprints required in record (New).
---	---

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

FLORIDA STATUTES

278 § 16A PROCEEDINGS IN CRIMINAL CASES

§ 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Historical Note

St. 1923 c. 251.

St. 1931 c. 205.

Law Review Commentaries

Right to public trial. 17 Annual Survey of Mass. Law, Boston College, p. 263 (1970).

Library References

Criminal Law C-635.
C.J.S. Criminal Law § 963.
Comments.

Sequestration of witnesses, see M. P.S. vol. 19, Hughes, § 109.

Exclusion of public from certain trials, M.P.S. vol. 30, Smith, § 1031.

Notes of Decisions

In general 2
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Public trial 5
Requisites of proceedings 3
Validity 1

ty. Com. v. Marshall (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 848;
Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

3. Requisites of proceedings

Trial in chambers of three defendants for rape and abuse of female child under 16 years of age, by jury, with testimony taken in their presence and complete stenographic record available to them and without exclusion of any person whom any defendant desired to have present did not deny defendants any rights under the state constitution. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

4. Persons with a direct interest

Under this section providing that court may exclude general public, admitting only such persons as may have a "direct interest" in trial for crime involving sex, committed against minor

1. Validity

This section does not violate due process of law clause of federal Constitution. U.S.C.A. Const. Amend. 14. Melanson v. O'Brien (CA.1951) 191 F.2d 963.

This section does not violate the provision of the state constitution prohibiting defendant from being deprived of his life, liberty or estate but by law of the land. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

2. In general

This section is to be strictly construed in favor of general principle of public-

Monday, November 30, 1981

Should Minor's Testimony Be Secret?

Court Faces Rape Victim Privacy Issue

By DAVID LAUTER

National Law Journal Staff Reporter

WASHINGTON — The issue of how much privacy to give the victims of rape — one of the most onerous questions a newspaper editor faces — has been placed before the Supreme Court.

The court has agreed to hear a challenge to a Massachusetts law that mandates closed courts during the testimony of rape victims who are minors. The case gives the court an opportunity to clear up what many lawyers consider serious contradictions between two earlier press freedom cases.

As interpreted by the Massachusetts Supreme Judicial Court, the commonwealth's law mandates closure of the court to press and public during testimony of a minor in rape cases and gives the trial judge discre-

tion to close the rest of the trial and to seal the trial transcript. The Supreme Court has agreed to take jurisdiction in an appeal by the Globe Newspaper Co., publisher of the Boston Globe, from a decision by the Massachusetts high court upholding the constitutionality of the law. *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 81-811.

tion to close the rest of the trial and to seal the trial transcript. The Supreme Court has agreed to take jurisdiction in an appeal by the Globe Newspaper Co., publisher of the Boston Globe, from a decision by the Massachusetts high court upholding the constitutionality of the law. *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 81-811.

In two recent cases, the Supreme Court has ruled that the Sixth Amendment does not guarantee press access to pretrial hearings but that the First Amendment may guarantee access to trials. The Globe maintains that both amendments should be read to forbid a law that orders courts closed without a hearing regardless of whether the

that the two decisions are hard to reconcile.

Although Gannett concerned only pretrial proceedings, many reporters and attorneys have concluded that the court's ruling eliminated any hope that the press could sustain a Sixth Amendment claim of access to trials. But Globe attorney James F. McHugh of Boston's Bingham, Dana & Gould, said he disagreed with that impression, and the Globe has pressed both First and Sixth Amendment claims.

Press attorney Floyd Abrams of New York's Cahill Gordon & Reindel agreed with Mr. McHugh's decision. "The jurisprudential underpinnings of Gannett have been so eroded by *Richmond* that I think it was a sound decision," Mr. Abrams said.

Mr. Abrams ascribed the apparent

contradictions in the court's opinions to the lack of "a perfect fit under either the Sixth Amendment or the First Amendment." On the other hand, he said, the justices appear to agree that "the notion that courts may routinely be closed is anathema to our history and is unacceptable in practical terms."

The nature of the Globe's arguments should allay the fears of many in the press that in appealing to the current Supreme Court the Globe may be jeopardizing the rights the press already has established, Mr. Abrams said.

The Globe has not challenged a judge's right to close rape trials in some cases, but has concentrated its argument on the mandatory nature of

the Massachusetts law, arguing that the law must at least provide for a hearing to consider whether other methods short of closing the court could be used to protect victims' privacy and further the state's interest in encouraging rape victims to testify.

The Massachusetts high court accepted state arguments that hearings inevitably would become detailed "side trials" that would subject the potential witnesses to exactly the sort of pressure the law was designed to avoid. The Globe has argued that such extensive hearings would not be required in all cases. Mr. McHugh conceded that the nature of the hearings the Globe would consider sufficient will need more clarification.

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County of Norfolk, 81-611.

In two recent cases, the Supreme Court has ruled that the Sixth Amendment does not guarantee press access to pretrial hearings but that the First Amendment may guarantee access to trials. The Globe maintains that both amendments should be read to forbid a law that orders courts closed without a hearing regardless of whether the defendant or the victim desires closure. Attorneys for both the Globe and the state agree that the mandatory aspect of the Massachusetts law appears to be unique.

In the case that gave rise to the Globe's challenge, Albert T. Aladjem Jr. was charged with raping and sodomizing three high school girls, aged 15, 16 and 17, in Wellesley, Mass. *Commonwealth v. Aladjem*, 73102-9. The entire trial, in which Mr. Aladjem was acquitted, was closed by Judge Robert V. Mulkern. Defense counsel noted exceptions to the judge's order excluding the public, and the district attorney in the case said, after consulting with the alleged victims, that the state would waive its rights to exclude the press.

A Personal Right

Exactly what rights the press and public have to attend trials has remained unclear despite two previous Supreme Court rulings. In 1979, in *Gannett v. DePasquale*, 443 U.S. 368, the court held that the Sixth Amendment's guarantee of a "public trial" is a personal right of the defendant that can be waived and that the press cannot invoke to gain access to pretrial hearings. But in 1980, in *Richmond Newspapers v. Virginia*, 448 U.S. 555, the court ruled that the right to attend criminal trials was, at least in most cases, guaranteed by the First Amendment.

No opinion commanded a majority in the Richmond case, and the court did not clarify the circumstances under which a judge could close a trial. Moreover, although *Richmond*, which concerned trials, did not overrule *Gannett*, which concerned pretrial hearings, many press attorneys find



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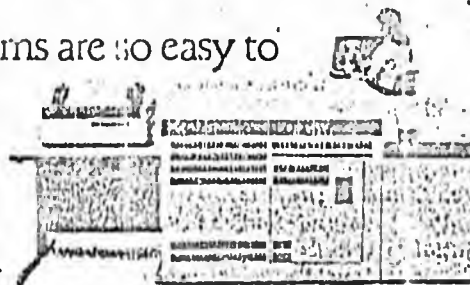
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A174

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. HB 576
 Title An Act Permitting the Videotaping of Testimony
 Requested by House Judiciary Committee Date 1/8/82

II. FISCAL DETAIL
 Agency Affected Alaska Court System
 Program Category Affected _____
 BRU, Program, or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)
EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

HB 576 allows the use of video taped testimony in certain cases, or the exclusion of the public during certain testimony. Neither of these elements should have a fiscal impact on the Alaska Court System. However, the District Attorney or other agencies choosing to utilize videotaped testimony should budget for the necessary cameras, recorders, and playback equipment.

IV. DATE 1/12/82 PREPARED BY Richard P. Barrier
 AGENCY Alaska Court System
 PHONE 264-0545
 Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 576
 Title Videotaping of testimony of victims of sexual assault
 Requested by House Judiciary Committee Date 1/7/82

II. FISCAL DETAIL

Agency Affected Department of Law
 Program Category Affected Administration of Justice
 BRU, Program, Or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

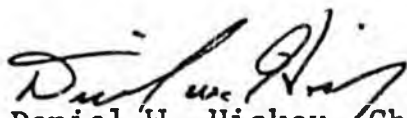
	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill authorizes the videotaping of the testimony of a young victim of a sexual assault outside the presence of the jury for playback at a criminal trial. The bill also permits the public to be excluded from a criminal trial under limited circumstances when a young victim of a sexual assault testifies in person. The bill should not result in any additional expenditures.

IV. DATE January 8, 1982 PREPARED BY  Chief Prosecutor
 AGENCY Department of Law
 Original: Legislative Finance PHONE 465-3429
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

JAY S. HAMMOND, GOVERNOR

POUCH N
ROOM 312, GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811

PHONE:

March 11, 1982

The Honorable Ramona Barnes
House of Representatives
Pouch V
Juneau, Ak. 99811

Dear Representative Barnes:

The Council on Domestic Violence and Sexual Assault would like to express their strong support of legislation which will permit young victims of sexual assault to have their testimony videotaped instead of having such victims be further traumatized by appearing in a public court.

Because of the trauma of such an experience for a young victim, the Council has determined that videotape legislation is of the highest priority.

Your assistance will be appreciated.

Sincerely



Betsey W. McGuire
Executive Director

BWMc

Proposed change to Sec. 14, line 23, page 9.

*Sec. 14, AS 28.35.032 is amended by adding new subsections to read:

(f) Refusal to submit to a chemical test of breath under (a) of this section is a class B misdemeanor. It shall be a bar to prosecution under this subsection that the defendant agreed to and submitted to a chemical test of his blood under (h) of this section.

Proposed insertion at line 22, page 1

Sec. AS 12.25.033 is amended to read:

Sec. 12.25.033. A peace officer may arrest a person without a warrant, whether or not the offense is committed in the presence of the officer, when the officer has probable cause to believe that the person to be arrested has committed the crime of operating a motor vehicle in violation of AS 28.35.030, AS 05.25.060(b), or a similar city or borough ordinance, if the violation is alleged to have occurred less than eight hours before the time of arrest.

Sec. AS 05.25.060 is amended to read:

Sec. AS.25.060. Prohibited operation. (a) A person may not operate a watercraft whether for recreational purposes or any other purpose or manipulate water skis, a surfboard, or a similar device on the waters of the state in a reckless or negligent manner so as to endanger the life or property of another person.

(b) A person may not operate a watercraft whether for recreational purposes of any other purpose or manipulate water skis, a surfboard, or a similar device on the waters of the state [WHILE UNDER THE INFLUENCE OF ANY INTOXICATING LIQUOR, NARCOTIC DRUG, BARBITUATE OR MARIJUANA.]

(1) While under the influence of intoxicating liquor, depressant, hallucinogenic, stimulant, or narcotic drugs, as defined in AS 17.10.230(13) and AS 17.12.151(3);

(2) when there is 0.10 percent or more by weight of alcohol in his blood or 100 milligrams or more of alcohol per 100 milliliters of his blood, or when there is 0.10 grams or more of alcohol per 210 liters of his breath; or

(3) while he is under the combined influence of intoxicating liquor and another substance.

(c) For the purpose of (b) of this section, AS 28.35.033 shall apply to calculation of the amount of alcohol in breath or blood.

*Sec. AS 05.25.090 is amended to read:

Sec. 05.25.090. Penalties. A person who violates any provision of this chapter is guilty of [a] an A misdemeanor [AND IS PUNISHABLE BY A FINE OF NOT MORE THAN \$500, OR BY IMPRISONMENT OF NOT MORE THAN SIX MONTHS, OR BY BOTH, FOR EACH VIOLATION].

Questions to settle in sub-committee on HB438:

1. What shall the minimum period be for first offense - considering "good time"? "120 consecutive hours" in present draft, pg. 6, line 18.
2. Shall 3rd, 4th, 5th, etc. be a C felony? It is in present draft, pg. 6, line 15.
3. What shall minimum sentence be for the felony? 120 days (90 w/good time) in present draft, pg. 7, line 1.
4. Shall the "B misdemeanor" rule for B.A. refusal apply to all cases where defendant was D.W.I? Present draft, pg. 9, line 24 does
5. Shall blood seizures be allowed for any case where defendant was D.W.I? Present draft, pg. 10, line 6.
6. Shall prosecution of "B misdemeanor" for B.A. refusal be barred if blood sample willingly given?

Proposed change to Sec. 14, line 23, page 9.

*Sec. 14, AS 28.35.032 is amended by adding new subsections to read:

(f) Refusal to submit to a chemical test of breath under (a) of this section is a class B misdemeanor if the crime charged is a result of the event is a violation of AS 28.35.030. It shall be a bar to prosecution under this subsection that a chemical test of the defendant's blood was administered under (h) of this section and admitted into evidence at a criminal trial of the charge under AS 28.35.030.

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

JAY S. HAMMOND, GOVERNOR

POUCH N
ROOM 312, GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811

PHONE:

February 1, 1982

The Honorable Ramona Barnes, Chair
Judiciary Committee
House of Representatives
Pouch V
Juneau, Ak. 99811

Dear Representative Barnes,

The Council on Domestic Violence and Sexual Assault has reviewed HB 576, An Act "permitting the videotaping of, or the exclusion of the public during, testimony of young victims".

While the Council totally supports the concept of the bill, in order to protect the constitutionality of the legislation, it would prefer that the bill be separated into two bills. If they are separated and challenges occur, then the whole concept would not be lost.

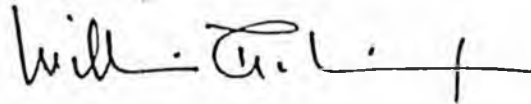
HB 576 gives a great deal of discretion to the Courts which is questionable for full protection of all victims and Page 1, Section 1(a)(2) does not eliminate the stress for the young victim as in order to make a determination of "suffering severe emotional stress", the victim would probably have to be diagnosed by a psychiatrist or psychologist, which once again creates trauma by having to repeat the story again.

Page 3, Sec.1(b)(5), line 1, indicates that "counsel for the child" could be at the hearing; does this mean an Attorney, a Guardian ad litem or is it intended to mean a friend of the child? Clarification is needed.

It is also important that not only sexual assault be included in this legislation, but it is also important that incest be specifically referred to in the title.

If you have any questions, please feel free to call Betsey W. McGuire, Executive Director for the Council at 465-4356.

Sincerely



William R. Nix, Chair

(305)

Simon

~~Stack~~

Steckel

547-7240

Mitt

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547 - 5200

918.16 closed courtroom

- no case law
- it is used - never challenged -
- used all the time
- standard pro.
- depends on judge - why someone
- people kept ...
- others - will lock ~~up~~ courtroom -

parties in it now.

- may do some thing of

918.17 videolisting

no case law at all

never personally seen it used.

Woman who is expert - Susan ->

being operation -

2 cites -

~~AD~~

Am. Decisions ~~AD~~ 1977

C 312

Am. Decisions AD 1979 C 69



DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

JIM SMITH
Attorney General
State of Florida

December 16, 1981

William D. Cook
Counsel for House Judiciary Committee
Juneau, Alaska 99811

Re: §§ 918.16 and 918.17, Fla.Stat. and
Fla.R.Crim.P. 3.190(j)

Dear Mr. Cook:

This letter has been prepared pursuant to your recent letter pertaining to §§ 918.16 and 918.17, Fla.Stat.

The Department of Legal Affairs, while actively engaged in reviewing proposed legislation, does not take an active role in preparing legal briefs and opinions on a prospective piece of legislation. Therefore, I have taken the liberty of forwarding your letter to Dr. Morris, Clerk, House of Representatives, for further consideration. I am sure that he or members of his staff will be able to provide you with any and all information prepared during the pendency of said legislation.

Sincerely,

Jim Smith
Attorney General

Carolyn M. Snurkowski
Assistant Attorney General

CMS/sw

Asper
12-1449

Asper
12-1449

heard 2/3 vote
@ home per Art IV §15
of Const.

Introduced: 5/15/81
Referred: Judiciary

BY THE RULES COMMITTEE
BY REQUEST (for the Task
Force on Violent Crime)

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act permitting the videotaping of, or the exclu-
7 sion of the public during, testimony of young victims
8 of sexual assault or sexual abuse of a minor; and
9 changing Rule 804, Alaska Rules of Evidence relating
10 to exceptions to the hearsay rule."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 12.45 is amended by adding new sections to read:

13 Sec. 12.45.047. VIDEOTAPING OF TESTIMONY BY YOUNG VICTIM OF
14 SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice to the defendant,
15 the state may apply to the court for an order allowing videotaping of
16 the testimony of a child who is the alleged victim of sexual assault in
17 any degree or who is the alleged victim of sexual abuse of a minor.
18 The order may be granted if the court finds that

19 (1) the child was 16 years of age or younger at the time of
20 the sexual assault; and

21 (2) there is a substantial likelihood that the child will
22 suffer severe emotional distress if required to testify in open court
23 at the trial; there is a presumption that a child who is under the age
24 of 16 at the time of an alleged sexual assault or sexual abuse will
25 suffer severe emotional distress if required to testify in open court,
26 which may only be overcome by the presentation of evidence to the
27 contrary at the time the application for an order excluding the public
28 is considered. ?

29 (b) If the order is granted, the trial judge shall preside at the

HB 576

1 videotaping proceeding and shall rule on all questions as if at trial.
2 The defendant shall be afforded all rights applicable to defendants
3 during trial, including the right to an attorney and the right to
4 confront and cross-examine the witness.

5 (c) Videotaped evidence taken in accordance with this section is
6 admissible in evidence in the criminal trial for sexual assault in any
7 degree or for sexual abuse of a minor.

8 Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY
9 BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice
10 to the defendant, the state may apply to the court for an order exclud-
1 ing the public from the courtroom during the ^{but video played} testimony of a child who
2 is the alleged victim of sexual assault in any degree or who is the
3 alleged victim of sexual abuse of a minor. The order may be granted if
4 the court finds that

5 (1) the child was 16 years of age or younger at the time of
6 the alleged sexual assault or sexual abuse; and

7 (2) there is a substantial likelihood that the child will
8 suffer severe emotional distress if required to testify in open court
9 at the trial; there is a presumption that a child who is under the age
10 of 16 at the time of an alleged sexual assault or sexual abuse will
1 suffer severe emotional distress if required to testify in open court,
2 which may only be overcome by the presentation of evidence to the
3 contrary at the time the application for an order excluding the public
4 is considered.

5 (b) In this section "public" means all persons except

- 6 (1) the judge presiding over the trial;
- 7 (2) the members of the jury;
- 8 (3) the defendant and his counsel;
- 9 (4) counsel for the state;

10 COMMITTEE COPY

1 (5) counsel for the child;

2 (6) the parents or legal guardians of the child; and

3 (7) court personnel essential for the taking of the testi-

4 mony.

5 * Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of
6 changing Rule 806, Alaska Rules of Evidence by adding the videotaped evidence
7 of a young victim of sexual assault or sexual abuse of a minor to the list
8 of exceptions to the hearsay rule.

9
10 *Bohiff; prosecutions "in Ct. Officer-witness"*
Ev Rule 615 (3)

PLEASE NOTE: THE FOLLOWING PAGES WERE TREATED
AS A UNIT IN THE ORIGINAL DOCUMENT

Register No. 175 at 41827-41828 (9 September 1975). Nonetheless, we do not reject defendant's position on that basis. Rather, we note that even if defendant does establish that blacks do not register in proportion to their share of the community population, which is all he seeks to show, he will have failed to demonstrate any systematic exclusion of blacks for jury duty. Although the registered voters list from which jurors are drawn may not parallel exactly the proportion of each minority within the community, that in no way establishes or even demonstrates systematic exclusion. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). As we have stated:

"A defendant is not entitled to a jury which is composed of, with mathematical precision, the exact proportion of his race as exists in the general population. All that is required is a jury selected by a process where the members of his race are not systematically excluded." *State v. Taylor*, 109 Ariz. 267, 272, 508 P.2d 731, 736 (1973).

The matter is remanded for a resentencing hearing pursuant to this opinion and for a hearing pursuant to Rule 32, Arizona Rules of Criminal Procedure (1973), on the question of effective assistance of counsel.

Remanded.

STRUCKMEYER, V. C. J., and HAYS, HOLOKAN and GORDON, JJ., concurring.



114 Ariz. 16
The STATE of Arizona, Appellee,

v.
Timothy REID, Appellant.

No. 3085.

Supreme Court of Arizona, In Banc.

Nov. 5, 1976.

Defendant was convicted in Superior Court, Pima County, Cause No. A-25732,

Mary Anne Richey, J., of first-degree murder, armed robbery, armed burglary, robbery, burglary, and theft of a motor vehicle with intent to temporarily deprive the owner, and he appealed. The Supreme Court, Cameron, C. J., held, *inter alia*, that harmless error occurred when defendant was required to wear shackles during the trial, that defendant was not entitled to have new counsel appointed at his request, and that the court properly admitted into evidence the video taped testimony of a prosecution witness.

Affirmed.

Struckmeyer, V. C. J., dissented and filed opinion.

1. Criminal Law ⇨121

Trial court did not abuse its discretion in refusing defendant's motion for change of venue due to pretrial publicity in prosecution for murder and other crimes.

2. Judges ⇨51(2)

Where attorney for defendant and attorney for State agreed to date of trial and a judge who would try case, defendant's subsequent motion for change of judge was not timely. 17 A.R.S. Rules of Criminal Procedure, rule 10.4.

3. Judges ⇨39

Defendant in murder prosecution had no fundamental right to approve judge who would try him.

4. Judges ⇨39

While defendant in criminal case may be entitled, as constitutional right, to impartial judge, he is not entitled to any particular judge and has no constitutional right to change of judge.

5. Attorney and Client ⇨88

Although better practice would be for counsel to consult with his client before agreeing to trial before a particular judge, such decision can usually be more intelligent made by counsel than client and

counsels' agreement before part of actual but unfair trial,

6. Constitut

While e as matter c from repres munity, Con ic exclusion panels and from those y lence makeu no blacks a that blacks A.Const. Ar

7. Jury ⇨

Defend to make pri absence of

8. Criminal

Absent contained in court's diser shackled du ror was har dence of de

9. Criminal

Person sel is not e choice.

10. Criminal

Trial co in refusing fendant in fendant's re time when resulted in

11. Witness

Confinc days, not ch oppressive i in most e §§ 13-1841

12. Criminal

Use of not prerequ fort on par

see p. 149

counsel's agreement to have matter tried before particular judge is, absent showing of actual bias and prejudice resulting in unfair trial, binding upon client.

6. Constitutional Law ⇐267

While criminal defendants are entitled, as matter of due process, to jury drawn from representative cross section of community, Constitution only forbids systematic exclusion of identifiable classes from jury panels and from juries ultimately drawn from those panels; defendant may not challenge makeup of jury panel merely because no blacks are represented, but must prove that blacks were, in fact, excluded. U.S.C. A.Const. Amends. 6, 14.

7. Jury ⇐120

Defendant in murder prosecution failed to make prima facie case of discriminatory absence of blacks in jury panel.

8. Criminal Law ⇐637, 1166.11

Absent some compelling reason not contained in record, it was abuse of trial court's discretion to allow defendant to be shackled during trial before jury; such error was harmless, however, in view of evidence of defendant's guilt.

9. Criminal Law ⇐641.10(1)

Person receiving court-appointed counsel is not entitled to have attorney of his choice.

10. Criminal Law ⇐641.10(2)

Trial court did not abuse its discretion in refusing to appoint new counsel for defendant in murder prosecution where defendant's request for such counsel came at time when granting of request would have resulted in delay of trial.

11. Witnesses ⇐20

Confinement of witness, even for few days, not charged with a crime, is harsh and oppressive measure which is justified only in most extreme circumstances. A.R.S. §§ 13-1841, 13-1843, 13-1843[B, C].

12. Criminal Law ⇐543(2)

Use of material witness statute was not prerequisite to proof of good-faith effort on part of State to obtain prosecution

witnesses' presence at trial of defendant on charges of murder and other crimes, and prosecution therefore properly was allowed to read preliminary hearing testimony of such witnesses into evidence despite failure to invoke such statute. A.R.S. §§ 13-1841, 13-1843, 13-1843[B, C].

13. Criminal Law ⇐1044.2(2)

Proper motion in limine will preserve defendant's objection to identification testimony on appeal even though not renewed at trial.

14. Criminal Law ⇐1169.1(5)

While trial court in murder prosecution should have set hearing to determine if identification of defendant by witness was tainted by pretrial procedures, including observation of defendant prior to preliminary hearing, error was harmless beyond reasonable doubt.

15. Criminal Law ⇐662(4)

Murder defendant's Sixth Amendment right to confrontation was not violated when trial court allowed testimony of coroner's pathologist to be video taped and introduced at trial after showing that pathologist was to be on "extended out-of-county travel" during dates set for trial. 16 A.R.S. Rules of Civil Procedure, rule 30; 17 A.R.S. Rules of Criminal Procedure rules 15.1 et seq., 15.3, 15.3, subd. c; U.S.C.A.Const. Amend. 6.

16. Criminal Law ⇐662(4)

When considering whether to allow witness to testify by video tape in criminal trial, trial court must balance right of defendant to confrontation of witnesses and need of trier of fact to additional benefit of having particular witness testify in person with extent of need for witness to be away at time of trial; in weighing right of defendant and convenience of witness, court may take into consideration the occupation of the witness and nature of his testimony. 16 A.R.S. Rules of Civil Procedure, rule 30; 17 A.R.S. Rules of Criminal Procedure, rules 15.1 et seq., 15.3, 15.3, subd. c; U.S.C.A.Const. Amend. 6.

17. Criminal Law ⇨1171.1(1)

While county attorney acted improperly in withholding from defendant the fact that he had talked to witness and taken notes on such interview, such withholding of information was not prejudicial in view of fact that such witness' testimony was adduced at trial.

18. Criminal Law ⇨675

Record in prosecution for murder, armed robbery and burglary, robbery, burglary, and theft of motor vehicle with intent to temporarily deprive owner refuted defendant's contention that he was denied fair trial due to admission into evidence of numerous cumulative photographs and fingerprints. A.R.S. §§ 13-302, 13-451, 13-452, 13-641, 13-643, 13-672.

19. Criminal Law ⇨351(3)

Evidence of defendant's attempted flight was admissible in his prosecution for murder, burglary and robbery even though charges of obstructing justice were dropped; fact that attempted flight occurred at point remote in time from actual crime went to weight and not to admissibility of such evidence.

20. Criminal Law ⇨986

Record in homicide prosecution showed that trial court followed statutory provisions requiring that materials in presentence report be revealed except for material necessary for protection of human life, and that any material withheld could not be considered in determining existence of aggravating or mitigating circumstances. A.R.S. § 13-454.

21. Burglary ⇨49

Homicide ⇨354

Larceny ⇨88

Robbery ⇨30

No excessiveness was shown where defendant was sentenced to life imprisonment after conviction on murder count, received concurrent sentences of 60 years to life on armed robbery, armed burglary and robbery counts, 14 to 15 years on burglary count, and time served on theft of motor vehicle count. A.R.S. §§ 13-302, 13-451, 13-452, 13-641, 13-643, 13-672.

Bruce E. Rabbitt, Atty. Gen. by William J. Schafer III, Cleon M. Duke, and Frank T. Galati, Asst. Attys. Gen., Phoenix, for appellee.

Clay G. Damos, Tucson, for appellant.

CAMERON, Chief Justice.

This is an appeal by defendant Timothy Reid from verdicts of guilty to charges of first degree murder, A.R.S. §§ 13-451 and 452; armed robbery, A.R.S. §§ 13-641 and 643; armed burglary, A.R.S. § 13-302; robbery, A.R.S. § 13-641; burglary, A.R.S. § 13-302; and theft of a motor vehicle with intent to temporarily deprive the owner, A.P.S. § 13-672. Defendant was sentenced to life imprisonment on the murder count; received concurrent sentences of 60 years to life on the armed robbery, armed burglary and robbery counts; 14 to 15 years on the burglary count; and time served on theft of a motor vehicle count.

We must answer the following questions on appeal:

1. Did the court err in denying defendant's motion for change of venue?
2. Did the court err in denying defendant's application for a change of judge?
3. Was defendant denied his right to be tried by an impartial jury due to the fact that no blacks were on the panel from which the jury was selected?
4. Did the court err in requiring defendant to wear shackles during the trial?
5. Was defendant entitled to have new counsel appointed at his request?
6. Was the warrantless search of defendant's apartment an unlawful search and seizure?
7. Did the affidavit underlying the telephonic search warrant contain sufficient facts and circumstances to support a finding of probable cause?
8. Was the preliminary hearing testimony of witnesses Linda Hugood, Jacqueline Knight, and Meredith

Brown presence?

9. Did the court err in admitting evidence of Eleanor (Cari)?
10. Did the evidence of a prosecution on the part of Nancy de...?
11. Should a... on the part of Nancy de...?
12. Did the cumulative...?
13. Did the State of... flight?
14. Were the...?

On the evening proximately 9:00 entered the home of Miles, slipped pillows, bound the heads, bound the fingers, forced their hands, ransacked the home in minutes. Neither intruders' faces, visible, from seeing and arm, to say approximately 11 themselves and... were numerous cards, jewelry, a newly purchased which was colored blue vinyl top.

At approximately night, two black men, Mr. Joseph Mascara, west side of Tucson from the Miles spoke through a man whom he identified as Timothy Reid. Reid, with permission to use a car, observed the... which he described with a light color. He testified that

- Brown properly admitted into evidence?
9. Did the court err in denying defendant a hearing concerning the in-court identification testimony of Eleanor Callman and Joseph Mascari?
 10. Did the court properly admit into evidence the videotaped testimony of a prosecution witness?
 11. Should a mistrial have been granted on the basis of the testimony of Nancy de Muth?
 12. Did the court improperly admit cumulative evidence?
 13. Did the court improperly permit the State to introduce evidence of flight?
 14. Were the sentences imposed excessive?

On the evening of 30 May 1974, at approximately 7:00 p.m., one or more persons entered the home of Mr. and Mrs. Paul W. Miles, slipped pillowcases over the Miles' heads, bound their victims with coathangers, forced them to lie on the floor, and ransacked the house for approximately 45 minutes. Neither of the victims saw the intruders' faces, although Mr. Miles was able, from seeing one of the person's hand and arm, to say that he was black. At approximately 11:30 p.m., the Miles freed themselves and called the police. Missing were numerous items, including credit cards, jewelry, silverware, and Mr. Miles' newly purchased 1974 Ford Gran Torino, which was colored light blue with a dark blue vinyl top.

At approximately 10:00 p.m. on the same night, two black men came to the door of Mr. Joseph Mascari who lived on the southwest side of Tucson, approximately 3 miles from the Miles residence. Mr. Mascari spoke through a screen door to one of the men whom he identified at trial as defendant Timothy Reid eventually refusing him permission to use his telephone. Mr. Mascari observed the two men get into a car which he described as a fairly new sedan with a light colored body and a darker roof. He testified that the men sat in the car

which was parked across the street from his house for approximately 10 minutes before driving away.

At approximately 10:25 p.m., two black males, one of whom displayed a gun, walked through an open door at the home of Mr. and Mrs. Albert Gallman, a few blocks from the Mascari residence. The men ordered Mr. and Mrs. Gallman, who were in their dining room downstairs, to get down on the floor, one of the intruders threw a blouse over Mrs. Gallman's head. At the defendants' trials, Mrs. Gallman identified the men as Spencer Watson and Timothy Reid, stating that Reid carried the gun.

Once Mr. and Mrs. Gallman were on the floor, the two men demanded money; one of them searched through Mrs. Gallman's purse complaining when he discovered that it contained only \$5 and some credit cards. Meanwhile, the other went upstairs, fired a shot, and forced his way into the bedroom of Nancy de Muth, Mrs. Gallman's daughter. Nancy testified that the man pointed a gun at her and ordered her to lie face down on her bed. She then heard footsteps followed by a series of gunshots and Mr. Gallman crying out. At that point, she opened her window and slid down a pipe to the ground. At about the same time that the first shot was fired, Mrs. Gallman got up and ran out of the house.

At this point, the sequence of events between the intruders and Mr. Gallman is not clear. It is clear, however, that Mr. Gallman, a border patrolman, obtained a gun and fired twice before being shot 4 times in the back, and that he died as a result of his wounds. There was evidence to suggest that Mr. Gallman grabbed his revolver, which he usually kept in a briefcase in the living room, and fired at defendant Reid as Reid was exiting the house. According to this version of the facts, the codefendant Spencer Watson, coming down the stairs, saw Gallman firing at Reid and shot Gallman from behind.

At approximately 11:30 a.m. on 31 May, Reid and Watson were stopped for questioning by a uniformed police officer who

observed the two shaking a gate and then running away at the sight of a policeman. As the officer was attempting to frisk the two men for weapons, Reid ran away from the scene. The officer grabbed Watson by the arm, but as he looked up to follow Reid's flight, Watson struck him in the left temple and also ran off. The two suspects were apprehended separately following a brief search.

Reid and Watson were originally charged as codefendants. A defense motion to sever was granted on 29 July 1974, after the arraignment and omnibus hearing. On 6 September, a consolidated hearing was held on various motions, including defendants' motions to have a change of venue, to suppress evidence, statements and identification, and to declare the death penalty unconstitutional, as well as a motion by the State for videotape testimony. The court, by minute entry dated 10 September 1974, denied the defendants' motion for change of venue and their death penalty motion. The defendants were tried separately. Watson was found guilty of first degree murder; armed robbery; armed burglary; robbery and burglary; theft of a motor vehicle; and obstruction of justice. *State v. Watson*, 113 Ariz. —, 559 P.2d 121 (1976) filed this day. Reid was found guilty by a jury and from these verdicts, judgments, and sentences he appeals.

CHANGE OF VENUE

[1] Defendant contends that the trial court erred in refusing his motion for a change of venue asserting that the change of venue should have been granted based upon the publicity in the record and the jurors' responses to voir dire questioning when considered in conjunction with the inflammatory nature of the crime.

The standard for the granting of a change of venue for prejudicial pretrial publicity under Rule 10.3(b), Arizona Rules of Criminal Procedure (1973), which must be proved by the defendant, is that "the dissemination of the prejudicial material will probably result in the party being deprived of a fair trial." We have stated:

"* * * the trial court's ruling on a motion for change of venue will not be disturbed on appeal unless a clear abuse of discretion appears and is shown to be prejudicial to the defendant (citations omitted)" *State v. Ferrari*, 112 Ariz. 324, 332, 541 P.2d 921, 929 (1975).

This is true not only because the trial judge is better able to assess the demeanor of the jurors in answering the questions concerning the effect of pretrial publicity upon them and the decisions they will be asked to make, but also a trial judge is better able to know the attitudes and emotions present in the community concerning the case in question at the time of the trial than we would viewing a cold record at a later date. To persuade this court that the trial court abused its discretion in not granting a change of venue, a party has a heavy burden which defendant has not carried in the instant case. We have read the examination of the jury as well as the complete record. We find no abuse of the trial court's discretion in denying the motion for change of venue.

CHANGE OF JUDGE

Prior to trial, the attorney for defendant and the attorney for the State met and agreed to the date of the trial and the judge who would try the case. After numerous motions had been heard by the trial judge and had been ruled upon, the defendant moved, on the day of the trial and pursuant to Rule 10.2, Arizona Rules of Criminal Procedure (1973), for a change of judge.

Rule 10.4, Arizona Rules of Criminal Procedure (1973), provided in part at the time of Reid's trial:

"a. Waiver. A party loses his right under Rule 10.2 to a change of judge when he agrees to the assignment of the case to a particular judge or participates before him in an omnibus hearing, any subsequent pretrial hearing, a hearing under Rule 17, or the commencement of trial."

[2] Defendant's request was not timely according to the rule and the trial judge

was correct. The defendant's trial court consent to the matter.

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was correct in denying it as being untimely. The defendant, however, raised before the trial court and on appeal the question of his consent to his attorney's agreement to have the matter tried before Judge Richey:

"THE DEFENDANT REID: Your Honor, the prosecutor mentioned that an agreement was made concerning who the judge would be. I wasn't advised of this. I feel I should, they should have asked me or found out what I had to say in regard to this. There was no mention of this to me, and I feel for an agreement to be made, it has got to be made so me having some say so, you know, about it, because I am the one being tried here, not him. There wasn't no mention who the judge will be or that they had agreed that you would be judge. I wasn't aware it happened.

"THE COURT: Normally, Mr. Reid, I guess what happens is that counsel get together, who have tried many cases, and they kind of determine this.

The record may show as to what you said, that at the time this agreement was made, that you had no knowledge of it and that it was done by your, I guess, by counsel without your knowledge.

"MR. HAYES: That is correct, Your Honor. This motion for a change of judge really came to light recently.

"THE COURT: This is the first time I have heard anything about it until this morning.

"MR. HAYES: I can't say I sat down and actually talked with the Defendant in particular with regard to this Court because it is my feeling the Defendant doesn't know which judge or what judges or what courtroom any particular judge sits, and I felt that was the decision I had to make in this particular case and I think I did mention that to the Defendant. I can't say that I honestly sat right down with him and told him it would be in this court because I don't think in the beginning it

would have made any sense to him at that time because I don't think he knew anything about the judge in this particular division.

"THE COURT: The motion for a change of judge is denied at this time."

[3] Defendant contends that the right to approve the judge who is going to try him is a fundamental right and any waiver of that right must be measured by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and therefore be knowingly and intelligently made by the defendant himself. We do not agree.

[4, 5] While defendant in a criminal case may be entitled, as a constitutional right, to an impartial (and independent) judge, *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), he is not entitled, as a matter of right, to any particular judge, *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973), or a constitutional right to a change of judge. Although the better practice would be for counsel to consult with his client before agreeing to a trial before a particular judge, we concur with the trial judge that this is a decision that can usually be more intelligently made by counsel than the client. We hold that, in the instant case, counsels' agreement to have the matter tried before a particular judge is, absent a showing of actual bias and prejudice resulting in an unfair trial, binding upon the client. We find no error.

REPRESENTATIVE JURY PANEL

[6, 7] Prior to trial, the defendant objected to the absence of blacks in the jury panel from which the jury was drawn. He consequently asserts that he was denied a fair and impartial trial under the Sixth and Fourteenth Amendments. While criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross section of the community, *Whitus v. Georgia*, 285 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967), all the Constitution forbids is systematic exclusion of identifiable classes from jury panels and from the juries ultimately drawn from those panels. A de-

defendant may not challenge the makeup of a jury panel merely because no blacks are represented, but most prove that blacks were, in fact, excluded. *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). The defendant here failed to make a prima facie case of such discrimination at the trial level and we cannot consider it on appeal. *State v. Money*, 110 Ariz. 18, 514 P.2d 1014 (1973).

THE USE OF SHACKLES

[8] At the beginning of the trial, the following transpired:

"THE COURT: * * *

I want to speak to the Sheriff's Deputies in the presence of Mr. Reid. Mr. Reid has requested the right to take notes, and it is my understanding, and I may be wrong again, Mr. Reid, I am quoting you, that there will be no objection made to leg irons rather than handcuffs. Is there any problem with that?

"THE DEPUTY SHERIFF: No, Your Honor.

"THE COURT: So he can have his hands to use to take notes?

"THE DEPUTY SHERIFF: We can replace them with leg irons, Your Honor."

Later, during the questioning of the jury the following transpired:

"MR. HAYES: Your Honor, I talked to Mr. Reid briefly here and he has asked me to question. He wants to know why he has to have the shackles on and the handcuffs. He feels that it prejudices him in his case in front of the jury, being brought in front of the jurors in the hall here with the shackles on. I did personally observe that this morning. He has asked me to make a motion in his behalf that he be permitted to not have to wear the shackles or the handcuffs at least while in the courtroom.

"THE DEFENDANT REID: That's right.

"THE COURT: I will consider the matter. I will take it under advisement. I

do not make these rulings. I have to consider it with Security in this matter."

It would appear that defendant was kept in leg shackles throughout the remainder of the trial and we find nothing else in the record concerning the shackles which would justify the shackling of the defendant before the jury.

The decision whether to require defendant to be shackled is generally within the sound discretion of the trial court. *State v. Moore*, 110 Ariz. 404, 519 P.2d 1145 (1974). When, however, as here, the defendant objects to being tried in shackles or handcuffs there must be some reason in the record to support such actions. We find no such reasons in the instant record. Absent some compelling reason not contained in the record, we believe it was an abuse of the trial court's discretion to allow the defendant to be shackled during trial before the jury.

"It is the contention of the defendant that he was prejudiced by being manacled or 'handcuffed' before the jury by the Deputy Sheriff who was in charge of his custody. It was a rule at common law that a defendant being tried for a criminal offense had the right to make his appearance in court free from all shackles. Manaculating a person when there is no necessity to do so, and bringing him into court in the presence of the jury could not be too strongly condemned. *State v. Randolph*, 99 Ariz. 753, 408 P.2d 397 (1965); *State v. Williams*, 18 Wash. 47, 50 P. 580, 39 L.R.A. 821 (1897); *State v. Coursolle*, 255 Minn. 384, 97 N.W.2d 472, 75 A.L.R.2d 755 (1959). * * *" *State v. Robinson*, 6 Ariz.App. 419, 422, 433 P.2d 70, 73 (1967).

Although we have stated that it was error to continue the shackling over the objections of the defendant without something in the record to justify such action, we do not believe that it mandates reversal. The United States Supreme Court has recognized that "the sight of shackles and gags might have a significant effect on the jury's

feelings about the trial." *Illinois v. All*, 1057, 1061, 52 the United indicated the concerned it is defendant:

"Consequently embrace a conviction es, where the jury have recommended proscribed against him. The reason compulsion arise stand trial ments. That it is to produce the hope jury." *Ill.* 507, 96 S. 126, 132-

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feelings about the defendant * * *." *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353, 359 (1970). But the United States Supreme Court has also indicated that as far as jail clothing is concerned it is not always prejudicial to defendant:

"Consequently, the courts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire. The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Estelle v. Williams*, 425 U.S. 501, 507, 96 S.Ct. 1691, 1694-95, 48 L.Ed.2d 126, 132-133 (1976).

The United States Supreme Court in *Estelle v. Williams*, *supra*, then noted that the harmless error rule has been applied to trials where the defendant is in prison clothes:

"The Fifth Circuit, in this as well as in prior decisions, had not purported to adopt a *per se* rule invalidating all convictions where a defendant had appeared in identifiable prison clothes. That court has held, for instance, that the harmless-error doctrine is applicable to this line of cases. 500 F.2d [206], at 210-212. See also *Thomas v. Beto*, 474 F.2d 981 (CA5), cert. denied, 414 U.S. 871 94 S.Ct. 95, 38 L.Ed.2d 89 (1973); *Hernandez v. Beto*, 443 F.2d [634], at 637. Other courts are in accord. *Bentley v. Crist*, 469 F.2d [854], at 856; *Wait v. Page*, 452 F.2d 1174, 1176-1177 (CA10 1971), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803 (1972)." 425 U.S. at 506, 96 S.Ct. at 1694, 48 L.Ed.2d at 131.

We see no reason why the harmless error rule may not be applied to shackles as well as prison garb.

It is impossible, of course, for this court to ascertain whether the shackles in the instant case generated more sympathy or prejudice for defendant in the minds of the jury. Based on the rest of the evidence before the jury, however, we believe the shackling of the defendant was harmless error beyond a reasonable doubt and does not require reversal. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

REPRESENTATION BY COUNSEL

Defendant, as an indigent, was appointed counsel by the court. During the proceedings, he made several requests for a different attorney:

"MR. HAYES: Your Honor, Mr. Reid has indicated to me in the jury room out here, where I just had a brief opportunity to talk to him before this hearing, that he didn't want to have me represent him anymore.

"THE COURT: Mr. Reid, you will be given the opportunity to state anything you want at the time set for the hearing on the motion to withdraw, and at that time you can state anything you want. I don't feel this is the appropriate time for that to be done.

"MR. REID: I feel it is the appropriate time in my trial not to proceed under these conditions.

"THE COURT: As I indicated—

"MR. REID: (interrupting) if I don't want him as my attorney he ain't got to be my attorney.

"THE COURT: The Court decides that, I think you realize that Mr. Watson—

"MR. REID: (interrupting) They have to decide that they go ahead on this.

"THE COURT: No. I am not going to decide it, and I am going to go ahead with this at this time.

"MR. REID: How?

"THE COURT: Just by—

"MR. REID: (interrupting) How do I have to accept him as my attorney when I don't want him?

"THE COURT: Because, Mr. Reid, he is appointed by the Court.

"MR. REID: I want to know the reason behind this.

"THE COURT: Very well. If you keep quiet a minute, I will tell you the reason. He is appointed by the Court to represent you.

"MR. REID: When was he appointed? They didn't bring me over here in court when they appointed him. He told me he would send an attorney to talk to me and he come over and talked to me and as things went with the law, he was my attorney but no judge appointed him to me.

"THE COURT: The record shows, and I have gone over it, that he was appointed attorney, and when you have an attorney appointed, Mr. Reid, you don't have the right to pick and choose your attorney. The Court appoints an attorney to do this. Mr. Hayes, in the opinion of this Court, and I am sure all the Courts here, is a very competent attorney that has had a great deal of experience in criminal matters.

"MR. REID: My opinion don't mean nothing then, huh?

"THE COURT: No, sir, other than at the time we have a hearing, if you can raise specific points, then the Court will listen to you at that time.

"MR. REID: Do you want to hear them?

"THE COURT: No. This isn't a trial. Let me explain it to you again. I am going to go ahead with this hearing. If Mr. Hayes is allowed to withdraw as your counsel and another attorney is appointed, then in that event this hearing would have no part of your lawsuit. If he isn't allowed to withdraw, the Court has ruled that this is a proper way.

"MR. REID: Why won't he be allowed to withdraw? I don't want him. What kind of trial is that?

"THE COURT: The Court determines whether he withdraws or not. You don't or he doesn't, the Court does."

The court also appointed a second attorney to assist the first attorney and objections were made by the defendant to the second attorney.

[9,10] Defendant contends that the court abused its discretion in failing to grant his various requests for a new attorney. As defendant admits in his brief, a person receiving court appointed counsel is not entitled to have the attorney of his choice. *State v. DeLuna*, 110 Ariz. 497, 520 P.2d 1121 (1974). In this case the request of the defendant came at a time when the granting of the request would have resulted in a delay of the trial. The court refused to appoint new counsel though it did appoint a second attorney to assist in Mr. Reid's defense. We find no error.

THE WARRANTLESS SEARCH AND PROBABLE CAUSE FOR ISSUANCE OF THE TELEPHONIC WARRANT

Evidence obtained as a result of the search of the apartment at 8570 East Cooper Street was introduced at trial. This same evidence was admitted in the companion case of *State v. Watson*, supra. On appeal, both Reid and Watson raise the same objections to this search and the basis for the search warrant. These objections have been fully considered and rejected in *Watson*, supra. The search was conducted pursuant to valid consent given by Linda Hugood and the affidavit for the telephonic warrant was sufficient for a finding of probable cause. See *State v. Watson*, supra. We find no error as to the defendant Reid.

ADMISSION OF PRELIMINARY HEARING TESTIMONY

Defendant argues that the trial court erred in allowing the prosecution to read into evidence the preliminary hearing testimony of Linda Hugood, Jacqueline Knight, and Meredith Brown. This objection was also raised in the companion case of *State v. Watson*, supra. We there held that the State had made a "good faith effort" to obtain the witnesses' presence at trial and

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that the admission of the testimony was not error. We reaffirm that holding here.

In addition to the arguments considered in *Watson*, supra, defendant Reid also argues that the State is precluded from establishing a good faith effort to secure the witnesses' appearance due to its failure to invoke the Arizona material witness statutes which read as follows:

"§ 13-1841. Undertaking by witnesses
"If the defendant is held to answer after preliminary hearing, the magistrate may require each material witness for the defendant if so requested by him, to enter into a written undertaking to appear and testify at the trial of the action or to forfeit such amount as the magistrate fixes."

And:

"§ 13-1843. Procedure when witness does not give security

"A. If a witness required to enter into an undertaking to appear to testify either with or without security refuses compliance with the order for that purpose, the magistrate shall commit him to custody until he complies or is legally discharged."

[11] There is considerable question whether any of the witnesses would have been able to post sufficient security to insure their appearance. The practical effect of invoking the statute, then, would quite likely have been the incarceration of the three witnesses. A.R.S. § 13-1843. Confinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified only in the most extreme circumstances. We note also that under A.R.S. § 13-1843(B) and (C), a material witness can be detained for a maximum of three days, and that during those three days the witness may be "conditionally examined" on application of either party. Testimony given on conditional examination

"* * * may be admitted in evidence at the trial under the same conditions and for the same purpose as the testimony of a defendant or witness testifying at a

preliminary hearing." A.R.S. § 13-1843(B).

[12] The use of the material witness statute as urged by defendant would have produced the same ultimate result. We hold that use of the material witness statute is not a prerequisite to proof of a good faith effort on the part of the State to obtain the witnesses' presence at trial.

THE IDENTIFICATION TESTIMONY

Prior to trial defendant moved to suppress any in-court identification testimony of Eleanor Gallman and Joseph Mascari.

Mrs. Eleanor Gallman, wife of the murder victim, had testified at the preliminary hearing and identified the defendant Reid. At the preliminary hearing she testified that she had been told previously by the county attorney's office that Watson and Reid would be there and she observed the two defendants handcuffed and in jail clothes prior to her identification testimony at the preliminary hearing. She also testified that she had seen a picture of one of the two defendants in a newspaper on the first day after the incident. Mrs. Gallman was cross-examined by the attorneys for Reid as to the basis of her identification. Both at the preliminary hearing and at the trial, her identification of the defendant as one of the men who participated in the robbery was firm and unwavering. Mr. Joseph Mascari did not testify at the preliminary hearing but did testify at the trial.

The defendants filed a motion to suppress the two identifications and asked for an evidentiary hearing on the matter of the identification of the defendant by both Mrs. Gallman and Mr. Mascari.

At the hearing on the motion the following transpired:

"MR. BROGNA: Your Honor, the Defendants have filed a motion to suppress identification, especially as to Mrs. Gallman. I have her down here under subpoena today. It is not my motion but I would like to make an argument at this time that it is not a proper motion.

* * * * *

"MR. DAVIS: Your Honor, the reason we requested this hearing is particularly the circumstances surrounding the actual identification of these particular clients in this case, our clients. Referring more particularly, the authority for this is the Stovall case, which is a United States Court case. It is our position, true, there was no line-up, but in fact, the first contact that Mrs. Gallman had with the Defendants in this case was at the preliminary hearing. At that point in time certain questions were asked of her when she got on the stand regarding her identification, and it was brought out quite clearly that she was influenced by the fact that our clients were brought in, shackled, similar clothing, and I asked her specifically myself at the preliminary hearing, and the transcript will bear this out, whether or not she had seen any photographs of these people prior to the hearing, and she contradicted herself on several occasions. First she said, no, she did not and then she said, 'I saw photographs in the paper but I paid no attention to them and didn't read the article.' and then she contradicted herself and said she had read the headlines in the articles and saw the photographs. It is our position, Your Honor, that this particular arrangement unfortunately that was occasioned by these articles and by the fact that our clients were paraded in front of her shackled, the same clothing, and the only ones there that were shackled like this, taken into the very courtroom that she was taken to to testify, led her to the identification of these two individuals, and we feel that her identification was tainted in that regard and is the reason that we have made a motion to suppress the identification. * * *

The court refused to allow a hearing on whether Mrs. Gallman's proposed identification was tainted by pretrial procedures.

The defendant did not pursue the motion to suppress as to the witness Mascari and we will not consider the motion to suppress his identification further.

[13] There was no objection nor request for hearing at the time Mrs. Gallman testified at the trial. However, we have said that a proper motion in limine will preserve the defendant's objection on appeal even though not renewed at trial. *State v. Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975).

We have stated that seeing the defendant at the preliminary hearing, or for that matter the trial, cannot, as a practical matter, be avoided or made less suggestive. *State v. Ware*, 113 Ariz. 340, 554 P.2d 1267, filed 7 September 1976; *State v. Fields*, 104 Ariz. 486, 455 P.2d 964 (1969). This does not mean that when the question is timely raised the court may refuse to conduct a hearing on the possibility that, considering the totality of the circumstances, the pre-trial actions have resulted in a tainted trial identification. In the instant case, the witness was told beforehand that she would see the defendants. She did see them shackled prior to her testimony, and the defendant had a right to a hearing to determine if her identification was the result of her observation prior to the preliminary hearing or as a result of the events at the time of the robbery.

[14] The trial court should have held a hearing to determine if the identification by Mrs. Gallman was tainted by pretrial procedures. In other words, did her identification come from the county attorney's suggestion that she would see the defendants in shackles before the preliminary hearing or from her recollection of the events on the night of the crime. We have stated:

"Defendant also suggests that this pre-trial confrontation was unduly suggestive and prejudicial and tainted the complaining witnesses' in-court identification. We are unable to determine from the record whether the confrontation was sufficiently suggestive to permit the possibility of misidentification. However, in light of the criteria which we outlined in *Dessureault*, should the defendant object to the in-court identification * * * it is imperative that the trial court, on retrial, hold a hearing in the absence of the jury.

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At such a hearing, the burden is on the prosecution to establish by clear and convincing evidence that the pretrial identification was not unduly suggestive. In addition, "if the trial judge concludes that the circumstances of the pre-trial identification were unduly suggestive or that the prosecution has failed to establish by clear and convincing evidence that they were not, then it is the prosecution's burden to satisfy the trial judge from clear and convincing evidence that the proposed in-court identification is not tainted by the prior identification." *State v. Dessureault, supra*, 104 Ariz. [380] at 384, 453 P.2d [951] at p. 955. See also *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). *State v. Lopez*, 105 Ariz. 84, 86, 459 P.2d 517, 519 (1969).

We believe that the trial court should have conducted a factual hearing concerning Mrs. Gallman's identification. Having failed to do so, we must consider whether this failure was harmless. As we stated in *Dessureault, supra*:

"[I]f it can be determined from the record on clear and convincing evidence that the in-court identification was not tainted by the prior identification procedures or from evidence beyond a reasonable doubt that it was harmless, and there is otherwise no error, the conviction will be affirmed." *State v. Dessureault, supra*, 104 Ariz. at 384, 453 P.2d at 955.

The testimony of Mrs. Gallman at the preliminary hearing together with her testimony at trial indicated that the meeting with the county attorney and the observation of the defendants prior to the preliminary hearing did not taint her identification of the defendant.

As a result, we believe any error was harmless beyond a reasonable doubt. *State v. Dessureault, supra*; *Chapman v. California, supra*; *Harrington v. California, supra*.

THE VIDEOTAPED TESTIMONY OF DR. HIRSCH

Prior to trial, the State moved for an order to videotape the testimony of Dr. Louis Hirsch, the coroner's pathologist for

Pima County, for admission into evidence at trial. According to the State's memorandum, Dr. Hirsch, the pathologist who examined the body of the deceased, was to be on "extended out-of-country travel during the dates set for trials." The defense filed a written opposition to the State's motion. After hearing, the court granted the motion. The testimony of Dr. Hirsch was videotaped in the courtroom with defendant present and the doctor was cross-examined by defendant's attorney. The trial judge was present and ruled on objections.

Rule 15.3 of the Arizona Rules of Criminal Procedure (1973) reads in part as follows:

"a. *Availability.* Upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant upon oral deposition under the following circumstances:

(1) A party shows that the person's testimony is material to the case and that there is a substantial likelihood that he will not be available at the time of trial;"

And subsection (c) of Rule 15.3 states:

"c. *Manner of Taking.* Except as otherwise provided herein or by order of the court, depositions shall be taken in the manner provided in civil actions. * * *

The Rules of Civil Procedure, 16 A.R.S., provide:

"(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense." Rule 30(b)(4), Arizona Rules of Civil Procedure, 16 A.R.S.

[15] We feel that Rule 15 of the Arizona Rules of Criminal Procedure (1973), when

read with Rule 30 of the Arizona Rules of Civil Procedure, 16 A.R.S., allows the testimony of a witness to be videotaped and introduced at trial under safeguards as provided by the trial judge. The defendant, however, contends that this procedure violates his Sixth Amendment right to confrontation. We do not agree.

The right to confront a witness at trial has long been recognized as fundamental to the adversary system of justice. It is not only a right of the defendant, but is a benefit to the trier of fact.

"It has been widely recognized, however, that in addition to the benefit which a defendant has in testing the reliability of a witness against him by cross-examination, confrontation ordinarily secures a secondary advantage in making it possible for the tribunal before whom the witness appears to judge from his demeanor the credibility of his evidence. This advantage results, not from the confrontation between the witness and the accused, but from the witness's presence before the tribunal." *Government v. Aquino*, 378 F.2d 540, 547 (3rd Cir. 1967).

And the United States Supreme Court has held that the Sixth Amendment right of an accused to confront the witness against him, as a fundamental right, is obligatory upon the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The court in this and other cases has been most concerned with the testimony at the preliminary hearing being used at the trial of the defendant.

There is, however, a difference between using testimony from a preliminary hearing and a deposition taken for use at the trial under adequate safeguards. As the court in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), also pointed out:

"A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." 390

U.S. at 725, 88 S.Ct. at 1322, 20 L.Ed.2d at 260.

The purpose of a preliminary hearing is for a determination of probable cause and not for guilt or innocence. Also, the defendant, at the time he cross-examines, does not know whether the witness is to be called later at trial. In the instant case, the deposition was taken under trial conditions and the defendant cross-examined knowing the purpose of the testimony and that the testimony was, in all probability, going to be used at the trial. Both the United States Supreme Court, *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and this court, *State v. Watson*, *supra*, allow preliminary hearing testimony to be read into evidence at trial when a witness is unavailable. We believe the procedure used here, under the facts in this case and the nature of Dr. Hirsch's testimony, to be far less offensive to defendant's right to confrontation than testimony from a preliminary hearing. Also, we think that there is even less conflict with the Sixth Amendment right to confrontation when the deposition is used for a purely foundational matter as the Florida Supreme Court did in allowing the videotape testimony of a lab technician to be admitted at trial. *Hutchins v. State*, 286 So.2d 214 (Fla.App., 1973). See also Annotation 60 A.L.R.3d 333.

Although Dr. Hirsch did testify concerning the angle of the bullets, leading to the inference that the victim was shot in the back, his testimony herein was concerned primarily with the cause and time of death which testimony was not seriously questioned but which was a necessary foundation to the establishment of the crime.

The Washington Supreme Court has gone even further in a case wherein a victim was allowed to testify by videotape which was introduced at the trial of the defendant. The victim was an officer on a merchant ship who was robbed on 20 May 1974 and was able to identify the defendant as one of his robbers. Since the ship was leaving shortly, the prosecution, after arrest of the defendant and appointment of counsel, notified the defendant that the victim's testi-

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may would be videotaped the following afternoon, 21 May 1974. The defendant stated that there was insufficient time to prepare for the deposition. Nevertheless, the videotape deposition was held at 4:00 p.m. the afternoon of the 21st with the defendant being present and his attorney cross-examining the victim. The Washington Supreme Court held:

" * * * the deposition satisfied the confrontation clause requirements of the Sixth Amendment to the United States Constitution." *State v. Hewett*, 86 Wash.2d 487, —, 545 P.2d 1201, 1205 (1976).

While we might not be willing to go as far as the Washington Supreme Court, we feel it indicates that this procedure can, when properly used, satisfy the confrontation clause of the Sixth Amendment.

[16] We find no error in allowing Dr. Hirsch to testify by videotape under the appropriate safeguards contained herein. In deciding as we do, we wish to emphasize that our decision might be different were he an eyewitness to the events of the crime. Such a crucial witness should not be lightly excused from attendance at the trial itself. When considering when to allow a witness to testify by videotape in a criminal trial, the trial court must balance the right of the defendant to the right of confrontation and the need of the trier of fact to the additional benefit of having a particular witness testify in person at the trial with the extent of the need for the witness to be away at the time of trial. The treatment by the courts of witnesses has not always resulted in willing and cooperative testimony once witnesses have been compelled to attend court. Because of his professional specialty, Dr. Hirsch, a pathologist, might not be able to go on a vacation without disrupting or postponing trial dates. The right of the defendant to confront the witness against him can also accommodate the convenience of the witness without doing an injustice.

In weighing the right of the defendant and the convenience of the witness, the court may take into consideration the occupation of the witness and the nature of his

testimony. If it can be demonstrated that the failure of the witness to be present at trial will prejudice the defendant or the State, the motion should not be granted. Absent a showing of prejudice or lack of good faith, we will rely on the sound discretion of the trial court in granting a motion to present videotaped evidence to the jury.

Under the safeguards required by the trial court, we find no violation of defendant's Sixth Amendment right to confrontation.

TESTIMONY OF NANCY de MUTH

[17] At the trial the following transpired:

"Q What did you do when you heard the shots?

"A I got up. I knew I had to get out of there because I didn't know, so I got up.

"Q Was that person still in your room?

"A I don't know. I looked up and I didn't see anybody so I just pushed open my window and pushed the screen out.

"Q Did you hear anything before you went to the window?

"A A shot and I heard a lot of shots and then I heard my stepfather calling out.

"MR. HAYES: Your honor, I have a motion that I would like to have heard outside the presence of the jury.

"THE COURT: What kind of a motion? (The following took place at the Bench of the Court:)

"MR. HAYES: I have received absolutely none of this in my discovery.

"MR. BROGNA: He has received all the police reports. I have no written reports on this person.

"MR. HAYES: About her lying on the bed?

"THE COURT: You may reserve your right to make your motion at a later time.

"MR. HAYES: There is nothing that I have heard about what she said about

her father or stepfather, what he said when she was lying on the bed, and the fact that she saw this man when he came right inside the room.

"THE COURT: I don't see any Brady material so far.

"MR. HAYES: I would like to ask for sanctions.

"THE COURT: You may reserve your right to make motions at a later time."

Later, at the hearing on the motion, it became apparent that the county attorney had talked to the witness and made some notes on this particular part of the testimony which he had not made available to the defendant. Our Court of Appeals has stated:

"In addition, it was error for the prosecution not to have disclosed the statements taken from Anna Morrison, a witness. The prosecuting attorney stated that he had taken notes when speaking with the witness. Such notes do not meet the 'work product' exception to disclosure under Rule 15.4(b)(1), 17 A.R.S., as they are not 'theories, opinions and conclusions' of the parties or their agents. To rule otherwise would make a premium out of not taking verbatim statements in order to avoid the disclosure required by the rules. However, the disclosure has now been accomplished due to the trial and hence, the matter is moot." *State v. Nunez*, 23 Ariz.App. 462, 463, 534 P.2d 270, 271 (1975).

The withholding of the information, however, does not appear to have been prejudicial, and we do not believe sanctions were required as defendant desired. Refusal to grant a mistrial was not error.

CUMULATIVE EVIDENCE

[18] Defendant argues that he was denied a fair trial due to the admission into evidence of "[n]umerous, cumulative photographs and fingerprints." We do not agree. The admission of evidence is largely within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Brierly*, 109 Ariz. 310, 509 P.2d 203 (1973).

We have read the record and reviewed the exhibits. We find nothing to indicate that defendant Reid was in any way prejudiced by the introduction of "cumulative" evidence.

EVIDENCE OF FLIGHT

[19] Evidence of defendant's attempt to escape from the police at the time he and Watson were arrested was introduced into evidence, primarily on the charge of obstructing justice. Defendant contends that since the court granted the defendant's motion for a directed verdict on the obstruction of justice count this testimony was not only inadmissible but prejudicial. We do not agree. Even if the defendant had not been charged with obstructing justice, the admission of his attempted flight would not have been inadmissible. The fact that the defendant attempted to flee from custody at a point remote in time from the actual crime goes to the weight and not to its admissibility. *State v. Wilczynski*, 111 Ariz. 533, 534 P.2d 738 (1975), cert. denied 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975). We find no error.

EXCESSIVE SENTENCE

The trial court ordered certain portions of the presentence report not to be disclosed to the defendant. In doing so, it stated on the record which portions were being withheld and that the reason for doing so was for "the protection of the people involved." Defendant, without further argument, submits that this constituted a denial of procedural due process.

[20] In the companion case of *State v. Watson*, *supra*, we held that the specific provisions of A.R.S. § 13-454 relating to sentencing in a first degree murder case, i.e. that only that material necessary for the protection of human life could be withheld and that such material could not be considered in determining the existence of any aggravating or mitigating circumstances, must be complied with. In the instant case, it would appear from the record that these provisions were followed. Moreover, in

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light of the fact that the defendant received the lesser of the two possible sentences (death or life), we can perceive of no prejudice having been suffered by him from the presentence report.

[21] Defendant also contends that the other sentences were also excessive. We have said:

"The legislature has given the trial court broad discretion in sentencing a defendant for a period within the statutory minimum and maximum. Because a defendant appears in person before the trial judge, the trial judge is, in most instances, better able than we to evaluate the defendant and his circumstances and to determine what action will most likely rehabilitate him to constructive activity. (citation omitted) Accordingly, this Court has consistently held that the pronouncing of a sentence is within the sound discretion of the trial court and that we will uphold a sentence if it is within the statutory limits unless there is a clear abuse of discretion. (citations omitted)." *State v. Smith*, 107 Ariz. 218, 219, 484 P.2d 1049, 1050 (1971).

All of the sentences imposed upon the defendant were within the statutory limits. In addition, we have read both the transcript and the probation report and have found nothing therein to indicate that the trial court abused its discretion.

The verdicts, judgments, and sentences are affirmed.

HAYS, HOLOHAN and GORDON, JJ., concurring.

STRUCKMEYER, Vice Chief Justice, dissenting.

I am unable to concur with the majority of the Court in the disposition of this case.

At the onset, two points should be made clear. First, seemingly Dr. Hirsch intended to leave Arizona on a vacation and to be absent from Arizona at the time of the trial. While he was within Arizona's jurisdiction, the prosecution petitioned the Superior Court for its order to permit his testimony to be videotaped. No effort was

made by the prosecution to require his personal attendance by subpoena. Indeed, insofar as the record is concerned no plausible reason is suggested why the trial should or could not have taken place either before or after his return. It is therefore abundantly clear that the videotape of his testimony and its subsequent use at the trial against the defendant was solely for the personal convenience of Dr. Hirsch or the court and for no other reason whatsoever.

I consider that the resolution by the majority of the question of the admissibility of Dr. Hirsch's videotaped testimony is constitutionally unsound. Their reliance on the principle that the "trial court must balance the right of the defendant to the right of confrontation and the need of the trier of fact to the additional benefit of having a particular witness testify in person at the trial with the extent of the need for the witness to be away at the time of trial" is unique in the annals of American constitutional law. No authority is cited for such a surprising doctrine. It is diametrically opposed to the repeated holdings of this Court, the Supreme Court of the United States, and the Sixth Amendment right of confrontation. Certainly one can be in sympathy with Dr. Hirsch and his personal desire for a vacation, but concern for the convenience of a witness does not evoke the power to suspend the Constitution of the United States.

Second, it is not Reid's position that videotaped testimony is different from testimony such as that taken at a preliminary hearing or a former trial. Where a transcript of testimony would be admitted under the customary rules of evidence, he does not argue that it should not have been admitted at this trial. The lucid statement of the Florida court in *Hutchins v. Florida* (Fla.App.) 286 So.2d 244, 246 (1973), is apposite:

"If the previously taken and preserved testimony of the witness, unable to be present was admissible at the trial, it has not been shown how its submission by video tape, as distinguished from a writ-

ten transcription of the questions and answers, resulted in harmful error."

The question here is whether a witness should be required to be present at the trial so that the right of confrontation may be exercised personally in the presence of the jury trying the accused. The most recent statement of this Court was made in 1973 in *State v. Briley*, 109 Ariz. 74, 505 P.2d 245. There, we said:

"Ordinarily, the defendant must be given the opportunity to test the recollection and credibility of the witnesses against him in a face to face encounter before the jury. This Sixth Amendment right of confrontation in the Constitution is essential and fundamental, and has been made obligatory upon the states through the Fourteenth Amendment." (Citations omitted) 109 Ariz. at 75, 505 P.2d at 246.

One of the latest cases of the United States Supreme Court construing a defendant's Sixth Amendment right to confrontation is *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). It deals with the testimony of a witness who testified at a preliminary hearing but who was absent at the trial in these circumstances. Petitioner Barber was charged with robbery in Oklahoma. A co-defendant, Woods, testified at the preliminary hearing incriminating Barber. When Barber was brought to trial, Woods was in a federal penitentiary in Texas, about 225 miles away. No attempt was made by the prosecution to bring Woods to the trial, but, rather, there was introduced a transcript of his testimony taken at the preliminary hearing. The Supreme Court of the United States emphasized that the objective of the confrontation clause of the Sixth Amendment to the Federal Constitution is not only to safeguard the right of the cross-examination, but to prevent depositions from being used against a defendant in place of a personal examination at which the witness was compelled to stand face to face with the accused and the jurors to determine whether the witness was worthy of belief.

Traditionally there has been an exception to the requirement of confrontation where

a witness is not available through no fault of the prosecution—that is, through death or having fled the jurisdiction. But the exception arises from necessity only. Where, as here and as in *Barber v. Page*, the State made absolutely no effort to obtain the presence of the witness at trial, the use of the substitute evidence cannot be condoned. True, it can be argued, videotape is better than the reading of a deposition or transcript of former testimony, but it is not the same as a personal confrontation. Something important may be lost in the process.

Nor should this defendant's constitutional rights be dependent upon the answer to the question whether Dr. Hirsch was not really an important witness as the majority seem to suggest. In the United States in the past a defendant has had the right to confront his accusers and have the jurors confront them. If this is not to be so, then the time will soon arrive when criminal trials will be conducted by videotaped depositions for it is seldom convenient for the witnesses to be present at the trial.



114 Ariz. 32

The STATE of Arizona, Appellee,

v.

John Gilbert FREEMAN, Sr., Appellant.

No. 3012-2.

Supreme Court of Arizona,
In Banc.

Nov. 29, 1976.

Defendant was convicted before the Superior Court of Maricopa County, Cause No. CR-81137, C. Kimball Rose, J., of seven counts of first-degree murder, and he appealed. The Supreme Court, Cameron, C. J., held that defendant who had been found

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86 Wash.2d 457

The STATE of Washington, Respondent,
v.

Reginald L. HEWETT and Johnny Lee
Simms, Appellants.

No. 43706.

Supreme Court of Washington,
En Banc.

Feb. 11, 1976.

Rehearing Denied April 7, 1976.

After defendants were convicted in Superior Court, Pierce County, Hardyn B. Soule, J., of armed robbery, they appealed. The Supreme Court, Hamilton, J., held, *inter alia*, that the State was properly allowed to introduce video taped testimony of the robbery victim, that photographic identification of defendants was not impermissibly suggestive, and that while an identification of defendants by the victim while they were seated on a bench in the police station might have been impermissibly suggestive, it did not taint the deposition identification since the latter had an independent source.

Affirmed.

1. Criminal Law ⇨662(1)

Statute guaranteeing accused's right to meet witnesses produced against him face to face did not prevent use of videotape recordings in criminal trial. RCWA 10.52.060; CrR 4.6; U.S.C.A.Const. Amend. 6.

2. Depositions ⇨67

Videotape recording falls within meaning of phrase "recorded by other than stenographic means" as that phrase is used in criminal rule dealing with testimony at deposition; Supreme Court would therefore expressly approve use of videotape recordings for taping of depositions. CR 30(b)(4); U.S.C.A.Const. Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

545 P.2d—76

3. Criminal Law ⇨438.1

In order properly to authenticate videotape for introduction during trial, proponent must show that video and audio portions of videotape are functioning properly; that operator is trained and experienced in use of videotape recording; that audio and visual portions of recording are authentic and accurate; that no changes, additions, or deletions have been made; that videotape has been properly preserved; and that video portion is clearly visible and audio portions sufficiently understandable; speakers must also be identified. CR 30(b)(4); U.S.C.A.Const. Amend. 6.

4. Depositions ⇨88

Videotaped deposition of robbery victim was properly admitted in evidence in robbery prosecution where circumstances of case presented emergency, since victim's ship was scheduled as to sail for Japan on morning following accused's arrests; under such circumstances, accused's were given adequate opportunity to cross-examine victim, despite their contentions that their counsel had not been prepared on such short notice to conduct such cross-examination adequately. RCWA 10.52.060; CrR 4.6, 4.6(e); CR 30(b)(4); U.S.C.A. Const. Amends. 6, 14.

5. Depositions ⇨90

Evidence sufficiently showed that robbery victim was unavailable for trial, so as to make his videotaped deposition admissible in evidence, where it was shown that victim was at sea on day of defendant's trial. CrR 4.6.

6. Depositions ⇨90

State satisfied requirement of making good-faith effort to obtain victim's presence at trial, so as to permit introduction of victim's videotaped deposition in evidence, where it cooperated fully with defendants in efforts to obtain victim's presence for proceedings subsequent to deposition and kept defendants informed of victim's movements and provided them with

see page 1204

opportunity to secure additional testimony from victim. CrR 4.6; U.S.C.A.Const. Amend. 6.

7. Constitutional Law \S 266(3)

Photographic identification was not conducted in impermissibly suggestive fashion, and did not constitute violation of due process clause of Fourteenth Amendment, where police chose photographs of five black men with somewhat similar features from police files and did not tell robbery victim of defendant's name or that defendant's picture was one of five pictures chosen. U.S.C.A.Const. Amend. 14.

8. Criminal Law \S 339

While identification of defendants by robbery victim where the defendants sat handcuffed to each other in hallway of police station might have been suggestive and conducive to mistaken identification, it did not taint victim's later deposition identification of defendants where such deposition identification had independent source in victim's opportunity to view defendants during commission of robbery in question.

Burkey, Marsico, Rovai, McGoffin, Turner & Mason, Thomas P. Larkin, Tacoma, for appellants.

Donald F. Herron, Pros. Atty., Michael R. Johnson, Deputy Pros. Atty., Tacoma, for respondent.

HAMILTON, Associate Justice.

This appeal involves the admissibility of a video tape deposition of the victim of a robbery. The appeal also concerns whether certain post-arrest identifications violated the due process clause of the Fourteenth Amendment to the United States Constitution.

On May 20, 1974, Mr. Saul B. Paeste, an officer of the merchant ship *M.S. Azalia*, met a young woman named Kathy at the Circle Tavern in Tacoma, Washington. After they spent several hours in the tavern, Mr. Paeste and the woman proceeded to another bar located in the nearby bus

station. They remained at this bar for 20 minutes, and then Mr. Paeste accompanied the woman to her apartment. On the way to the apartment, Mr. Paeste observed a black man give the woman a key. Shortly after they arrived, two black men entered the apartment and asked Mr. Paeste for money. Mr. Paeste recognized one of the men as the person who gave the woman a key outside the bus station. Mr. Paeste offered the two men \$20. The men refused this amount and demanded that Mr. Paeste give them all of his money. One of the men pointed a gun at the victim and the other displayed a knife. Mr. Paeste gave them \$105. Then, the two men forced the victim out of the apartment and into a car. The two men drove the victim a few blocks and ordered him out of the car.

At approximately 2:30 a. m., the victim called the police. Investigator Parks responded to the call and arrived at the scene of the robbery a half hour later. The victim recounted the events of the robbery and gave a detailed description of Kathy and the two black men. Mr. Parks also observed the names of Kathy Huth and appellant Johnny Simms on the apartment mailbox. The officer then drove the victim to the police station. At the station, investigator Parks placed five photographs in front of the victim and he identified a picture of the appellant Johnny Simms. The victim also described the car in which he rode with the two men. Investigator Parks checked the automobile records and found that the appellant Simms owned an automobile similar to the one that the victim described. Mr. Parks drove the victim to his ship which was anchored in the Tacoma harbor.

Investigator Parks returned to the apartment and at 4:45 a. m. arrested appellant Simms, appellant Hewett, and Kathy Huth. Mr. Parks brought the victim back to the station at 5 a. m. The victim spotted the defendant Kathy Huth upon entering the station and identified her as the woman involved in the robbery. The victim later observed the appellants handcuffed to each

other and seated in the rear of the station wagon as the way of the station appellants as the

At 11:30 a. m. for the State court, the Director Assigned Counsel arranged for a court judge. To serve the testimony use of video tape deposition was due today. The appeal they had insufficient the deposition. ed to the use of The trial judge of the deposition. p. m. and lasted minutes.

At trial, the press the video denied the motion

1. "Every person the right to not against him fact whenever any witness have been taken trate, in the presence of counsel, shall be when required for hearing, so much court shall deem shall be admitted case." RCW 1

2. "Rule 4.0 Deposition (a) When a prospective witness or prevented from or if a witness with either counsel material and the deposition in or justice, the court of an indictment motion of a pre order that his testimony and that documents or to be produced at (b) Notice of instance a deposition to every other party of the time and

other and seated on the bench in the hallway of the station. He identified the appellants as the two men who robbed him.

At 11.30 a. m. on May 21, 1974, counsel for the State contacted Mr. M. Fred Weedon, the Director of the Department of Assigned Counsel for Pierce County, and arranged for a hearing before a superior court judge. The State proposed to preserve the testimony of the victim with the use of video tape equipment. Mr. Paeste's ship was due to sail at 10 a. m. the next day. The appellants' counsel claimed that they had insufficient time to prepare for the deposition. The appellants also objected to the use of the video tape equipment. The trial judge ordered the video taping of the deposition. The deposition began at 4 p. m. and lasted approximately 1 hour, 45 minutes.

At trial, the appellants moved to suppress the video tape. The trial court denied the motion. The video tape deposi-

tion was played during the trial. The jury convicted the appellants of the crime of robbery and entered a special verdict finding the appellants armed with deadly weapons at the time of the commission of the robbery.

[1] Initially, the appellants contend that RCW 10.52.060¹ prohibits the use of video tape recordings in a criminal trial. We disagree. RCW 10.52.060 provides for the taking of a "deposition" of a witness when that witness is unavailable for trial. CrR 4.6² provides the procedure for taking depositions in criminal proceedings. Pursuant to this rule and upon motion by any party, the court may order a deposition to be taken in order to prevent a failure of justice. The trial court in this case properly ordered the deposition to be taken in order to preserve the testimony of the victim whose ship sailed the following day. CrR 4.6(c) states that "[a] deposition shall be taken in the manner provided in civil

1. "Every person accused of crime shall have the right to meet the witnesses produced against him face to face: *Provided*, That whenever any witness whose deposition shall have been taken pursuant to law by a magistrate, in the presence of the defendant and his counsel, shall be absent, and cannot be found when required to testify upon any trial or hearing, so much of such deposition as the court shall deem admissible and competent shall be admitted and read as evidence in such case." RCW 10.52.060.

2. "Rule 4.6 Depositions.

"(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

"(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposi-

tion. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

"(c) How Taken. A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

"(d) Use. At the trial or upon any hearing, a part or all of a deposition so far as otherwise admissible under the rules of evidence may be used if it appears: that the witness is dead; or that the witness is unavailable, unless it appears that his unavailability was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

"(e) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions." CrR 4.6.

actions." Thus, CR 30(b)(4) controls, and it provides:

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. In which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

[2] A video tape recording clearly falls within the terms "recorded by other than stenographic means." We expressly approve the use of video tape recordings for the taping of depositions.

Both state and federal authorities unanimously support the use of video tapes for the preservation of testimony for trial. *Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972); *People v. Moran*, 39 Cal.App. 3d 398, 114 Cal.Rptr. 413 (1974); *Hutchins v. Florida*, 286 So.2d 244 (Fla.App.1973); *Admissibility of Videotape Film in Evidence in Criminal Trial*, Annot., 60 A.L.R. 3d 333 (1974).³ The commentators also attest to the accuracy and reliability of video tapes in criminal proceedings. Barber and Bates, *Videotapes in Criminal Proceedings*, 25 *Hastings L.J.* 1017 (1974); Shutkin, *Videotape Trials: Legal and Practical Implications*, 9 *Colum.J.Law & Social Prob.* 363 (1973); see *The Library*

3. In *State v. Neiman*, 4 Wash.App. 588, 484 P.2d 473 (1971), this jurisdiction approved of the use of a video tape recording to depict a post-arrest identification.

4. Neither party addressed the foundational requirements for the admission of a video tape recording into evidence. In *State v. Neiman*, *supra* at 593, 484 P.2d at 476, the Court of Appeals stated:

To lay a proper foundation for such demonstrative evidence, it is only required that some witness, not necessarily the photographer, be able to give some indication as to when, where, and under what circumstances the photograph was taken, and that

—Selected Checklist on Videotape and the Courts, 30 Record of N.Y.C.B.A. 221 (1975) (collecting source material).

In *State v. Roebuck*, 75 Wash.2d 67, 70, 448 P.2d 934 (1968), we held that the reproduction of prior testimony does not violate the Sixth Amendment right to confrontation of witnesses if there is a satisfactory showing that:

(1) the witness is unavailable, (2) the witness was sworn to testify at the previous trial, (3) the accused was present and was afforded the opportunity to cross-examine and (4) the person who seeks to relate the absent witness' testimony was present, heard the witness testify, and can state in substance the nature of the subject matter sought to be established.

[3] Unlike the *Roebuck* case, the respondent in this case did not call an individual to recount the testimony of the victim. The respondent also declined to take a written deposition of the victim pursuant to CrR 4.6. The respondent chose to video tape the deposition. The use of a video tape is a more efficient means of reproducing the testimony than the record of a preliminary hearing, or the recollection of testimony by a person present at a preliminary hearing. The video tape preserves a permanent and viewable record of all confrontations. It enables the trier of fact to observe the demeanor of the deponent. Therefore, if a party properly authenticates a video tape,⁴ and the reproduction

the photograph accurately portrays the subject illustrated.

The court admitted the video tape in the *Neiman* case for demonstrative purposes, i. e., to depict a post-arrest lineup. In this case, the video tape presented testimonial evidence. Therefore, to lay a proper foundation for the use of video tapes to preserve testimonial evidence, the proponent essentially must meet the requirements of *State v. Williams*, 49 Wash. 2d 354, 360, 301 P.2d 760 (1956). That is, the proponent must show: (1) that the video and audio portions of the video tape are functioning properly; (2) the operator is trained and experienced in the use of video taping equipment; (3) the audio and visual portions

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meets the first of *v. Roebuck*, *supra* evidence does not Sixth Amendment witness.

[4] The appellant failed. *Roebuck* requires counsel claim that to adequately. The circumstances an emergency. scheduled to sail morning. The victim of the sailing testified the appellant afforded all of the evidence during the arrest to a 1½-hour. This provided the hours to prepare deposition continue the appellants for at least an ship returned to July of 1974. The appellants of its assist the appellant money from the declined this opportunity cross-examination appellants were cross-examination the emergency case, the appellant opportunity to

[5] The appellant failed to was unavailable testified at the de scheduled to sail day. At trial, the ship in fact day. The recording victim was at se

of the recording (4) no changes been made; (5) erly preserved;

meets the first three requirements of *State v. Roebuck, supra*, then its admission into evidence does not violate the appellants' Sixth Amendment right to confront the witness.

[4] The appellants contend that the respondent failed to establish two of the *Roebuck* requirements. The appellants' counsel claim that they were not prepared to adequately cross-examine the victim. The circumstances of this case presented an emergency. The victim's ship was scheduled to sail for Japan the following morning. The victim informed the respondent of the sailing, and the respondent notified the appellants 2 hours later. The respondent afforded the appellants access to all of the evidence that the police seized during the arrest. Respondent also agreed to a 1½-hour delay of the deposition. This provided the appellants with some 4 hours to prepare for the deposition. The deposition continued for 1¼ hours, and the appellants cross-examined the victim for at least an hour. Also, the victim's ship returned to the Pacific Northwest in July of 1974. The respondent notified the appellants of its return and offered to assist the appellants in securing further testimony from the victim. The appellants declined this opportunity for additional cross-examination. This indicates that the appellants were satisfied with the original cross-examination. Therefore, in light of the emergency time restrictions of this case, the appellants were given an adequate opportunity to cross-examine the victim.

[5] The appellants also assert the respondent failed to establish that the victim was unavailable for trial. The victim testified at the deposition that his ship was scheduled to sail at 10 a. m. the following day. At trial, two officers testified that the ship in fact sailed for Japan the next day. The record also indicates that the victim was at sea on the day of the appel-

lants' trial. This evidence established that the victim was unavailable for trial.

[6] The respondent also cooperated fully with the appellants in the effort to obtain the victim's presence for proceedings subsequent to the deposition. Respondent kept the appellants informed of the victim's movements and provided the appellants with an opportunity to secure additional testimony from the victim. The respondent clearly satisfied its requirement of making a good faith effort to obtain the victim's presence at trial. *Barber v. Page*, 390 U.S. 719, 724-25, 88 S.Ct. 1318, 20 L. Ed.2d 255 (1968). Thus, the deposition satisfied the confrontation clause requirements of the Sixth Amendment to the United States Constitution.

[7] The appellant Simms also maintains that the trial court erroneously denied the motion to suppress the photographic identification. This identification must comply with due process requirements. *State v. Gefeller*, 76 Wash.2d 449, 458 P.2d 17 (1969); *State v. Kearney*, 75 Wash.2d 168, 419 P.2d 400 (1969). If the deposition identification is based upon pre-trial identification procedures violative of due process, then the evidence is inadmissible because it is based on a tainted source. *State v. Moore*, 7 Wash.App. 1, 3, 499 P.2d 16 (1972). In *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L. Ed.2d 1247 (1968), the Supreme Court considered a photographic identification, and stated:

[E]ach case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

of the recording are authentic and accurate; (4) no changes, additions, or deletions have been made; (5) the video tape has been properly preserved; (6) the video portion is clear-

ly visible and the audio portion sufficiently understandable, and (7) the speakers must be identified.

In the instant case, investigator Parks chose photographs of five black men with somewhat similar features from the police files. Mr. Parks testified that he did not tell the victim the appellant's name or that the appellant's picture was one of the five pictures chosen. Parks displayed the photographs to the victim, and the victim selected the photograph of appellant Simms. Nothing in the record suggests that the photographic identification was "impermissibly suggestive," and we find no violation of the due process clause of the Fourteenth Amendment.

[8] The appellants further assert that the trial court erroneously admitted the portion of the video tape testimony that concerned the identification of the appellants while they were seated on the bench in the police station. Essentially, the same due process test applies to the identification of suspects by individually showing them to a victim as applies to photographic identifications. A claimed violation of due process of law depends on the totality of the circumstances surrounding it. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *State v. Moore, supra*. In this case, the police officer returned to the victim's vessel at 5 a.m. and informed the victim that the officer had arrested two robbery suspects. The officer requested the victim to accompany him back to the police station to identify the suspects. The victim walked by the appellants and observed them handcuffed to each other and seated on the bench in the hallway of the station. The totality of these circumstances could be suggestive and conducive to mistaken identification. However, in *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967), the Supreme Court directed the Court of Appeals to vacate and remand the trial court judgment, and announced an important limitation on the due process requirements of pretrial identifications. The court stated:

We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [improper] lineup identification.

The identification by the victim at the deposition hearing was based on the victim's independent pre-arrest observations of the appellants. The victim watched appellant Simms give the woman a key outside the bus station. The victim saw both appellants for 10 minutes in the apartment. He later observed them outside the apartment and in the automobile. He also made a proper photographic identification of appellant Simms at the police station. Further, the trial judge also followed the appellants' request concerning the identification procedure at the deposition. The appellants remained in an anteroom of the courtroom during the deposition. The victim gave a detailed description of each appellant, which included a description of the clothes. Then, each appellant was brought into the courtroom. The victim identified the appellants as the individuals who robbed him the night before.

This deposition hearing identification was not tainted by the police station identification. The police station identification consisted of a brief observation by the victim as he walked by the appellants in the hallway of the station. Therefore, we hold that the respondent established that the deposition identification had an independent source and that the admission of the police station identification was not reversible error. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The trial court judgment is affirmed.

STAFFORD, C. J., and FINLEY, ROSELLINI, HUNTER, WRIGHT, UTTER, BRACHTENBACH and HOROWITZ, JJ., concur.

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CRIMINAL DEFENDANT HAS SIXTH AMENDMENT RIGHT TO
PHYSICALLY CONFRONT WITNESS AT VIDEO-TAPED
DEPOSITION

United States v. Benfield, 593 F.2d 815
(8th Cir. 1979)

In *United States v. Benfield*¹ the Eighth Circuit Court of Appeals clarified the application of the sixth amendment's confrontation clause² to a Rule 15 video-taped deposition³ used in lieu of deponent's personal appearance⁴ at a federal criminal trial.

1. 593 F.2d 815 (8th Cir. 1979).

2. U.S. CONST. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (emphasis added).

3. F.R.D. CRIM. P. 15 provides in relevant part:

Depositions

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . .

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. . . . The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 803(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition.

4. F.R.D. CRIM. P. 15(c), *supra* note 3, also allows the use of a deposition at trial as sub-

The government charged Russell Benfield in a four-count indictment⁵ with the federal crime of misprision of the kidnapping of Patricia Cady.⁶ Several months after the kidnapping, but before the trial, Cady developed psychiatric problems resulting in her hospitalization and necessitating two trial continuances.⁷

Subsequently, the government filed a request to take a video-taped deposition of Cady's testimony and, at the hearing on that request, her psychiatrist testified that Cady's psychiatric problems were directly related to her kidnapping.⁸ He urged that if she must testify, the surroundings be less stressful than those of a courtroom and that she not be required to face Benfield.⁹ Granting the government's motion for a deposition, the trial court ordered that Benfield could be "present at the deposition but not within the vision of Mrs. Patricia Cady."¹⁰ Benfield, without Cady's knowledge, monitored her deposition from a separate room and, by sounding a buzzer, was able to interrupt the questioning

stantive evidence if "the witness gives testimony at the trial or hearing inconsistent with his deposition." This use of the deposition was not at issue in *Benfield* and the court did not discuss it. But see *California v. Green*, 399 U.S. 149, 159 (1970) (if witness testifies at trial, witness' prior statement is admissible even if not subject to confrontation when made, as long as defendant is assured of effective cross-examination at trial). Accord, *Nelson v. O'Neil*, 402 U.S. 622, 626-27 (1971). See generally Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 Mich. L. Rev. 1565 (1971).

5. 593 F.2d at 817.

6. *Id.* 18 U.S.C. § 4 (1976) provides:

Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

7. 593 F.2d at 817 & n.3. Following her rescue by law enforcement officers, Cady participated in a news conference and press interviews. Her subsequent illness, however, left her unable to cope with crowd situations or work. *Id.*

8. *Id.* at 817.

9. *Id.*

10. *Id.* Fed. R. Crim. P. 15(b), *supra* note 3, allows the trial court to fix the terms upon which the defendant may be present at the deposition if the defendant is not in custody. The court of appeals noted a possible equal protection problem because Rule 15(b) seems to allow greater restrictions upon the defendant's presence at a deposition when the defendant is not in custody than when he is in custody. Additionally, the trial court's conditional order for a deposition may have violated Rule 15(d), *supra* note 3, which provides that "the scope and manner of examination and cross-examination [at the deposition] shall be such as would be allowed in the trial itself." The court of appeals did not resolve these questions because the parties failed to argue them or sufficiently develop them in the appellate record. 593 F.2d at 820 n.7.

to confer with his counsel outside the deposition room.¹¹

The trial court admitted the video-taped deposition as substantive evidence against Benfield and allowed it to be shown to the jury.¹² Benfield was convicted and sentenced to two years in prison.¹³ The Court of Appeals for the Eighth Circuit reversed, remanded, and *held*: The sixth amendment's confrontation clause assures the active participation of the accused at all stages of his criminal trial, including at a deposition.¹⁴ Accordingly, in the absence of either a face-to-face meeting between defendant and witness or a showing that defendant had waived, forfeited, or lost by necessity his constitutional right of confrontation, the procedure that limited defendant's participation to monitoring the video-taped deposition and conferring with his attorney outside the deposition room after sounding a buzzer, without the deponent's knowledge, was unconstitutional.¹⁵

The sixth amendment guarantees the criminally accused the right to confront the witnesses against him.¹⁶ In *Mattox v. United States*¹⁷ the

11. 593 F.2d at 817. Benfield's lawyer was allowed to cross-examine Cady at the deposition. *Id.*

12. *Id.* at 817, 822. F.R.D. R. Evid. 804(a)(4) (applicable to F.R.D. Crim. P. 15 deposition proceedings through Rule 15(e), *supra* note 3) defines "unavailability as a witness" to include situations in which the witness "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Benfield argued that the video-taped deposition's admission was improper because the government had failed to demonstrate the unavailability of Cady at the time of trial. *See* Brief for Appellant at 39-42. The court of appeals conceded that the government's showing of Cady's unavailability at trial was "marginal" because the government had relied passively on the failure of Cady's psychiatrist to inform it of an improvement in Cady's condition. Nevertheless, the court did not reverse Benfield's conviction on this ground, commenting that "[a]n additional showing of the witness' mental condition and availability on the trial date would have been a much better practice." 593 F.2d at 817 n.4. *See also* note 41 *infra*.

13. 593 F.2d at 816-17.

14. *Id.* at 821.

15. *Id.* at 817, 820-22.

16. *See* note 2 *supra*. The Supreme Court declared the right of confrontation fundamental and applicable to the states in *Pointer v. Texas*, 380 U.S. 400 (1965), *overriding* *Stein v. New York*, 346 U.S. 156, 195-96 (1953), and *West v. Louisiana*, 194 U.S. 258, 264 (1904). For analyses testing rules of evidence by the standard of due process of law, see *Chambers v. Mississippi*, 410 U.S. 284, 294-301 (1973); *Dutton v. Evans*, 400 U.S. 74, 96-100 (1970) (Harlan, J., concurring); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); *In re Oliver*, 333 U.S. 257, 273 (1948). *See generally* Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 *CROSS. L. REV.* 529 (1974); Girswood, *The Due Process Revolution and Confrontation*, 119 *U. PA. L. REV.* 711 (1971); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 *HARV. L. REV.* 561 (1978); Note, *The Burger Court and the Confrontation Clause: A Return to the Fair Trial Rule*, 73 *MAR. J. PRIV. & PROC.* 136 (1973).

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17. 156 U.S.

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19. *Id.* at 24

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Id. at 158

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Supreme Court noted that although the defendant's right of confrontation normally includes a face-to-face meeting with the witness and an opportunity to subject the witness to cross-examination,¹⁸ these constitutional safeguards must on occasion yield to "considerations of public policy and the necessities of the case."¹⁹ After balancing the interests of the defendant and the public, the Court held that the testimony of a now-deceased witness at defendant's earlier trial on the same charge was admissible at defendant's retrial.²⁰

Following *Mattox*, the Court repeatedly defined the essential elements of the confrontation clause as physical confrontation and cross-examination.²¹ In *Douglas v. Alabama*,²² however, the Court expressly stated that physical confrontation is not an indispensable part of the constitutional right.²³ Thereafter in *California v. Green*,²⁴ the Court omitted physical confrontation from its list of attributes of the confrontation clause.²⁵ The most recent decisions of the Supreme Court inter-

17. 156 U.S. 237 (1895).

18. "The substance of the constitutional protection is preserved to the prisoner 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." *Id.* at 244.

19. *Id.* at 243. See notes 18-22 *infra* and accompanying text.

20. 156 U.S. at 243-44.

21. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) ("the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment"); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (right of confrontation was "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him"); *Kirby v. United States*, 134 U.S. 47, 55 (1890) (defendant has trial right to confront witnesses "upon whom he [the accused] 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").

22. 380 U.S. 415 (1965).

23. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination, an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418. See also *Bruton v. United States*, 391 U.S. 123, 127-28 (1968); *Broadhart v. Jams*, 384 U.S. 1, 3 (1966); *Pointer v. Texas*, 350 U.S. 400, 406-07 (1965).

24. 399 U.S. 149 (1970).

25. 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. (citation omitted)

Id. at 158.

The Supreme Court has alluded to the demeanor aspect of confrontation on several occasions. See, e.g., *Barber v. Page*, 390 U.S. 719, 725 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). But see *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 115 (1970) (in light of the

interpreting the confrontation clause dwell on the defendant's right to effective cross-examination²⁶ and refer to physical confrontation only incidentally.²⁷

Despite the Court's conflicting statements about the requisites of confrontation,²⁸ it has emphasized the importance of the constitutional

holding in *California v. Green* allowing the admission into evidence of prior recorded testimony of a witness testifying at trial, and the consequent denial of the factfinder's opportunity to observe the witness' demeanor when he was giving his earlier testimony. "the factfinder's observation of the witness' confrontation with the defendant is not constitutionally required" (citations omitted).

26. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974), *Chambers v. Mississippi*, 410 U.S. 284 (1973).

27. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'" (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))).

28. See notes 17-27 *supra* and accompanying text. The result of the Court's conflict is exemplified by the confusion within the Fifth Circuit. Compare *Canal Zone v. P. (Pinto)*, 590 F.2d 1344, 1352 (5th Cir. 1979) ("cross-examination is the essential right secured by the confrontation clause"), with *United States v. Amaya*, 533 F.2d 188, 190 (5th Cir. 1976) ("[t]he primary object of the confrontation clause is to permit personal examination and cross-examination of the witness by the defendant"), *cert. denied*, 529 U.S. 1101 (1977).

The documentary history of the sixth amendment sheds little light on the exact meaning of the confrontation clause. See generally *California v. Green*, 399 U.S. 149, 174-79 (1970) (Harlan, J., concurring) and sources cited therein.

Some commentators believe that the confrontation clause was designed to prevent the kind of abuse that characterized the trial of Sir Walter Raleigh in England in 1603. Raleigh was convicted and later executed for treason, based upon depositions and ex parte affidavits, with no opportunity to call his own witnesses or cross-examine those adverse to him. See *United States v. Payne*, 492 F.2d 449, 457-65 (4th Cir.) (concurring and dissenting opinion), *cert. denied*, 419 U.S. 876 (1974); F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 104-06 (2d ed. 1969); 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 216-29 (1926); F. J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 333-37 (1883); Stephen, *The Trial of Sir Walter Raleigh*, in 2 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 172-87 (4th ser. 1919); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. POL. L. 381, 388-89 (1959).

Before the Bill of Rights was added to the Constitution, a delegate at the Massachusetts convention objected to the lack of protections afforded the criminally accused. The nature of his arguments ultimately proved persuasive:

Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.

It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not.

The mode of trial is altogether undetermined, whether the criminal is to be allowed the benefit of counsel, whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.

These are matters of by no means small consequence, yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges.

On the whole, when we fully consider this matter, and fully investigate the powers

right as a whole to *States*³⁰ announce trial for homicide expressly consenting Diaz was away, cross-examined by err in permitting the Court explain right to confront

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Many state constitutions ant and the witnesses concerning the physical CONST. art. II, § 16. D. § 8; IND. CONST. art. MASS. ANN. LAWS ch. MO. CONST. art. I, § 18 ANN. § 29-01-06 (1974 S.D. CONST. art. VI, CONST. art. I, § 22. W

29. See notes 30- Consider the related tion is not invoked, w reached. See, e.g., *Sn accompany jury at vic (notes of trial judge ar not subject to confront confrontation does not by prosecution at trial) (2d Cir. 1969) (right of Eberhart v. United Sta F.2d 954, 959 (3rd Cir question of law), *aff'd* (D.C. Cir. 1941) (right*

30. 223 U.S. 442.

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455. A Court opinions had n sence. See, e.g., *Lew power of the prisoner, during the trial"); Hoq*

right as a whole by limiting the exceptions thereunder.²⁹ *Diaz v. United States*³⁰ announced one such exception. On two occasions during his trial for homicide, defendant *Diaz* voluntarily left the courtroom, expressly consenting to the trial's continuation in his absence.³¹ While *Diaz* was away, two adverse witnesses testified against him and were cross-examined by his attorney.³² In ruling that the trial court did not err in permitting the trial to proceed despite the defendant's absence, the Court explained that a defendant could affirmatively waive his right to confront witnesses against him.³³

granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

(emphasis in original). 2 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-11 (reprint 1974) (1st ed. 1836). See also 1 B. SCHWARTZ, THE BILL OF RIGHTS 505-10 (1971).

Many state constitutions or statutes expressly guarantee face-to-face meetings between defendant and the witnesses against him, thereby resolving any ambiguity that might otherwise exist concerning the physical aspect of confrontation. See, e.g., ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; HAWAII REV. STAT. § 801-2 (1976); ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. BILL OF RIGHTS § 10; MASS. CONST. pt. I, art. 12; MASS. ANN. LAWS ch. 263, § 5 (Michie/Law Co-op 1968); MICH. COMP. LAWS § 763.1 (1970); MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; N.H. CONST. art. I, § 11; N.D. CONST. CODE ANN. § 29-01-06 (1974); OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TENN. CODE ANN. 40-2465 (1975); WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

29. See notes 30-42 *infra* and accompanying text.

Consider the related problem of determining under what circumstances the right of confrontation is *not invoked*, whereby the question of the scope of the exceptions to confrontation is not reached. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (defendant not entitled to accompany jury at view of crime scene); *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911) (notes of trial judge and clerk pertaining to conduct of trial and supplementing appellate record not subject to confrontation); *Meadows v. New York*, 426 F.2d 1176, 1184 (2d Cir. 1970) (right of confrontation does not entitle accused to discovery of evidence that is not ultimately introduced by prosecution at trial), *cert. denied*, 401 U.S. 941 (1971); *United States v. Polisa*, 416 F.2d 573, 579 (2d Cir. 1969) (right of confrontation does not compel prosecution to call particular witnesses); *Fiberart v. United States*, 262 F.2d 421, 422 (9th Cir. 1958) (same); *United States v. Johnson*, 129 F.2d 954, 959 (3rd Cir. 1942) (defendant may be excluded from courtroom during argument on question of law), *aff'd on other grounds*, 318 U.S. 189 (1943); *Curtis v. Rives*, 123 F.2d 936, 938 (D.C. Cir. 1941) (right of confrontation does not compel prosecution to call particular witnesses).

30. 223 U.S. 442 (1912).

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455. *Accord*, *Taylor v. United States*, 414 U.S. 17, 20 (1973). Earlier Supreme Court opinions had implied that no aspect of a criminal trial could be held in a defendant's absence. See, e.g., *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial"); *Hopt v. Utah*, 110 U.S. 574, 579 (1884) ("[t]hat which the law makes essential in

The Supreme Court went further in *Illinois v. Allen*.³⁴ During his trial for robbery, Allen continually disrupted the trial despite judicial warnings to behave.³⁵ The Court held that defendant, as a result of his misconduct, forfeited³⁶ his right of confrontation and that the decision to remove him and proceed with the trial in the presence of his attorney

proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused")

Cf. Brady v. United States, 397 U.S. 742, 748 (1970) ("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" (footnote omitted)); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). See also *Boydin v. Alabama*, 395 U.S. 238, 243 (1969) (accused may waive right of confrontation by pleading guilty); *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959) (when defendant admitted truth of state attorney's statements of details of crime and of defendant's criminal record, defendant implicitly waived right of confrontation on those statements); *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973) (defendant may stipulate to admission of evidence and thus waive right to confront source of evidence); *cert. denied*, 417 U.S. 948 (1974).

34. 397 U.S. 337 (1970).

35. *Id.* at 339-41. Allen was readmitted to the courtroom on several occasions, and the judge offered Allen the option of remaining at the trial if Allen would promise good behavior. Allen replied, "I'll promise you shut." Appendix to Petition for Certiorari at 38, *Illinois v. Allen*, 397 U.S. 337 (1970), cited in *The Supreme Court, 1969 Term*, *supra* note 28, at 91 n.6.

36. Compare Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 U. Colo. L. REV. 171, 173 (1964) (arguing that repeated misconduct by defendant after warning amounts to voluntary waiver), with PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, ADVISORY COMMITTEE NOTE TO FED. R. CRIM. P. 43(b) (1978) (discussing proposed change in language concerning exceptions to requirement that defendant be present at every stage of his criminal trial).

Subdivision (b) is amended so as to deal with the situations included therein in terms of forfeiture rather than waiver. Although waiver terminology is commonly found in the cases, a defendant who absents himself or who engages in disruptive conduct does not really "agree" to be tried in his absence or "intentionally relinquish" his right to be present. Rather he loses or forfeits his right to be present by way of a penalty for violating certain obligations or conditions. This is more than a matter of semantics. In *Illinois v. Allen*, holding that a disruptive defendant may be excluded from his trial, the Court did not conclude that the defendant had waived his right to be present, but rather that [he] he "lost his right" by virtue of his behavior "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." [397 U.S. at 346.] The court of appeals had reached the opposite result by analyzing the case in terms of waiver and concluding that so long as Allen insisted upon his right to be present, which he clearly did, he could not be held to have waived it because "the insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver." 413 F.2d 232[, 235] (7th Cir. 1969)

(citations omitted)

See also Note, *Illinois v. Allen: The Unruly Defendant's Right to a Fair Trial*, 46 N.Y.U.L. REV. 120, 132-34 (1971); 22 S.D. L. REV. 447 (1977); 28 U. PITT. L. REV. 445, 455 (1967).

was proper.³⁷

The Supreme Court's decision in *Illinois v. Allen*—the no frontation—the no ant Stubbs claim had violated his c testimony of a wit that the witness, v available. Holding "sufficient indicia Tennessee court, ble" to testify at t

37. 397 U.S. at 343 exception to the right of accused. *See, e.g., Reyno* keeps a witness from tes 547 F.2d 1346, 1359-60 (S absence of confrontation ness' unavailability at tr 637, 645-51 (6th Cir.) (d own interests may not c 1008 (1975). *Cf. Parker v.* defendant's right of confi misconduct violated def A.2d 163, 168 (1972) (de violated defendant's six the Constitutional Right evidence outside the rec error was harmless). *See Walter Raleigh Loses An a witness ought not be accusation").*

38. 403 U.S. 204 (1971).

39. *Id.* at 209. This court. In his habeas corp was unconstitutional, the cate for a harsher punish

40. The focus of the ity which have bee placed before the ju am . . . [400 U.S. 5 evaluating the truth (1970)]. It is clear Court, that even the of these "indicia of 405 U.S. at 213.

41. Compare *United* testified to memory laps

was proper.³⁷

The Supreme Court elucidated the final exception to the right of confrontation—the necessity exception—in *Mancusi v. Stubbs*.³⁸ Defendant Stubbs claimed that a Tennessee court, in retrying him for murder, had violated his constitutional right of confrontation by admitting the testimony of a witness at his previous trial.³⁹ The government argued that the witness, who had moved to Sweden before the retrial, was unavailable. Holding that the witness' testimony at the first trial bore "sufficient indicia of reliability,"⁴⁰ the Supreme Court ruled that the Tennessee court, after finding that the witness was, in fact, unavailable⁴¹ to testify at the second trial, had properly admitted the testimony

37. 377 U.S. at 343. With its strong emphasis on defendant's misbehavior, the forfeiture exception to the right of confrontation has been limited to extreme cases of misconduct by the accused. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (defendant who voluntarily keeps a witness from testifying cannot insist on right of confrontation); *United States v. Carlson*, 547 F.2d 1346, 1359-60 (8th Cir. 1976) (witness' prior grand jury testimony held admissible despite absence of confrontation with defendant because defendant's intimidation of witness caused witness' unavailability at trial), *cert. denied*, 431 U.S. 914 (1977); *United States v. Mayes*, 512 F.2d 637, 648-51 (6th Cir.) (defendant who brings about denial of confrontation in furtherance of his own interests may not complain of violation of his constitutional rights), *cert. denied*, 422 U.S. 1008 (1975); cf. *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam) (bailiff's misconduct violated defendant's right of confrontation); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965) (prosecutor's misconduct violated defendant's right of confrontation); *State v. Collins*, 265 Md. 70, 78-79, 288 A.2d 163, 168 (1972) (defendant's absence, through no fault of his own, at deposition of witness violated defendant's sixth amendment right of confrontation); Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 CRIM. L. BULL. 293 (1973) (if prosecutor refers to evidence outside the record in his summation, burden should be on prosecution to establish that error was harmless). See also Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Losev Another One*, 8 CRIM. L. BULL. 99, 139 (1972) ("[a] defendant who murders a witness ought not be permitted to invoke the right of confrontation to prohibit the use of his accusation").

38. 408 U.S. 204 (1972).

39. *Id.* at 209. This case arose after Stubbs was convicted of a felony in a New York state court. In his habeas corpus petition, Stubbs alleged that because his earlier Tennessee conviction was unconstitutional, the New York state court could not use the Tennessee conviction as a predicate for a harsher punishment under New York's second offender laws. *Id.* at 205.

40. 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," *Dutton v. Evans*, . . . [403 U.S. 74, 89 (1970)], and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green*, . . . [399 U.S. 149, 161 (1970)]. 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" referred to in *Dutton*.

408 U.S. at 213.

41. Compare *United States v. Rogers*, 549 F.2d 490, 498-502 (8th Cir. 1976) (witness who testified to memory lapse and invoked fifth amendment privilege was not "unavailable" at trial).

Moreover, with recent technological advances in the field of electronics, depositions by video tape are gaining recognition at federal criminal

Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (if testimony is critical to defense, "hearsay rule may not be applied mechanically to defeat the ends of justice").

Nevertheless, the policies underlying the necessity exception to confrontation and the exceptions to the hearsay rule are similar. See, e.g., *Dutton v. Evans*, 400 U.S. at 80-83 (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *California v. Green*, 399 U.S. at 165 (alternative holding) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness if defendant had opportunity to cross-examine that witness at time of recording); *Delaney v. United States*, 263 U.S. 586, 590 (1924) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness because defendant had opportunity to cross-examine at time of recording); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (allowing admission at criminal trial of dying declaration); *United States v. Martinez*, 573 F.2d 529, 533 (8th Cir. 1978) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *McLaughlin v. Vinzant*, 522 F.2d 448, 450-51 (1st Cir.) (allowing admission at criminal trial of spontaneous utterance), *cert. denied*, 423 U.S. 1037 (1975); *United States v. Snow*, 521 F.2d 730, 734-36 (9th Cir. 1975) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy), *cert. denied*, 423 U.S. 1090 (1976); *United States v. Lipscomb*, 435 F.2d 795, 802-03 (5th Cir. 1970) (allowing admission at criminal trial of entries in the regular course of business), *cert. denied*, 401 U.S. 980 (1971); *Hanley v. United States*, 416 F.2d 1160, 1167-68 (5th Cir. 1969) (same), *cert. denied*, 397 U.S. 910 (1970); *United States v. Kelly*, 349 F.2d 720, 770-71 (2d Cir. 1965) (allowing admission at criminal trial of recorded past recollection), *cert. denied*, 384 U.S. 947 (1966); *Reed v. Betz*, 343 F.2d 723, 724 (5th Cir. 1965) (allowing admission at criminal trial of public records of routine character). But see, e.g., *Barber v. Page*, 390 U.S. 719, 722-25 (1968) (expanding "unavailability" concept beyond its traditional hearsay definition); *Kirby v. United States*, 174 U.S. 47, 53-56 (1899) (denying admission at criminal trial of record of conviction of thieves to prove that property received by defendant had been stolen); *Phillips v. Neil*, 452 F.2d 347, 343-48 (6th Cir. 1971) (refusing admission at criminal trial of entry in the regular course of business), *cert. denied*, 409 U.S. 884 (1972).

See generally Baker, *supra* note 16; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Griswold, *supra* note 16; Read, *The New Confrontation—The Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *supra* note 16; Younger, *Hearsay and Confrontation, Or, What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay*, 2 NAT'L J. CRIM. DEF. 65 (1976); Note, *Confrontation, Cross Examination and the Right to Prepare a Defense*, 56 GEO. L.J. 939 (1968); Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360 (1968); Note, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965); Note, *Hearsay and Confrontation: Can the Criminal Defendant's Rights be Preserved Under a Bipartite Standard?*, 32 WASH. & LEE L. REV. 243 (1975); 38 LA. L. REV. 898 (1978); 40 MO. L. REV. 710 (1975); 13 U.C.L.A. L. REV. 366 (1966); 31 VAND. L. REV. 682 (1978); 75 YALE L.J. 1434 (1966).

See also C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 252 (2d ed. 1972); J. WELLS & M. BERGER, *WELLS'S EVIDENCE* at ¶ 800 [04] (1977); 5 WILSON, *EVIDENCE* §§ 1465, 1495-1499 (Chadbourne rev. 1974).

trials.⁴⁶

46. See, e.g., *United States v. King*, 552 F.2d 833, 841 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); cf. *Hendricks v. Swenson*, 456 F.2d 503, 505-07 (8th Cir. 1972) (allowing admission at criminal trial of video-taped confession by defendant).

FED. R. CIV. P. 30(b)(4) (applicable to criminal trials through FED. R. CRIM. P. 15(d), *supra* note 3, provides:

The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(emphasis added)

See *State v. Reid*, 114 Ariz. 16, 27-29, 559 P.2d 136, 147-49 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by non-key witness), *cert. denied*, 431 U.S. 921 (1977); *People v. Moran*, 39 Cal. App. 3d 398, 110, 114 Cal. Rptr. 413, 420 (1974) (allowing admission at criminal trial of video-taped testimony by main prosecution witness; "[v]ideo tape is sufficiently similar to live testimony to permit the jury to properly perform its function"); *Hutchins v. State*, 286 So.2d 244, 245-46 (Fla. Dist. Ct. App. 1973) (allowing admission at criminal trial of video-taped testimony by expert witness); *State v. Hewett*, 86 Wash. 2d 487, 490-94, 545 P.2d 1201, 1203-05 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by victim).

In *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (en banc), the Supreme Court of Missouri sustained, as consistent with the confrontation clause, the use of closed circuit television in the examination of an absent witness at a criminal trial. The city's expert witness testified from the crime laboratory while the judge, parties and counsel watched from the courtroom. As noted by the Supreme Court of Missouri, the two-way closed circuit television system causes the transmission of pictures and voices to be instantaneous. *Id.* at 337. In contrast, a video-taped deposition is not a present event, but a record of a past event. See Weis, *Electronics Expand Courtrooms' Walls*, 63 A.B.A. J. 1713, 1715 (1977). The distinction might be significant in light of the requirement that a witness be unavailable at a federal criminal trial before the trial court may admit a deposition by that witness as substantive evidence against the accused. See FED. R. CRIM. P. 15(e), *supra* note 3. When using closed circuit television, because the witness is testifying at the time of the trial, it might be unnecessary to show that the witness is unavailable to testify in the courtroom. But see 44 U.M.E.C. L. REV. 517 (1976) (arguing that due to the unique characteristics of closed circuit television, its use at a criminal trial, unlike the use of video tape, violates the defendant's right of confrontation).

A wealth of material discussing the use of video tape at various stages of the trial process exists; most commentators advocate its use in the courtroom. See generally Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Bermant & Jacobovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 HASTINGS L.J. 999 (1975); Cunningham, *Videotape Evidence: Technological Innovation in the Trial Process*, 36 ALA. LAW. 228 (1975); Dotel, *Trial by Videotape—Can Justice Be Done?*, 47 TEMP. L.Q. 228 (1974); Kennelly, *The Practical Uses of Trialvision and Deposition*, 1972 TRIAL LAW GUIDE 183; Kornblum & Rush, *Television in Courtroom and Classroom*, 59 A.B.A.J. 273 (1973); Leibson, *How and When to Use Video Tape Depositions*, 42 KY. BENCH & B. 30 (Apr. 1978); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DES. L.J. 463 (1973); Miller, *Videotaping the Oral Deposition*, 18 PRACT. LAW 45 (1972); Morrill, *Enter—The Video Tape Trial*, 31 MAR. J. PRACT. & PROC. 237 (1970); Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. L. & SOC. PROBS. 363 (1973); Note, *Nebraska Faces Videotape: The New Video Technology in Perspective*, 6 CREIGHTON L. REV. 214 (1972); Note, *Video Tape Trials: A Practical*

In *United States* asserted that both presentation are essential confrontation.⁴⁸ Unnecessity this constitute actual face-to-face not meet the requirement conclusion. the *States*,⁵⁰ *Kirby v. Under v. Massachusetts* Gibson argued that denies that confrontation none lessens the force

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48. *Id.* at 821.

49. *Id.* at 820-22.

50. 156 U.S. 237 (1895)

51. 174 U.S. 47 (1899)

52. 221 U.S. 325 (1910)

53. 291 U.S. 97 (1933)

54. 593 F.2d at 821.

55. *Id.*

56. *Id.*

The right of cross-examination are influenced by ment right additional

Id.

In a footnote, the court testimony is taken for introduction representation" *Id.* at 82

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In *United States v. Benfield*⁴⁷ the Eighth Circuit Court of Appeals asserted that both physical confrontation and concurrent cross-examination are essential elements of a defendant's sixth amendment right of confrontation.⁴⁸ Unless the defendant waives, forfeits, or loses by necessity this constitutional right, a confrontation that does not entail an actual face-to-face meeting between the accused and the witness does not meet the requirements of the sixth amendment.⁴⁹ In reaching this conclusion, the Court specifically relied upon *Mattox v. United States*,⁵⁰ *Kirby v. United States*,⁵¹ *Dowdell v. United States*,⁵² and *Snyder v. Massachusetts*.⁵³ Writing for a unanimous court, Chief Judge Gibson argued that, "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."⁵⁴

In the opinion of the court, physical confrontation is of primary importance because it guarantees to the accused the right to participate in the conduct of his defense.⁵⁵ Moreover, the court expressed the belief that the accuracy of an adverse witness' testimony is sharpened by the presence of the defendant.⁵⁶ Cross examination is an essential com-

Evaluation and a Legal Analysis, 26 STAN. L. REV. 619 (1974), 20 DE PAUL L. REV. 924 (1971); 42 MO. L. REV. 121 (1977).

See also G. CHU & W. SCHRAMM, LEARNING FROM TELEVISION 84-86 (1968) (study indicated that media instruction to students matches effectiveness of live instruction), Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCH. 655 (1965) (discussing use of video-taped interviews to determine legal competency).

47. 593 F.2d 815 (8th Cir. 1979).

48. *Id.* at 821.

49. *Id.* at 820-22.

50. 156 U.S. 237 (1895). See note 18 *supra* and accompanying text.

51. 174 U.S. 47 (1899). See note 21 *supra* and accompanying text.

52. 221 U.S. 325 (1911). See note 21 *supra* and accompanying text.

53. 291 U.S. 97 (1934). See note 21 *supra* and accompanying text.

54. 593 F.2d at 821.

55. *Id.*

56. *Id.*

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.

Id.

In a footnote, the court noted that "[e]xclusion of the defendant from a deposition where testimony is taken for introduction at trial also potentially conflicts with the defendant's right of self-representation." *Id.* at 821 n.8 (citations omitted).

The court cited no authority to support its contention that a face-to-face meeting between defendant and witness increases the likelihood that the witness will truthfully relate the facts. Whether effective cross-examination, by counsel produces the same result, and whether the court's

panion to physical confrontation, but it is not independently sufficient to satisfy the requirements of the sixth amendment.⁵⁷

Once the court established that physical confrontation was required, it turned to the question of whether Benfield, verbally or through his actions, had lost the protection of his constitutional right. The court found that Benfield had not waived, forfeited, or lost by necessity his right to physically confront Cady at the deposition.⁵⁸ No evidence of an affirmative waiver by Benfield existed,⁵⁹ and the court did not find the charge against Benfield so heinous as to excuse the prosecutrix from facing defendant while testifying.⁶⁰ Shifting its focus to the specific procedure used at the deposition, the court found that the absence of a face-to-face meeting between Benfield and Cady, and the latter's unawareness that during the course of the deposition she was being monitored by defendant, resulted in only an imperfect confrontation.⁶¹ As such, it was insufficient to test the accuracy of Cady's perceptions and expressions of her ordeal.⁶²

The court carefully noted that it did not condemn the use of electronic devices in the courtroom.⁶³ Instead, the court's concern stemmed from the particular procedure employed. The deposition procedure used was "[t]oo great an abridgement . . . of defendant's con-

proposition is sound from a psychological standpoint is unclear. See generally C. KLEINKE, *FIRST IMPRESSIONS* 27 (1975); M. LADD & R. CARLSON, *CASES AND MATERIALS ON EVIDENCE* 166-73 (1972); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967); 44 U.M.K.C. L. REV. 517, 521-25 (1976); see also *United States v. West*, 574 F.2d 1131, 1141 (4th Cir. 1978) (Widener, J., dissenting) (undocumented statement that "we must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face").

57. 593 F.2d at 821. "The right of cross-examination reinforces the importance of physical confrontation." *Id.*

58. *Id.* at 821-22.

59. *Id.* at 821.

60. *Id.* The court merely assumed, without deciding, that a grievous crime against a person could excuse the victim from facing the defendant while testifying. *Id.* Although noting that *State v. Richey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971), allowed the examination, in defendant's absence, of a child abuse victim's competency to testify, the *Benfield* court found no indication that the child had given substantive testimony in the defendant's absence. 593 F.2d at 821 n.10. The *Benfield* court concluded that "[t]o find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons." *Id.* at 821.

61. 593 F.2d at 821-22.

62. *Id.*

63. "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." *Id.* at 821.

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65. *Id.* at 822.

66. *Id.*

67. *Id.*

68. See notes 18, 21 &

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72. Cf. *The Supreme's*
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frontation right to pass constitutional muster."⁶⁴ The court ordered that Benfield's conviction be reversed⁶⁵ and, after disposing of Benfield's objections against the government's ability to retry him,⁶⁶ remanded the case to the district court for further proceedings.⁶⁷

Benfield's significance lies in the Eighth Circuit's reestablishment of the requirement of a face-to-face meeting between defendants and witnesses as an important part of the constitutional right of confrontation. The court's emphasis on defendants' right to personal, physical confrontation is consistent with the *Mattox* line of cases⁶⁸ and the holdings of *Diaz* and *Allen*.⁶⁹ The Supreme Court's recent focus on effective cross-examination as the essential element of confrontation, however, had shifted the requirement of physical confrontation to the background.⁷⁰ Thus, the *Benfield* court's reemphasis on face-to-face meetings absent a showing of waiver, forfeiture, or necessity indicates that physical confrontation has not been eliminated from the rights guaranteed by the sixth amendment.

The decision in *Benfield* is also important because the court expressly approved the use in criminal trials of video-taped depositions that comply with the terms of Rule 15 and allow the defendant to participate actively in the proceeding. Commentators generally agree that a jury is capable of satisfactorily viewing a deponent's demeanor through video tape,⁷¹ and the court's decision exhibits a willingness to accept this proposition.⁷²

A deposition proceeding plays a significant role in the ultimate deter-

64. *Id.* "Here the right of confrontation was considerably curtailed by the procedures employed. What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct." *Id.*

65. *Id.* at 822.

66. *Id.*

67. *Id.*

68. See notes 18, 21 *supra* and accompanying text.

69. In neither *Diaz* nor *Allen* did the Supreme Court declare defendant's confrontation right satisfied by vicarious representation through counsel. Instead, the Court devised the waiver and forfeiture exceptions, respectively, to the right of confrontation. See notes 30-37 *supra* and accompanying text. Thus, the ability of Benfield's attorney to cross-examine Cady at the deposition, see note 11 *supra*, could not properly support a finding that Benfield's right of confrontation was satisfied.

70. See notes 22-27 *supra* and accompanying text.

71. See cases and other authorities cited note 46 *supra*.

72. Cf. *The Supreme Court, 1989 Term, supra* note 25, at 115 (when applied to *Benfield*, suggests that although video tape sufficiently exhibits a witness' demeanor, the Constitution may not require that the jury view demeanor).

mination of a defendant's guilt or innocence. Thus, the *Benfield* court's careful scrutiny of the procedure employed during the victim's deposition is commendable. The court's holding that confrontation between defendants and witnesses must be complete precludes a step backward toward a judicial system in which ex parte affidavits and depositions would be sufficient to support a criminal conviction.⁷³

73. See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); note 28 *supra*.

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clared that the witness would testify in accordance with the information in the affidavit, he subsequently advised the court that he only intended to present the witness, have her identify her signature on the affidavit, and request that it be admitted as a defense exhibit. At that point, the defendant's theory changed from an attempted impeachment following "surprise" testimony, to a request that he be permitted to introduce a hearsay document (over an already asserted prosecutorial objection) admissible as a statement against the penal interest of the declarant.

We hold that the proposed evidence was not admissible on either theory.

[3, 4] On the impeachment theory, there was simply no presentation to a jury to which the defendant could claim "surprise" and which he should, therefore, be given the opportunity to attack or destroy. In any event, the impeaching evidence would be incompetent to prove substantive "facts" encompassed in such evidence. *State v. Flichman*, 35 Wash.2d 243, 212 P.2d 794 (1949).

[5] On the penal interest theory, the proposed evidence does not meet the minimal criteria necessary to mandate its use:

- (1) the declarant's testimony is otherwise unavailable;
- (2) the declaration is an admission of an unlawful act;
- (3) the declaration is inherently inconsistent with the guilt of the accused; and (4) *there are such corroborating facts and circumstances surrounding the making of the declaration as to clearly indicate that it has a high probability of trustworthiness.*

(Emphasis added.) *State v. Gardner*, 13 Wash.App. 194, 198-99, 534 P.2d 140, 142 (1975). See *State v. Young*, 89 Wash.2d 613, 574 P.2d 1171 (1978).

[6] Ms. Harris' affidavit and her subsequent declaration to the court probably satisfy the first three criteria, but the trial court concluded that the affidavit failed utterly to meet the fourth criterion. Rather than indicating a "high probability of

trustworthiness," the surrounding circumstances negate any degree of trustworthiness. We find no error in the trial court's ruling to excuse Ms. Harris as a witness and to prohibit any further reference to her during the trial.

In view of our holding on the speedy trial issue, the judgment and sentence are reversed, and this matter is remanded with direction to dismiss the information.

PEARSON, C. J., and SOULE, J., concur.



22 Wash.App. 703

The STATE of Washington, Respondent,

v.

Michael S. FIRVEN, Appellant.

No. 2965-II.

Court of Appeals of Washington,
Division 2.

Feb. 21, 1979.

Defendant was convicted before the Superior Court, Kitsap County, Terence Hanley, J., of second-degree assault and third-degree theft, and he appealed. The Court of Appeals, Pearson, C. J., held that admission of pretrial depositions of three complaining witnesses was not error where complaining witnesses were physically unable to testify, prosecutor was unable to procure their attendance by subpoena, and defendant not only had opportunity to cross-examine but made thorough use of his opportunity in questioning each witness when depositions were taken.

Affirmed.

1. Criminal Law ⇌ 1110(1)

Although appellate court has power to correct or supplement record, it is not required to do so. RAP 9.10

2. Criminal Law \S 627.2

Complaining witnesses, three navy seamen who were scheduled to ship out on day their depositions were taken, and whose exact whereabouts on day of trial were unknown, were physically unable to testify and prosecutor was unable to procure their attendance at trial by subpoena, and thus admission of their pretrial depositions was not error on theory that there was insufficient showing of their unavailability. CrR 4.6(d).

3. Criminal Law \S 662(3)

Defense counsel, who had some 15 hours for preparation and who not only had opportunity to cross-examine complaining witnesses at their depositions but who also made thorough use of his opportunity in questioning each witness, had sufficient time to prepare for cross-examination, and thus permitting depositions of witnesses, who were unavailable for trial, to be read into record did not deny defendant adequate opportunity to cross-examine complaining witnesses in violation of confrontation clause. U.S.C.A.Const. Amend. 6.

Ronald D. Ness (Appointed), Kitsap County Public Defender, Bremerton, for appellant.

C. Danny Clem, Pros. Atty., Christian C. Casad, Deputy Pros. Atty., Port Orchard, for respondent.

PEARSON, Chief Judge.

Defendant Michael Firven, was convicted of the crimes of assault in the second degree and theft in the third degree. He now appeals from the judgment and sentence entered by the trial court. The sole issue on appeal is whether the trial court erred in allowing in evidence the pretrial depositions of the 3 complaining witnesses. We affirm.

Ricky McMillan got drunk at an enlistment's club on March 12, 1977, and stepped outside to engage in some horseplay with his friends, Lee Allen and Mike Parmalee. After some grabbing and laughing, McMillan yelled for someone "to kick Mike Parmalee's ass." Defendant who was standing

a few feet away, said that he would do it for \$50. McMillan said, "all I have is \$35," and pulled it out of his pocket as he approached defendant. Defendant grabbed the bills out of McMillan's hand, tearing off part of one bill, and ran. McMillan, Allen, and Parmalee chased defendant until he stopped abruptly and turned to them with a knife, yelling that he would cut them up. He ran towards Allen, who fled. Swinging the knife at Allen's back, defendant chased him; Parmalee and McMillan chased defendant. Defendant broke off and ran down an alley, where he was apprehended by a shore patrol officer. The \$35 wad was found on the ground in the alley, and part of a \$20 bill was torn off.

The complaining witnesses—McMillan, Parmalee, and Allen—were Navy seamen scheduled to ship out on April 1 for San Diego. An order for their depositions was issued by the court on March 31, 1977 at 4:30 p. m., but the depositions were not taken until the following morning at 8 a. m. at defense counsel's request, to allow him time to interview the 3 witnesses. The witnesses were subpoenaed to appear at trial on May 2, but they did not appear. The trial court permitted their depositions to be read to the jury, over defendant's objection.

Defendant's sole contention on appeal is that the trial court erred in permitting the depositions of the 3 complaining witnesses to be read into the record at trial, on the grounds that: first, there was not a sufficient showing of their unavailability to testify, and second, this procedure denied him an adequate opportunity to cross-examine the complaining witnesses, in violation of the confrontation clause of the sixth amendment to the United States Constitution. We disagree.

[1] It should be noted that defendant does not assign error to the order that depositions be taken, although his argument includes criticism of that order. Further, we have no record of the proceeding in which depositions were ordered. The party seeking review of a lower court's ruling is

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responsible for designating the necessary Clerk's Papers and exhibits. RAP 9.6. Although the appellate court has the power to correct or supplement the record, RAP 9.10, it is not required to do so. *Heilman v. Wentworth*, 18 Wash.App. 751, 571 P.2d 963 (1977). Therefore, the only issue that we must address on this appeal is the admissibility of the depositions at trial. The case of *State v. Roebuck*, 75 Wash.2d 67, 448 P.2d 934 (1968), is controlling.

In *Roebuck* the complaining witness was an elderly man who, at the defendant's preliminary hearing for assault, testified under oath that the defendant had knocked him down and attempted to take his wallet. An officer corroborated this testimony. The defendant was present with his attorney.

At the subsequent trial the complaining witness was brought into the courtroom on a stretcher, and after interrogation the court found that he lacked the capacity to testify and was not "available" to testify. The judge and police witness in the preliminary hearing were then called as witnesses in the trial and permitted to testify as to their recollections of the complaining witness's testimony in the preliminary hearing. The defendant was convicted.

The Supreme Court affirmed his conviction, holding that testimony given at a preliminary hearing, like that given at a previous trial, is admissible when there is a satisfactory showing that (1) the witness is unavailable; (2) the witness was sworn to testify at a previous proceeding; (3) the accused was present at that time and had the opportunity to cross-examine; and (4) the person who seeks to relate the absent witness's testimony was present, heard the witness testify, and can state in substance the nature of the subject matter sought to be established.

[2] Defendant asserts that there was not a sufficient showing of unavailability of the complaining witnesses in the present case. All 3 witnesses were served with subpoenas on March 22, 1977, but they failed to appear at trial on May 2, 1977. Testimony in the depositions taken on April

1, 1977, indicated that the witnesses were scheduled to leave Bremerton that day on their ship, the U.S.S. *Kitty Hawk*. Their destination was San Diego. But their exact whereabouts on the day of trial were unknown.

CrR 4.6(d) provides in part:

At the trial or upon any hearing, a part or all of a deposition so far as otherwise admissible under the rules of evidence may be used if it appears: that the witness is dead; or that the witness is unavailable, unless it appears that his unavailability was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(Italics ours.) The complaining witnesses in this case were physically unavailable to testify, and the prosecutor was unable to procure their attendance at trial by subpoena.

[3] Defendant next contends that he had insufficient time to prepare for cross-examination of the complaining witnesses, because their depositions were ordered on March 31, 1977 at 4.30 p. m. and taken at 8 a. m. the following day, leaving defense counsel a period of 15 hours for preparation.

In *State v. Roebuck*, *supra*, the defendant was represented at the preliminary hearing by an attorney who had just been appointed by the court and had conferred with the defendant shortly before the hearing commenced. The defense attorney in *Roebuck* did not cross-examine either witness at the hearing, but the court held that it was sufficient that he had the opportunity to do so. We note that a period of only 4½ hours for preparation was allowed under similar facts in *State v. Hewett*, 86 Wash.2d 487, 545 P.2d 1201 (1976).

Defendant in the present case fails to specify any way in which his cross-examination could have been improved with more than 15 hours for preparation. Further, we are satisfied from our reading of the record that defendant not only had the opportuni-

ty to cross-examine *see State v. Roebuck, supra*, but also made thorough use of his opportunity in questioning each witness.

Affirmed.

PETRIE and REED, JJ., concur.



22 Wash.App. 730

The STATE of Washington, Respondent,

v.

Randall A. ORCUTT, Appellant

No. 3178-11

Court of Appeals of Washington,
Division 2.

Feb. 26, 1979.

Defendant was convicted in the Superior Court, Cowlitz County, Frank L. Price, J., of possession of psilocybin mushrooms, a controlled substance, and defendant appealed. The Court of Appeals, Pearson, C. J., held that: (1) under circumstances, governmental interest in ascertaining vehicle ownership outweighed limited invasion of privacy, and qualified as an appropriate "community caretaking" exception to search warrant requirement, but (2) even if police officer's discovery of marijuana residue in glove box while properly searching for a registration certificate created probable cause to believe that vehicle contained other contraband, there was insufficient evidence of exigent circumstances to justify second exploratory search without first presenting evidence to a neutral and detached magistrate.

Reversed and remanded.

1. Searches and Seizures ⇌ 7(1)

Subject to only a few exceptions, a warrantless search is per se unreasonable under Fourth Amendment. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇌ 3.3(6)

Whether a court is considering the "community caretaking function" exception to search warrant requirement as applied to automobiles, or the general exploratory search exception, which requires a finding of probable cause to search plus exigent circumstances which justify police in proceeding without a warrant, an automobile search must nevertheless meet constitutional requirements of reasonableness, and question of reasonableness always involves a consideration of facts and circumstances of case and a balancing of governmental interests with individual's right and expectation of privacy. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇌ 3.3(6)

Where operator drove evasively in presence of police, abandoned vehicle under unusual circumstances in an unusual place with driver's door open and vehicle full of personal property, police were unable to ascertain ownership by any other prompt measures, and defendant was fleeing from police, governmental interest in determining vehicle ownership justified a limited intrusion into glove box in search of a registration certificate, since circumstances were sufficient to create a reasonable belief that vehicle may have been stolen; under circumstances, governmental interest in ascertaining vehicle ownership outweighed limited invasion of privacy, and qualified as an appropriate "community caretaking" exception to search warrant requirement. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇌ 3.3(1)

Scope of caretaking function search is limited to extent necessary to carry out caretaking function. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇌ 3.3(4)

Seizure of flakes of marijuana found by police officer in glove compartment while properly searching for a registration certificate would have been reasonable under plain view doctrine, but doctrine would

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Alaska State Legislature

1975

Source:

SCR 15

SENATE
CONCURRENT RESOLUTION NO. 15

Relating to the assignment of policewomen to reported incidents of rape.

BE IT RESOLVED

BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS many rape victims do not report the incident to law enforcement authorities because they fear the embarrassment of undergoing interrogation by male officers; and

WHEREAS, even in law enforcement agencies where policewomen are currently employed, they are usually not assigned to positions which enable them to respond to reported rapes; and

WHEREAS in other areas of the country the experience has been that rape victims believe female peace officers are or would be more sensitive to their physical and emotional needs; and

WHEREAS special efforts should be made to assign policewomen to night duty during which time most rapes occur;

BE IT RESOLVED by the Alaska State Legislature that all state and local law enforcement agencies are encouraged to undertake an affirmative recruitment and assignment program designed to place policewomen in positions that will enable them to respond to cases of reported rape.

COPIES of this resolution shall be sent to all local and state law enforcement agencies.



Alaska State Legislature

1975

Source:

SCR 16

SENATE
CONCURRENT RESOLUTION NO. 16

Relating to medical examinations of victims sexually assaulted.

BE IT RESOLVED
BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS victims of sexual assaults are generally transported to an emergency medical facility for emergency care and for an examination to compile evidence for future criminal prosecution; and

WHEREAS a victim of sexual assault is often beaten, traumatized, and in need of thorough medical and psychological treatment and in need of information regarding pregnancy, venereal disease, and psychiatric follow-up; and

WHEREAS, in many instances, the staff of the emergency medical facility is unable or not equipped to provide the needed information and counseling;

BE IT RESOLVED by the Alaska State Legislature that the staff of all emergency medical facilities or private emergency medical facilities under contract be instructed on the appropriate care and treatment of victims who have been sexually assaulted and that these facilities, as a matter of course, be required to inform the victim of the availability of venereal disease, pregnancy and psychiatric services, of the possibility of financial aid from the Violent Crimes Compensation Board, and of any other services or aids available in the community which ~~could serve to alleviate~~ the eventual trauma occasioned by a sexual assault.

COPIES of this resolution shall be sent to the director of each public medical facility in the state and to each private

medical emergency facility in the state having a contractual relationship with the state or local political subdivision.



Source:

CSSCR 17

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Relating to peace officer
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Alaska State Legislature

1975

Source:

CSSCR 17

SENATE CONCURRENT RESOLUTION NO. 17

Relating to peace officer training programs related to treatment of rape victims.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS many rape victims suffer great emotional trauma as well as physical injury as the result of being assaulted; and

WHEREAS current peace officer training practices emphasize the legal elements of the crime of rape and neglect the psychological effects of the crime on the victim and the victim's emotional needs following the ordeal; and

WHEREAS rape victims have charged that peace officers display a lack of sensitivity to their needs;

BE IT RESOLVED by the Alaska State legislature that, utilizing available funds, the Alaska Police Standards Council, in conjunction with local community women's organizations and representatives of local medical professions, develop courses of instruction for law enforcement personnel regarding the proper investigation of rape cases, with emphasis on the psychological and emotional effects on the victim.

COPIES of this resolution shall be sent to the members of the Alaska Police Standards Council.



Alaska State Legislature

1975

*Mary + Barbara
- is this
happening?*

Source:

SCR 18

SENATE
CONCURRENT RESOLUTION NO. 18

Relating to training in nonaggressive self-defense in secondary schools of the state.

BE IT RESOLVED
BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS, with the high incidence of violent crimes against individuals, there is a need for public high schools to include as part of their physical education program training in non-aggressive self-defense; and

WHEREAS, if persons were better able to defend themselves, they would be less vulnerable to rape and other violent bodily assaults;

BE IT RESOLVED by the Alaska State Legislature that the governing board of each school district maintaining a high school is respectfully requested to ascertain the need for offering physical education classes in nonaggressive self-defense and, if a need exists, to report to the Department of Education by July 1, 1976 what action, if any, has been taken; and be it

FURTHER RESOLVED that the Department of Education is respectfully requested to work with and assist school districts, including the state-operated school system, in developing programs in nonaggressive self-defense; and be it

FURTHER RESOLVED that the department submit a summary and evaluation of the findings by the various school districts together with a progress report on the implementation of such programs to the Tenth Legislature - First Session.

COPIES of this resolution shall be sent to each school board in the state and to the Alaska Department of Education.

Fla. App. 1971, 249 So.2d 42; cf. Kelly v. State, Fla. App. 1967, 202 So.2d 901; Adams v. Smith, Fla. 1967, 205 So.2d 530; State v. Lane, Fla. App. 1968, 209 So.2d 873; King v. State, Fla. App. 1972, 258 So.2d 21; 23A C.J.S. Criminal Law § 1385, p. 1034.

Certiorari denied.

CROSS, MAGER, and DOWNEY, JJ., concur.



Joseph Leo BIVINS, Appellant,

v.

STATE of Florida, Appellee.

No. 74-671.

District Court of Appeal of Florida, Fourth District.

June 6, 1975.

Defendant was convicted before the Circuit Court, Orange County, Cecil H. Brown, J., of rape, and false imprisonment and he appealed. The District Court of Appeal, Woodson, J. William, Associate Judge, held that defendant was not denied a public trial because the trial court excluded all spectators, except those authorized by statute, while the prosecutrix was testifying; that the defendant waived his objection to the denial of concluding argument before the jury where the procedure was announced in advance by the trial court and the defendant did not object to the procedure; and that the judgment adjudicating defendant guilty of rape was not invalid on ground there was no valid verdict of guilty rape.

Affirmed.

1. Criminal Law § 635

Defendant, in prosecution for rape and false imprisonment, was not denied a public trial because the trial court excluded all spectators except those authorized by statute in a case in which any person under the age of 16 is testifying concerning any sex offense, after there was a disturbance by outburst of small children when the prosecutrix, who was over 16 years of age, was beginning her testimony. West's F.S.A. § 801.231.

2. Criminal Law § 635

In a case in which a witness over the age of 16 years is testifying concerning a sex offense, trial court is entitled to exclude the same portion of the public as it is entitled to if the witness is under 16 years of age. West's F.S.A § 801.231.

3. Criminal Law § 645

Where trial court announced in advance that defendant would not be entitled to concluding argument before the jury if he offered no testimony in his own behalf except his own and defendant did not object to the procedure, he waived the objection.

4. Criminal Law § 894

Where the jury returned and verdict forms were handed to the clerk, the clerk announced that the jury found the codefendant guilty of rape and false imprisonment and the defendant guilty of false imprisonment, the jury was then polled as to their verdict and each announced in the affirmative that these were their verdicts, the court then announced that the defendant was found guilty of count I rape and was adjudicated guilty of rape and announced that the defendant had been found guilty of count II false imprisonment and was adjudicated guilty of false imprisonment and the defendant made no objection to the adjudication by the trial judge, the judgment adjudicating defendant guilty of rape was not invalid on ground there was no valid verdict of guilty of rape.

James C. Dukach, Jr., Orlando, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and Basil S. Diamond, Asst. Atty. Gen., West Palm Beach, for appellee.

WOODSON, J. WILLIAM, Associate Judge.

The appellant was tried before a jury on two counts, rape and false imprisonment. There was some disturbance by outburst of small children during trial after nine witnesses had testified and prosecutrix, who was over 16 years of age, was beginning her testimony. State moved to exclude all spectators. Court excluded all spectators except those authorized under F.S. 801.231.

[1,2] The appellant maintains he was denied a public trial, in violation of the Florida Constitution and the Federal Constitution; we think not. If the trial court can exclude a portion of the public if the witness is under 16 years of age, it can exclude that same portion of the public if the witness is over 16 years of age. The age of the prosecutrix is not the determining factor in whether or not the trial is public. The Supreme Court of Florida stated in the decision of *Robertson v. State*, 64 Fla. 457, 60 So. 118 (1912)

"The word 'public,' as used in the Constitution guaranteeing to all persons accused of crime a public trial, is there used in opposition to 'secret.' The constitutional requirement is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

[3] The appellant's Point II on appeal was that he offered no testimony in his

own behalf except his own, and was denied concluding argument before the jury.

The procedure was announced in advance by the trial judge and the appellant having not objected to the procedure at the trial level waives that objection.

[4] The appellant cites as his Point III on appeal, the judgment adjudicating appellant guilty of rape is invalid because there was no valid verdict of guilty of rape; we think not.

When the jury returned and the verdict forms were handed to the clerk, the clerk announced that the jury found the co-defendant guilty of rape and false imprisonment and the appellant guilty of false imprisonment. The jury was then polled as to their verdict and each announced in the affirmative that these were their verdicts. The court then announced that the appellant, Joseph Lee Bivins, was found guilty of Count I—rape and was adjudicated guilty of rape. The court announced that the appellant has been found guilty of Count II—false imprisonment and was adjudicated guilty of false imprisonment. The court then proceeded with his co-defendant as to his guilt on both charges.

The verdict slips were delivered in the presence of a jury, the court adjudicated the appellant guilty in the presence of the jury on both counts and there was no objection by any juror of the verdicts.

The appellant made no objection to the adjudication by the trial judge.

We think any departure from the procedural requirements was harmless error and was waived by the appellant by not making timely objections.

Affirmed.

OWEN, C. J., and CROSS, J., concur.

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

<u>Title</u>	<u>Docket Number</u>	<u>* Date</u>	<u>Disposition</u>	<u>** Appeal from and Citation</u>
Abercrombie v. State	47471	1/ 7/76	Cert. den.	4th DCA 311 So.2d 785
Alco Services, Inc. v. City of Hollywood	47546	2/ 6/76	Dism.	4th DCA 315 So.2d 110
Alston v. State	48761	2/ 3/76	Hab. Corp. den.	
Anderson Ins. Co. v. Glens Falls Ins. Co.	47758	2/ 4/76	Cert. den.	2d DCA 314 So.2d 25
Anderson v. Wainwright	48215	12/ 9/75	Hab. Corp. disch.	
Anheuser-Busch, Inc. v. Campbell	46983	12/18/75	Cert. dism.	306 So.2d 198
Arnett v. State	48745	2/ 3/76	Hab. Corp. den.	
Askew v. General American Transportation Corp.	47384	12/17/75	Cert. den.	1st DCA 310 So.2d 46
Baker and Co. v. Goding	48144	2/11/76	Cert. den.	3d DCA 317 So.2d 118
Barber v. Howard	48287	2/ 3/76	Hab. Corp. disch.	
Barnes v. Kelly	48483	12/16/75	Hab. Corp. den.	
Barnes v. Wainwright	48727	1/27/76	Hab. Corp. den.	
Barron v. Reed-Haughton	47557	12/19/75	Cert. dism.	
Bauders Trucking, Inc. v. Mayo	47796	12/18/75	Cert. den.	
Bazzell v. Massey	48390	12/ 8/75	Hab. Corp. den.	
Bivins v. State	47648	2/ 4/76	Cert. den.	4th DCA 313 So.2d 471
Branch v. State	47902	2/ 4/76	Cert. den.	1st DCA 315 So.2d 244
Brevard County Board of County Commissioners v. Clarkson	47560	2/ 3/76	Cert. den.	Ind. Rel. Comm.
Brown v. Carnival Fruit Co. ...	47678	2/ 4/76	Cert. den.	Ind. Rel. Comm.
Calvin v. Taylor-Smith Corp. ...	47320	12/18/75	Cert. den.	1st DCA 310 So.2d 309
Christian v. State	47695	2/ 4/76	Cert. den.	2d DCA 314 So.2d 270
Chrysler Credit Corp. v. Evans	47629	2/ 4/76	Cert. den.	4th DCA 312 So.2d 839

* Date of decision or date rehearing denied (if requested).

** Court or agency rendering decision appealed and citation (if reported).

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public policy demand that the Town be ordered to forthwith proceed with construction and installation of the water line. The Town's obligation to do justice by carrying out its part of the bargain "is as great as that of an individual or business corporation, and we find no legal impediment in requiring it to do so." *County of Greenlee v. Webster*, 30 Ariz. 245 at 252, 246 P. 543 at 545 (1926). It would be grossly unfair to all concerned to allow the Town to idly sit back and reap the benefits of its bargain without requiring it to pay accordingly.

Relative to the contention that estoppel and waiver cannot be used to prevent the Town from asserting the illegality of a contract, we agree. In the instant case, however, the agreement was not illegal.

[10] In a proper case, the principles of waiver and estoppel cannot be applied to circumvent stated legislative intent and policy, nor can a contract which violates A.R.S. § 42-303, subsec. D and is, therefore, void ab initio be ratified or approved in any manner by defendant or its officers or any other person so as to create an enforceable liability. *City of Phoenix v. Kidd*, 54 Ariz. 75, 92 P.2d 513 (1939).

VI. No competent evidence of damages was presented to the lower court.

[11] The Town claims that the trial court erred in basing damages on the amount of increased insurance premiums which the Company was required to pay as a direct result of the Town's failure to provide the water line. We find that the lower court correctly assessed the damages suffered by the Company as a direct result of the Town's breach of the contract.

Relative to the Town's denial that a contract existed and its assertion that the agreement was not specifically enforceable, we find no merit whatsoever.

[12] The lower court properly entered judgment in favor of the individual defendants (members of the Town Council). Having acted in good faith, and we assume that they did, there is no personal

liability. *Sims Printing Company v. Kerby*, 56 Ariz. 130, 106 P.2d 197 (1940).

In accordance with the foregoing, judgment of the lower court is affirmed.

STRUCKMEYER, C. J., HAYS, V. C. J., and LOCKWOOD and CAMERON, JJ., concur.



107 Ariz. 552

STATE of Arizona, Appellee,

v.

Irvin Paul RITCHEY, Appellant.

No. 1964.

Supreme Court of Arizona,
In Division.

Nov. 11, 1971.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR 51340, Edwin Thurston, J., of two counts of child molesting, and he appealed. The Supreme Court, Hays, V. C. J., held that where record failed to show whether defendant authorized or ratified action of his attorney in waiving his right to jury trial, matter would be remanded for hearing to determine whether waiver was, in fact, knowingly and intelligently made; it could not be assumed that defendant consented to trial without jury by sitting through bench trial without objecting to absence of jury.

Remanded for proceedings consistent with opinion.

I. Criminal Law ☞1181

Where record failed to show whether defendant authorized or ratified action of his attorney in waiving his right to jury trial, matter would be remanded for hearing to determine whether waiver was, in fact, knowingly and intelligently made; it

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could not be assumed that defendant consented to trial without jury by sitting through bench trial without objecting to absence of jury. U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law \hookrightarrow 662(7)

Defendant who did not show that he was prejudiced by procedure employed was not denied his Sixth Amendment right of confrontation by virtue of court's examination, in defendant's absence but in presence of defendant's counsel, of 7-year-old prosecuting witness as to her competency to testify in child molestation prosecution. U.S. C.A.Const. Amend. 6.

3. Criminal Law \hookrightarrow 366(4)

Where defendant was good friend of family as well as companion to child molestation victims and record showed that victims, although usually playful and talkative, were unusually quiet after their return with defendant from airport visit during which attack allegedly took place, out of court statements of six-year-old child to her mother and grandmother some 25 minutes following their return with defendant concerning defendant's alleged molestation of child and her four-year-old sister were properly admitted as spontaneous or excited utterances exception to hearsay rule.

4. Criminal Law \hookrightarrow 404(4)

Where defendant did not offer proof of actual change in evidence or show that evidence had been tampered with, and investigating officers testified that on receipt of items gathered in child molestation investigation, they initialed items themselves or bags in which they were placed and replied affirmatively when asked whether items were in substantially same condition as they were when removed from their owners, there existed sufficient foundation for admission of items in evidence, notwithstanding inability of State to show continuous chain of custody.

5. Criminal Law \hookrightarrow 258(4)

Judgment of guilt on counts charging child molestation was not inconsistent with judgment of acquittal on count charging a

lewd and lascivious act, notwithstanding evidence to support all acts was the same. A.R.S. §§ 13-652, 13-653.

Gary K. Nelson, Atty. Gen. by William P. Dixon and Jerry C. Schmidt, Asst. Attys. Gen., Phoenix, for appellee.

Ross P. Lee, Maricopa County Public Defender by Anne Kappes, Deputy Public Defender, Phoenix, for appellant.

HAYS, Vice Chief Justice.

The defendant, Irvin Paul Ritchey, was charged with two counts of child molesting and one count of lewd and lascivious act. The matter was tried to the court without a jury on stipulation of counsel. The court made a finding of not guilty on the count of lewd and lascivious act and guilty on the two counts of child molesting, and imposed a sentence of two to five years on each count to run concurrently.

The alleged victims were two girls, ages four and six. The defendant was a friend of the children's parents and he often came to their home on social visits. The testimony indicates that he was fond of the children.

After ruling that the elder of the children, then age seven, was competent to testify, the court heard testimony from her that the defendant took her and her sister to a place near the airport where they could watch the airplanes. She testified that while they were there, "[h]e done nasty to me."

A short time later the defendant brought the children home. After he left the children's home, the children were asked where they had been by their mother and grandmother. The younger of the children stated, "Ritchey done nasty to us, Mommy." Both children stated that Ritchey had pulled down the pants of the younger child and had moved her up and down on his body. They stated that Ritchey had unzipped his pants and had taken his "thing" out. The elder child also stated that the defendant had pulled her pants down and

played with her private parts. This testimony was received from the mother and the grandmother of the children who were relating what the children had told them. The defendant raises several contentions of error in his appeal.

[1] Defendant's initial argument raises the question of the validity of a waiver of trial by jury when made by counsel for defendant in chambers and out of the presence of the defendant. The record of the proceedings below shows that the waiver was accomplished by stipulation between counsel for the defense and counsel for the state. Nowhere in the record is there any indication that the defendant participated in the decision to waive his right to a jury trial, or that he, in fact, was aware that he had such a right.

The right of trial by jury is among the fundamental rights bestowed by the Sixth and Fourteenth Amendments of the United States Constitution. It is a right, however, which may be waived by a defendant if he so desires. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). In the *Patton* case, the Supreme Court designated guidelines by which to determine whether a waiver has been validly made. The Court stated:

"* * * before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." (emphasis added.)

This court has ruled that a knowing and intelligent waiver of trial by jury may be made through counsel in the presence of the accused and need not be made by the defendant personally. *State v. Jelks*, 105 Ariz. 175, 461 P.2d 473 (1969). It was there stated that if a defendant permits his attorney, in his presence and without objection on his part, to waive his right to

* See *People v. McKinney*, 130 Ill.App. 2d 339, 261 N.E.2d 797 (1970), a case on all fours with the one before us. There, counsel stipulated to a bench trial out of the presence of the defendant, and

trial by jury, "[he] must be held to have knowingly acquiesced in that decision." *State v. Jelks*, *supra*, at 178, 461 P.2d at 476. It was further stated that:

"[I]n view of the importance of the right of a trial by jury as a fundamental right, it is doubtful that a written waiver signed only by the attorney or an oral waiver by counsel out of the defendant's presence would be sufficient waiver without something of record to show authorization or ratification by the defendant." at p. 178, 461 P.2d at p. 476. (emphasis added.)

We adopt the views expressed in the above language as the law of this case and state that because the record fails to show whether, in fact, the defendant did authorize or ratify the action of his attorney in waiving his right to jury trial, this matter must be remanded for a hearing by the trial court to determine whether the waiver was, in fact, knowingly and intelligently made.* The trial court must make findings of fact and refer the matter back to this court.

We specifically recommend that the waiver of such fundamental constitutional rights as the right to jury trial be accomplished in the defendant's presence, and, if possible, with his express consent.

We reject the argument of the state that the defendant evidenced his consent to a trial without a jury by sitting through a bench trial without objecting to the absence of a jury. It cannot be presumed that the defendant was aware of his right to make such an objection. See *People v. Turner*, 80 1st App.2d 146, 225 N.E.2d 65 (1967). The burden of coming forth and asserting one's own basic constitutional rights cannot be placed upon persons who may be reluctant to take such affirmative action before the court. By this position we do not intend to infer that counsel can-

the Appellate Court of Illinois held that the matter must be reversed because there was no showing that the defendant understandingly waived his personal privilege to trial by jury.

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not himself make the decisions of trial strategy which often require the waiver of rights or the abandoning of positions. This rule is meant to apply to basic constitutional rights heretofore delineated by the United States Supreme Court.

[2] We turn to defendant's additional contentions. He claims that he was denied his Sixth Amendment right of confrontation when the court examined the prosecuting witness as to her competency to testify in his absence. This examination took place in chambers with attorneys for defendant and for the state present. We do not find the same compelling need for a defendant to be present at such a proceeding as we find when a personal constitutional right, such as trial by jury, is at stake. Here, a defendant's attorney can adequately exercise the defendant's rights. The determination of the competency of a witness to testify is a matter of law to which legal counsel is specially qualified to address himself. The defendant cannot show that he was prejudiced by the procedure employed herein.

[3] The defendant raised objection at the trial to the admissibility of the out-of-court statements of the elder child to her mother and grandmother concerning the alleged molesting of the children. The trial court admitted them as an exception to the hearsay rule as spontaneous or excited utterances.

The facts germane to deciding whether, in fact, the statements qualify under the exception are as follows: At about 7:00 P.M., the defendant and the children returned to the children's home. The defendant talked with the parents and grandmother of the children for about ten minutes and then left to buy some beer. He returned with the beer in about ten or fifteen minutes and left the home a few minutes later. It was at this time that the children's mother first asked them where they had been. The children then related the statements which are the subject of the defendant's objections.

The mother of the children testified that the children liked being with the defendant. He would visit the house at least two or three times a week to play with them and twice a month or so the children would spend the night with the defendant and his wife.

When asked to describe the demeanor and appearance of the girls at the time they returned with the defendant, the mother stated that the face of the elder child was streaked as though she might have been crying. She also stated that where the children were usually rowdy and playful when they arrived home, on this evening they were very quiet. The children would always place themselves near the defendant, sometimes sitting on his lap to talk to him, but on this night they stayed to themselves in another room of the house. The mother stated she had never seen the children act in this manner when the defendant was in the house. She also stated that the defendant himself, though still friendly, was somewhat withdrawn.

The children's grandmother likewise testified that the children did not seem as happy as usual and were not playing with the defendant or having anything to do with him. When asked to take their toys and play, they stated that they didn't want the toys because the defendant had given the toys to them.

This court, in reviewing fact situations involving the excited or spontaneous utterance exception has followed the test laid down by Wigmore. The three requisites that compose this test are these:

1. There must be a startling event.
2. The words spoken must be spoken soon after the event so as not to give the person speaking the words time to fabricate.
3. The words spoken must relate to the startling event.

6 Wigmore on Evidence (3rd ed.) § 1750.

The existence of a startling event is deemed necessary to produce the type of

excited utterances which the courts accept to be reliable notwithstanding their hearsay character. In deciding whether there was evidence of a startling event, special notice must be taken of the age of the children involved and the identity of the perpetrator of the crime. The children were four and six years of age at the time of the crime and could have known little if anything about sexual matters. When asked if she had ever discussed sex with the children before, the mother replied she had not.

In addition, the alleged perpetrator of the crimes was a good friend of the family as well as a companion to the children. Therefore, it would not seem strange, taking into consideration the age of the children, that they should not have shown even more visible signs of excitement or distress, or have spoken up immediately about what had transpired. The children may well have been persuaded, as the testimony indicates, that what they were doing was all right. Therefore, under this specific fact situation, the court will adopt a less strict test by which to determine if, in fact, the evidence indicated a startling event.

There is no requirement that the evidence show the children to be hysterical; the evidence indicates that their demeanor and actions were considerably altered. Their demeanor and actions were sufficient evidence of a startling or shocking event, notwithstanding the children did not volunteer their information until questioned. See *State v. McLain*, 74 Ariz. 132, 245 P. 2d 278 (1952).

The second requisite—that the words be spoken soon after the event—is satisfied as well. The testimony revealed that the children did not make any statement about the acts of the defendant until approximately forty-five minutes after they had returned home, and then they spoke only in answer to their mother's questions. The children may not have understood that what had happened was as startling as it might appear to others. In addition, the courts have recognized that the time interval when children are involved should be less

fixed since they are less likely to employ their reflective powers to fabricate a deliberate untruth. *Soto v. Territory*, 12 Ariz. 36, 94 P. 1104 (1908).

In that the words spoken did relate to the startling event, we find that the statements in question meet all the requisites of spontaneous or excited utterances and were properly admitted into evidence. *State v. Lopez*, 107 Ariz. 214, 484 P.2d 1045 (1971).

[4] The defendant's next contention is that it was error to admit the testimony of an expert witness with regard to certain exhibits when there was no evidence that these exhibits were held in an uninterrupted chain of custody. The exhibits included clothing from the defendant and the two children, a cotton swab, a pubic hair found on the person of one of the children, and pubic hair removed from the defendant.

Evidence at the trial indicated that the above items were removed by investigating officers from the defendant and the children and given to a police detective. The detective transferred the items to a criminologist who examined them and made findings of fact. The detective was unavailable for testimony at the trial and the defendant argues that this break in the chain of possession is fatal to the foundation that need be laid for the introduction of these items in evidence. We disagree.

The investigating officers testified that on receipt of the items, they initialed either the items themselves or the bags in which they were placed. They replied affirmatively when asked whether the items were in substantially the same condition as they were when removed from their owners.

The criminologist who examined the exhibits stated that they were marked by him for identification. He also testified that the items were presently in substantially the same condition as when he received them.

We have held that an exhibit is admissible when it has been identified as being the same object about which testimony is given and when it is stated to be in substantially the same condition as at the time of the

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occurrence in question. Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 231 P.2d 952 (1951). We further stated, citing Allen v. Porter, 19 Wash.2d 503, 143 P.2d 328 (1943), that it was unnecessary to negative the possibility of an opportunity for tampering with an exhibit, there being no need to trace its custody by placing each of its custodians on the witness stand. Witt Ice & Gas Co. v. Bedway, *supra*, at 156. See also State v. McGonigle, 103 Ariz. 267, 410 P.2d 100 (1968).

It is our opinion that the markings made by the investigating personnel and their testimony as to the condition of the exhibits provide sufficient foundation for their admission in evidence, notwithstanding the inability of the state to show a continuous chain of custody. Under such circumstances, unless a defendant can offer proof of actual change in the evidence, or show that the evidence has, indeed, been tampered with, such evidence will be admissible.

[5] The defendant contends that a judgment of guilt on counts one and three of child molesting is inconsistent with the judgment of acquittal on count two of lewd and lascivious act, when the evidence to support all three acts was the same. However, it is to be noted that one may commit the crime of child molesting without committing the crime of lewd and lascivious act. A prerequisite of the latter (A.R.S. § 13-652) is that such act be done with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of either the perpetrator or the victim. This prerequisite is absent in the child molesting statute (A.R.S. § 13-653). Therefore, the evidence may show child molesting without showing lewd and lascivious conduct. In examining the trial record, we find that the court held that there was no physical evidence corroborative of the count on lewdness. The judgments as to the several counts were not inconsistent.

The defendant's final argument is that the finding of guilt is not supported by the court's findings on the evidence. We have

held that where there is reasonable evidence to support the factual finding of the trial court, we will not disturb that finding on appeal. State v. Linsner, 105 Ariz. 488, 467 P.2d 238 (1970). In examining the record as a whole, we find that reasonable evidence does exist to support the court's findings.

Cause remanded for proceedings consistent herewith.

UDALL and ROCKWOOD, JJ., concur.



107 Ariz. 557

PHOENIX NEWSPAPERS INCORPORATED, Petitioner,

v.

Honorable Benz D. JENNINGS, Justice of the Peace, East Phoenix Precinct #1, Maricopa County, et al., Respondents.

No. 10638.

Supreme Court of Arizona,
In Banc.

Nov. 19, 1971.

Rehearing Denied Dec. 14, 1971.

Special action by newspaper company against justice of the peace, county attorney, and defendant to prohibit enforcement of order excluding reporters and public from preliminary hearing on multiple homicide charge. The Supreme Court, Struckmeyer, C. J., held that defendant was not entitled to have reporters and public excluded from preliminary hearing, despite claim that harmful and prejudicial publicity would endanger his right to fair trial by impartial jury, where he did not suggest that evidence inadmissible at trial would be introduced at hearing.

Writ issued.

I. Criminal Law ◊635

Defendant has no right to secret trial and may not foreclose right of people from

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tions with the prosecutor and cites Widener v. Croft, Fla.App. 1966, 184 So.2d 444. We find this contention untenable. In the Widener case, the Fourth District Court of Appeal was concerned with a situation where the defendant in a malicious prosecution suit was asserting a privilege on behalf of another witness due to the witness' conversations with the prosecutor. Here, appellee is attempting to assert the privilege and immunity on his own behalf to entirely avoid liability for an alleged malicious prosecution. The general rule is that a defendant who seeks to avoid responsibility for a malicious prosecution due to the action of the prosecuting attorney must show that he made a full and fair disclosure of all the material facts in good faith and that he relied upon the prosecutor's judgment. Adler v. Segal, Fla.App. 1959, 108 So.2d 773; 52 Am.Jur.2d, Malicious Prosecution § 81.

[8] Appellee has also requested a ruling, contingent upon reversal of the trial court, that this cause be remanded for consideration of a motion for a new trial which still is pending in the trial court. Florida RCP 1.481, 30 F.S.A., provides that a motion for a new trial may be joined alternatively with a reserved motion for a directed verdict. Our courts have recognized that a motion for a new trial is a matter for the sound exercise of broad judicial discretion by the trial court, and when a trial court has ruled upon a reserved motion for directed verdict, but not upon the motion for a new trial, upon reversal the appellate court should remand the cause for the trial court to rule upon the motion for a new trial. King v. Jacksonville Coach Company, Fla.App. 1960, 122 So.2d 480; McCloskey v. Louisville & Nashville Railroad Company, Fla.App. 1960, 122 So.2d 481; McQueen v. Atlantic Truck Service, Inc., Fla.App. 1968, 215 So.2d 325; Warriner v. Ramirez, Fla.App. 1973, 280 So.2d 4.

[9] We feel constrained to add that the purpose of joining a motion for directed

verdict with a motion for new trial is to expedite a cause by permitting the trial judge to rule on both the alternative motions, thus eliminating the need for a possible second appeal.

Therefore, for the reasons stated and upon the authorities cited, the judgment appealed is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.



Victor Edward HUTCHINS, Appellant,

v.

The STATE of Florida, Appellee.

No. 72-1493.

District Court of Appeal of Florida,
Third District.

Nov. 6, 1973.

Rehearing Denied Dec. 20, 1973.

Defendant was convicted in the Criminal Court of Record, Dade County, Murray Goodman, J., of unlawful possession of narcotic drug, a felony, and he appealed. The District Court of Appeal, Carroll, J., held that, if previously taken and preserved testimony of witness, who was unable to be present at trial, was admissible, its submission by video tape, as distinguished from written transcript of questions and answers, did not result in harmful error, and that portion of sentence providing for probation for period of three years to follow serving of ten-month sentence in county jail was unauthorized.

Judgment affirmed and sentence modified to eliminate provision for probation.

1. Criminal Law ⇨ 1169.1(1)

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present at trial, was admissible, its submission by video tape, as distinguished from written transcript of questions and answers, did not result in harmful error.

Robert L. Shevin, Atty. Gen., and William L. Rogers, Asst. Atty. Gen., for appellee.

Before CHARLES CARROLL, HENDRY and HAVERFIELD, JJ.

2. Criminal Law \S 1147

An illegal sentence or illegal part of sentence is within scope of appellate review under rule providing that court in its discretion may review anything said or done appearing in appeal record. 32 F.S.A. Florida Appellate Rules, rule 6.16.

CARROLL, Judge.

The appellant was informed against, tried by a jury and convicted of unlawful possession of a narcotic drug, a felony. See §§ 398.03 and 398.22, Fla.Stat., F.S.A. The sentence imposed was that the defendant be imprisoned in the Dade County jail for a period of ten months, and *thereafter* to be on probation for a period of three years. The defendant filed this appeal from the judgment and sentence.

3. Criminal Law \S 1130(5)

Even though no contention of invalidity of sentence was argued in brief, error in sentence was within scope of appellate review. 32 F.S.A. Florida Appellate Rules, rule 6.16.

By a pretrial order reciting that it had been ascertained by the court that Melvin Brewer, a laboratory technician whose testimony was desired to be presented by the state at trial, would be "unavailable to appear at the Courthouse for the taking of his testimony in the above styled cause on the date set for trial," the court made provision for the testimony of said witness to be obtained and preserved by being taken and recorded on video tape. The order included details respecting the taking of the deposition by video tape, with direction that it be so taken in duplicate in order for a copy to be made available to counsel for the defendant, with provision for presence of the defendant and his counsel, and directions for the preservation and security of the master tape for presentation at trial.

4. Criminal Law \S 982.3(2)

Portion of sentence providing for probation for period of three years to follow serving of ten-month sentence in county jail was unauthorized. F.S.A. § 948.01(4).

Objections thereto by the defendant were considered and denied. They did not include a challenge or objection to the finding as to unavailability of the witness for testimony at trial.

5. Criminal Law \S 982.2

Statute granting authority to add a period of probation to be combined with jail sentence permits defendant to be placed on probation upon completion of any specified period of sentence; thus, where court in sentencing a defendant to imprisonment for designated period in county jail provides that, after serving stated portion thereof, defendant should be on probation for some period, the penalty for violation of probation would call for return of defendant to county jail for unserved balance of jail sentence, or such part as court should determine, but the statute does not provide for adding period of probation to follow service of term for which defendant was committed to county jail. F.S.A. § 948.01(4).

The provision for the commission for the taking and preservation of the testimony of the witness was made pursuant to Rule 3.190(j) Cr.P.R., 33 F.S.A. In subparagraph (5) thereof it is stated that, except as otherwise provided for, the rules governing the taking and processing of

Phillip Hubbart, Public Defender, and Mark King Leban, Asst. Public Defender, for appellant.

oral depositions in civil actions shall apply in criminal cases. Civil Procedure Rule 1-310, 30 F.S.A., dealing with depositions upon oral examination, in subsection (c) [relating to record of examination] provides: "The testimony shall be recorded verbatim stenographically or by mechanical means and transcribed unless the parties agree otherwise."

It will be noted that while the provision last referred to authorizes the deposition testimony of a deponent to be taken or recorded by mechanical means, the rule appears to contemplate that the record thereof when so taken will be transcribed (for subsequent use at trial as if recorded stenographically). The difference in the instant case is that the deposition testimony taken by video tape was not submitted at trial in transcribed form, but was presented in the form of the video tape recording.

The appellant contends such video tape presentation of the evidence was prejudicial error because there was no authority or precedent for the preservation and presentation of the testimony by video tape, and because by its use the defendant was deprived of his right to confront the witness at time of trial. In response thereto the state argues that notwithstanding absence of express precedent or authority to present the testimony in that manner, no harmful error resulted since it accurately portrayed the testimony as given. By the presence of the defendant and his counsel at the deposition, the right of confrontation and cross-examination was available there. The state points out that the defendant would have been equally deprived of the right of confrontation at time of trial if the deposition testimony had been reported stenographically and presented in transcribed form. Additionally, the state argues that the presentation of testimony by video tape, rather than by written transcription, enabled the trier of fact to better judge the credibility of the witness, by affording opportunity to observe the manner and demeanor of the witness while testifying.

[1] If the previously taken and preserved testimony of the witness, unable to be present was admissible at the trial, it has not been shown how its submission by video tape, as distinguished from a written transcription of the questions and answers, resulted in harmful error. Where not otherwise prejudicial, the use of sound moving pictures, as a scientific advance in presentation of evidentiary matter at trials, has generally been viewed with approval. See *Cox v. State*, Fla.App.1969, 219 So.2d 762; *Paramore v. State*, Fla.1969, 229 So.2d 855; *People v. Hayes*, 21 Cal.App.2d 320, 71 P.2d 321; *Commonwealth v. Roller*, 100 Pa.Super. 125.

Accordingly, we affirm the judgment of conviction, but we find error in the sentence, in the respect set out below.

[2,3] No contention of invalidity of the sentence was argued in the brief. However, we regard an illegal sentence, or illegal part of a sentence, where it appears on an appeal, to be a matter within the scope of appellate review under Rule 6.16 F.A.R. 32 F.S.A., wherein it is provided: "The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury."

[4,5] Here the portion of the sentence which made provision for probation for a period of three years, to follow after the serving of the ten month sentence in the county jail, was unauthorized and improper, for the reasons set out in *Williams v. State*, Fla.App.1973, 280 So.2d 518. In *Williams* it was pointed out that the authority granted by § 948.01(4) Fla.Stat., F.S.A. to add a period of probation to be combined with a jail sentence was to provide for the defendant to be placed on probation "upon completion of any specified period of such sentence." Thus, where a court in sentencing a defendant to imprisonment for a designated period in the county jail provides that after serving a stated portion thereof the defendant should

be on probation for a violation for return of jail for the sentence, or should determine make provision to follow this case ten defendant was

The judgment is modified to provide for probation

It is so ordered

CITY OF MIAMI
of the State

FLORIDA ELECTRIC
COMPANY

District Court

Rehearing

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be on probation for some period, the penalty for a violation of probation would call for return of the defendant to the county jail for the unserved balance of the jail sentence, or such part thereof as the court should determine. The statute did not make provision for adding a period of probation to follow service of the term [in this case ten months] for which the defendant was committed to the county jail.

The judgment is affirmed. The sentence is modified to eliminate therefrom the provision for probation.

It is so ordered.



CITY OF MIAMI, a municipal corporation
of the State of Florida, Appellant,

v.

FLORIDA EAST COAST RAILWAY COM-
PANY, a Florida corporation, et
al., Appellees.

No. 73-210.

District Court of Appeal of Florida,
Third District.

Nov. 27, 1973.

Rehearing Denied Dec. 19, 1973.

City brought petition in eminent domain to condemn for park purposes railroad property used in part as port facilities. The Circuit Court for Dade County, Grady L. Crawford, J., held that the city was not authorized to condemn the property except portion which was leased to private commercial users, and the city appealed. The District Court of Appeal held that neither city nor railroad could be considered as having a higher right of eminent domain; that in order to forestall condemnation, railroad's use must not only be a public use but a use necessary for successful operation of the railroad; and that

only such portions of the port facilities on the land in question, including bay bottom, as were necessary for the operation of the railroad were properly excluded from condemnation.

Affirmed in part, reversed in part, and remanded.

Hendry, J., filed opinion concurring in part and dissenting in part.

1. Eminent Domain ⇨ 198(2)

Trial court properly proceeded to determine issue of city's right to eminent domain with respect to railroad property at a pretrial hearing without the aid of the jury. F.S.A. § 73.061(1).

2. Eminent Domain ⇨ 47(1)

Neither city, seeking to condemn railroad property for park purposes, nor railroad could be considered as having a higher right of eminent domain. F.S.A. §§ 360.01(4), 360.02, 361.01.

3. Eminent Domain ⇨ 47(1)

For purposes of applying "prior use doctrine" to the effect that, at least between two public bodies, property already devoted to a public use may not be taken for another public use in absence of express legislative authority, railroad was not a "public body" but was a "franchised public use company."

See publication Words and Phrases for other judicial constructions and definitions.

4. Eminent Domain ⇨ 47(1)

In order to forestall condemnation of its property, a railroad's use must not only be a public use but must also be a use necessary for the successful operation of the railroad.

5. Eminent Domain ⇨ 47(1)

Railroad property which was being leased to private commercial users was not being used for public purposes and was subject to condemnation by city for park purposes.

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CONFRONTATION AND THE HEARSAY RULE

In 1953, the Supreme Court refused to reverse the state conviction of a defendant who had been incriminated by the confessions of his co-defendants and was unable, at their joint trial, to cross-examine the confessor.¹ "Basically . . . [the defendant's] objection to the introduction of the confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."² In 1965, however, in an opinion of breathtaking simplicity, the Court all but transformed its argument by horrible consequence into constitutional reality. In *Pointer v. Texas*³ the Court read into the Fourteenth Amendment the confrontation clause of the Sixth Amendment,⁴ making no attempt to distinguish that clause from the evidentiary rule against hearsay.⁵

Petitioner in *Pointer* and a co-defendant had been arrested for robbery and identified by the victim at a preliminary hearing where neither defendant was represented by counsel.⁶ After the prosecutor

1. *Stein v. New York*, 346 U.S. 156 (1953), *overruled on other grounds*, *Jackson v. Denno*, 378 U.S. 368 (1964).

2. 346 U.S. at 196.

3. 380 U.S. 400, *overruling* *West v. Louisiana*, 194 U.S. 258 (1904).

4. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

5. With the caveat that "simplification is falsification," McCormick offers the following definition of hearsay: "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick, *EVIDENCE* § 225 (1954). See also, 5 Wigmore, *EVIDENCE* § 1261, 6 *id.* § 1766 (3d ed. 1910); Morgan, *Hearsay Dangers and Application of the Hearsay Concept*, 62 *HARV. L. REV.* 177 (1948).

6. Right to counsel seems to have beckoned as an alternative, and innocuous, ground of decision, but the Court found that problem more difficult than the one it ultimately faced. The Court had interpreted *Gideon v. Wainwright*, 372 U.S. 335 (1963), to require that counsel be provided at any critical stage of a criminal proceeding, including the preliminary hearing. *White v. Maryland*, 373 U.S. 59 (1963). *Cf.* *Hamilton v. Alabama*, 368 U.S. 52 (1961). But the Court distinguished those cases as having dealt with preliminary hearings that could have been the occasion for entering a plea; the Texas hearing could not. 380 U.S. at 402. The Court expressly refused to decide whether there might be other features of the Texas hearing so critical as to make counsel compulsory, implying that the record was not sufficiently informative. 380 U.S. at 403. But the record did show, at a minimum, that prosecution testimony could be taken at the Texas prelim-

showed at the trial to introduce a transcript of the hearing. The defendant denied "confrontation" by the trial and observed that the right to the Amendment right to confrontation starts

With that stroke of certain reach. It has casually identified the hearsay rule.⁸ The recognized two exceptions to the Sixth Amer-

inary hearing and probably that counsel was required as much as prosecutor's inary hearing would be antee that testimony of defendants at all points have demanded a high a critical stage at which

7. 380 U.S. at 401.

8. See, e.g., *Snyder v. Nor* has the privilege ceptions, as for initial cases omitted.] The ex to time if there is no *Robertson v. Baldwin*, 1

Nor does the provisions against him of witnesses who have Compare *Kay v. United* 825 (1958), asserting intended to prevent the and inflexible barrier exceptions to the hea 9. This Court has tions, [citation of case testified at a former t the contrary.

380 U.S. at 407. This p in reassessing the hea exceptions. If any case such a reassessment, it is Court offered dying de-

showed at the trial that the victim had left the state, he sought to introduce a transcript of the testimony the victim gave at the preliminary hearing. The defense attorney objected, claiming his client had been denied "confrontment of the witnesses . . .," a contention rejected by the trial and appellate courts. Reversing, the Supreme Court observed that the right to cross-examine witnesses is included in the Sixth Amendment right to confront them, and then incorporated the federal confrontation standard into the Fourteenth Amendment.

With that stroke, the Court imposed on the states a doctrine of uncertain reach. It did not elaborate past exegesis of the clause, which has casually identified confrontation with the irreducible core of the hearsay rule.⁸ The Court in *Pointer*, without mentioning hearsay, recognized two exceptions to the rule against hearsay as exceptions to the Sixth Amendment's confrontation requirement.⁹ Thus *Pointer*

inay hearing and preserved for later use at the trial. If the Court felt unable to hold flatly that counsel was required at the Texas hearing, it might simply have ruled that counsel was required at any hearing whose testimony was to be preserved for later trial. Inasmuch as prosecutors could never be sure that every witness who testified at a preliminary hearing would be able to appear at the trial, they would probably wish to guarantee that testimony could be preserved for later use by obtaining counsel for defendants at all preliminary hearings. Still, such a rule of *caveat prosecutor* would not have demanded a finding that the Texas preliminary hearing was by its very nature a critical stage at which counsel was required.

7. 380 U.S. at 401.

8. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (Cardozo, J.): Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. [Citation of cases omitted.] The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule.

Robertson v. Baldwin, 165 U.S. 275, 282 (1897):

Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

Compare *Kay v. United States*, 255 F.2d 476, 480 (4th Cir. 1956), *cert. denied*, 358 U.S. 825 (1958), asserting the clause was

intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

9. This Court has recognized the admissibility against an accused of dying declarations, [citation of cases omitted] and of testimony of a deceased witness who has testified at a former trial. [Citation of cases omitted.] Nothing we hold here is to the contrary.

380 U.S. at 407. This passage makes it difficult to interpret the decision as a first step in reassessing the hearsay rule and establishing new standards of reliability for hearsay exceptions. If any category of admissible hearsay deserves to be eliminated as part of such a reassessment, it is the category of dying declarations. See Note 18 *infra*. Yet the Court offered dying declarations as an example of unquestionably admissible hearsay.

left undisturbed the notion that the hearsay rule and the constitutional requirement are interchangeable.

Despite the superficial similarity between the evidentiary rule and the constitutional clause,¹⁰ the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature.¹¹ From Bentham¹² to the authors of the Uniform Rules of Evidence,¹³ authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well.

The major problem is not, however, scraping the barnacles from hearsay law. No hearsay code, however streamlined, could serve appropriately as a constitutional principle. The goal of any hearsay rule is to admit hearsay when its out-of-court context can serve as an acceptable substitute for cross-examination.¹⁴ Thus dying declarations are admitted on the theory that a man would not face death with a lie on his lips.¹⁵ This example illustrates two characteristics of hearsay rules. First, they are at best a partial substitute for cross-examination. Cross-examination helps expose all of the defects of testimony—deficiencies of observation, errors in the use of words, distortions of memory, and deliberate falsification.¹⁶ Here the out-of-court substi-

10. One writer has suggested that the constitutional right is based on a common law principle which, in turn, finds its origin in a reaction to abuses at the trial of Sir Walter Raleigh. F. H. ULLER, *THE SIXTH AMENDMENT 101* (1951). This apparently is the only historical illumination the clause has received.

11. See Weinstein, *Probative Force of Hearsay*, 46 *IOWA L. REV.* 331, 344-46 (1961) (collecting epithets).

12. See, e.g., 1 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 449-53 (1827); 3 *id.* 413.

13. UNIFORM RULE 63(4)(c) holds admissible,

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 him and while his recollection was clear, and was made in good faith prior to the commencement of the action.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *HANDBOOK* 200 (1953). The rule represents on its face a considerable liberalization. But it is weakened by the Commissioners' Note ("Clause (c) is drafted so as to indicate an attitude of reluctance and requires most careful scrutiny in admitting hearsay statements under its provisions." *Ibid.*) and by the Prefatory Note to the entire set of rules ("Of course a given rule would be inoperative in a given situation when there would occur from its application an invasion of constitutional rights." *Id.* at 163).

14. 5 WATSON, *op. cit. supra* note 5, § 1120.

15. *Mattox v. United States*, 146 U.S. 150, 152 (1892).

16. For an extensive analysis of how effectively hearsay rules deal with problems of narration, sincerity, memory and perception, see Morgan, *supra* note 5.

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tute—fear of impending death—assures at most sincerity.¹⁷ And even if it gave some assurance of the other aspects of reliability, it would lack the unique potency of cross-examination. Only cross-examination subjects testimony to the ordeal of a hostile adversary's probe for weaknesses.

A second defect is equally crucial. Inevitably, any hearsay rule is arbitrary. The judge cannot halt the trial to ponder the reliability of every item of hearsay evidence; nor can attorneys calculate reliability in time to object to hearsay in a running narrative. They must have broad categories of admissibility which yield an effortless decision. In this area, rules of law must be rules of thumb. All we can ask is that the categories of admissible hearsay be generally reliable, any particular example may be suspect and call for the exercise by a trial judge of his discretion to exclude unreliable evidence.

In summary, no hearsay rule closely approximates the advantages of confrontation; and no rule accurately distinguishes between reliable and unreliable evidence. There are, no doubt, better and worse attempts. But experts cannot begin to sort them out; the empirical evidence is scanty and ambiguous.¹⁸ There is no basis for exalting any of these ragged approximations as the essence of the confrontation clause. The Court should not cast itself in this area, as it has in no others, as the final arbiter of the reliability of evidence.

When faced directly with problems of evidentiary weight, the Court has been wary. Its few forays into this swamp have been circumspect. *Thompson v. City of Louisville*¹⁹ and its progeny²⁰ mark the outer limits. Petitioner in *Thompson* was arrested for loitering when police

17. The guarantee of sincerity seems the one most characteristic of the exceptions to the rule against hearsay. Morgan, *supra* note 5 at 203; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 749 (1961). See also MOORE, *CONF. OF EVIDENCE* 221-22 (1912).

18. See, e.g., Hutchins and Slesinger, *Some Observations on the Law of Evidence, Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928). Paradoxically, the Court in *Pointer* chose one of the most vulnerable exceptions—dying declarations—as an example of an evidentiary category that meets constitutional standards. See note 9 *supra*. Of all the exceptions, the one for dying declarations has been called "the most mystical in its theory and the most arbitrary in its limitations." McCormick, *EVIDENCE* § 258 (1954). The verbal product of a death agony would seem to be of dubious reliability.

19. 362 U.S. 199 (1960).

20. *Shuttlesworth v. City of Birmingham*, 382 U.S. 91 (1965); *Garner v. Louisiana*, 368 U.S. 157 (1961). Though *Thompson* is best known for establishing the principle that conviction may not be had on no evidence, its holding was foreshadowed in *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957). Rhetorically, however, the Court in *Schwartz* measured the sanity of bar examiners not the weight of evidence: "There is no evidence in the record which rationally justifies a finding that Schwartz was morally unfit to practice law." 353 U.S. at 246-47.

entered a cafe and saw him shuffling his feet in time to background music. The arresting officers added a charge of disturbing the peace when petitioner became argumentative as they led him away. He was convicted of both charges in police court. Reversing, the Supreme Court said the question before it turned "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."²¹ If any explanation of the case was necessary, the Court provided it in *Shuttlesworth v. City of Birmingham*: "The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of evidence in any particular case. It goes, rather, to the most basic concepts of due process of law."²²

If the Court adds a hearsay rule to the Constitution, it will face the case-by-case review of evidence that it sidestepped in *Thompson*. Hearsay questions demand particularized judgment, and require as much familiarity with the record as with the rulebook. Only by sifting the evidence itself can the Court be sure that a particular use of hearsay is not harmless error or the exercise of trial court discretion. But no task could be further from the Supreme Court's constitutional function than the exercise of routine appellate review.

This is not to say that there is no room in the Constitution for a requirement of some measure of evidentiary reliability. But this requirement should be enforced through the due process clause, not the confrontation clause.²³ As *Thompson* and its progeny illustrate, hearsay problems are not the only ones that arise in connection with criminal trial evidence. (The potential for admitting worthless evidence is as broad as the range of facts that may be presented in a courtroom, either through testimonial or real proof.) The confrontation clause, even if given the widest interpretation possible under *Pointer*, protects only against weaknesses in testimony that arise for want of cross-examination. Moreover, if there exists this basic and extensive concern with minimal reliability, it should not be confined to criminal cases as it would be under the confrontation clause. Only due process is pervasive enough to reach the evil.

The confrontation clause should serve a discrete and more limited function. It should focus on the legitimate concerns raised by a liberalized hearsay rule: that such a rule may institutionalize baseless prosecu-

tions, or at least to witnesses whose den prosecutorial negligence alternative of present. Such practices undermine innocence and insists be absolutely above r

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21. 362 U.S. at 199.

22. 382 U.S. 87, 94 (1965).

23. Compare Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).

24. For example, alt hearsay rules, McGonst under the proposed stat

25. Cf. *Napue v. Illinois*

26. 360 U.S. 474 (1959)

27. Though petition damage to his reputatio sufficient to warrant ap ment's failure in *Green*. 349 U.S. 231 (1955); Bai equally divided court I Compare *Dayton v. Dul* 28. 360 U.S. at 479.

utions, or at least tempt prosecutors to use hearsay instead of live witnesses whose demeanor is unimpressive; or that it may induce prosecutorial negligence in securing witnesses by holding out the easy alternative of presenting their statements through other witnesses. Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach.

Fears of this sort would be allayed by a confrontation clause read not as a Delphic reference to the essence of the hearsay rule, but as a canon of prosecutorial behavior. The clause should be held to require that the prosecutor make a diligent, good-faith effort to produce witnesses to testify. So read, the clause would bind the prosecutor regardless of whether some exception to the rule against hearsay would allow the prospective witness' testimony to be recounted by others.²⁴

The objection to the prosecutor's presentation of hearsay instead of an available witness is not that such hearsay necessarily is less reliable than the hearsay of an unavailable witness, but that the prosecutor has made the testimony less reliable than it might have been.²⁵

Although the Supreme Court never has discussed confrontation explicitly in terms of prosecutorial behavior, its decisions strongly suggest such a rule. *Greene v. McElroy*²⁶ presents a striking example of objectionable failure by the government to present witnesses.²⁷ *Greene* dealt with the dismissal of an executive of a private company that held defense contracts solely because his security clearance had been revoked by a Defense Department security board. The revocation came after a hearing at which the government presented no witnesses. "It was obvious, however . . . that the Board relied on confidential reports which were never made available to petitioner. . . . Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements."²⁸ The Court sidestepped the constitutional

24. For example, although an excited utterance is admissible under conventional hearsay rules, *McCormick*, EVIDENCE § 272 (1954), the prosecutor would be required under the proposed standard to produce an available witness.

25. Cf. *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 291 U.S. 108 (1935).

26. 360 U.S. 474 (1959).

27. Though petitioner suffered no criminal sanction, the loss of his job and the damage to his reputation that followed the loss of security clearance apparently were sufficient to warrant application by the Court of criminal trial standards. The government's failure in *Greene* to present witnesses was not unique. See, e.g., *Peters v. Hobby*, 349 U.S. 331 (1955); *Bailey v. Richardson* 341 U.S. 918 (1951), affirming *per curiam* by an equally divided court 182 F.2d 46 (1950); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955). Compare *Dayton v. Dulles*, 357 U.S. 144 (1958).

28. 360 U.S. at 479.

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question, holding that the Board was authorized by Congress and the President to conduct only the kind of security clearance program "which affords affected persons the safeguards of confrontation and cross-examination."²⁹

A confrontation clause incorporated into the Fourteenth Amendment speaks not only to the threat of Big Government foreshadowed by the Defense Department's Industrial Security Board, but also to the home-spun guile and sloth of local prosecutors. The obligation of federal prosecutors to present at trial the best available evidence was established in leading decisions under the confrontation clause before *Pointer* extended it to the states. Petitioner in *Kirby v. United States*³⁰ was charged with receiving stolen goods. The Court found error in the admission, to prove the property was stolen, of evidence that three other persons had been convicted of stealing it. In *Motes v. United States*,³¹ petitioner's conviction was reversed because the trial judge admitted a transcript of testimony taken at a preliminary hearing after a showing that the witness' absence was due to the prosecutor's negligence. In both cases the prosecutors settled for second-hand evidence. In neither was there a showing that first-hand evidence was unavailable.

Pointer and its companion case, *Douglas v. Alabama*,³² come within the compass of the earlier decisions. In *Pointer* the state where the trial was held and the state where the key witness had gone were signatories to the Uniform Act to Secure the Attendance of Witnesses from Without the State,³³ which, in effect, allows interstate service of process. Since the victim's hearsay testimony was the most damaging piece of evidence against petitioner, it was reasonable to require that the prosecutor undergo the slight inconvenience of using the act to insure the witness' presence. There is no indication that he attempted to do so.

In *Douglas* the prosecutor knew in advance that a witness he intended to call, a confessed accomplice of the defendant who had been convicted at a separate trial, would avoid damaging his chances for an appeal by refusing on Fifth Amendment grounds to testify. Nonetheless, he was called. When he refused to testify, the prosecutor read aloud from his confession, which incriminated the defendant, pausing

at intervals to incite the statements at conviction.

It is arguable that present the best standard. When the rely upon hearsay tation with the he hearsay that distu inmissible under co. interest,³⁴ and in f The prosecutor, t fuse to testify, ca confession by putt mouth; that is, to ventriloquism suc credibility and ne Court's major obj cutor's reading an The former indici ness. This inferen two policemen w the witness' relian fession implicating be tested because refused to testify.³⁵

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29. *Id.* at 506.

30. 174 U.S. 47 (1899).

31. 178 U.S. 458 (1900).

32. 380 U.S. 415 (1965).

33. CAL. PEN. CODE §§ 1334-34.6; TEX. CODE CRIM. PROC. art. 24.28 (1966).

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35. 350 U.S. at 419. used a conviction afte way that put it beyon witnesses at a murder which could not but fo ians during the entire *Douglas*, however, and

36. *Snyder v. Massac* not to present confro (judge, clerk and offici had pleaded in trial co the constitutional stand testimony of deceased v

at intervals to inquire whether the witness remembered having made the statements attributed to him. The Court reversed the defendant's conviction.

It is arguable that however cynical the prosecutor's charade, he did present the best available evidence by bringing a live witness to the stand. When the witness refused to testify, he had no choice but to rely upon hearsay testimony. So read, *Douglas* would equate confrontation with the hearsay rule. But it was not simply the introduction of hearsay that disturbed the Court. The confession might have been admissible under conventional hearsay law as a declaration against penal interest,³⁴ and in fact was described in the testimony of two policemen. The prosecutor, however, knowing in advance the witness would refuse to testify, called him simply to enhance the credibility of the confession by putting words in the witness' instead of the prosecutor's mouth; that is, to profit from the same illusion that for ages has made ventriloquism such an engaging folk art. It was this enhancement of credibility and not simply the presentation of hearsay that drew the Court's major objection. The Court distinguished between the prosecutor's reading and the witness' invocation of the Fifth Amendment. The former indicated only that the confession was made by the witness. This inference could be partially tested by cross-examining the two policemen who had testified that the confession was made. But the witness' reliance on the Fifth Amendment suggested that the confession implicating the defendant was true; that inference could not be tested because only the witness was competent to discuss it and he refused to testify.³⁵

The cases in which the Court has denied claims based on the confrontation clause do not appear to involve violations of the proposed standard, and thus are consistent with it.³⁶ This frees the Court to

34. See UNIFORM RULES OF EVIDENCE 63(10).

35. 380 U.S. at 419-20. In *Turner v. Louisiana*, 379 U.S. 466 (1965), the Court reversed a conviction after the credibility of witnesses' testimony had been enhanced in a way that put it beyond attack by cross-examination. Two deputy sheriffs, important witnesses at a murder trial, had custody of the jury. ". . . [T]he relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Id.* at 474. The case pre-dated *Pointer* and *Douglas*, however, and the due process standard was employed.

36. *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (view by jury of crime scene held not to present confrontation problem); *Dowdell v. United States*, 221 U.S. 325 (1911) (judge, clerk and official reporter who certified that defendants had been arraigned and had pleaded in trial court not "witnesses" within the meaning of a statute embodying the constitutional standard.); *Mattox v. United States*, 156 U.S. 237 (1895) (cross-examined testimony of deceased witnesses held admissible). *But cf.*, *Salinger v. United States*, 272

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interpret the confrontation clause as a standard of prosecutorial behavior and to abandon the unwieldy and unwise hearsay-confrontation equation suggested by the rhetoric in *Pointer*.

U.S. 542 (1926) (letters from persons not called as witnesses admitted to explain replies by accused to them—perhaps a marginal case, though the most damaging evidence appears to have come from letters written by the accused).

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The Confrontation Clause, Short Circuited

The case of *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975), is a test case. Its purpose is to test the constitutionality of the use of closed circuit television [hereinafter cited C.C.T.V.] in the examination of witnesses.¹ In deciding this case, the Missouri Supreme Court held, *inter alia*,² that the use of C.C.T.V. for the examination of an expert witness did not violate the defendant's right to confront his adverse witnesses under the Sixth Amendment of the United States Constitution.³ While the *McCoy* decision involved a prosecution under a municipal ordinance for the possession of marijuana, its holding may open the door for the use of C.C.T.V. examination of witnesses in other prosecutions. The witness examined in this case was the state's expert witness who testified as to the chemical analysis of a substance alleged to be marijuana. This examination was conducted via C.C.T.V. even though the witness was only a few miles away in the police laboratory. Furthermore, there was no showing that the state had tried but was unable to produce the witness in person, or that the witness was otherwise unavailable for in-court examination.⁴ In upholding the use of C.C.T.V. in this situation the Missouri court stressed:

The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits, . . . being used against the prisoner in lieu of personal examination and cross-examination of the witness. . . .⁵

and that

. . . a primary interest secured by it [the Confrontation Clause] the right of cross examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of *physical confrontation*.⁶

In further support of this position, the court cited a Massachusetts case wherein the use of a certificate from the state department of health attesting to the

1. *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (dissenting opinion).

2. The court also held that the use of C.C.T.V. equipment and the presence of reporters did not violate the defendant's Fifth and Fourteenth Amendment rights of due process under the United States Constitution. It based its holding upon the facts that the C.C.T.V. equipment was installed in an unobtrusive manner, judicial decorum was maintained, and the positioning of the equipment was such that attorney/client communications were not obstructed, and that therefore the defendant got a fair trial and his rights under the Due Process Clause were not denied. Answering the charge that the use of C.C.T.V. was a violation of the Code of Professional Responsibility and contrary to judicial ethics, the court said that the use of C.C.T.V. in this case is not the type of "televising" proscribed by Canon 30(7) of Rule 2 of the Code of Ethics. Finally, the defendant argued that the marijuana seized from Elm was illegally seized, but the court dismissed this claim by reaffirming a prior decision [*State v. Darabesek*, 412 S.W.2d 97 (Mo. 1967)], which held that a search made in conjunction with a booking procedure was a reasonable procedure and that evidence thus seized need not be suppressed.

3. 525 S.W.2d 336 at 337-39.

4. *Id.*

5. 525 S.W.2d at 338, quoting from *Mattox v. United States*, 156 U.S. 237, 242 (1895).

6. 525 S.W.2d at 338, quoting from *Douglas v. Alabama*, 380 U.S. 415, 416 (1965).

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chemical analysis of an alleged drug had been held not violative of the defendant's right to confrontation under the United States Constitution.⁷ From this case, the Missouri court reasoned that if a mere certificate could be upheld, then the use of C.C.T.V., which presumably grants a greater right, could not violate the defendant's right to confront witnesses. However, the court's analysis of the confrontation problem is superficial. The court failed to take into consideration the differences between the use of C.C.T.V. and actual physical confrontation, and they failed to show how these differences affect the purpose of the Confrontation Clause of the United States Constitution. This note is an attempt to analyze some of these deficiencies.

HISTORY AND PURPOSE OF THE CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution states, in pertinent part, that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him."⁸ Since the time of the incorporation of this clause of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment,⁹ the Confrontation Clause has been subject to increasing amounts of litigation.¹⁰ Traditionally, the Confrontation Clause has been thought of as a bar against the use of ex parte affidavits against the accused in lieu of personal examination and cross-examination of the witness.¹¹ In addition, a substantial number of cases concern admissibility of hearsay evidence and its possible conflict with the Confrontation Clause. Generally, these cases state that evidence allowed by established exceptions to the hearsay evidence rules do not violate the defendant's right of confrontation where there is an adequate opportunity of cross examination.¹² However, even a well-established hearsay exception will not be tolerated when it "unnecessarily subvert(s) the opportunity to cross-examination."¹³ Thus, for example, in *Barber v. Page*,¹⁴ the defendant was deprived of his right to confront the witness where the witness was out of the trial court's jurisdiction but where the state had made no effort to procure his attendance. The Supreme Court stated that this witness is not unavailable "unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."¹⁵ In *Mancusi v. Stubbs*,¹⁶ the Supreme Court distinguished *Barber* and held that there was no violation of the Confrontation Clause when the prior testimony of the witness is used in evidence where:

1) the witness was out of the trial, and 3) the defendant had the first trial. In both these cases prior testimony exception to the Confrontation Clause would be unavailable.¹⁷

More recently, in *California v. Green*,¹⁸ the Supreme Court again spoke of the purpose of the Confrontation Clause:

Confrontation: (1) insures the witness's oath—thus impressing him with the gravity of his duty against the lie by the possibility of cross-examination; (2) insures the discovery of the truth"; (3) insures the defendant's right to observe the demeanor of the witness in the courtroom and the jury in assessing his credibility.¹⁹

In sum, the purpose of the Confrontation Clause is to provide a satisfactory basis for evaluating the witness's testimony to insure maximum probability of a just verdict.

CONFRONTATION AND AUDIOVISUAL MEDIA

At this point it is important to discuss the use of audiovisual media, in particular videotape, in criminal cases. The use of videotape in criminal cases has caused much controversy because of its potential to deprive the accused of his right to confront the witness. The use of videotape is important in criminal cases because of its potential to deprive the accused of his right to confront the witness. The use of videotape is important in criminal cases because of its potential to deprive the accused of his right to confront the witness.

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7. *Commonwealth v. Harvard*, 356 Mass. 452, 253 N.E.2d 346 (1969); see also *Commonwealth v. Slavick*, 245 Mass. 405, 140 N.E. 465 (1923); *Annot.*, 29 A.J.R. 280 (1924).

8. U.S. Const. amend. VI.

9. *Pointer v. Texas*, 390 U.S. 400 (1965).

10. J. LADD and W. LAFAYE, *CRIMINAL PROCEDURE, CONSTITUTIONAL LIMITATIONS* sec. 6, at 58 (2d ed. 1975) (hereinafter cited as *CRIMINAL PROCEDURE*).

11. *Murray v. United States*, 155 U.S. at 242; *Kumra City v. McCoy*, 125 S.W.2d at 305.

12. *Pointer v. Texas*, *supra* note 9; see also *California v. Green*, 399 U.S. 149 (1970); *Mancusi v. Stubbs*, 405 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968); *CRIMINAL PROCEDURE*, *supra* note 10, at 59-60.

13. *CRIMINAL PROCEDURE*, *supra* note 10, at 59.

14. *Barber v. Page*, 390 U.S. 719 (1968).

15. *Id.* at 725.

16. *Mancusi v. Stubbs*, *supra* note 12.

17. *Barber v. Page*; *Mancusi v. Stubbs*, 405 U.S. 204 (1972).

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

19. *Id.* at 153.

20. *Id.*; see also *Sermerjian, The*

21. *State v. Lusk*, 452 S.W.2d 100 (1970); *Kornblum and Rush, Televised Hearings and the Confrontation Clause*, 6 *Televised Hearings and the Confrontation Clause* (1974).

22. *Kornblum and Rush, supra*

23. 6 *CRIMINAL J. REV.* 214, at 214 (1974).

24. *Kornblum and Rush, supra*

1) the witness was out of the country; 2) the witness had testified at the first trial, and 3) the defendant had the opportunity to cross-examine the witness at the first trial. In both these cases however, the Court stressed that before the prior testimony exception to the hearsay rule can be applied, the witness must in fact be unavailable.¹⁷

More recently, in *California v. Green*,¹⁸ the United States Supreme Court again spoke of the purpose of the Confrontation Clause:

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 the 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.¹⁹

In sum, the purpose of the Confrontation Clause is to afford the trier of fact a satisfactory basis for evaluating the truth in the fact-finding process so as to insure maximum probability that the truth will emerge.²⁰

CONFRONTATION: VIDEOTAPE vs. C.C.T.V.

At this point it is important to distinguish between C.C.T.V. and other audiovisual media, in particular, videotape. This distinction is important because though the two media outwardly seem very similar, the effect which they have on an accused's right to confrontation is very different. Also, a discussion of videotape is important inasmuch as there has been some case law and commentaries approving its uses²¹ and an analysis of these can serve as a tool to the analysis of C.C.T.V. and its effect upon confrontation.

It is generally accepted that the increasing use of audiovisual aids has been a boon to the adjudicatory process.²² Videotape is one of the newer technological achievements in this field. The term videotape refers to a process by which both audio and visual portions are transcribed onto magnetic tape. This is done with the use of a camera and special recording equipment. The tape can be stored easily and can be replayed at will on a monitor similar to a television monitor.²³ Videotape can and has been used in both civil and criminal cases.²⁴ There are at least four foreseeable ways in which it can be used, i.e. to record: (1) ex parte

17. *Barber v. Page*; *Mancusi v. Stubbs*, *supra* note 12; *CRIMINAL PROCEDURE*, *supra* note 10, at 69.

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

19. *Id.* at 153.

20. *Id.*; see also *Sennecjinn*, *The Right of Confrontation*, 55 A.B.A.J. 152 (1969).

21. *State v. Lusk*, 452 S.W.2d 219 (Mo. 1970); *State v. Hendricks*, 456 S.W.2d 11 (Mo. 1970); *Kornblum and Rush*, *Television in the Courtroom and Classroom*, 59 A.B.A.J. 273 (1973) [hereinafter cited *Kornblum and Rush*]; *Comment, Nebraska Faces Videotape: The New Videotape Technology In Perspective*, 6 *CINCINNATI L. REV.* 214 (1972); *Comment*, 26 *STAN. L. REV.* 619 (1974).

22. *Kornblum and Rush*, *supra* note 21.

23. 6 *CINCINNATI L. REV.* 214, *supra* note 21.

24. *Kornblum and Rush*, *supra* note 21; 6 *CINCINNATI L. REV.* 214, *supra* note 21.

statements, for example, confessions, (2) depositions of witnesses, (3) testimony for trial, and (4) live testimony at the trial to prepare an appellate record.²⁵

The use of videotape in presenting confessions of a defendant has been upheld by the Missouri Supreme Court.²⁶ Likewise, other uses are also thought to be non-violative of the defendant's constitutional rights.²⁷ The question of whether prerecorded videotaped testimony of an available witness violates the defendant's right to confront the witness will probably be answered soon.²⁸ In this last situation, it can be argued that where a witness testifies in front of a camera in the defendant's presence and the defendant has the opportunity to cross-examine, and the videotape is played back to the trier of fact at the trial so that it can weigh the witness' demeanor, the purpose of producing the witness has been fulfilled and this procedure will not violate the defendant's right to confront the witness.²⁹ It is important to note that the use of videotape just described is the use most analogous to the use of C.C.T.V. in the *McCoy* case; henceforth, when the term videotape is used it will refer to this use.

Videotape and C.C.T.V., although similar in that they both transmit audio and visual messages, are different in their use and their effect upon confrontation. C.C.T.V. is the use of a camera, microphone, and broadcasting system by which audio and visual images are *instantaneously* broadcast to a remote monitor location.³⁰ The set-up in the *McCoy* case consisted of two such systems. In the courtroom there were two stationary television cameras, two monitors which appeared to be ordinary television sets, and microphones for the use of judge and counsel. In the laboratory, where the state's expert witness was located, was a camera, a monitor and microphone. During the examination of the witness, the witness could be heard and seen in the courtroom by the defendant, the attorneys, and the judge who sat as the trier of fact in this case. The witness could see and hear the examining attorney and he could hear the judge as well. There was no court official present with the witness; however, there were four other persons present in the room with him. The transmission of images and voices was instantaneous.³¹

From this description of the C.C.T.V. system used in *McCoy*, it is easy to see the striking contrast between it and the videotape system described above. First, in the videotape recording of the witness' testimony, the witness is physically confronted with the defendant at the time of the deposition. Second, the witness is physically confronted with both the defendant's and state's attorney. There is the physical presence of a court official who is to administer the oath.

25. *Id.*

26. *State v. Lash*, *supra* note 21; *State v. Hendricks*, *supra* note 21.

27. 26 STAN. L. REV. 619, *supra* note 21, at 639-642. (This article gives a good discussion on the use of videotape and its relationship to the Confrontation Clause.)

28. 6 CINCINNATI L. REV. 214, *supra* note 21. The National Center for State Courts plans to raise these issues on appeal in cases presently being prepared in Georgia and New Hampshire.

29. 26 STAN. L. REV. 619, *supra* note 21, at 641; see also, *The Supreme Court, 1969 Term*, 81 HARV. L. REV. 1, 115 (1970).

30. 21 ENCYCLOPEDIA BRITANNICA, *Television* 812-13 (1973).

31. *Record*, *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975); note also that a videotape recording was made of the examination of the witness to preserve the record for any subsequent appeals.

Finally, there is an edvtape deposition by which his testimony. For these tion the witness is produ that the transmission of This argument cannot b present the witness' testi the witness is never phys neys or judge or any cou as a witness who testifies than when videotape is v and familiar surrounding events that occur at the developed below, it is due that the argument made cannot be made for C.C provide the defendant wi

THE PURPOSES OF

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32. 26 STAN. L. REV. 619, *supra* note 21.

33. *Record*, *supra* note 31; the monitor; all he saw was the

34. 339 U.S. at 158.

35. *Id.*

36. Kornblum and Rush, *supra* note 31.

There is an advocacy atmosphere surrounding the taking of the videotape deposition by which the witness realizes the importance and seriousness of his testimony. For these reasons, some persons argue that in a videotape deposition the witness is produced for the purposes of the Confrontation Clause and that the transmission of this confrontation to the trier of fact is merely delayed.³² This argument cannot be so easily made, however, when the medium used to present the witness' testimony is C.C.T.V. When C.C.T.V. is used, as in *McCoy*, the witness is never physically confronted with the defendant³³ or by the attorneys or judge or any court official; therefore, he is not under the same pressures as a witness who testifies via videotape. The atmosphere is much less adversary than when videotape is used. The witness is insulated in his own comfortable and familiar surroundings and there is no monitoring or control of any of the events that occur at the place of examination of the witness. As will be fully developed below, it is due to these differences (between videotape and C.C.T.V.) that the argument made for videotape's non-violative effect on confrontation cannot be made for C.C.T.V., and that C.C.T.V., as used in *McCoy*, fails to provide the defendant with his right to confront adverse witnesses.

THE PURPOSES OF CONFRONTATION, SHORT CIRCUITED

The argument that C.C.T.V. deprives the defendant of his right to confront the witness can be supported by applying the purpose of the Confrontation Clause to the use of C.C.T.V. in examining witnesses. In *California v. Green*, *supra*, the United States Supreme Court summarized the purpose of confrontation as: (1) insuring that testimony will be given under oath, (2) forcing the witness to submit to cross-examination, and (3) allowing the trier of facts to observe the witness' demeanor.³⁴ Each of these purposes will be discussed as they apply to the *McCoy* case.

Testimony Given Under Oath

The first purpose of confrontation is that it "insures the witness will give his statements under oath. . . ."³⁵ Confrontation undoubtedly has this effect when the witness is testifying in front of the court. He is physically present before the court and therefore is constantly reminded by his surroundings that he is testifying under oath. However, when videotape is used, there is a more relaxed atmosphere and this may cause the witness to be less mindful of the important purpose of his testimony.³⁶ Notwithstanding this fact, the witness is still reminded by the advocacy nature of the proceeding that his testimony is a serious matter. But the use of C.C.T.V. has a strikingly less profound effect upon the witness. There is virtually nothing to remind the witness that he is testifying under oath. The witness is not in the presence of the attorneys, judge, defendant

32. 26 STAN. L. REV. 619, *supra* note 21, at 641.

33. Record, *supra* note 31; the witness in this case did not even see the defendant's image on the monitor; all he saw was the image of the examining attorney.

34. 399 U.S. at 158.

35. *Id.*

36. Kornblum and Rush, *supra* note 21; 25 STAN. L. REV. 619, *supra* note 21, at 630.

or any court official. The witness is in his own familiar surroundings and all he has to remind him of the seriousness of the proceedings is a small television screen with the image of the examining attorney.³⁷ In fact, in the McCoy case the oath was not even properly administered. The examination of the witness was begun before the witness had the presence of mind to remind the court that he had not been given the oath.³⁸ This occurrence in itself shows the great deficiency of C.C.T.V. in insuring that the witness will give his statements under oath.

Cross-Examination

The Supreme Court has declared that another purpose of the Confrontation Clause is that it "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'."³⁹ Here the Supreme Court quotes Dean Wigmore who likens the purpose of cross-examination to the purpose that torture served in the medieval system,⁴⁰ that is, to put the witness under certain physical and psychological pressures to insure that he is telling the truth.⁴¹ When an in-court examination or a videotape examination of a witness is made, all available pressure can be applied to the witness because the examining attorney is physically confronting him. However, when C.C.T.V. is used, the pressure that an attorney can exert upon a witness is significantly diminished. Besides disabling the examining attorney from applying certain physical and psychological pressures upon the witness, the use of C.C.T.V. has the additional effect of making cross-examination less effective by cutting off certain feedback the attorney would have received from the witness had the examination taken place within his/her physical presence.

Physical and psychological pressures can be placed upon the witness by means other than the mere asking of questions. One such pressure which requires physical confrontation of a witness is the actual physical closeness with which he is confronted. It seems unquestionably true that people's actions toward and interactions with other people are influenced by space.⁴² When a person comes so close to another person that it invades his personal buffer zone it causes that person discomfort.⁴³ This principle has been known and applied by the police for years. One of their textbooks recommends the following:

[T]he interrogator should sit close to the subject, with no table or desk between them, since "an obstruction of any sort affords the suspect a certain degree of relief and confidence not otherwise obtainable." At the beginning of the session the officer's chair may be two or three feet away, "but after the interrogation is underway the interrogator should move his chair in closer so that one of the subject's knees is just about between the interrogator's two knees."⁴⁴

37. Record, *supra* note 31.

38. *Id.*

39. *California v. Green*, 339 U.S. at 106.

40. WIGMORE, EVIDENCE § 1367, at 32 (Chadborn rev. 1974).

41. *Id.*

42. C. KLEASKE, FIRST IMPRESSIONS, THE PSYCHOLOGY OF ESCORTING OFFICERS, at 35 (1975) [hereinafter referred to as FIRST IMPRESSIONS].

43. *Id.*

44. *Id.* at 37.

This procedure is to maintain the truth of his witness in a situation, i.e. the giving or receiving of an aversion to dominance.⁴⁵ There is a witness and thereby both an in-court examination and both the pressure of due to the existence used both types of certainly not physically could effectively control several feet away from effects of gaze because the television camera.

Because C.C.T.V. certain non-verbal extremely important when they act deceptively seen in their bodily learned to control the a result often leak the ing experiment a rule to be hiding their heads and faces and who saw only heads viewed only the body teach us to monitor ful.⁴⁶ As Freud put betrayed oozes out of back, C.C.T.V. also to an audience they tell the truth.⁴⁷ A witness in either an in-court pick up this feedback of deceit. But where an audience or a group

45. *Id.* at 22.

46. *Id.*

47. *Id.* at 54; see also

48. FIRST IMPRESSIONS,

49. *Id.*

50. *Id.*

51. S. FREUD, FRAGMENTS

52. FIRST IMPRESSIONS,

*no sense, just
a screw up by
the Ct.*

[Handwritten mark]

This procedure is used by the police to apply pressure upon a suspect to ascertain the truth of his statements. Another pressure that can be placed upon a witness in a situation where there is physical confrontation is the use of gaze, *i.e.* the giving or receiving of steady, fixed eye contact.⁴⁵ The receiver of gaze will have an aversion to receiving it especially when it communicates threat or dominance.⁴⁶ Therefore, the astute attorney can use gaze to put pressure on a witness and thereby insure a more thorough investigation of that witness. In both an in-court examination of a witness and an examination on videotape, both the pressure of physical closeness and gaze can be applied to the witness due to the existence of actual physical confrontation. But where C.C.T.V. is used both types of pressure are effectively curtailed. The defense attorney is certainly not physically close to the witness and even if the television monitor could effectively convey the pressure of physical closeness it still is probably several feet away from the witness. Also, the witness is not subject to any of the effects of gaze because no eyes are upon him other than the impersonal eye of the television camera.

Because C.C.T.V. does not involve physical confrontation with the witness, certain non-verbal feedback is cut off to the examining attorney. This can be extremely important because studies have shown that people act differently when they act deceptively, rather than truthfully, and these differences can be seen in their bodily movements.⁴⁷ This is true because most people have not learned to control their body "cues" as well as their verbal statements, and as a result often leak their true feelings via their body movements.⁴⁸ In one interesting experiment a number of judges were shown silent movies of patients known to be hiding their true feelings. Half of the judges viewed only the patients' heads and faces and the other half viewed only the patients' bodies. The judges who saw only heads and faces were much more often deceived than those who viewed only the bodies.⁴⁹ The reason for this result is that our society does not teach us to monitor our bodies as much as our faces when we are being deceitful.⁵⁰ As Freud put it, "if his lips are silent, he chatters with his finger tips; betrayal oozes out of him at every pore."⁵¹ Besides cutting off this bodily feedback, C.C.T.V. also cuts off some facial feedback. When people are asked to lie to an audience they often look at the audience less than when they are asked to tell the truth.⁵² A witness would have the same reactions when testifying in front of others. If the witness is being physically confronted by an examining attorney in either an in-court examination or one made on videotape, the attorney can pick up this feedback and use it to probe areas in which the witness shows signs of deceit. But where C.C.T.V. is used, the witness is not testifying in front of an audience or a group and the tendency to look or not look at the audience will

45. *Id.* at 22.

46. *Id.*

47. *Id.* at 54; see also D. McCorty, *PSYCHOLOGY AND THE LAW*, 165-68 (1959).

48. *FIRST IMPRESSIONS*, *supra* note 42 at 64.

49. *Id.*

50. *Id.*

51. S. FREUD, *TEXTS OF AN ANALYSIS OF A CASE OF HYSTERIA* (1905).

52. *FIRST IMPRESSIONS*, *supra* note 42, at 27.

be negated. The witness may further avoid giving feedback by constantly looking in the direction of the camera or monitor. This action will effectively eliminate this feedback to both the examining attorney and the trier of fact. Inasmuch as the use of C.C.T.V. decreases the amount and degree of physical and psychological pressure that can be placed on a witness in that it eliminates the effects of physical closeness and gaze, and because it thwarts the examining attorney's attempts to get feedback from the witness, Wigmore's "greatest legal machine"⁵³ can effectively be short-circuited and the purpose of forcing the witness to submit to cross-examination as suggested in *Green* defeated.

Jury Evaluation

A third purpose of confrontation as stated in *Green* is that it permits the fact-finder to observe the witness' demeanor, thus aiding it in assessing his credibility.⁵⁴ The jury system has been a fundamental part of our legal framework. It is the duty of the jury to determine questions of fact. In order best to do this, the jury must be able to observe the witness under the pressure of the advocacy process. When an in-court examination of the witness is conducted, there is no doubt that this goal is accomplished. The witness is seen by the trier of fact as he is physically confronted with the defendant, the attorneys and the judge. The witness is well aware of the seriousness of his testimony and he is subject to maximum pressure by the defendant and his attorney. The trier of fact is able to watch his every action and it is able to weigh his demeanor and assess his credibility. Similarly, when videotape is used, the witness is physically confronted by the defendant and his attorney. The advocacy procedure puts the same type of pressure on the witness as an in-court examination. His reaction to this pressure can be seen and evaluated by the trier of fact on the videotape replay. The videotape procedure will capture the witness' demeanor much as it would be seen by the trier of fact in an in-court examination, the major difference being that the witness is seen by the trier of fact on a television monitor and not in person. Hence, the argument can be made that the witness is produced for the purpose of confrontation, and the trier of fact is able to weigh the witness' demeanor as it would have been weighed in an in-court confrontation. The two situations just described are, however, very different from the situation in which C.C.T.V. is used. When C.C.T.V. is used, the atmosphere in which the testimony is given is very relaxed and none of the physical and psychological pressures of a physical confrontation are present. The witness is shown to the trier of fact in the comfort of familiar surroundings and in a situation where there is no court control over his actions.⁵⁵ The trier of fact sees the witness as the witness wishes to be seen and not under the fire of an adverse cross-examination. Because of these deficiencies in the C.C.T.V. procedure, the

trier of fact is diminished credibility. The witness is defeated.

The Missouri limited circumstances expert witness testimony municipal violative court's opinion in *McCoy* to those in the *McCoy* the door for the use by the statement witness against or to require more (1) many instances of *McCoy*. To have thus opened with the use of C.C.T.V. accused to confront points out that, "of the use of close examination right grips with the pressure and concludes that in *McCoy*, falls short insure that testimony cross-examination witness.



56. 525 S.W.2d
57. *Id.* at 339.
58. *Id.* at 340 (d)

53. Wigmore, *supra* note 40, at 32.

54. 399 U.S. at 158.

55. Extreme abuses are possible; for example, the witness may be prompted in giving his answers by others in the room, he may resort to the use of notes or other memoranda in giving his answers, etc.

trier of fact is disabled in weighing the demeanor of the witness and assessing his credibility. Therefore, one of the purposes of cross-examination is defeated.

CONCLUSION

The Missouri Supreme Court has allowed the use of C.C.T.V. under the limited circumstances of the *McCoy* case, i.e. in an examination of the state's expert witness testifying to a routine chemical analysis for a prosecution of a municipal violation, a proceeding said to be "civil in nature."⁵⁶ However, the court's opinion may be read so as not to strictly limit the decision to facts similar to those in the *McCoy* case. The opinion can easily be interpreted as opening the door for the use of C.C.T.V. in more serious prosecutions. This is evidenced by the statement in the opinion that, "to require *physical presence* of an expert witness against one accused of violating a municipal police regulation would be to require more than the confrontation clause rights of an accused demand in many instances of prosecutions for felonies."⁵⁷ (emphasis supplied by the court) To have thus opened the door without a full analysis of the problems involved with the use of C.C.T.V. is indeed unfortunate, for it allows the right of the accused to confront his witnesses to be severely eroded. The dissenting opinion points out that, "the facts in this case do not portray a sufficiently clear picture of the use of closed circuit television with respect to confrontation and cross-examination rights under the Sixth Amendment for this court to really come to grips with the problem."⁵⁸ This note wholeheartedly agrees with that opinion and concludes that an examination of a witness via a C.C.T.V. system, as used in *McCoy*, falls short of the purpose of the Confrontation Clause as it does not insure that testimony will be given under oath, it severely hampers effective cross-examination, and it disables the jury from weighing the demeanor of the witness.

James R. Coge

56. 525 S.W.2d at 337-39.

57. *Id.* at 339.

58. *Id.* at 340 (dissenting opinion).

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(3) At any pre-trial conference; unless waived by Defendant in writing;

(4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

(5) At all proceedings before the court when the jury is present;

(6) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;

(7) At any view by the jury;

(8) At the rendition of the verdict;

(9) At the pronouncement of judgment and the imposition of sentence.

(b) Defendant Absenting Himself. If the defendant is present at the beginning of the trial and shall thereafter, during the progress of said trial or before the verdict of the jury shall have been re-

turned into court, voluntarily absent himself from the presence of the court without leave of court, or is removed from the presence of the court because of his disruptive conduct during the trial, the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of said case to the jury for verdict, and the return of the verdict of the jury shall proceed in all respects as though the defendant were present in court at all times.

(c) Defendant May Be Tried in Absentia. Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid.

(d) Presence of Corporation. A corporation shall appear by counsel at all times and for all purposes.

Committee Note

Same as prior Rule except (3) added to conform to R.C. and other sections renumbered.

V. PRE-TRIAL MOTIONS AND DEFENSES

Rule 3.190. Pre-Trial Motions

(a) Pre-Trial Motions in General. Every pre-trial motion and pleading in response to a motion shall be in writing and signed by the party making the motion or the attorney for the party. This requirement may be waived by the court for good cause shown. Each such motion or other pleading shall state the ground or grounds on which it is based. A copy shall be served on the adverse party's attorney before the time the original is filed. A certificate of service must accompany the filing of any such pleading.

(b) Motion to Dismiss.

Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.

(c) Time for Moving to Dismiss. Unless the court grants him further time, the defendant shall move to dismiss the indictment or information either before or upon arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based upon fundamental grounds, every ground for motion to dismiss which is not presented by a motion to dismiss within the time hereinabove provided for shall be taken to have been waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:

(1) The defendant is charged with an offense which he has been pardoned; or

(2) The defendant is charged with an offense which he has previously been placed in jeopardy; or

(3) The defendant is charged with an offense which he has previously been granted immunity; or

(4) There are no material disputed facts, or undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically stated and the motion sworn to.

(d) Traverse or Demurrer. The State may traverse or demur to a motion to dismiss which relates to factual matters. Factual matters alleged by the defendant to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue necessary to the decision on the motion. A motion to dismiss under (c)(4) of this rule shall be denied if the State files a traverse which with specific denials traverses each of the material fact or facts on which the motion to dismiss is based. Such demurrer or traverse shall be filed a reasonable time before the court on the motion to dismiss.

(e) Effect of Sustaining a Motion to Dismiss. If a motion to dismiss is sustained the court shall order that the defendant be held in custody or admitted to bail for a reasonable specified period pending the filing of a new indictment or information. If a new indictment or information is filed within the time specified in the order, or within such additional time as the court may allow for

shown, the defendant, if in custody, shall be discharged therefrom, unless some other charge justifies a continuance in custody. If he has been released on bail he and his sureties shall be exonerated. If money or bonds have been deposited as bail the money or bonds shall be refunded.

(d) **Order Dismissing.** For the purpose of concerning Section 921.07(1), Florida Statutes (1969), the statutory term "order quashing" shall be taken and used to mean "order dismissing."

(e) **Motion for Continuance.**

(1) **Definition.** A continuance within the meaning of this rule is the postponement of a cause for any period of time.

(2) **Cause.** The court on motion of the State or a defendant or upon its own motion may in its discretion for good cause shown grant a continuance.

(3) **Time for Filing.** A motion for continuance may be made only before or at the time the case is set for trial, unless good cause for failure to so apply is shown or unless the ground for the motion arose after the cause was set for trial.

(4) **Certificate of Good Faith.** A motion for continuance shall be accompanied by a certificate of the defendant's counsel that the motion is made in good faith.

(5) **Affidavits.** The party applying for a continuance may file affidavits in support of his motion, and the adverse party may file counter-affidavits in opposition to the motion.

(f) **Motion to suppress Evidence in Unlawful Search.**

(1) **Grounds.** A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:

- (a) The property was illegally seized without a warrant, or
- (b) The warrant is insufficient on its face, or
- (c) The property seized is not that described in the warrant, or
- (d) There was no probable cause for believing the existence of the grounds on which the warrant was based, or
- (e) The warrant was illegally executed.

(2) **Contents of Motion.** Every motion to suppress evidence shall clearly state the particular evidence sought to be suppressed, the reasons for suppression and a general statement of the facts on which the motion is based.

(3) **Hearing.** Before hearing evidence, the court shall determine if the motion is legally sufficient. If not, the motion shall be denied. If the court grants the motion on its merits, the defendant shall produce evidence supporting his position and the State may offer rebuttal evidence.

(4) **Time for Filing.** The motion to suppress shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial.

(g) **Motion to Suppress a Confession or Admissions Illegally Obtained.**

(1) **Grounds.** Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) **Time for Filing.** The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) **Hearing.** The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

(h) **Motion to Take Deposition to Perpetuate Testimony.**

(1) After an indictment or information upon which a defendant is to be tried is filed, the defendant or the State may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

(2) If the defendant or the State desires to perpetuate the testimony of a witness living in or out of the State whose testimony is material and necessary to the case, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by him and filed in the trial court.

(3) If the deposition is taken on the application of the State, the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep him in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but his failure to appear after notice and tender of expenses shall constitute a

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waiver of the right to be present. The State shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The State shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed that is in the possession of the State and that the State would be required to make available to the defendant if the witness were testifying at trial.

(4) The application and order to issue the commission may be made either in term time or in vacation. The commission shall be issued at a time to be fixed by the court.

(5) Except as otherwise provided, the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution and return of the commission and the opening of the depositions in civil actions shall apply in criminal cases.

(6) No deposition shall be used or read in the evidence when the attendance of the witnesses can be procured. If it shall appear to the court that any person whose deposition has been taken has absented himself by procurement, inducement or threats of any person on behalf of the State or of the defendant or of any person on his behalf, the depositions shall not be read in evidence on behalf of the defendant.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

Repeal

Law 1979, c. 7, § 69, § 3, provides for the repeal of Rule 3.190(j) "insofar as it is inconsistent with the provisions of this act." Section 4 of the law provides: "This act shall take effect upon becoming a law, except that section 3 shall take effect only if passed by a two-thirds vote of the membership of each house of the legislature." The law was passed with the requisite majority vote. The other provisions of the law will be designated as F.S. 1979 § 918.17 which permits video-taping of testimony of certain minors in cases involving sexual battery or child abuse.

Committee Note

1972 Revision. Subdivision (a) is amended to require the defendant to specify the factual basis behind the grounds for a motion to suppress evidence. Subdivision (1) is amended to permit the State to take depositions under the same conditions that the defendant can take them. Former sections (j) and (k) transferred to Rules 3.159, 3.161 and 3.152. Sections (l) and (m) renumbered (j) and (k) respectively. Otherwise, same as prior rule.

1977 Amendment. This amendment resolves any ambiguity in the rule as to whether the State must file a general or a specific traverse to a motion to dismiss filed under the authority of Rule 3.190(c)(4).

See State v. Kemp, 305 So.2d 863 (Fla.3d DCA 1974).

The amendment clearly now requires a specific traverse to specific material fact or facts.

Rule 3.191. Speedy Trial

(a)(1). Speedy Trial Without Demand. Except as otherwise provided by this Rule, and subject to the limitations imposed under (b)(1) and (b)(2), a person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, and if not brought to trial within such period shall upon motion timely filed with the court in the jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion, shall make the required inquiry under (d)(3). The time period established by this section shall commence when such person is taken into custody as defined in (a)(4). A person charged with a crime is entitled to the benefits of this Rule whether such person is in custody in a jail or correctional institution of the State or a political sub-division thereof or is on liberty on bail or recognizance. This section shall cease to apply whenever a person files a valid demand for speedy trial under (a)(2).

(a)(2). Speedy Trial Upon Demand. Except as otherwise provided by this Rule and subject to the limitations imposed under (b)(1) and (c), every person charged with a crime by indictment or information shall upon demand filed with the court having jurisdiction and upon service of a copy of such demand upon the prosecuting attorney be brought to trial within 60 days, and if not brought to trial within such period of time following such demand shall upon motion timely filed with the court and served on the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall make the required inquiry under (d)(3). The time period established by this section shall commence when such demand has been properly filed and served. Trial may be scheduled at any time within the 60 day period except that trial shall not be scheduled within 5 days of the filing of the demand without the consent of the defendant and the prosecuting attorney.

(a)(3). Commencement of Trial. A person shall be deemed to have been brought to trial if the trial commences within the time herein provided. Trial is deemed to have commenced when the jury panel for that specific trial is sworn for voir dire examination, or, upon waiver of a jury trial, when the trial proceedings begin before the judge.

(a)(4). Custody. For purposes of this Rule, a person is taken into custody, (i) when the person is arrested as a result of the conduct or criminal episode which gave rise to the crime charged, or (ii) when the person is served with a notice to appear in lieu of physical arrest.

(b)(1). Prisoners Outside Jurisdiction. A person who is in federal custody or incarcerated in a

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STATE OF NEW MEXICO
Office of the Attorney General

DEPARTMENT OF JUSTICE

P.O. Drawer 1508

Santa Fe, N. M. 87501

JEFF BINGAMAN
ATTORNEY GENERAL

October 28, 1981

Bill Cook
Box 3382
Anchorage, Alaska 99510

Dear Mr. Cook:

This is in response to your inquiry concerning the use of videotaped depositions of alleged rape victims who are under sixteen years of age.

The Legislative Council Service advised they have no history on this type of legislation. The only documents they have are prior laws and amendments to these laws.

Enclosed is a copy of Rule 29.1 of our Judicial Pamphlet. The annotations to this Rule might be of help to you.

If there is further we can do, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in cursive script that reads "Diana Armiyo".

DIANA ARMIJO
Administrative Secretary

Enclosure

da

30-9-16. Testimony; limitations; in camera hearing.

Section is not unconstitutional on its face. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section not in conflict with rules. — The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P., regarding pretrial hearings. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. is to be applied in determining admissibility.

State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

There is no conflict between this section and Rule 405, N.M.R. Evid., regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section is not limited to sex by consent; rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Victim's past sexual conduct in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim. 1

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act [this section].

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.

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Mack Masley, *Justice*
H. Vern Payne, *Justice*

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Rose Marie Alderete, *Clerk*

RULES OF CRIMINAL PROCEDURE
FOR THE DISTRICT
COURTS

With Amendments Through July 1, 1980
and Annotations Through 604 P.2d 1050

Judicial Pamphlet 6



1980 REPLACEMENT PAMPHLET

RULES OF CRIMINAL PROCEDURE COMMITTEE

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Although the defendant may not be compelled to produce evidence if it would result in a violation of his privilege against self-incrimination, this rule has been upheld as not contravening the privilege against self-incrimination or the right to due process of law guaranteed by the fifth amendment to the United States constitution. *Gray v. Sanchez*, 86 N.M. 146, 529 P.2d 1091 (1974). See also, *Jones v. Superior Court*, 58 Cal.2d 55, 23 Cal. Rptr. 879, 372 P.2d 919 (1962); *Pradheme v. Superior Court*, 2 Cal.3d 350, 85 Cal. Rptr. 129, 466 P.2d 673 (1970); *Williams v. Florida*, 359 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970); *Wardius v. Oregon*, 412 U.S. 77 (1973); *United States v. Nobles*, 422 U.S. 242, 955 S.W.2d 151, 15 L. Ed. 2d 141 (1975).

See Rule 27(f) for the definition of "statement" as used in this rule.

Cross-references. -- For disclosure by government, see Rule 27. For forms on certificate and supplemental certificate of disclosure of information, see Criminal Forms 5.55 and 5.58 in Judicial Pamphlet 10A.

The 1989 amendment redesignated former Subdivisions (b) and (c)(3) as present Subdivisions (a)(3) and (c)(2), rewrote the introductory paragraph in Subdivision (a), inserted present Subdivision (b), deleted former Subdivision (c)(2), added Subdivision (d), in Subdivision (a)(3), deleted "Upon motion of the state, the court may order the defendant to furnish the state" at the beginning of the paragraph, substituted "the defendant" for "he" and added "together with any statement made by the witness;" at the end of the paragraph.

Compiler's note. -- Subdivision (c) is similar to Rule 10(b)(2) of the Federal Rules of Criminal Procedure.

Constitutionality of rule. -- This rule is not an unconstitutional violation of U.S. Const., amend. V. *Gray v. Sanchez*, 86 N.M. 146, 529 P.2d 1091 (1974).

Constitutional to permit disclosure of physician's analysis of polygraph results. -- Disclosure of analysis and conclusions of doctor appointed on behalf of defendant to examine results of a polygraph examination would not deny defendant due process, interfere with his right to put on a defense, deny equal protection of the law nor violate his privilege against self-incrimination. *State v. Gallegos*, 92 N.M. 370, 588

P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Defendant had burden of establishing lawyer-client privilege as to doctor's report. -- Defendant objecting to discovery of a doctor's report, prepared for defendant's counsel under court order, has the burden of establishing the existence of the lawyer-client privilege. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Disclosure of witnesses. -- Where the defendant failed to furnish the state a list of the names and addresses of the witnesses he intended to call at the trial as he had been ordered to do by the trial court pursuant to Subdivision (b) (now (a)(3)), the state objected to calling these witnesses and the trial court granted the state's motion, reserving reconsideration of the matter until the district attorney had spoken to the witnesses, but, without explanation, defendant did not call any of these witnesses to the stand, it was held that he voluntarily abandoned any further effort to have these witnesses appear and that he could not be heard on appeal to complain of error in their exclusion. *State v. Bojorquez*, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 549 P.2d 248 (1975) (decided prior to 1989 amendment).

Effect of omitting reference to limitation provisions from disclosure order. -- Failure to copy into order pertaining to disclosure of evidence and witnesses a reference to Subdivision (c), pertaining to information not subject to disclosure, does not render the order beyond the jurisdiction of the court. *Gray v. Sanchez*, 86 N.M. 146, 529 P.2d 1091 (1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Am. Jur. 2d and C.J.S. references. -- 21 Am. Jur. 2d Criminal Law § 351; 23 Am. Jur. 2d Depositions and Discovery § 97.

93 C.J.S. Criminal Law §§ 955 to 957.

Rule 29. Depositions.

(a) **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment or information, the district court may order the taking of the deposition of any person other than the defendant upon a showing that his testimony may be material and relevant to the offense charged, that it is necessary to take his deposition to prevent injustice, and either (1) the person will not cooperate in giving a statement to the moving party, or (2) the person may be unable to attend trial or a hearing.

(b) **Scope of discovery.** Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) **Time and place of deposition.** Unless otherwise stipulated to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court.

(d) **Person before whom depositions may be taken.**

(1) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken

before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(2) In foreign countries. In a foreign country, depositions may be taken (i) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (ii) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (iii) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(3) Disqualification for interest. No deposition shall be taken before a person who is a relative, employee, attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is interested in the action.

(c) Notice of examination; general requirements; nonstenographic recording. (1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place set for taking the deposition and the name and address of each person to be examined.

(2) The court may for cause shown enlarge or shorten the time previously set for taking the deposition.

(3) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means including by videotape, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(f) Record of examination. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness.

(g) Depositions of corporations, partnerships, and governmental agencies. A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

(h) Examination and cross-examination; objections. Examination and cross-examination of witnesses may proceed as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. All objections made at time of the examination to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer taking the deposition who shall propound them to the witness and record the answers verbatim.

(i) Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending, or the court in the district where the deposition is being taken, may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition pursuant to Rule 31. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(j) Substitution to witness; changes; signing. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, the illness or absence of the witness, or the fact of the refusal by the witness to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(k) Certification and filing by officer; copies; notice of filing. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(l) Stipulations regarding discovery procedure. Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, or (2) provide for other methods of discovery.

(m) Attendance. A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued. The deposition of any witness confined in prison shall be taken where the witness is confined.

(n) Use of depositions. At the trial, or at any hearing, any part or all of a deposition, as an exception to the hearsay rule of the Rules of Evidence applied as though the witness were then present and testifying, may be used:

(1) if the witness is dead;

(2) if the witness is unable to attend to testify because of illness or infirmity;

(3) if the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

(4) if the witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition; and

(5) to contradict or impeach the witness.

If only part of a deposition is offered in evidence by a party, any adverse party may require him to offer any other part or parts relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

(o) **Objections to admissibility.** Subject to the provisions of Rule 29(q)(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(p) **Effect of taking or using depositions.** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(q) **Effect of errors and irregularities in depositions.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to taking of deposition.** (i) Objections to the competency of a witness or admissibility of evidence are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written interrogatories submitted pursuant to this rule are waived unless served in writing upon the party propounding them within three days after service of the interrogatories.

(4) **As to completion and return of depositions.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under this rule are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(r) **Contempt.** If a witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken, the refusal may be considered a contempt of that court. [As amended, effective July 1, 1973 and July 1, 1980.]

Committee commentary. -- This rule was derived from Rule 3.220 of the Florida Rules of Criminal Procedure. See also, Rule 15 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 295-304 (1974). Depositions are to be used in criminal cases, only in exceptional circumstances. *McGuinness v. State*, 82 N.M. 441, 539 P.2d 1032 (1976); *State v. Barcla*, 66 N.M. 104, 519 P.2d 1185 (Cl. App. 1974).

"Statement" as used in Subdivision (a) includes any statement given by a witness, including a videotape or recorded statement. See Rule 27 of these rules for the definition of "Statement."

This rule provides for the use of a deposition when the party offering the deposition is unable to procure the attendance of the witness by subpoena. The state may not use the deposition of a witness who refuses to testify by asserting his privilege against self-incrimination. *McGuinness v. State*, supra.

The court of appeals has indicated that one of the

purposes of a deposition is to enable the defense to impeach a witness on cross examination at trial. *State v. Billington*, 66 N.M. 44, 519 P.2d 140 (Cl. App. 1974). However, under Subdivision (a), the right to take the deposition would appear to be limited to the situation where the person will not give a written statement. See *State v. Billington*, supra, 66 N.M. at 43-49 (dissenting opinion).

The use of a deposition at trial by the state requires strict compliance with Subdivision (a). See *State v. Barcla*, supra; *State v. Berry*, 66 N.M. 138, 620 P.2d 558 (Cl. App. 1974). This is an exception to the hearsay rule. See Rule 802 of the Rules of Evidence. See also, Rule 801(d)(1) of the Rules of Evidence, *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 499 (1970), and Rule 804(c) of the Rules of Evidence. Rules 801 and 804 of the Rules of Evidence are amended insofar as they relate to the use of depositions in criminal cases. See *McGuinness v. State*, supra. The

Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

The 1959 amendment deleted "voluntarily signed, written" preceding "statement" in Subdivision (a)(1), inserted "including by videotape" near the beginning of the first sentence of Subdivision (a)(3), substituted "as an exception to the hearsay rule of" for "so far as admissible under" in the introductory paragraph in Subdivision (a) and made minor punctuation changes throughout the rule.

Compiler's notes. — Subdivisions (a) to (c) are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Subdivision (a) is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The 1973 amendment amended only Subdivision (c).

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. *State v. Williams*, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. *State v. Herrera*, 92 N.M. 7, 583 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Scope of authority to take depositions. — In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. *State v. Berry*, 86 N.M. 134, 520 P.2d 558 (Ct. App. 1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Where deposition not admissible. — As there was no showing that the presence of a witness who was out of the state could not be ascertained by subpoena or other lawful means, then his deposition is not admissible under this rule. *State v. Berry*, 86 N.M. 133, 520 P.2d 663 (Ct. App. 1974).

Generally as to use of depositions. — While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Use of depositions by state at trial requires strict compliance with Subdivision (a). *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

There must be strict compliance with Subdivision (a) where deposition of absent witness was admitted

absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. *State v. Parela*, 88 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. — Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Once a witness is permitted to claim his privilege against self-incrimination, he becomes unavailable as a witness under Rule 804(a)(1), N.M.R. Evid., and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. *State v. Vialpanda*, 93 N.M. 259, 599 P.2d 1065 (Ct. App.), cert. denied, 93 N.M. 172, 593 P.2d 215 (1979).

No error in continuing trial where no abuse of discretion and expert's deposition admitted. — Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and deposition of the expert was properly admitted at trial. *State v. DeLeon*, 91 N.M. 428, 576 P.2d 612 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Criminal Law §§ 340, 344, 345; 23 Am. Jur. 2d Depositions and Discovery § 1.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Production and inspection of premises, persons or things, 93 A.L.R.2d 909.

Admissibility in evidence of deposition of individual one not a party at time of its taking, 4 A.L.R.2d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.2d 451.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.2d 1401.

23 C.J.S. Criminal Law § 1036.

Rule 29.1. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

(a) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that

the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

(b) At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, any part or all of the videotaped deposition of a child under thirteen years of age taken pursuant to Paragraph (a) of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

(c) In addition to the use of a videotaped deposition as permitted by Paragraph (b) of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph (n) of Rule 29. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and 30-9-17 NMSA 1978. The purpose of 30-9-17, supra, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico constitution or the United States constitution. See *Gannett Co. v. DePasquale*, 99 U.S. Ct. 2893 (1979); *Estes v. Texas*, 381 U.S. 562, 587, 85 S. Ct. 1623, 1634, 14 L. Ed. 2d 543, 563 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to a public trial under the United States constitution could not even be waived by the defendant. See

constitution of the United States, congressional research service, 1973. There is also a right to a public trial under the New Mexico constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. See Rule 31.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule the child must be under the age of thirteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

Rule 29.2. Testimony before grand jury.

(a) At any time after indictment, on request of a party, the district court clerk shall furnish to the defendant:

(1) a copy of the record of defendant's testimony before the grand jury; and

(2) a copy of the record of the testimony of any witness on the state's witness list relating to the crime charged.

(b) At any time after indictment, on motion, the district court may order that a copy of the record or other portions of the record before the grand jury be given to the defendant or to the state by the clerk of the court upon a showing of particularized need. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the transcript of testimony of a defendant before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 27, the prosecution was required to produce the statement of the defendant before the grand jury. Section 31-6-3 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"[O]nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged." *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), cert. denied, 70 N.M. 637, quoting from *State v. Sparks*, 85 N.M. 429, 512 P.2d 1256 (Ct. App. 1973)

278 § 16A PROCEEDINGS IN CRIMINAL CASES

§ 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Historical Note

St.1923 c. 251.

St.1931 c. 205.

Law Review Commentaries

Right to public trial. 17 Annual Survey of Mass.Law, Boston College, p. 263 (1970).

Library References

Criminal Law C-635.
C.J.S. Criminal Law § 963.
Comments.

Sequestration of witnesses, see M. P.S. vol. 19, Hughes, § 109.

Exclusion of public from certain trials, M.P.S. vol. 30, Smith, § 1031.

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ty. Com. v. Marshall (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 848; Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 504.

3. Requisites of proceedings

Trial in chambers of three defendants for rape and abuse of female child under 16 years of age, by jury, with testimony taken in their presence and complete stenographic record available to them and without exclusion of any person whom any defendant desired to have present did not deny defendants any rights under the state constitution. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 504.

4. Persons with a direct interest

Under this section providing that court may exclude general public, admitting only such persons as may have a "direct interest" in trial for crime involving sex, committed against minor

1. Validity

This section does not violate due process of law clause of federal Constitution. U.S.C.A.Const. Amend. 14. Melanson v. O'Brien (C.A.1951) 191 F.2d 903.

This section does not violate the provision of the state constitution prohibiting defendant from being deprived of his life, liberty or estate but by law of the land. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 504.

2. In general

This section is to be strictly construed in favor of general principle of public-

under 15 years of age, quoted phrase must be interpreted broadly and is not limited to parties, but includes counsel, witnesses, stenographers and usual court attendants; and it does not exclude a parent, husband, wife or guardian of defendant, or even a friend, whose presence defendant desires and who might give him legitimate assistance or comfort without interfering with trial. *Com. v. Blondin* (1949) 87 N.E.2d 457, 324 Mass. 564.

5. Public trial

The guarantee to an accused of "public trial" is a safeguard against any attempt to employ courts as instruments of persecution, and knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power. In *re Oliver* (1948) 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

Defendant whose counsel had requested that witnesses be sequestered and who had not asked his counsel to arrange to have particular available per-

sons, friends, or relatives present at trial was not entitled to new trial on theory that he had been denied right to public trial. *Com. v. Wells* (1971) 274 N.E.2d 452, — Mass. —.

Excluding mother, sister, brother, and friend of defendant during trial for sex crimes was violation of Sixth Amendment which provides that in all criminal prosecutions accused shall enjoy the right to a speedy and public trial. *Com. v. Marshall* (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 546.

Under Fourteenth Amendment, Sixth Amendment right to a public trial was applicable to defendant's trial for sex crimes in state court. *Id.*

6. Habeas corpus

On petition for writ of habeas corpus brought by a petitioner who had been convicted in Massachusetts court of rape and carnal abuse of a female child, evidence did not establish that commonwealth prevented petitioner's wife from testifying in behalf of petitioner at petitioner's trial. *Melanson v. O'Brien* (C.A.1953) 203 F.2d 934.

§ 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

The presiding justice of a district court may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife.

Added by St.1949, c. 302.

Library References

Criminal Law C-635.
C.J.S. Criminal Law § 963.
Comments.

Exclusion of the public from certain trials, see M.P.S. vol. 30, Smith, § 1031.

Sequestration of witnesses, see M.P.S. vol. 19, Hughes, § 109.

Notes of Decisions

1. In general

Section 16A of this chapter providing that court may exclude general public admitting only such persons as may

have a direct interest in trial, is to be strictly construed in favor of general principle of publicity. *Com. v. Blondin* (1949) 87 N.E.2d 457, 324 Mass. 564.

dicts finding defendant guilty of murder in the second degree and not guilty of armed robbery were not inconsistent. *Id.*

12.5 Instructions

Evidence in prosecution for armed robbery, did not require instruction on issue of defendants' guilt of lesser included offenses of unarmed robbery, larceny, or assault. *Com. v. Hogg* (1974) 311 N.E.2d 63, 365 Mass. 290.

Evidence in prosecution for, inter alia, larceny of a motor vehicle did not require instruction on issue of defendant's guilt of

lesser included offense of use of motor vehicle without authority. *Id.*

Where defendant was charged with forcible rape of female under 16, but judge considered that evidence would have permitted finding either of forcible rape or of statutory rape as lesser included offense and instructed accordingly, he should have further instructed jury to specify offense should they find defendant guilty. *Com. v. Franks* (1974) 309 N.E.2d 879, 365 Mass. 74, appeal after remand 341 N.E.2d 660, 369 Mass. 308, appeal after remand 362 N.E.2d 895, 372 Mass. 866.

§ 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

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2. In general

If closing all or part of trial for sex offenses involving minors under age of 18 were necessary to assure availability of evidence of fresh complaint, judge would be justified in ordering closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

Although this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 is mandatory only as to victim's testimony, it is possible that trial judge might close other parts of trial; such decision to close any part of trial other than victim's testimony or to close entire trial is matter within judge's sound discretion. *Id.*

Because of the policy favoring publicity, an agreement between prosecution and defense to close a trial should not justify closure or even be relevant to judge's determination of necessity for a closure of trial for sex offenses involving minors under age of 18. *Id.*

Issue at a hearing on Commonwealth's motion to close parts or all of trial for sex offenses involving minors under age of 18 shall be whether such closure is necessary to preserve evidence required for just conviction. *Id.*

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. *Ottaway Newspapers, Inc. v.*

Appellate Court (1977) 362 N.E.2d 1189, 372 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. *Id.*

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable closure, including impoundment, in other cases when found necessary. *Id.*

2.5 Purpose of law

Main purpose of this section, which provides for exclusion of general public from courtroom in trials involving sex crimes if the victim is under 18 years of age, is to assure that Commonwealth's case will not be destroyed by reason of witnesses' reluctance to testify before a miscellaneous audience. *Com. v. Leo* (1979) 393 N.E.2d 410, 1979 Mass. Adv. Sh. 2245.

Defendant, who was convicted of committing sexual offenses against 14-year-old girl, could not complain of an alleged violation of this section, in light of fact that such statute was not intended to benefit criminal defendants. *Id.*

3. Requisites of proceedings

Judge should hold hearing before entering order closing parts of trial other than victim's testimony under this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

4. Persons with a direct interest

The press does not have a sufficiently "direct interest" to be exempt from this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v.*

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Superior Court (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

5. Public trial

In prosecution for four counts of rape of a child under 16 years of age, where defendant claimed that he was denied his right to public trial because judge excluded public from his entire trial, burden was on defendant to demonstrate that public was excluded from trial after minor victims testified, but defendant was not obligated to demonstrate that he was prejudiced by closing of balance of his trial. *Com. v. Williams* (1980) 401 N.E.2d 376, 1980 Mass. Adv. Sh. 515.

Defendant did not demonstrate his trial on four counts of rape of a child under 16 years of age was improperly closed, but remand was necessary for a determination of extent to which trial was closed to public, and, if it was, for consideration whether defendant properly waived his right to public trial, through his actions or actions of his counsel. *Id.*

7. Stage of proceedings

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 mandatorily requires closure of trial during victim's testimony. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

In sex offenses involving minors under age of 18, Commonwealth bears burden of showing necessity for a closure of parts of trial other than victim's testimony or foreclosure of entire trial. *Id.*

In case in which this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 applies, Commonwealth may move for closure of parts of trial other than victim's testimony or foreclosure of entire trial. *Id.*

This section providing for exclusion of public from trial for sex offenses involving minors under age of 13 relates to closure of trial only during victim's testimony. *Id.*

8. Objections

Public need not receive prior notice of closure hearing for sex offenses involving minors under age of 18; however, court should hear a person who in timely fashion informs court of his desire to object to closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

Any person to be excluded from the trial of sex offenses involving minors under age of 18 other than during victim's testimony should have opportunity to state objections to order; such person need not file formal motion to intervene. *Id.*

9. Findings

On conclusion of hearing requesting exclusion of public from trial for sex offenses involving minors under age of 18 during other than victim's testimony, judge should make findings of fact as appropriate and should rule on necessity for closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

§ 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

1. In general

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. *Ottaway Newspapers, Inc. v. Appeals Court* (1977) 362 N.E.2d 1189, 372 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. *Id.*

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable closure, including impoundment, in other cases when found necessary. *Id.*

§ 16C. Exclusion of public from trial involving crime of incest or rape

To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof;

and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded.

Added by St.1978, c. 316.

1978 Enactment. St.1978, c. 316, was approved June 20, 1978.

Library References
Criminal Law ◊635.
C.J.S.Criminal Law § 963.

§ 17. Repealed by St.1979, c. 344, § 43B

St.1979, c. 344, § 43B, an emergency act, repealing this section, was approved June 30, 1979, and by section 51 made effective July 1, 1979.

Prior to repeal, this section was amended by St.1978, c. 478, § 301.

See, now, c. 277, § 47A; Mass.R.Crim.P. Rule 13.

§ 18. Appeals in criminal cases to jury-of-six sessions; recognizance

Whoever is found guilty of a crime before a justice in a district court, or in the municipal court of the city of Boston, having filed the written waiver of trial by jury in the first instance provided by section twenty-six A of chapter two hundred and eighteen, may appeal the finding of guilty or the sentence imposed thereon to a jury-of-six session in accordance with section twenty-seven A of chapter two hundred and eighteen, and at the time of such finding of guilty or sentencing shall be notified of his right to take such appeal. The case shall be entered in the jury-of-six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at said jury session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case only for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance ~~costs~~ upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court, or the municipal court of the city of Boston, may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with said section twenty-seven A.

Amended by St.1973, c. 657; St.1974, c. 107; St.1978, c. 478, § 302.

1973 Amendment. St.1973, c. 657, approved Aug. 20, 1973, in the first sentence, inserted "the finding of guilty or the sentence imposed thereon" and "or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen"; in the second sentence, substituted "released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter

two hundred seventy-six" for "committed to abide the sentence of said court"; in the third sentence, inserted "is not released on personal recognizance and"; deleted the former fourth sentence; and added the last sentence.

1974 Amendment. St.1974, c. 107, approved May 2, 1974, substituted "found guilty" for "convicted" and "such finding of guilty or sentencing" for "conviction" in the first sentence.

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Introduced: 5/15/81.
Referred: Judiciary

BY THE RULES COMMITTEE
BY REQUEST (for the Task
Force on Violent Crime)

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A FULL

6 For an Act entitled: "An Act permitting the videotaping of, or the exclu-
7 sion of the public during, testimony of young victims
8 of sexual assault or sexual abuse of a minor; and
9 changing Rule 804, Alaska Rules of Evidence relating
10 to exceptions to the hearsay rule."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 12.45 is amended by adding new sections to read:

13 Sec. 12.45.047. VIDEOTAPING OF TESTIMONY BY YOUNG VICTIM OF
14 SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice to the defendant,
15 the state may apply to the court for an order allowing videotaping of
16 the testimony of a ^{MINOR} child who is the alleged victim of sexual assault in
17 any degree or ^{IN CASE} who is the alleged victim of sexual abuse of a minor.
18 The order may be granted if the court finds that

19 (1) the child was 16 years of age or younger at the time of
20 the sexual assault; ^{or abuse} and

21 (2) there is a substantial likelihood that the child will
22 suffer severe emotional distress if required to testify in open court
23 at the trial; there is a presumption that a child who is under the age
24 of 16 at the time of an alleged sexual assault or sexual abuse will
25 suffer severe emotional distress if required to testify in open court,
26 which may only be overcome by the presentation of evidence to the
27 contrary at the time the application for an order, ~~excluding the public~~
28 ~~is considered.~~

29 (b) If the order is granted, the trial judge shall preside at the

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1 videotaping proceeding and shall rule on all questions as if at trial.
2 The defendant shall be afforded all rights applicable to defendants
3 during trial, including the right to an attorney and the right to
4 confront and cross-examine the witness.

5 (c) Videotaped evidence taken in accordance with this section is
6 admissible in evidence in the criminal trial for sexual assault in any
7 degree or for sexual abuse of a minor. (insert 3)

8 Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY
9 BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (insert)
10 (a) After notice to the defendant, the state may apply to the court for an order exclud-
11 ing the public from the courtroom (during the testimony) of a child who
12 is the alleged victim of sexual assault in any degree or who is the
13 alleged victim of sexual abuse of a minor. (insert) The order may be granted if
14 the court finds that

15 (1) the child was 16 years of age or younger at the time of
16 the alleged sexual assault or sexual abuse; and

17 (2) there is a substantial likelihood that the child will
18 suffer severe emotional distress if required to testify in open court
19 at the trial; there is a presumption that a child who is under the age
20 of 16 at the time of an alleged sexual assault or sexual abuse will
21 suffer severe emotional distress if required to testify in open court,
22 which may only be overcome by the presentation of evidence to the
23 contrary at the time the application for an order excluding the public
24 is considered.

25 (b) In this section "public" means all persons except

- 26 (1) the judge presiding over the trial;
27 (2) the members of the jury;
28 (3) the defendant and his counsel;
29 (4) counsel for the state;

Public Trial
Still a Public Trial

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(5) counsel for the child;

(6) the parents or legal guardians of the child; and

(7) court personnel essential for the taking of the testimony.

* Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence of a young victim of sexual assault or sexual abuse of a minor to the list of exceptions to the hearsay rule.

should we have a section making the recorded testimony open to the public?

Introduced: 5/15/81
Referred: Judiciary

BY THE RULES COMMITTEE
BY REQUEST (for the Task
Force on Violent Crime)

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

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15 the state may apply to the court for an [REDACTED] taping of
16 the testimony of a child who is the alleged victim of sexual assault in
17 any degree or who is the alleged victim of sexual abuse of a minor.
18 The order may be granted [REDACTED] the court finds that

19 (1) the child [REDACTED] at the time of
20 the sexual assault; and

21 (2) there is a [REDACTED] that the child will
22 suffer severe emotional distress if required to testify in open court
23 at the trial; there is a presumption that a child who is (under the age)
24 of 16 at the time of an alleged sexual assault or sexual abuse will
25 suffer severe [REDACTED] in open court,
26 which may only be overcome by the presentation of evidence to the
27 contrary at the time the application for an order excluding the public
28 is considered.

29 (b) If the order is granted, the trial judge shall preside at the

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1 videotaping proceeding and shall rule on all questions as if at trial.
2 The defendant shall be afforded all rights applicable to defendants
3 during trial, including the right to an attorney and the right to
4 confront and cross-examine the witness.

5 (c) Videotaped evidence taken in accordance with this section is
6 admissible in evidence in the criminal trial for sexual assault in any
7 degree or for sexual abuse of a minor.

8 Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY
9 BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (a) [redacted] e
10 to the defendant, the state may [redacted] go the court for an [redacted] exclud-
11 ing the public from the courtroom during the testimony of a child who
12 is the alleged victim of sexual assault in any degree or who is the
13 alleged victim of sexual abuse of a minor. The order may be granted if
14 the court finds that

15 (1) [redacted] [redacted] at the time of
16 the alleged sexual assault or sexual abuse; and

17 (2) there is a [redacted] that the child will
18 suffer severe emotional distress if required to testify in open court
19 at the trial; there is a presumption that a child who is under the age
20 of 16 at the time of an alleged sexual assault or sexual abuse will
21 suffer severe emotional distress if required to testify in open court,
22 which may only be overcome by the presentation of evidence to the
23 contrary at the time the application for an order excluding the public
24 is considered.

25 (b) In this section "public" means [redacted]

- 26 (1) the judge presiding over the trial;
- 27 (2) the members of the jury;
- 28 (3) the defendant and his counsel;
- 29 (4) counsel for the state;

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(5) counsel for the child;

(6) the parents or legal guardians of the child; and

(8) court personnel essential for the taking of the testi-

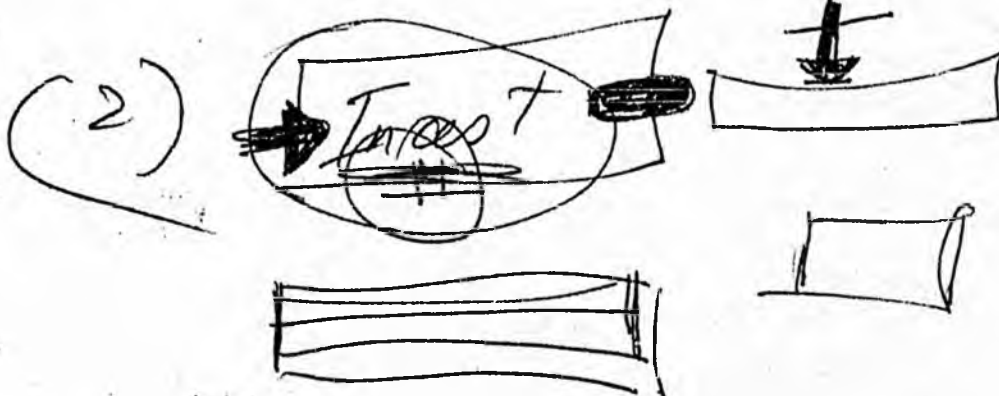
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* Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence of a young victim of sexual assault or sexual abuse of a minor to the list of exceptions to the hearsay rule.

(c) the testimony of the child shall be made (public record)

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After notice to the a, the State may apply to the ct for an order allowing videotaping of the testimony of a child who is the alleged victim of sexual assault in any degree, incest, or who is the alleged victim of sexual abuse of a minor. The order may be granted if the ct finds that

(1) the child was ~~was~~ ¹⁶ years of age or younger at the time of the videotaped recordings; and

(2) [there is... ^{STRIKE} ~~the~~ ^{this} will cause tremendous harm to the victim because will subject her to psychiatrists)

(b) If the order is granted, the trial judge shall preside at the videotaping proceeding; shall rule on all questions as if at trial. The videotaping proceeding shall be closed to all persons except the judge presiding over the ^{videotaping proceeding} ~~the~~ ~~members of the~~ ~~jury~~ the defendant and his counsel ^{is staff} counsel for

Taking of the testimony, the child witness, and
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She & shall be afforded all rights applicable to defendants during trial, including the right to an attorney's the right to confront and cross examine the witness.

(c) Videotaped evidence taken in accordance w/ this section is admissible in evidence in the criminal trial for sexual assault in any degree, incest, or for sexual abuse of a minor.

Sec 12.45.048

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39 Cal.App.3d 398

1395

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William John MORAN, Defendant
and Appellant.

Cr. 12122.

Court of Appeal, First District,
Division 2.

May 23, 1974.

Rehearing Denied June 17, 1974.

Hearing Denied July 17, 1974.

Prosecution for murder. Defendant was convicted in the Superior Court, Contra Costa County, Richard E. Arnason, J., and appealed. The Court of Appeal, Taylor, P. J., held that where a witness who had testified at preliminary examination was not available to testify, and the entire video tape of the preliminary examination was reviewed by court and counsel before presentation and all motions and objections carefully considered, and a careful foundation was laid as to its technical aspects, accuracy and reliability, and ability of all to see the tape was carefully monitored and there was no editing or shortcutting, the video tape was properly admitted. Where photographs and a motion picture of grave sites and exhumation of bodies were in part gory but were not cumulative as evidence and permitted the prosecution to show that the bodies sustained no damage in the recovery process, such evidence was admissible.

Affirmed.

1. Criminal Law ⇨662(G)

Where it was known at time of preliminary examination that witness would probably not survive to testify at trial and it was expected that testimony at preliminary examination would be used at trial and there was extensive cross-examination, there was no denial of confrontation right by use, at trial, of video tape of preliminary examination. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, §§ 1290, 1291; U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇨700

In view of expectation that, because witness was not expected to live until time of trial, his testimony at preliminary hearing would be used, and where cross-examination at preliminary hearing was accordingly extensive, objection that, because stenographic transcript was prepared, defense was lulled into false sense of security, i. e., that video tape of such testimony would not be used, was properly overruled. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, §§ 1290, 1291.

3. Criminal Law ⇨304(1)

Court in murder prosecution took judicial notice of existence of special state bar committee on video tape and judicial proceedings and of recent experiments with video taped trials conducted in the state. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 452.

4. Criminal Law ⇨438(8)

By enacting the more liberal concept of a "writing" in the Evidence Code, legislature intended to recognize widespread use of video tape and its relevance to legal proceedings. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 250; Fed.Rules Civ.Proc. rule 30(b)(4), 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇨438(B)

Advantages and disadvantages of "filtering" effect of video tape fall equally on both sides, and there is no inherent unfairness in its use. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 250.

6. Criminal Law ⇨633(1)

Fair new procedures that facilitate proper fact finding are allowable, even if not traditional. West's Ann.Evid.Code, § 250.

7. Criminal Law ⇨304(1)

Court of Appeal could take judicial notice of the ubiquity of television sets, as revealed by the 1970 census, and recent

See page 420

availability of low-cost television cameras. West's Ann.Evid.Code, §§ 250, 452(h).

8. Criminal Law ⇨438(8)

In homicide trial wherein witness who had testified at preliminary examination was not available to testify, and entire tape of preliminary examination was reviewed by court and counsel before presentation and all motions and objections carefully considered, and careful foundation was laid as to its technical aspects, accuracy and reliability, and ability of all to see tape was carefully monitored and there was no editing or shortcutting, video tape was properly admitted. Cal.Rules of Court, rules 980, 980(c).

9. Criminal Law ⇨438(6, 8)

Where photographs and motion picture of grave sites and exhumation of bodies were in part gory but were not cumulative as evidence and permitted prosecution to show that bodies sustained no damage in recovery process, such evidence was admissible in murder prosecution. West's Ann. Evid.Code, § 352.

10. Criminal Law ⇨627.8(6)

Where film was simply more complete depiction of photographs than defense had already seen and there was no bad faith in nondisclosure, and, though defense counsel expressed surprise there was no motion for continuance, there was no error in admitting film in evidence.

11. Criminal Law ⇨507(1, 2)

To be an accomplice, one must have guilty knowledge and intent with regard to commission of the crime.

12. Criminal Law ⇨742(2)

Under evidence, it was question for jury whether witnesses were accomplices to crime of murder, although one of them invited the victims to the meeting at which they were killed.

13. Criminal Law ⇨59(5), 507(1)

Mere presence, knowledge of the crime or failure to attempt to prevent it does not suffice to make one an aider or abettor and, therefore, an accomplice.

14. Criminal Law ⇨1170½(1)

Witnesses ⇨414(1)

Where witness had originally been charged with murders, as accessory, had suffered previous convictions and turned State's evidence, his credibility was major issue and it was permissible, for purpose of showing facts affecting his decision to testify, for State to elicit from him that a member of motorcycle club visited him in jail and warned him against testifying against any member of the club; in any event, there was no prejudice in view of court's immediate caution and overwhelming evidence of guilt.

15. Homicide ⇨231

Testimony that defendant participated in holding down murder victim and beating him for about an hour and aided and abetted another who refused medical care to victim was sufficient to show malice on defendant's part.

16. Homicide ⇨270, 273

In murder prosecution, issues with respect to intoxication, unconsciousness, compulsion and diminished capacity were properly left to jury.

17. Homicide ⇨126

Defense of compulsion was available to defendant at time of trial in murder prosecution, though death penalty had been temporarily abolished after murder but before defendant's trial. West's Ann.Pen. Code, §§ 26, 26, subd. 8.

Allan R. Frumkin, San Lorenzo (Court appointed Counsel), for defendant and appellant.

Evelle J. Younger, Atty. Gen. of Cal., Jack R. Winkler, Chief Asst. Atty. Gen.—Crim. Div., Edward P. O'Brien, Asst Atty. Gen., Derald E. Granberg, Clifford K. Thompson, Jr., Deputy Attys. Gen., San Francisco, for plaintiff and respondent.

TAYLOR, Presiding Justice.

Defendant, W. J. Moran, appeals from a judgment of conviction entered on a jury verdict finding him guilty of first degree

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murder of C. Baker and not guilty of the murder of T. Shull. He raises a question of first impression as to the propriety of the trial court's admission of a video tape of the preliminary hearing testimony of the main prosecution witness. He also asserts that the trial court abused its discretion in admitting into evidence photographs and a motion picture of the exhumation of the bodies: erred in its accomplice instructions, in the admission of the evidence of a threat to a prosecution witness by a third party, in denying his motion for acquittal as to the murder of Shull; and that the verdict was against the law as the jury rejected his defense of compulsion established as a matter of law by the prosecution; or, in the alternative, his defense of diminished capacity established as a matter of law by the defense. We have concluded that there is no merit to any of these contentions and that the judgment must be affirmed.

1103

As there are no contentions concerning the sufficiency of the evidence to support the verdict and judgment, a brief summary of the pertinent facts will suffice. In September 1972, Hell's Angels member William "Whispering Bill" Pifer, met an old acquaintance, Frank Tiscareno, of the Pittsburgh police. Pifer had only six months to live as he had throat cancer, and explained that in January 1971, he and other members of the Richmond Hells Angels club had buried the victims of a double murder in a deep well on a ranch in Healdsburg. In late October 1972, Pifer led the authorities to the Wethern Ranch in Mendocino County where, as Pifer had predicated, the bodies of Baker and Shull were discovered beneath earth, timbers and lime. Although both bodies had decomposed so severely since their interment that the examining pathologist could not assign a cause of death, it was clear that Baker's skull had been fractured.

Pifer was granted immunity for a wide variety of federal and state crimes and testified at the preliminary hearing in November 1972 that the murders occurred at a party after a business meeting of the

Richmond Hells Angels. At the meeting on January 15, 1971, in the clubhouse in El Sobrante, were the club president, "Rotten Richard" Barker; Frank "Badger" Mumm; "Junior" Carter; Rollin Crane; Pifer and his 16-year-old son, William, Jr.; "Big Frank" Herman; Angelo Borburia; defendant Moran and his common-law wife, Liz Ault; a woman named Carol; Chester Green; and the two victims, Tom Shull and Charlie Baker. Shull and Baker had been invited to the meeting by Green and arrived with him about 6 p. m.

After the business meeting, Barker decided to throw a party and supplied cocaine, which was snorted through a rolled-up \$100 bill. Other drugs were also in general use. After Shull and Baker were sent out for beer and whiskey, Barker and Green slipped about 10 LSD tablets into Shull's coffee and a similar number into Baker's beer. About 6 o'clock the following morning, Shull became hysterical and paranoid; everyone began "playing games with his mind."

After Shull had been provoked to violence, Barker ordered: "Grab that son-of-a-bitch." Defendant and others held Shull while Barker telephoned club member Spann for seconal tablets to quiet Shull. The members attempted to force the tablets down Shull but he spat them out. For about 45 minutes, everyone took turns holding him down and trying to knock him out, but without success; there was blood all over the place. At Barker's direction, Shull was hog-tied and carried into a bedroom.

1404

About 7:45 a. m., Barker summoned Green, who had left the party five hours earlier. When Green entered the clubhouse, he saw Shull screaming, hysterical and bleeding and struggling to remove his bonds. When Green suggested that Shull be taken to a hospital, Barker refused. A few moments later, Pifer emerged from the bedroom and told Barker that Shull was dead. Barker, Crane and defendant then went into the bedroom to verify this fact.

When Barker returned from the bedroom to the living room where Baker was seated, Barker pulled out his gun and instructed Pifer to kill Baker as "we don't want no witnesses." Pifer refused. When Baker stood up, Crane knocked him down by hitting him on the head with a chair leg. Defendant then strangled Baker at Barker's direction for about 15 minutes with his hands and then his belt. After remarking "This guy don't want to die," defendant finally placed a rope around Baker's neck, inserted a stick and twisted it. Green and young Pifer left the room.

Barker's body was subsequently stored with Shull's in the bedroom closet. Defendant joined the others in the removal of the blood-stained furnishings of the clubhouse and clean-up. The following Monday, the two bodies were stuffed into the trunk of Green's Cadillac, taken to the Wethern Ranch and buried by Crane, Pifer, Sr., Carter and Green, with Mitten and Barker both armed and standing guard. Carter was originally charged with the murders along with defendant; Green and Mitten were charged as accessories. Green testified for the prosecution at the trial.

Defendant testified that he never touched Shull and could not remember strangling Baker. He did, however, remember seeing Barker with a rope around Baker's neck. He also recalled seeing Baker lying on the floor and Barker saying "Get this guy out of here." Defendant was able to assist in removing Baker's body but could not remember any of the events of the evening or morning as he was bloated with large amounts of whiskey

1. The preliminary hearing was video taped pursuant to California Rules of Court, rule 980(c). California Rules of Court section 980 provides: "(a) Photographing, recording for broadcasting and broadcasting shall not be permitted within the courtroom while court is in session or during any mid-morning or mid-afternoon recess except as provided in subdivision (b) hereof.

"(b) Photographing, recording for broadcasting and broadcasting of judicial proceedings may be permitted by the court and under its supervision if such proceedings are

and drugs. Defendant repeatedly acknowledged that he would do as Barker directed to maintain his membership in the Hells Angels and to keep his Hells Angels "patch," his status symbol.

The major contention on appeal concerns the admission into evidence of the eight-hour video tape of Pifer's preliminary hearing testimony.¹ The question is one of first impression in this state.

The record indicates that immediately after the prosecution indicated that it planned to introduce the video tape, defendant objected on several grounds, discussed below. Defendant clearly indicated that if the court determined that the video tape was admissible, the entire tape should be admitted into evidence without the excision of any portions contrary to the suggestion of the prosecution.

When defendant raised the threshold question of Pifer's availability for the trial, his physician, Dr. Cohen, indicated that Pifer had just been admitted to the hospital and was near death. In fact, Pifer died during the first days of the jury trial.² Pifer's condition was known at the time of the preliminary. Accordingly, it "was assumed by all concerned that Pifer would be dead by the time of trial." Defendant's counsel at the preliminary, Mr. Russell, indicated that his cross-examination of Pifer would be "considerably more lengthy" than that of the other attorneys. Mr. Russell was true to his word and made extensive efforts to impeach Pifer on the basis of his prior acts of misconduct, his consumption, sale and transportation of narcotics, the grant of transactional immunity for all state and federal offenses, his prior state-

designed and carried out primarily as ceremonial proceedings.

"(c) Photographing, recording for broadcasting and broadcasting within the courtroom when not prohibited by this rule shall be subject to such limitations as the court may prescribe."

2. Dr. Cohen also indicated that when he originally examined Pifer in November 1972, he then estimated that Pifer had only about five weeks to live.

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The record hours of the viewed by th most the entir ings was spei sion of the tpe. The tr entire video Thereafter, ti additional rep tape was to b was a corr existence.⁴ I video tape be foundation w and exact pro of the microph inger, the spe video tape. I Corson, an es reading interp portion to cla pered words o court and coun sure that ever defendant expres of the cross-e counsel. Duri identified every

[1] Defend. 380 U.S. 400, 923, and Dougl. 85 S.Ct. 1074, tends that the deprived him right of confro

3. Pifer refused granted comple asserted that h charges against

4. We have aug the transcript video tape to the questions r 60 Cal.2d 64, P.2d 131). We the tape was a script in which posed. We not

ments, his physical condition and motive for testifying,³ and his bias against defendant.

The record indicates that the entire eight hours of the video tape was carefully reviewed by the court and all counsel. Almost the entire week of pretrial proceedings was spent on the viewing, and discussion of the issues relating to the video tape. The trial court then ruled that the entire video tape would be admitted. Thereafter, the parties stipulated that no additional reporter's transcript of the video tape was to be made at the trial since there was a correct transcript already in existence.⁴ Prior to the playing of the video tape before the jury, an extensive foundation was laid as to qualifications and exact procedures (including placement of the microphones) followed by J. P. Reisinger, the special agent who recorded the video tape. Reisinger explained that Mr. Corson, an experienced and qualified lip reading interpreter, was used on the sound portion to clarify some of Pifer's whispered words on the tape. At all times, the court and counsel took extreme care to assure that everyone had a good view. Defendant expressly consented to the showing of the cross-examination of Pifer by all counsel. During the showing, Reisinger identified every reel.

[1] Defendant, citing *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, and *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, first contends that the use of the tape improperly deprived him of his Sixth Amendment right of confrontation. There is no merit

3. Pifer refused to testify until after he was granted complete immunity; subsequently, he asserted that his main motive was to prevent charges against his son.

4. We have augmented the record to include the transcript and have also viewed the video tape to satisfy ourselves as to all of the questions raised (cf. *People v. Spencer*, 60 Cal.2d 64, 70, 31 Cal.Rptr. 782, 383 P.2d 134). We noted that in some instances, the tape was more accurate than the transcript in which some words had been juxtaposed. We noted that while the questions

to this contention. It is well established that pursuant to Evidence Code sections 1290, 1291, the testimony of an unavailable witness at the preliminary hearing is "former testimony" and may be admitted at the trial. (*People v. Benjamin*, 3 Cal. App.3d 687, 694, 83 Cal.Rptr. 764.) The requirements of the confrontation clause are satisfied if at the prior hearing the accused was afforded a complete and adequate opportunity to cross-examine (*California v. Green*, 399 U.S. 149, 165-168, 90 S.Ct. 1930, 26 L.Ed.2d 489). In the instant case, there is no question as to Pifer's unavailability at the trial. Nor, in view of the knowledge of Pifer's condition at the time of the preliminary, the announced expectation that the testimony would be used at the trial, and the unusually extensive cross-examination, was there any denial of confrontation rights.⁵

[2,3] Defendant asserts that in any event, he was unduly prejudiced in view of the tactical considerations and purpose of the preliminary that involved four defendants, including Green, who later turned state's evidence. He further asserts that he had been lulled into a false sense of security (i. e., that the video tape would not be used) since a transcript of the preliminary had already been prepared. We think that under the particular circumstances of this case, detailed above, the trial court did not abuse its discretion in overruling these objections.

Defendant's contention concerning the "video tape" form of Pifer's testimony presents a question of first impression in this state.⁶ He asserts that the trial court

and answers were clearly audible, the same was not consistently true of the objections and the court's rulings.

5. This is consistent with the interpretation that under *Green*, "the factfinder's observation of the witness' confrontation with the defendant is not constitutionally required." (*The Supreme Court*, 1969 term, 84 Harv. L.Rev. 1, 115 (1970).)

6. We may take judicial notice of the existence of a special State Bar Committee on Video Tape and Judicial Proceedings and recent experiments with video taped trials

abused its discretion in permitting Pifer's testimony to be presented to the jury in this form rather than in the usual reading of the transcript. He also argues that the tape was admitted below without any of the elaborate procedural safeguards that have been established by the courts of other jurisdictions in the past few years. He also urges that he was deprived of due process as the video tape medium unduly distorts the appearance and demeanor of its subject and, therefore, does not accurately transmit the demeanor of the witness and the dramatic components of the testimony.

Significantly, neither side has cited to us any specific provisions of California law that expressly authorizes the use of video tapes.⁷ However, Evidence Code section 250 provides: "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

Video tape recording differs from the ordinary methods of recording images in permanent form in that the image is recorded electronically rather than photographically. Instead of relying on light rays to convey an invisible image, which is then revealed through a chemical process as does standard photography, video tape employs a process whereby the image is sensed by the camera and changed into electrical impulses which can be recorded on the tape. Thus, as in sound recording, the tape used in video recording does not have to be processed and thus can be re-

conducted in this state (Evid.Code, § 452). To date, the work of the committee, like most of the commentators, has focused on video tapes in civil proceedings.

7. For example, since 1970, the Federal Rules of Civil Procedure, Rule 30(b) (1), applicable to criminal cases pursuant to Federal Rules of Criminal Procedure 15(a), specifically authorize the taking of depositions by other than stenographic means (Carson v. Burlington Northern Inc. (D.C.Neb.1971) 52 F.R.D. 402; Kallen v. Nexus Corporation (D.C.Mi.

played instantly. Moreover, video tape can also be used to provide either still or motion pictures. (2 Scott, Photographic Evidence: Preparation & Presentation (2d ed. 1974 Supp.) § 714, pp. 9-11.)

Recently, recordings and photographic transparencies have been held within the scope of the statute (People v. Kageler, 32 Cal.App.3d 738, 108 Cal.Rptr. 235; Peonle v. Enskat, 20 Cal.App.3d Supp. 1, 98 Cal. Rptr. 646). Even before the Evidence Code, our Supreme Court held that with a proper foundation and authentication, a film may be admitted not merely as illustrated evidence of a human witness but as substantive evidence of the commission of the criminal acts charged (People v. Bowley, 59 Cal.2d 855, 861, 31 Cal.Rptr. 471, 382 P.2d 591; People v. Bowley, 230 Cal. App.2d 269, 40 Cal.Rptr. 859). The courts of this state have long sanctioned the use of sound motion pictures (People v. Hayes, 21 Cal.App.2d 320, 71 P.2d 321; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1 (re-enactment of crime); and sound recordings (People v. Spencer, 60 Cal.2d 64, 31 Cal. Rptr. 782, 383 P.2d 134).

[4] We conclude, therefore, that by enacting the more liberal concept of a writing in the Evidence Code, the Legislature of this state (where the motion picture industry and its more recent off-shoot, the television industry, have flourished) recognized the widespread use of video tape in our society and its relevance to legal proceedings (cf. Kornblum, Videotape in Civil Cases, 21 Hastings L.J. 9, 11).

The leading and most thoughtful case on the use of video tapes in criminal proceedings is Hendricks v. Swenson (8 Cir. 1972)

1972) 51 F.R.D. 610); since January 15, 1972, Ohio has expressly permitted the use of video tape evidence (Ohio R.Civ.P. 40); specific guidelines are provided by Ohio Supreme Court Rule 15 (see J. A. Slutkin, Videotape Trials: Legal and Practical Implications, 9 Columbia Journal of Law and Social Problems (1973) 303 et seq.). The Michigan Supreme Court recently adopted a comprehensive rule to permit the use of video tape (Mich.Ct.R. 315). (See Videotape--The Michigan Experience, 24 Hastings L.J. 1.)

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456 F.2d 503, where the court held that the use of a video taped confession in a first degree murder case did not impinge on a defendant's Fifth Amendment rights, where the statement was freely and voluntarily given and a proper foundation was laid. The court referred to the recently amended Federal Rules of Criminal Procedure, the rules requiring a person in lawful custody to submit to photographing and reviewed the history of the use of motion pictures in criminal proceedings.

After an extensive citation of authorities, the court said at 506: "Differing with our colleague, we suggest that a video tape is protection for the accused. If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not. Instead of denying a defendant his rights, we believe it is a modern technique to protect a defendant's rights.

"We do not agree with our colleague as to the need for make-up and other preparation to project a better image. To permit the applying of make-up would defeat the true purpose of a statement which is to present the facts as they are. It would place in the hands of any person willing to alter evidence the opportunity to eliminate cuts, bruises, or other signs, if any, of mistreatment.

"If a proper foundation is laid for the admission of a video tape by showing that it truly and correctly depicted the events and persons shown, and that it accurately reproduced the defendant's confession, we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved.

8. Significantly, the dissent in *Hendricks* (456 F.2d at 507-509) focusing on the medium's unusual technical aspects (distortions), its powerful emotional effect and unusual sensory effect of fleeting images suggested that a

"The dissent attempts to lump the video taping of a confession with all forms of visual aids or entertainment, such as television or movies. However, the video tape in question here is *not* a television broadcast or movie designed to entertain or manipulate an audience. It is *not* merely a 'packaging device for consumers,' as stated by Marshall McLuhan in referring to the press, movies, and radio. McLuhan, in his book quoted in the dissent, is talking about the electronic media's vast impact on today's audiences and of the vast opportunities to educate those audiences by means of the media.

"This does not mean that the principles to be employed in making it a more effective device for education defeat its use to correctly detail a voluntary confession.

"The dissent also indirectly calls attention to the television experiences of a certain Presidential candidate. We do not see a trial as a stage appearance or as a campaign presentation. We believe it a part of the procedure for obtaining justice, and emphasize the importance of a trial truly presenting the facts as they exist. We believe that this is best done whether video tape is used or whether the witnesses testify in court by presenting the events and the parties as they are."

After noting that it did not think a video tape was any more prejudicial to a defendant than the constitutionally permissible use of still photographs or blood or urine samples, the court continued at 507: "We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth. An after all, the end for which we strive in all trials is 'that the truth may be ascertained and the proceedings justly determined.'"⁸

video tape came dangerously close to self-incrimination, and therefore recommended additional minimal standards for the use of video taped confessions.

In *State v. Newman*, 4 Wash.App. 488, 484 P.2d 473, at 477, the Washington appellate court sanctioned the use of video taped lineup evidence on the basis of the same and less cumbersome foundation required for motion pictures and photographs, rather than the more stringent standard for sound recordings as the defense urged. The Washington court relied on *Paramore v. State*, Fla., 229 So.2d 855. Recently, a Florida appellate court was faced with the identical question here presented and resolved it in favor of the use of video tape (*Hutchins v. State* (Fla. Ct. of Appeal, Third Dist., Nov. 6, 1973) 286 So.2d 244 (rehearing den. Dec. 20, 1973).)

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Another consideration was mentioned in *Rubino v. G. L. Searle & Co.* (Sup.Ct. 1973) 73 Misc.2d 447, 448, 340 N.Y.S.2d 574, at 576, quoting from *Carson v. Burlington Northern, Inc.*, D.C., 52 F.R.D. 492, and noted: "[T]he finder of fact at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audiovisual devices. Moreover, a recording, a video tape, or a motion picture of a deposition will avoid the tedium that is produced when counsel read lengthy depositions into evidence at trial."

Defendant attempts to argue that the use of the video tape in the instant case was error and particularly prejudicial in view of the seriousness of the offenses charged. As indicated above, the use of video tape in murder prosecutions has been sanctioned in other jurisdictions. We have indicated that we think the video tape of Pifer's testimony fulfilled the broad purposes of the confrontation clause and, therefore, need not consider defendant's additional assertion that the instant case is distinguishable from all of the other reported cases as the person video taped (usually the defendant)

9. Even assuming that Pifer was made to look "rougher" by the video taping process, it could only inure to the benefit of defendant here.

10. 93 percent of all households had at least one black and white television set (Statistical

was available for cross-examination at the trial.

[5,6] We turn next to defendant's due process contentions concerning the technical distortions of the medium and its failure to accurately transmit the demeanor of the witness and the dramatic components of the testimony. In general, the advantages and disadvantages of the "filtering" effect of the medium fall equally on both sides. Therefore, its use is "fair" and there is no inherent unfairness (*Estes v. Texas*, 381 U.S. 532, 542-543, 85 S.Ct. 1628, 14 L.Ed.2d 543).⁹ Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury (see 26 Stan.L.Rev. 619, fns. 29-30, at p. 623). Video tape is sufficiently similar to live testimony to permit the jury to properly perform its function. Fair new procedures that facilitate proper factfinding are allowable, although not traditional (*Byrne v. Mieczak* (3 Cir. 1958) 254 F.2d 525, at 528-529). In any event, we do not comprehend defendant's contention that the tape is less valid or less reliable than the reading of the written transcript of the preliminary hearing.

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[7] We agree with the federal court in *Hendricks* that the video tape is a modern technique that better protects the rights of all concerned. We can also take judicial notice of the fact of the ubiquity of television sets, as revealed by the 1970 census,¹⁰ and recent availability of low-cost television cameras¹¹ (Evid.Code, § 452, subd. (h)). With such a widespread availability of television comes a familiarity with its technical characteristics and distortions. Indeed, the television camera is a stranger only in the slower moving apparatus of justice.

[8] We have weighed all of defendant's contentions and reiterate that all of the procedural safeguards established by the

Abstract of U.S. 1073, U.S.Dept. of Commerce, July 1073) p. 409).

11. The cost of equipment for making and showing black and white video tape is comparable to the cost of 16 mm motion picture film (*Scott, Photographic Evidence, supra*).

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law of this state for photographs and motion pictures were followed in exemplary fashion by the trial court and counsel. The entire tape was carefully previewed by the court and counsel before its presentation to the jury and all motions and objections were carefully and thoroughly considered at that time. Prior to the viewing of the tape by the jury, a careful foundation was laid as to its technical aspects, accuracy and reliability. The ability of all concerned to see the video tape was carefully monitored. The entire eight hours were presented to the jury so that there were no opportunities for any misrepresentations of the testimony by editing or shortcutting. We think with all of these safeguards, the video tape of Pifer's preliminary hearing testimony was properly admitted.

[9] Defendant next contends that the trial court abused its discretion by admitting into evidence the photograph and short film pertaining to the exhumation of the bodies. The record indicates that the pictures were offered to buttress the credibility of Pifer's testimony and to corroborate the testimony of the autopsy surgeon. The defense objected on grounds that the photographs were gory and irrelevant, inflammable and prejudicial. The trial court reviewed the photographs and the motion picture and concluded that the motion picture was nonprejudicial and free from any gross matters that could be inflammatory and admitted it. The court also carefully reviewed the photographs and then exercised its broad discretion pursuant to Evidence Code section 352, admitted 15 of the photographs and excluded 7. The admission of both the photographs and the motion picture was within the sound discretion of the trial court and its ruling will not be reversed unless the probative value is clearly outweighed by the prejudicial effect (People v. Murphy, 8 Cal.3d 349, 105 Cal.Rptr. 138, 503 P.2d 594). No abuse of discretion was shown here. Most of the photographs were not of the bodies but of the grave sites. The evidence was not cumulative as it permitted the prosecution to show that the bodies sustained no damage during the recovery procedures. Although

counsel on both sides admitted that some of the photographs were gory, the nature of the case precluded the possibility of any other kinds of evidence. Hideous and grotesque photographs have been held properly admissible where relevant and not unduly prejudicial (People v. Smith, 33 Cal. App.3d 51, 108 Cal.Rptr. 698; cf. People v. Terry, 2 Cal.3d 362, 403, 85 Cal.Rptr. 409, 466 P.2d 961).

[10] In addition, defendant contends that the film should have been excluded because the district attorney did not tell the defense about it until after formal discovery proceedings were concluded. The record indicates that the prosecution and defense counsel had discussed the photographs and at one time the prosecution indicated there was nothing else. Subsequently at the trial, the prosecution reversed its intent to introduce the color film. Defense counsel expressed surprise but did not seek a continuance to investigate and produce available rebuttal evidence (People v. McRae, 256 Cal.App.2d 95, 102-105, 63 Cal.Rptr. 854). The record indicates no indication of wilful or bad faith by the prosecution to disclose the film. The film furthermore was simply a more complete depiction of the photographs that the defense had already seen. Accordingly, there was no error in admitting the film into evidence.

[11] Defendant next contends that the court erred to his prejudice by failing to instruct the jury that Pifer, his son and Green were also accomplices as a matter of law to the murder of Baker. The record indicates that the court instructed the jury that: 1) accomplice testimony was to be distrusted and required corroboration; 2) an aider and abettor was guilty as a principal; and 3) as a matter of law, Pifer was an accomplice to the murder of Shull. The proper standard for an accomplice was recently discussed by our Supreme Court in People v. Gordon, 10 Cal.3d 460 at 466-467, 110 Cal.Rptr. 906, 516 P.2d 298. The court indicated that the mere fact that a witness was liable to prosecution for the identical offense charged against the defendant at the time the acts are committed

did not establish the accomplice status. In order to be included within the definition of an accomplice, the witness must have "guilty knowledge and intent" with regard to the commission of the crime. In the instant case, the trial court properly concluded that Pifer, Sr., his son and Green as accomplices of the murder of Baker were considerations of fact for the jury. The complicity of each was disputed and reasonably susceptible to a contrary inference.

Although Green invited Shull and Baker to the meeting, there was evidence that his invitation was innocent. He had warned them to avoid any "trick bag"¹² and then told the club members to treat the visitors well. Green left the clubhouse at 2:30 a. m. and did not return until after Shull had been carried to the bedroom and suggested to Barker that Shull be taken to a hospital. Green also testified that when Barker ordered Baker's death, he began to intervene to stop it and then left the room while defendant strangled Baker.

[12, 13] Pifer, Jr. feared for his own safety as he was not a member of the motorcycle club, and attempted to remain inconspicuous. He also left the room when defendant applied the rope and stick to Baker. Pifer, Sr. refused when Barker ordered him to kill Baker. This refusal was strong evidence that Pifer did not share the intent of the others and, therefore, was not an accomplice (*People v. Crary*, 265 Cal.App.2d 534, 541, 71 Cal.Rptr. 457). Mere presence, knowledge of the crime or failure to attempt to prevent it does not suffice to make one an aider or abettor and, therefore, an accomplice (*People v. Williams*, 10 Cal.App.3d 638, 641, 89 Cal.Rptr. 143). We conclude that as to Baker's murder, the accomplice status of Pifer, his son and Green were properly left to the jury as questions of fact.

[14] Defendant next complains that over his objection, the prosecution was permitted to elicit from its witness Green testimony concerning a pretrial jail house visit from Hells Angel Richard 'Indian'

McGill. McGill told Green he was no longer a member and warned him not to testify about any one member of the Hells Angels club. The record indicates that the trial court promptly instructed the jury that this hearsay item was to be considered only for the purpose of showing background and motivation, incentive or other facts that resulted in Green's decision to testify. The prosecution did not attempt to show that defendant authorized McGill's action. In fact, it was shown that Green was no longer a member of the motorcycle club and had been granted immunity. Defendant contends that the evidence was not properly admitted, even for the limited purpose of assessing the credibility of Green. As indicated above, Green was originally charged as an accessory to the murders, had suffered prior convictions, and subsequently turned state's evidence. Accordingly, his credibility was a major issue at the trial.

Defendant cites *People v. Terry*, 57 Cal.2d 538, 21 Cal.Rptr. 185, 370 P.2d 985, and other authorities in each of which the jury was permitted to infer that a prosecution witness had been threatened or improperly influenced by a representative of the particular defendant and from that inference to further infer a consciousness of guilt. The instant case, however, is more like *People v. Woodberry*, 10 Cal.App.3d 695, 709-710, 89 Cal.Rptr. 330, where, unknown to the defendant, the witness, a Black Panther, was threatened by other Black Panthers. This evidence was admitted for the purpose of explaining the witness' refusal to continue testifying. Here, also Green's testimony concerning the threat was relevant and could have aided the jury in evaluating his decision to testify for the prosecution. In view of the court's immediate caution and the overwhelming evidence of defendant's guilt, even if the evidence was erroneously admitted, it was not prejudicial (*People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243).

12. The term refers to a form of harassment that requires the subject to assert his manhood to escape from his predicament.

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[15] Defendant also argues that the trial court erred to his prejudice by denying his motion for a judgment of acquittal on Count One relating to the murder of Thomas Shull. He urges that the trial court's denial of the motion at the close of the prosecution's case in chief was prejudicial error. The simple answer to the contention is that defendant was acquitted by the jury of the murder of Shull. He further argues, however, that there was insufficient substantial evidence of malice or intent on his part to torture or inflict cruel suffering on Shull.

As our above summary of the pertinent portions of the record indicates, there was substantial evidence to sustain a conviction of defendant's participation in the murder of Shull. Pifer indicated that defendant participated in holding down Shull and beating him for about an hour. Green described the hog-tied Shull as screaming, hysterical, bleeding and with lumps all over

his head and face. Barker, whom defendant aided and abetted, refused medical care to Shull. From these circumstances, the jury could imply defendant's malice with respect to Shull (People v. Mattison, 4 Cal.3d 177, 182, 93 Cal.Rptr. 185, 191 P.2d 193; People v. Ricketts, 7 Cal.App.3d 441, 446, 86 Cal.Rptr. 647).

[16] Finally, defendant contends that the verdict was contrary to law as his asserted defenses of compulsion were established as a matter of law by the witnesses for the prosecution or, in the alternative, that his defense of diminished capacity was established as a matter of law by the testimony of his own witnesses. The record indicates that the trial court properly instructed the jury as set forth below¹³ on intoxication, unconsciousness and compulsion.

[As to the defense of diminished capacity and intoxication, the record indicates that defendant's expert, Dr. Joel Fort, indicated

13. "In the crime of murder of which the defendant is accused, a necessary element is the existence in the mind of the defendant of the specific intent to kill a human being with malice aforethought.

"If the evidence shows that the defendant was intoxicated, at the time of the alleged offense, the jury should consider his state of intoxication, in determining if defendant had such specific intent.

"If from all the evidence, you have a reasonable doubt, whether defendant was capable of forming such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent."

"Intoxication of a person is voluntary if it results from his willing partaking of any intoxicating liquor, drug or other substance when he knows that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect as a possibility."

"Intoxication is involuntary when it is produced in a person without his willing and knowing use of intoxicating liquor, drugs or other substance, and without his willing assumption of the risk of possible intoxication."

"Proof of the involuntary intoxication of a defendant should be considered by the jury in determining whether the defendant had the capacity or ability to commit any crime or to form a criminal intent at the time the crime is alleged to have been committed.

"[Involuntary intoxication should also be considered in determining the existence of

any motive or purpose for the commission of the alleged offense.]"

"In the crime of murder by torture of which the defendant is accused [in Count 1 of the information], a necessary element is the existence in the mind of defendant of knowledge that his conduct endangers the life of the victim.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

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"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

that if in fact defendant had ingested the amount of drugs and alcohol claimed for the time in question, defendant would have been so intoxicated as to be unable to premeditate, entertain malice, appreciate the difference between right and wrong or even recognize that he was engaging in acts that had a high probability of resulting in another's death. Dr. Fort, however, acknowledged that he was relying on information furnished by defendant and that defendant's statement that the victim would not die made during the strangulation of Baker would tend to show a recognition of what was happening.

Accordingly, the question of defendant's diminished capacity was properly left to the jury.

As to the defense of compulsion, Green testified that when Barker directed the killing of Baker, he pointed a gun at Pifer and defendant. Defendant, however, stated he never saw the gun and Dr. Fort indicated that even if displayed, the gun would have been irrelevant to defendant, given his condition. In addition, Dr. Fort explained that the Hells Angels patch was defendant's "status badge." Defendant repeatedly acknowledged that he would do as Barker directed in order to maintain his membership in the Hells Angels. Thus, the defense of compulsion was also not established as a matter of law.

[17] The People raise the additional question of whether because of the temporary abolition of the death penalty (People

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"This rule of law applies only to cases of the unconsciousness of persons of sound mind, such as somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind."

"If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant acted as if he was conscious, you should find that he was conscious.

"However, if, notwithstanding the defendant's appearance of consciousness, the evi-

v. Anderson, 6 Cal.3d 628, 657, fn. 45, 100 Cal.Rptr. 152, 493 P.2d 880) after the murder of Baker but before defendant's trial, the defense was available at all to defendant at the trial. Penal Code section 26, so far as pertinent, provides: "All persons are capable of committing crimes except those belonging to the following classes:

"Eight—Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The People for the first time on appeal urge that the subsequent judicial abolition of the death penalty could not create a defense that did not exist at the time of trial. People v. Anderson, supra, footnote 45, at 657, 100 Cal.Rptr. 152, 493 P.2d 880, was made fully retroactive. The abolition of the death penalty rendered meaningless the exception pertaining to capital crimes of Penal Code section 26, subdivision Eight (Witkin, Calif. Crimes (1973 Supp.) § 155, p. 81).

Accordingly, the defense of compulsion was available to defendant at the time of trial. We conclude that the trial court properly concluded that the availability of the defense was a question of law.

The judgment is affirmed.

KANE and ROUSE, JJ., concur.

dence raises a reasonable doubt whether he was in fact conscious, you should find that he was then unconscious."

"A person is not guilty of crime when he commits an act or engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

"1. Where the threats and menaces are such that they would create in the mind of a reasonable person the fear that his life would be in imminent and immediate danger, if he did not commit the act or engage in the conduct charged, and

"2. If such person then believed that his life would be so endangered.

"This rule does not apply to threats, menaces, and fear of future danger to his life."

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Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

The 1980 amendment deleted "voluntary, signed, written" preceding "statement" in Subdivision (a)(1), inserted "including by videotape" near the beginning of the first sentence of Subdivision (e)(3), substituted "as an exception to the hearsay rule of" for "so far as admissible under" in the introductory paragraph in Subdivision (n) and made minor punctuation changes throughout the rule.

Compiler's notes. -- Subdivisions (n) to (c) are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Subdivision (n) is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The 1973 amendment amended only Subdivision (h).

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. *State v. Williams*, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Scope of authority to take depositions. -- In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. *State v. Berry*, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Where deposition not admissible. -- As there was no showing that the presence of a witness who was out of the state could not be secured by subpoena or other lawful means, then his deposition is not admissible under this rule. *State v. Barry*, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Generally as to use of depositions. -- While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Use of deposition by state at trial requires strict compliance with Subdivision (n). *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

There must be strict compliance with Subdivision (n). Where deposition of absent witness was admitted

absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. *State v. Barela*, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. -- Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Once a witness is permitted to claim his privilege against self incrimination, he becomes unavailable as a witness under Rule 804(a)(1), N.M.R. Evid., and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1046 (Ct. App. cert. denied, 93 N.M. 172, 598 P.2d 215 (1979)).

No error in continuing trial where no abuse of discretion and expert's deposition admitted. -- Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and a deposition of the expert was properly admitted at trial. *State v. DeSantos*, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. -- 21 Am. Jur. 2d Criminal Law §§ 340, 344, 345; 23 Am. Jur. 2d Depositions and Discovery § 1.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Production and inspection of premises, persons or things, 98 A.L.R.2d 909.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Partial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

23 C.J.S. Criminal Law § 1098.

Rule 29.1. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

(a) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that

the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

(b) At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, any part or all of the videotaped deposition of a child under thirteen years of age taken pursuant to Paragraph (a) of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

- (1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- (2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and
- (3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

(c) In addition to the use of a videotaped deposition as permitted by Paragraph (b) of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph (n) of Rule 29. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and 30-9-17 NMSA 1978. The purpose of 30-9-17, supra, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico constitution or the United States constitution. See *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979); *Estes v. Texas*, 381 U.S. 532, 547, 85 S. Ct. 1028, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to a public trial under the United States constitution could not even be waived by the defendant. See

constitution of the United States, congressional research service, 1973. There is also a right to a public trial under the New Mexico constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. See Rule 31.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule the child must be under the age of thirteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

Rule 29.2. Testimony before grand jury.

(a) At any time after indictment, on request of a party, the district court clerk shall furnish to the defendant:

- (1) a copy of the record of defendant's testimony before the grand jury; and
- (2) a copy of the record of the testimony of any witness on the state's witness list relating to the crime charged.

(b) At any time after indictment, on motion, the district court may order that a copy of the record or other portions of the record before the grand jury be given to the defendant or to the state by the clerk of the court upon a showing of particularized need. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the transcript of testimony of a defendant before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 27, the prosecution was required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged." *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), cert. denied, 90 N.M. 637, quoting from *State v. Sparks*, 85 N.M. 429, 512 P.2d 1256 (Ct. App. 1973).

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

JAY S. HAMMOND, GOVERNOR

POUCH N
ROOM 312, GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811

PHONE:

March 11, 1982

The Honorable Ramona Barnes
House of Representatives
Pouch V
Juneau, Ak. 99811

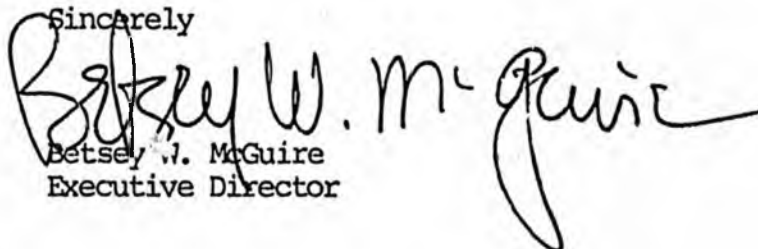
Dear Representative Barnes:

The Council on Domestic Violence and Sexual Assault would like to express their strong support of legislation which will permit young victims of sexual assault to have their testimony videotaped instead of having such victims be further traumatized by appearing in a public court.

Because of the trauma of such an experience for a young victim, the Council has determined that videotape legislation is of the highest priority.

Your assistance will be appreciated.

Sincerely



Betsy J. McGuire
Executive Director

BWMC

POSITION PAPER

HOUSE BILL NO. 576

"An Act permitting the videotaping of, or the exclusion of the public during testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions to the hearsay rule."

House Bill No. 576 provides that a child 16 years of age or younger who is a victim of sexual assault or sexual abuse could provide testimony by videotape rather than having to appear in open court. The Bill provides a presumption that a child under the age of 16 will suffer severe emotional distress if required to testify in open court. The judge presides at the videotaping proceeding and rules on all questions as if at trial, and the defendant has the right to an attorney and to confront and cross-examine the witness. In addition, this Bill provides that the public may be excluded from the courtroom while the testimony of a child is taken.

The Department has seen an increase in reporting of sexual abuse cases over the last year, including a 300% increase in Anchorage and a 240% increase in Fairbanks. Cases of sexual assault often have sensational aspects which bring curiosity-seekers and the press to the courtroom. To testify before a crowded courtroom can be emotionally harmful to a child who has already suffered trauma from the assault or abuse. This Bill would provide protection for the child from some of the more harmful aspects of such testimony. Therefore, the Department is in full support of House Bill No. 576. However, the following recommendations are made:

1. The Department recommends including incest and sexual exploitation to the crimes for which this option applies.
2. In Sec. 12.45.047 it is recommended that the statute delineate which persons will be allowed to be present during the videotaping.

RECOMMENDED BY: John R. Pugh
John R. Pugh, Director
Division of Family & Youth
Services

DATE: 1/25/82

APPROVED BY: Helen D. Beirne
Helen D. Beirne
Commissioner

DATE: 1/26/82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Bill No. 576
Title "videotaping testimony of young victims of sexual abuse/assault..."
Requested by _____ Date _____

II. FISCAL DETAIL
Agency Affected Department of Health and Social Services
Program Category Affected Social Services
BRU, Program, Or Subprogram(s) Affected Various
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

House Bill No. 576 has no fiscal impact on the Department of Health and Social Services.

IV. DATE 1/25/82 PREPARED BY John R. Pugh John R. Pugh, Director
AGENCY Division of Family and Youth Services
Original: Legislative Finance PHONE 465-7170
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

*Karen Robinson
Favors bill.*

Introduced: 5/15/81
Referred: Judiciary

BY THE RULES COMMITTEE
BY REQUEST (for the Task
Force on Violent Crime)

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act permitting the videotaping of, or the exclu-
7 sion of the public during, testimony of young victims
8 of sexual assault or sexual abuse of a minor; and
9 changing Rule 804, Alaska Rules of Evidence relating
10 to exceptions to the hearsay rule."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 12.45 is amended by adding new sections to read:

13 Sec. 12.45.047. VIDEOTAPING OF TESTIMONY BY YOUNG VICTIM OF
14 SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice to the defendant,
15 the state may apply to the court for an order allowing videotaping of
16 the testimony of a child who is the alleged victim of sexual assault in
17 any degree or who is the alleged victim of sexual abuse of a minor.
18 The order may be granted if the court finds that

19 (1) the child was 16 years of age or younger at the time of
20 the sexual assault; and

21 (2) there is a substantial likelihood that the child will
22 suffer severe emotional distress if required to testify in open court;
23 at the trial; there is a presumption that a child who is under the age
24 of 16 at the time of an alleged sexual assault or sexual abuse will
25 suffer severe emotional distress if required to testify in open court,
26 which may only be overcome by the presentation of evidence to the
27 contrary at the time the application for an order excluding the public
28 is considered.

29 (b) If the order is granted, the trial judge shall preside at the

*Barry
Sterr*
In some other sections of law.

1 videotaping proceeding and shall rule on all questions as if at trial.
2 The defendant shall be afforded all rights applicable to defendants
3 during trial, including the right to an attorney and the right to
4 confront and cross-examine the witness.

5 (c) Videotaped evidence taken in accordance with this section is
6 admissible in evidence in the criminal trial for sexual assault in any
7 degree or for sexual abuse of a minor.

8 Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY
9 BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice
10 to the defendant, the state may apply to the court for an order exclud-
11 ing the public from the courtroom during the testimony of a child who
12 is the alleged victim of sexual assault in any degree or who is the
13 alleged victim of sexual abuse of a minor. The order may be granted if
14 the court finds that

15 (1) the child was 16 years of age or younger at the time of
16 the alleged sexual assault or sexual abuse; and

17 (2) there is a substantial likelihood that the child will
18 suffer severe emotional distress if required to testify in open court
19 at the trial; there is a presumption that a child who is under the age
20 of 16 at the time of an alleged sexual assault or sexual abuse will
21 suffer severe emotional distress if required to testify in open court,
22 which may only be overcome by the presentation of evidence to the
23 contrary at the time the application for an order excluding the public
24 is considered.

25 (b) In this section "public" means all persons except

26 (1) the judge presiding over the trial;

27 (2) the members of the jury;

28 (3) the defendant and his counsel;

29 (4) counsel for the state;

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- (5) counsel for the child;
- (6) the parents or legal guardians of the child; and
- (7) court personnel essential for the taking of the testimony.

* Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence of a young victim of sexual assault or sexual abuse of a minor to the list of exceptions to the hearsay rule.

Robinson → Add section → Speed up cases → make them priority for the courts.

I would also like to address the difficulty in the process of servicing the assailants. We would like to suggest that legislation be passed that makes it mandatory that all peace officers ^{be} required to serve process so the victims can be protected and not find out upon his appearance that in fact this has not occurred.

HB 573 Tampering with a witness - making this a Class C Felony

We support this bill as in crimes such as domestic violence and sexual assault the only witness is the victim. It is not uncommon to have an assailant threaten or actually assault the victim again in order to have them revoke their testimony.

HB 578 Release on bail after certain crimes

We support this bill as many times victims are reluctant to press charges for fear of retaliation in the time before sentencing or pending appeal. Experience attests to the fact that the victims are in extreme danger, and the crime committed again, before they appear for trial.

HB 576 Regards the videotaping or the exclusion of the public during testimony of young victims of sexual assault or abuse.

We firmly support this bill for the fact that young victims are often traumatized by public testimony.

We would like to suggest that this bill be amended to include all victims of sexual assault.

In addition to this we would ask that crimes of this nature be given first priority on the court calendar.

We have found that both public testimony as well as long, protracted trials traumatize not only the victim under 16, but all victims of sexual assault and/or abuse.

Valley Women's Res. Ctr

CITY OF KOTZEBUE

P.O. BOX 46
KOTZEBUE, ALASKA 99752

KOTZEBUE POLICE DEPARTMENT
907-442-3551

September 22, 1981

Representative Ramona L. Barnes, Chairman
House Judiciary Committee
P.O. Box 3382
Anchorage, Alaska 99510

Dear Representative Barnes:

I regret I cannot attend personally but would like to present my written comments to the House Judiciary Committee.

☆
I would like to lend my support to all but one of the proposals. I would especially give my highest recommendation to the Governors Drug Bill, House Bill #180, It is badly needed.

My one reservation is in regard to House Bill # 572 on Domestic Violence.

Most often the Police Officer answering domestic dispute calls is acting as an arbitrator and/or mediator. Injecting the Officer further into the dispute by requiring the Officer to assist one party or the other will remove their "impartial" stature and make their job harder in the future as the Officer will be viewed as an adversary by the other party involved.

The Court must be presented the documents before service and I feel the court is the proper place for assistance to be rendered the party seeking injunctive relief.

Donald E. Buehler
DONALD E. BUEHLER
Chief of Police

cc: AS Revisions file
Sgt Jones
Sgt Wallace

DEB/dew

"GATEWAY TO NORTHWEST ALASKA"

Edward Leslie STORES, Appellant,

v.

STATE of Alaska, Appellee.

No. 3595.

Supreme Court of Alaska.

Dec. 19, 1980.

Defendant was convicted in the Superior Court, Third Judicial District, C. J. Ochipinti, J., of rape, and he appealed. The Supreme Court, Connor, J., held that: (1) conduct of prosecutor, who was aware of missing witness' plans to depart for Hawaii prior to trial and also of her willingness to appear at trial as subpoenaed, in failing to subpoena witness precluded a finding that diligence was exercised; thus, witness' videotaped deposition was inadmissible at rape trial under applicable criminal rule, and (2) improper admission of videotaped deposition testimony of victim's family doctor, which was highly corroborative of victim's testimony, constituted reversible error.

Reversed.

Matthews, J., filed dissenting opinion.

1. Criminal Law ⇨419(5)

Under federal standard, out-of-court statements may be used at trial upon showing that the client is unavailable and that the statements bear adequate indicia of reliability. U.S.C.A.Const. Amend. 6.

2. Witnesses ⇨6

Witness, who presumably went to Hawaii on a vacation, was not beyond jurisdiction of court to compel her appearance at rape trial. AS 12.50.010 to 12.50.080.

3. Criminal Law ⇨627.2

Showing required to establish unavailability of a witness for purpose of rule governing use of deposition at trial parallels the showing required under federal constitutional law. Rules of Criminal Procedure, Rule 15(d); U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇨1134(3)

Determination of whether witness is unavailable for purposes of rule governing admission of deposition at criminal trial must be made independently by reviewing court. Rules of Criminal Procedure, Rule 15.

5. Criminal Law ⇨627.2

Requirement of good-faith, diligent efforts to secure presence of a witness before preliminary hearing testimony may be introduced against an accused in a criminal trial applies with equal force to use of a deposition taken prior to trial. Rules of Criminal Procedure, Rule 15.

6. Criminal Law ⇨627.2

Conduct of prosecutor, who was aware of missing witness' plans to depart for Hawaii prior to trial and also of her willingness to appear at trial if subpoenaed, in failing to subpoena witness precluded a finding that diligence was exercised; thus, witness' videotaped deposition was inadmissible at rape trial under applicable criminal rule. Rules of Criminal Procedure, Rule 15.

7. Criminal Law ⇨1169.2(1)

Reviewing court must examine evidentiary error to determine whether jury was substantially influenced or swayed in its verdict by introduction of improperly admitted evidence in the context of entire trial record; if properly admitted evidence is merely cumulative, and state's case is otherwise very strong, error may be deemed harmless, even if of constitutional dimension but where disputed evidence appreciably affects jury's verdict, error requires reversal.

8. Criminal Law ⇨627.2, 1166(1)

Improper admission of videotaped deposition testimony of victim's family doctor, which was highly corroborative of victim's testimony in rape trial, constituted reversible error. Rules of Criminal Procedure, Rule 15.

Christine Schleuss, Asst. Public Defender,
John M. Murtagh, Asst. Public Defender,

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and Brian Shortell, Public Defender, Anchorage, for appellant.

John Scukanec, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., CONNOR and MATTHEWS, JJ., and DIMOND, Senior Justice.

OPINION

CONNOR, Justice.

This appeal requires us to decide whether it was proper to admit into evidence the videotaped deposition of a key prosecution witness who was out of the state at the time of trial.

In March, 1977, Edward Stores was charged with one count of rape.¹ The state's case consisted primarily of the testimony of three witnesses. The prosecutrix, a high school student, testified that the defendant, a stranger, approached her in the school parking lot and asked for a lift to his home because he had been injured in a fight. He claimed that his lip had been split. When they arrived at his residence, she agreed to accompany him inside to explain to his mother the circumstances of his return home in the early afternoon. Stores asked her to wait in the living room, and when he returned he put his arm around her neck and forced her into the back bedroom. He ordered her, at knifepoint, to undress, and then raped her. The act of sexual intercourse was very brief. The two got dressed, left the house together, and she gave the defendant a ride to another location. The defendant asked her for a date but she declined. The victim then returned to school, knocked on a classroom door, and told the teacher she needed to see her friend who was in the class. Since the victim was crying, the teacher excused the friend from class. The victim then related the foregoing story. The friend informed

the victim's mother, who arranged for an immediate gynecological examination for her daughter. The victim's parents also telephoned the police.

This version of events was disputed by another prosecution witness, Mrs. Hughes, the defendant's cousin and legal guardian. Mrs. Hughes testified on direct examination that the defendant informed her that the alleged victim had consented to the sexual act, but that afterwards she became angry with the defendant when he refused her demand for oral sex because of his lip injury. Stores and the young woman argued, and Stores had to force her to leave by brandishing a knife. She threatened that she would "get even with him" for his failure to accommodate her.

On the critical issue of consent, a key prosecution witness was Dr. Sydnam, a family practitioner, whose testimony was presented to the jury on videotape, over the objection of the defense. On the videotape, Dr. Sydnam testified on direct examination that she performed a pelvic examination of the victim shortly after the alleged rape and observed redness and contusion of the vulva, which was tender, and a copious amount of sperm within the vagina, signifying that intercourse had occurred within several hours of the examination. The bruises on the outer walls of the vagina were not, she testified, customarily associated with intercourse between willing partners, but were consistent with forcible intercourse. In addition, she related that the alleged victim "is ordinarily . . . very self-assured, calm," but that on the day of this examination, "she was very, very different. . . . She was not composed and she was not calm, and—and she was visibly upset, and as I described before, crying and—and distraught."

On cross-examination, Dr. Sydnam testified that consensual intercourse could produce the same symptoms "[o]nly if there's

1. Former AS 11.15.120 provides:

"A person who (1) has carnal knowledge of a female person, forcibly and against her will . . . is guilty of rape."

The new Criminal Code, effective January 1, 1980, reclassifies rape in AS 11.41.410-.440.

something the matter with the (indiscernible) of the people involved, I think." On re-direct, she repeated that "it's extremely unlikely [that a consenting female could sustain these injuries during intercourse] unless it's extremely prolonged and brutal intercourse, and by extremely prolonged, I mean over a matter of, you know, hours."

The defense rested after the conclusion of the state's case. Stores was convicted by the jury and he was sentenced to seven years' imprisonment.²

On appeal, the defendant contends that it was reversible error to admit Dr. Sydnam's videotaped deposition at trial. We must examine this claim of error in the context of the particular factors in this case.

On May 3, 1977, six days before the commencement of trial, the state informed the court that Dr. Sydnam, its key witness, would be out of the state and unavailable to testify at the trial. The prosecutor moved for an order to take her deposition. He gave the following grounds as "good cause" for ordering the deposition:

"I have reviewed the police report in connection with Dr. Sydnam's examination of the alleged victim, . . . and feel that her testimony would be *highly corroborative of the victim's complaint*. Dr. Sydnam basically would testify that the victim did sustain some injury to the vaginal area of her body. . . .

The State feels that Dr. Sydnam's testimony would be *absolutely necessary to corroborate the victim's statement that she was forcibly raped, and to counter the anticipated defense of consent.*" (emphasis added).

Since it was evident to the defendant that the purpose of the deposition was to preserve Dr. Sydnam's testimony, he objected, not to the taking of the deposition, but to its anticipated use at trial, as a violation of the defendant's right of confrontation and Alaska Rule of Criminal Procedure 15. The defense suggestion of a continuance

2. Former AS 11.15.130(c) authorized a sentence of one to twenty years upon conviction for forcible rape of an unrelated female over the age of 16 by a person over the age of 19.

was opposed by the state and denied by the court. The court granted the state's motion and on May 5, 1977, Dr. Sydnam's deposition was recorded on videotape.

Defendant and his counsel were present. In response to preliminary questioning by the prosecutor, the witness testified that she had long-standing vacation plans to spend in excess of two weeks in Hawaii, that she would leave the state of Alaska "next Tuesday evening or Wednesday morning," that she had made arrangements to share a condominium with three other persons, who, if she cancelled her trip, would be financially obligated to pay her pro-rata share of the rental fee. The witness was asked and she answered:

"Q. Okay. All right. Assuming that you were to be subpoenaed to remain here in Anchorage say, next Tuesday or next Wednesday, I take it that you would abide by that subpoena and remain here and frustrate your plans, is that correct?

A. I suppose so."

At trial, the defendant renewed his objections to the use of the videotape. The objections were overruled and the tape was played for the jury.³

On appeal, the defendant maintains that the admission of the pre-trial deposition under these circumstances violated both his confrontation rights guaranteed by the sixth amendment and Alaska Rule of Criminal Procedure 15. The state, on the other hand, argues that since the witness was not present at the trial and "presumably" beyond the jurisdiction of the court, it was proper to admit her pre-recorded testimony as substantive evidence. The state also maintains that the defendant's cross-examination of the witness at the time of the deposition satisfies his sixth amendment rights.

We note that the United States Supreme Court has never expressly authorized the

3. The videotape was played on a 21-inch television screen, in black and white, with a synchronized audio portion played on a tape recorder. Testimony was given from the witness stand.

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use of an absent witness' deposition in lieu of viva voce testimony in a criminal trial, although it has allowed the use, in narrow circumstances, of testimony from a prior trial, e. g., *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 53 L.Ed.2d 293 (1972); *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); or testimony from a preliminary hearing, e. g., *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). From the very first, the Court has recognized that

"[t]he primary object of the [Confrontation Clause] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of personal examination and cross-examination 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 may look upon him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief."

Mattox, 156 U.S. at 242-43, 15 S.Ct. at 339, 39 L.Ed. at 411. While a definitive history of the sixth amendment remains to be written,⁴ we adopt the observation of Justice Harlan that "[f]rom the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers and absentee witnesses." *California v. Green*, 399 U.S. 149, 179, 90 S.Ct. 1930, 1946, 26 L.Ed.2d 489, 509 (1970) (Harlan, J., concurring).⁵

We think that one of the purposes which the Confrontation Clause serves is to relieve prosecutors of the temptation to use pre-recorded testimony instead of live witnesses.⁶

4. It has been suggested that the reason for adoption of the Confrontation Clause as a bulwark against the use of letters and other second-hand accounts by the prosecution when the actual accusing witnesses were in fact available was the practice at common law whereby "the proof was usually given by reading depositions, letters and the like; and this occasioned frequent demands by the prisoner to have his accusers, i. e., the witnesses against him, brought before him face to face." 1 J. Stephen, *A History of the Criminal Law of England* 326 (1883). See Baker, *Right to Confrontation, the Hearsay Rules and Due Process—a Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 Conn.L. Rev. 529, 532 n.16 (1974); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim.L. Bull. 99, 130 (1972); Graham, *The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 Alaska L.J. 3 (Jan. 1971); Graham, *The Right of Confrontation and Rules of Evidence: The Return of the Portuguese Gentleman*, 9 Alaska L.J. 3 (May 1971).

5. History supports this interpretation. See *State v. McO'Brien*, 24 Mo. 402, 421 (1857) (Ryland, J.) ("There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witnesses are reproduced in the form of

deposition."). See Lord Strafford's plea in his November, 1680, impeachment: "I beg your lordships that he [the witness Dugdale] may look me in the face, and give his evidence, as 'he law is. . . I desire the letter of the law, which says, my accuser shall come face to face." 7 Howell's State Trials 1293, 1341 (Cobbett's ed. 1810). See also the trial of Sir Walter Raleigh for treason in 1603, where the following repartee took place between the accused and the court after the Crown introduced the statement of Lord Cobham, Raleigh's principal accuser, who was absent from the trial:

"The proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done."

Raleigh's demand for confrontation was answered by Justice Warburton:

"I marvel, Sir Walter, that you being of such experience and wit should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses."

2 Howell's State Trials 15-16, 18 (1816).

6. One commentator has expressed concern that liberal use of hearsay "may induce prosecutorial negligence in securing witnesses. . . . Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach." Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1438-39 (1966).

Thus, we are in agreement with Professor Westen's conclusion that

"the confrontation clause is not merely a constitutional rule governing the attendance of witnesses; it also embodies constitutional controls on the manner by which the state presents its case against the accused."

This broader notion of confrontation not only is consistent with the Court's language, but serves an important procedural purpose. It requires the state, wherever possible, to present its evidence against the accused in what is traditionally considered the most reliable form, that of direct testimony in open court." (footnote omitted).

Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv.L.Rev. 567, 578 (1978).⁷

[1] There are, however, certain instances where the interests embodied in the Confrontation Clause give way to a competing interest, namely, the state's "strong interest in effective law enforcement . . ." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, 607 (1980). Thus, under the federal standard, out-of-court statements may be used at trial if a two-tier test is met. First, the Confrontation Clause requires a showing that the declarant is unavailable. Second, the statements are admissible only if they bear adequate "indicia of

7. In his article, Professor Westen proposes the following rule to limit the state's discretion in presenting evidence against the accused

"Before it may use a witness' out-of-court statements against the accused at trial, the state has an obligation to make a 'good faith effort' to produce the witness in person and, having produced the witness, to try to elicit his evidence in the form of direct testimony under oath and in the presence of the jury."

91 Harv.L.Rev. at 579.

8. Criminal Rule 15(a) provides in pertinent part:

"When Taken. Upon order of the court for good cause shown, the testimony of a prospective witness may be taken by either party for discovery upon notice and after the deposing party has disclosed all statements, exhibits, and witness lists required by Rule 16."

reliability." *Roberts*, 448 U.S. at 66, 100 S.Ct. at 2539, 65 L.Ed.2d at 608. Often, where the evidence falls within an established hearsay exception, reliability can be inferred. *Id.* In other cases, the evidence must be excluded, "absent a showing of particular guarantees of trustworthiness." *Id.*

We need not reach, however, the constitutional issue presented, since Alaska Rule of Criminal Procedure 15 serves a purpose similar to that of the Confrontation Clause with regard to the use of depositions in criminal cases. Each conditions the use of such out-of-court testimony upon an initial showing of unavailability. The rule permits the deposition of a prospective witness to be taken for discovery purposes upon order of the court for good cause shown.⁸ But the use at trial of a deposition is conditioned upon either the stipulation of the parties, or the unavailability of the witness.⁹ Under Criminal Rule 15(e) a witness is unavailable when he is:

"(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persistent in refusing to testify despite an order of the judge to do so; or

(3) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

This differs from the analogous Federal Rule of Criminal Procedure 15 which authorizes the use of depositions not for discovery purposes, but only to preserve evidence, *U. S. v. Steffes*, 35 F.R.D. 24 (D.Mont.1964), and from Alaska Rule of Civil Procedure 27(a) which permits the taking of depositions for the purpose of perpetuating testimony. The defendant has not raised the use of the deposition to preserve evidence as a ground of appeal.

9. Criminal Rule 15(d). This rule also permits the use of a deposition at trial for impeachment purposes. Compare Alaska Rule of Civil Procedure 32(a)(3) authorizing use at trial of a deposition for "exceptional circumstances [which] make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. . . ."

(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance." ¹⁰

[2] The question is thus narrowed to an inquiry of unavailability, that is, whether the state, the proponent of the witness in this case, "exercised reasonable diligence but [was] unable to procure [her] attendance" at trial.¹¹ Alaska R.Crim.P. 15(e)(4).

In *Fresneda v. State*, 483 P.2d 1011 (Alaska 1971), we addressed ourselves to the standard of "due diligence" which must be exercised by the proponent of a witness' statement to secure the presence of a witness at trial before it seeks to introduce former testimony of that witness. In *Fresneda*, one of the state's witnesses who testified at the first trial¹² was absent at the retrial. The state made no sincere effort to locate this witness until seven days prior to the retrial when a check of police records in Juneau and Anchorage, where the witness was believed to reside, revealed no trace of him.

10. It is significant to note that the 1975 Committee Notes to the Federal Rule of Criminal Procedure 15, from which the Alaska Rule is derived, specifically state: "The committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from the witness on the witness stand." 8 Moore's Federal Practice ¶ 15.01[3], at 15-10 (Rev. ed. 1978).

11. We think it is clear that the witness was not beyond the jurisdiction of the court to compel appearance.

For witnesses not in prison, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one state can obtain an order from a court in the state where the witness is found, directing the witness to appear in court in the first state to testify. The state seeking his appearance must pay the witness a specified sum as a travel allowance and compensation for his time. AS 12.50.010-.080.

12. We reversed the first conviction in *Fresneda v. State*, 458 P.2d 134 (Alaska 1969).

13. *Fresneda* modified our holding in *McBride v. State*, 368 P.2d 925, 927 (Alaska 1962) that "[t]he question of diligence or lack of it on the part of the state in attempting to find the

Two days prior to trial, the court attache was assigned to the search. His inquiries disclosed the possibility that the witness had enlisted in the Army, but he did not follow up on his request for verification of this fact. On the day of trial, the prosecutor's secretary learned that the witness had in fact enlisted in the Army approximately seven months earlier, and had been sent to Fort Lewis, Washington, for eight weeks of basic training. Her source of information, a major in the Army National Guard, had no actual knowledge of the witness' location, but suggested that he might be in Vietnam. The trial court apparently assumed that the witness was in fact in Vietnam and admitted the former testimony.

[3] We held this ruling to be error on the part of the trial court, *id.* at 1018;¹³ we found that the prosecution's efforts to locate the witness¹⁴ did not measure up to the standards of due diligence recently announced by the United States Supreme Court in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).¹⁵ We now

witness is in the first instance a question of fact for the trial judge to decide, and we shall reverse his decision only if there has been a clear abuse of discretion."

14. We noted that

"United States Army Reg. 27-45 provides a method for obtaining the return of Army personnel to testify in civil and criminal cases." 483 P.2d at 1018 n.26.

15. *Barber* reversed an Oklahoma conviction which rested in part on the state's use at trial of a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in a federal prison in Texas. The state made no attempt to subpoena the witness, claiming instead that use of the former testimony was proper where a witness was unavailable to testify merely because he was outside the jurisdiction, if the defendant had been afforded his right of cross-examination at the time the testimony was given. (The Court assumed the defendant waived his right to cross-examine at the preliminary hearing. 390 U.S. at 722, 88 S.Ct. at 1320, 20 L.Ed.2d at 259). The United States Supreme Court found this contention to be constitutionally untenable:

"We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he

reiterate our position that the showing required under Criminal Rule 15(e) to establish unavailability parallels the showing required under federal constitutional law.

[4] In light of the constitutional basis of the decision in *Roberts* and *Barber*, the determination of whether the witness was unavailable must be made independently by the reviewing court. *Green v. State*, 579 P.2d 14, 16-17 (Alaska 1978). In *Green*, a witness subpoenaed by the district attorney failed to appear at trial. Even though the district attorney had advance knowledge that the witness might not show up at trial,¹⁶ he took no action to secure her presence until the initial trial date.¹⁷ A bench warrant was issued and state troopers, who had learned of the witness' move to California, checked with authorities in two cities

was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d ed. 1940).

Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law. . . .

In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. . . . In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (footnotes omitted).

390 U.S. at 723-24, 88 S.Ct. at 1321, 20 L.Ed.2d at 259-60.

Subsequently, in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court allowed the use of a preliminary hearing

there. They never located the witness, and the trial court admitted into evidence her preliminary hearing testimony. We reversed on the ground that the trial court had erroneously concluded that the state's efforts to locate the missing witness were adequate. We concluded that the state's failure to check with the witness' last known employer or the post office for a forwarding address demonstrated lack of due diligence,¹⁸ which precluded the use at trial of the witness' preliminary hearing testimony.

[5] The requirement of good-faith, diligent efforts to secure the presence of the witness before preliminary hearing testimony may be introduced against an accused in a criminal trial applies with equal force to

transcript in a criminal trial. Unlike the facts of *Barber*, in *Roberts* the state made a sufficient good-faith effort to locate the witness so as to enable the court to reasonably conclude she was unavailable. In *Roberts*, five separate subpoenas for the witness were issued for four different trial dates; each was served at the home of the witness' parents, her last known address. The state contacted the parents four months before trial in an effort to locate the witness. Her parents did not know her whereabouts, nor did they know how to locate her. *Id.* at 75, 100 S.Ct. at 2543, 65 L.Ed.2d at 613. In fact, no one in the witness' family had been able to locate the witness in over a year. *Id.* at 75, 100 S.Ct. at 2544, 65 L.Ed.2d at 614.

16. The witness had informed the process server that she might be leaving the state and he in turn conveyed this information to the district attorney. 579 P.2d at 17.

17. The trial was stayed for four months pending decision on a petition for review. 579 P.2d at 17 n.4.

18. In *Fresneda*, 483 P.2d 1017, we relied upon the following language, which we cited with approval in *Green*, 579 P.2d at 18:

"The word 'diligence' connotes persevering application, untiring efforts in good earnest. There must be evidence of a substantial character to support the conclusion of due diligence. [What is required is] a thorough, painstaking and systematic attempt to locate the witnesses."

Quoting *People v. Redston*, 139 Cal.App.2d 485, 293 P.2d 860, 886 (1956).

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the use of a deposition taken prior to trial.¹⁹ As we said in *Fresneda*,

"While we recognize that there is a difference between testimony elicited at preliminary hearings and testimony introduced at trial in terms of completeness and depth of cross-examination, we find that this difference should not be the basis for the requirement of a different standard of due diligence in each case."

483 P.2d at 1017 n.25.

[6] Applying the standards of due diligence developed in *Fresneda* and *Green* to the instant case, we find that the state failed to make any effort to secure the presence of Dr. Sydnam at trial even though it had advance knowledge not only of her plans to depart, but also of her

19. There is, however, a distinction between former trial testimony and a deposition taken prior to trial:

"First, at the time a deposition of a prosecution witness is taken the defense may not be prepared adequately to cross-examine, while prior trial testimony is used only at a time when the defendant is presumably ready for trial. The second difference is that the testimony of a witness at a prior trial has been subjected at least once to the crucible of in-court scrutiny by judge and jury. This is, perhaps, another way of saying that testimony in the solemn, impressive atmosphere of a . . . courtroom, before the eyes of a keen judge and an observant jury, may be given with a little more care, deliberation and accuracy on the part of the witness than it might be given [otherwise]." (footnotes omitted).

United States v. Singleton, 460 F.2d 1148, 1155 (2d Cir. 1972) (Oakes, J., dissenting), cert. denied, 410 U.S. 984, 93 S.Ct. 1506, 36 L.Ed.2d 180 (1973).

20. We reject the state's claim in this case that its failure to subpoena the witness was "reasonable." First, as we said in *Fresneda*, "we find it inappropriate to encourage any but the best efforts to [secure the presence of] witnesses in view of the qualitative differences between live and recorded testimony." 483 P.2d at 1018 n.24. Second, the case upon which the state relies, *State v. Reid*, 559 P.2d 136 (Ariz. 1976), is distinguishable on the facts.

In that case, prior to Reid's trial for murder, armed robbery, burglary and theft of a motor vehicle, the prosecution moved for an order to videotape the testimony of the coroner's pathologist who planned to be out of the country for extended travel during the dates set for trial. The motion was granted and the videotaped deposition was used at trial. The Ariz-

willingness to appear at trial if subpoenaed. The sole purpose of taking the deposition was to create former testimony to be used in lieu of live testimony. We will not sanction such an evasion of the constitutionally based preference for live testimony in open court which is embodied in Criminal Rule 15. The conduct of the state in failing to subpoena the witness precludes a finding that due diligence was exercised.²⁰ The deposition was inadmissible under Criminal Rule 15.

The state asks us to relax the specific requirements of Criminal Rule 15(e), and the preference for in personam testimony embodied in former Criminal Rule 26,²¹ in accordance with the provision of Criminal Rule 53²² "to facilitate business and ad-

na Supreme Court upheld the use of the deposition in lieu of viva voce evidence because the deposition was "used for a purely foundational matter."

"Although Dr. Hirsch did testify concerning the angle of the bullets, leading to the inference that the victim was shot in the back, his testimony herein was concerned primarily with the cause and time of death which testimony was not seriously questioned but which was a necessary foundation to the establishment of the crime."

Id. at 148.

The Arizona court took pains to note that a different result might be warranted if the testimony sought to be had by deposition were "crucial." *Id.* at 149. Dr. Sydnam's testimony goes far beyond merely foundational matters.

Nor does *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) compel a different result. Unlike the facts in *Roberts*, here, Dr. Sydnam's whereabouts were fully known. The only "unavailability," if any, was temporary. The state had the ability to compel her attendance, but chose not to exercise that power. Such conduct hardly constitutes due diligence.

21. At the time of trial Criminal Rule 26(a) provided, in pertinent part:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules." Criminal Rule 26 was rescinded effective August 1, 1979 by Supreme Court Order 369.

22. Criminal Rule 53 states:

"*Relaxation of Rules.* These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be

vance justice." Since the application of the rule came before the trial court, it would have been up to the trial judge to relax the rules. In this instance, however, if the trial court had indicated that the rules were being relaxed, we would have to find such ruling to be an abuse of discretion.

While relaxation of the rules is not tantamount to rewriting a rule, even if we felt free to rewrite Criminal Rule 15,²³ we would refuse to do so in this case. First, the defendant is entitled to the benefit of the procedural rights which this court has conferred upon him. Second, trial by deposition under these circumstances would not advance justice.²⁴ We are sympathetic to the inconveniences which may attend adherence to the rules, but we are also mindful that "the giving of testimony and the attendance upon court . . . are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned. . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979, 982-83 (1919). If fear for the safety of one's self and family is not a valid excuse for failure to appear in court to testify, *Piemonte v. United States*, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed.2d 1028 (1961),

manifest to the court that a strict adherence to them will work injustice."

23. We have declined to rewrite the Rules of Criminal Procedure from the bench, noting that expansion of the rules is appropriately accomplished by amendment upon recommendation of the Rules Committee, the bench and the bar. *Buchanan v. State*, 561 P.2d 1197, 1209 (Alaska 1977).

24. Indeed, it may subvert justice, as is suggested in Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 Or.L.Rev. 567, 570-72 (1976). Both the Ninth and Second Circuit Courts of Appeals have held that videotaped pre-trial depositions of witnesses may be used in lieu of personal appearance before the jury where the defendant was present with counsel and given an opportunity to cross-examine and the prosecution has made a "good faith" effort to produce the witness at trial. *United States v. King*, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1646,

then disruption of vacation plans is surely insufficient.

[7] The erroneous admission of the videotaped deposition must compel reversal unless harmless. Although evidentiary error may be harmless in some circumstances, *Fresneda v. State*, 483 P.2d 1011, 1018 (Alaska 1971), it is not so here. Reversal based upon non-constitutional, evidentiary error revolves around "what the error might have meant to the jury." *Love v. State*, 457 P.2d 622, 630 (Alaska 1969). Under the *Love* test, we must examine the error to determine whether the jury was substantially influenced or swayed in its verdict by the introduction of the evidence in the context of the entire trial record. If improperly admitted evidence is merely cumulative, and the state's case is otherwise very strong, the error may be deemed harmless, even if of constitutional dimension, e. g., *Burford v. State*, 515 P.2d 382, 384 (Alaska 1973); but where the disputed evidence "appreciably affect[s] the jury's verdict," the error requires reversal. *Stevens v. State*, 582 P.2d 621, 626 (Alaska 1978).

[8] Significant differences exist between testimony by videotape and testimony face-to-face with the jury. Videotape may affect the jurors' impressions of the witness' demeanor and credibility.²⁵ Such

52 L.Ed.2d 357 (1977) (videotaped depositions of two unindicted co-conspirators unavailable to testify because they were incarcerated in Japan were admissible); *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984, 93 S.Ct. 1506, 36 L.Ed.2d 180 (1973) (videotaped deposition of critically ill prosecution witness admissible). However, the Eighth Circuit has expressed some doubt on the constitutionality of use of a videotaped deposition at a criminal trial. *United States v. Benefield*, 593 F.2d 815, 821 (8th Cir. 1970).

25. As one commentator has pointed out, there is a potential for distortion of a juror's perception of a witness whose testimony is presented by videotape.

"Some courts and legal commentators have assumed that evidence recorded on videotape can simply be transported from courtroom to television monitor with little or no effect upon it. In reality, however, the camera unintentionally becomes the juror's

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considerations are of particular importance when the demeanor and credibility of the witness are crucial to the state's case. We cannot agree with the dissent that this "is not a case involving the testimony of a crucial eyewitness, when it might be important at trial to test the witness's powers of observation, memory, or possible bias." To the contrary, Dr. Sydnam was a crucial eyewitness to the aftermath of the alleged rape, who testified not only to the physical condition of the victim, but also to her distraught emotional state. The doctor's testimony that injuries to the victim's vaginal areas were inconsistent with willing intercourse, but consistent with forcible rape, was the most compelling evidence offered by the state on the issue of consent. In addition, as the victim's family doctor, there was a possible basis for bias. Thus, there were many aspects of Dr. Sydnam's testimony as to which her "powers of observation, memory, or possible bias" were very much at issue here. Given her testimony, we conclude the jury was substantially influenced in its verdict by the introduction of the videotaped deposition.

Moreover, there is a further distinction between trial testimony and videotaped testimony taken prior to trial which may have significance here. With videotape, the witness cannot be cross-examined in the context of other evidence and testimony which has been presented at trial. Store's counsel may have taken a different approach to the cross-examination of Dr. Sydnam had her testimony been taken as part of the prosecution's entire case. If the doctor had been available at trial, the defense would have had the opportunity to explore any discrepancies between the testimony of various witnesses and to recall the doctor to clarify

eyes, necessarily selecting and commenting upon what is seen. . . .

Evidence distortion is most serious when videotaping a witness because the picture conveyed may influence a juror's feelings about guilt or believability. . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question, all of which are potentially important to jury decision making. Whether testi-

any medical questions that might have arisen during the course of the trial.

The use of videotape, in the trial process is relatively new. Its real impact remains undetermined. This is not to say that a videotaped deposition should never be used at trial; in fact, it may provide the most reliable and accurate means of preserving testimony when the witness is truly unavailable for trial. It is quite a different matter, however, to conclude that the erroneous admission of a videotaped deposition of a crucial witness, who was available to testify at trial, had no effect on the outcome of the trial.

We have not hesitated to reverse where an error flows from prosecutorial violation of the Rules of Criminal Procedure. *Stevens v. State*, 582 P.2d 621 (Alaska 1978). In view of the requirements of *Love* and the concomitant substantial effect that the deposition must have had on the jury's verdict, reversal is required.

We find the other contentions advanced by the defendant on appeal to be without merit.

REVERSED.

BOOCHEVER and BURKE, JJ., not participating.

MATTHEWS, Justice, dissenting.

I disagree with the majority's opinion that the admission of Dr. Sydnam's videotaped deposition was not harmless error beyond a reasonable doubt.

The question is not simply whether the state might have obtained a conviction without Dr. Sydnam's testimony. It appears plain that had the state or the trial

witness is taped in black and white or in more expensive color may also be of critical importance.

Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded ~~with~~ the focus is on another part of the body of an . . . her witness." (footnote omitted).

Note, *supra* note 24, at 574-76.

judge insisted, Dr. Sydnam would have appeared in court. It is also abundantly clear that had Dr. Sydnam testified in court her testimony would have been admissible. Therefore, the critical question is whether there was a significant difference between the testimony as it was actually presented to the jury on the videotape and as it might have been presented had Dr. Sydnam appeared in person at Stores' trial.

The videotaped testimony was prepared within less than a week of trial. It was clear to the defendant and his lawyer that the purpose of the taping session was to preserve the doctor's testimony for use at trial. Thus, this is not a case where the defendant's lawyer did not have adequate time to prepare, or where the issue to be proved or the quantum of proof needed was different from that at trial. Such might be the case if testimony from a preliminary examination or a deposition believed to be for discovery purposes were used.¹

The defendant had the assistance of the same lawyer at both the taping session and at trial. A trial judge was present and ruled on objections raised by both parties. Defendant's lawyer freely cross-examined the witness.

A videotape records the demeanor of a witness with even more faithfulness than a sound recording. With regard to the latter, we said in *McBride v. State*, 368 P.2d 925, 928-29 (Alaska 1962) (footnotes omitted),

1. "A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1323, 20 L.Ed.2d 255, 260 (1968).
2. In *State v. Reid*, 559 P.2d 136, 149 (Ariz. 1976), *cert. denied*, 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977), the Arizona Supreme Court allowed the testimony of a coroner to be videotaped prior to trial. The court noted:

We find no error in allowing Dr. Hirsch to testify by videotape under the appropriate safeguards contained herein. In deciding as we do, we wish to emphasize that our decision might be different were he an eyewitness to the events of the crime. Such a crucial witness should not be lightly excused from attendance at the trial itself. When

cert. denied, 374 U.S. 811, 83 S.Ct. 1702, 10 L.Ed.2d 1035 (1963):

The entire direct and cross-examination were played back through a high fidelity loudspeaker mounted on the courtroom wall. The jury was able to hear the inflections of voice which are so often important. They were able to note the readiness and promptness of the witness's answers or the reverse; the distinctness of what he related or lack of it; the directness or evasiveness of his answers; the frankness or equivocation; the responsiveness or reluctance to answer questions; the silences; the explanations; the contradictions; and the apparent intelligence or lack of it. These are vital elements touching upon the witness's veracity which are available in this jurisdiction to be noted and weighed by a jury even when the witness is not present in person. To a large extent, then, demeanor evidence is available for a subsequent jury; it is no longer wholly "elusive and incommunicable" as in the case of manual reporting of former testimony.

Finally, Dr. Sydnam testified as an expert witness concerning the results of her medical examination of the victim. This was not a case involving the testimony of a crucial eyewitness to the events of the crime, where it might be important at trial to test the witness's powers of observation, memory, or possible bias.²

considering when to allow a witness to testify by videotape in a criminal trial, the trial court must balance the right of the defendant to the right of confrontation and the need of the trier of fact to the additional benefit of having a particular witness testify in person at the trial with the extent of the need for the witness to be away at the time of trial. The treatment by the courts of witnesses has not always resulted in willing and cooperative testimony once witnesses have been compelled to attend court. Because of his professional specialty, Dr. Hirsch, a pathologist, might not be able to go on a vacation without disrupting or postponing trial dates. The right of the defendant to confront the witness against him can also accommodate the convenience of the witness without doing an injustice.

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ALASKA STATE HOUSING AUTH. v. WALSH & CO., INC., Alaska 831

Cite as, Alaska, 625 P.2d 831

There is no reason to doubt the truth or accuracy of Dr. Sydnam's testimony, nor does the defendant suggest her testimony was in any way unreliable. The defendant has not suggested that some profitable line of cross-examination was left unexplored. Under the circumstances, admitting the videotape was harmless error. Accordingly I would affirm the conviction.



ALASKA STATE HOUSING
AUTHORITY, Appellant,

v.

WALSH & COMPANY, INC., Appellee.

WALSH & COMPANY, INC.,
Cross-Appellant,

v.

ALASKA STATE HOUSING AUTHORITY,
Cross-Appellee.

Nos. 3679, 3680.

Supreme Court of Alaska.

Dec. 19, 1980.

Contractor brought suit against State Housing Authority to recover balance due and added expenses allegedly incurred in road construction project. The Superior Court, Third Judicial District, Anchorage, Peter J. Kalamarides, J., rendered judgment from which the housing authority appealed and the contractor cross-appealed. The Supreme Court, Connor, J., held that: (1) trial court's determination that the contract was substantially performed did not result from a misallocation of the burden of proof; (2) trial court's determination that there was substantial performance by the contractor was not clearly erroneous, particularly in view of evidence that the road was substantially serving its intended purpose and did not require rebuilding; (3) for deficiencies in the construction work, the trial court utilized an improper measure of damages in merely awarding housing authority the value of omitted road base materials;

(4) in regard to what gravel surface material was required, an ambiguity existed in the contract; (5) contract's technical specifications did not unambiguously require that the road base material used be mechanically crushed and, therefore, the contractor did not act improperly in attempting to incorporate material that satisfied only the requirements of Alaska Method T-7; and (6) since none of the technical specifications required contractor to submit for approval samples of "Crushed Surfacing, Type A," contractor had no duty to furnish such a sample to housing authority.

Affirmed in part, reversed in part, and remanded.

1. Contracts ⇐ 294

Doctrine of substantial performance permits recovery by contractor who has substantially, though imperfectly, performed his contractual undertaking; in such circumstances, the contractor is entitled to recover contract price, less reasonable cost of remedying defects in the work or materials.

2. Contracts ⇐ 322(1)

Initial burden of proving substantial performance is on contractor, and if his evidence shows substantial performance, burden is then on owner to prove that certain deficiencies in the work require recoupment or setoff.

3. Contracts ⇐ 294

Substantial performance is determined by considering such factors as character of performance that was promised, purpose that contract was meant to serve, and extent to which any nonperformance by contractor has defeated purposes or ends which were meant to be achieved.

4. Contracts ⇐ 294

In many cases, substantial performance becomes a matter of degree, to be determined by weighing a number of factors together.

5. Highways ⇐ 113(4)

In suit brought by contractor against State Housing Authority to recover balance due and added expenses allegedly incurred

I. REQUEST

Bill/Resolution No. HB 576
 Title Videotaping of Testimony
 Requested by House Judiciary Date 2/18/82

II FISCAL DETAIL

Agency Affected Alaska Court System
 Program Category Affected Administration of Justice
 BRU, Program, Or Subprogram(s) Affected Trial Courts
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.6	6.0	6.6	7.2	8.0
400 COMMODITIES		55.9				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		61.5	6.0	6.6	7.2	8.0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		61.5	6.0	6.6	7.2	8.0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

At the time the original fiscal note for this bill was prepared, the Court System policy was to not provide any new video equipment for the use of the police or district attorneys. This policy was necessitated by the disparity of types of equipment being purchased by the local police and state agencies around the state, and the inability of the Court System to provide and maintain compatible equipment in all locations. However, since that time the State Troopers and district attorneys have agreed to utilize a consistent 3/4 inch U-matic format, and to procure similar units for the local police. As a result of that effort toward standardization, the Court System has revised its policy against purchasing new video equipment, and will now be supplying this equipment in many court locations.

HB 576 envisions the State producing video recordings for playback at trials. As the bill now stands, and with the current Court System policy about purchasing video equipment, the Court will be required to provide the necessary cameras and playback units in at least all the Superior Court locations, as well as the locations where Superior Court cases are frequently held, such as Barrow or Palmer. This will require a minimum of 13 complete video units at the cost of \$4,300 each. The annual maintenance cost is estimated at \$5,600. The first year cost will therefore be \$61,500, with ongoing costs of \$5,600 plus inflation.

IV. DATE 2/18/82 PREPARED BY Richard P. Barrier
 AGENCY Alaska Court System
 Original: Legislative Finance PHONE 264-0545
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/81)

III. ANALYSIS (Continued)

Salary:

Anchorage:

2 Clerk I at Range 8 (\$17,196): 34,392
1 Clerk II at Range 10 (\$19,356): 19,356

Fairbanks

1 Clerk I at Range 8 (\$19,356): 19,356
\$73,104

Benefits: \$24,698

Total Personnel \$97,802

Equipment:

4 desks, chairs typewriters 6,672

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August 1930
Interim Annotation
Service

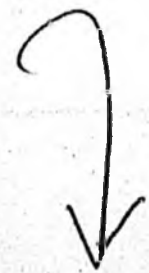
Supplementing M.G.L.A. Pocket Parts For Use
In 1930-1931

Massachusetts Public of Court 1930 Pamphlet

NOTICE

Set laws of the 1930 Regular Session, and the
Massachusetts Legislative Service for 1930 and table
showing the M.G.L.A. Sections added, amended, or
otherwise affected.

MASSACHUSETTS
LEGISLATIVE SERVICE
1000 STATE HOUSE
BOSTON, MASS. 02133



§ 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

Supplementary Index to Notes

- Findings 9
- Objections 8
- Stage of proceedings 7

2. In general

If closing all or part of trial for sex offenses involving minors under age of 18 were necessary to assure availability of evidence of fresh complaint, judge would be justified in ordering closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

Although this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 is mandatory only as to victim's testimony, it is possible that trial judge might close other parts of trial; such decision to close any part of trial other than victim's testimony or to close entire trial is matter within judge's sound discretion. *Id.*

Reasons of the policy favoring publicity, an adversarial hearing procedure and closure to show a trial should not justify closure or even be relevant to judge's determination of necessity for a closure of trial for sex offenses involving minors under age of 18. *Id.*

Issue at a hearing on Commonwealth's motion to close parts of all or trial for sex offenses involving minors under age of 18 shall be whether such closure is necessary to preserve evidence required for just conviction. *Id.*

3. Requirements of proceedings

Judge should hold hearing before entering order closing parts of trial other than victim's testimony and this section provides for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

4. Persons with a direct interest

The press does not have a sufficiently "direct interest" to be exempt from this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

5. Public trial

In prosecution for four counts of rape of a child under 16 years of age, where defendant claimed that he was denied his right to public trial because judge excluded public from his entire trial, burden was on defendant to demonstrate that public was excluded from trial after minor victim's tes-

tified, but defendant was not obligated to demonstrate that he was prejudiced by closing of balance of his trial. *Com. v. Williams* (1980) 401 N.E.2d 375, 1980 Mass. Adv.Sh. 515.

Defendant did not demonstrate his trial on four counts of rape of a child under 16 years of age was improperly closed, but record was necessary for a determination of extent to which trial was closed to public, and, if it was, for consideration whether defendant properly waived his right to public trial, through his actions or actions of his counsel. *Id.*

7. Stage of proceedings

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 mandatorily requires closure of trial during victim's testimony. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

In sex offenses involving minors under age of 18, Commonwealth must burden of showing necessity for a closure of parts of trial other than victim's testimony or fore-closure of entire trial. *Id.*

In case in which this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 applies, Commonwealth may move for closure of parts of trial other than victim's testimony or foreclosure of entire trial. *Id.*

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 relates to closure of trial only during victim's testimony. *Id.*

8. Objections

Public need not resolve prior motion of closure pending for sex offenses involving minors under age of 18; however, court should hear a person who in timely fashion informs court of his desire to object to closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

Any person to be excluded from the trial of sex offenses involving minors under age of 18 other than during victim's testimony should have opportunity to state objections to order which person moves and file record motion to be reviewed. *Id.*

9. Findings

On conclusion of hearing regarding exclusion of public from trial for sex offenses involving minors under age of 18 during other than victim's testimony, judge should make findings of fact as appropriate and should rule on necessity for closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 455.

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search for controlled substances. (U.S. v. Harrington, 10/23/81)

In its original opinion, the court held that Reorganization Plan No. 2 of 1973, 87 Stat 1091, completely removed the Customs Service's authority to investigate drug law violations, placing all such authority in the hands of the Drug Enforcement Administration.

The court rejected then, as it does now, the government's attempt to rely on isolated portions of the plan and the presidential transmittal memorandum as indicating an intent to place "primary" drug enforcement authority in the DEA while leaving secondary authority in other agencies. Such an interpretation, the court says, would do violence not only to the plain language of the plan but also to the policy underlying it. "Once all intelligence, investigative, and law enforcement functions had been transferred from the Secretary of the Treasury to the Attorney General, Treasury had no such functions to perform. * * * [T]his court finds itself unable to read the [language of the plan] to mean less than it clearly says."

The court also rejects two new arguments raised by the government. First, the government claims that complete authority for the search can be found in the Currency and Foreign Transactions Reporting Act, 31 USC 1101. While it is true that the affidavit filed by the agent made a "fleeting" reference to the Act, the court is unable to conclude that the warrant was issued with any consideration of that statute. The affidavit made a bald assertion that the agent believed that the individuals under investigation were violating the Act, but pointed to no specific, articulable facts to establish such a violation. Accordingly, the authority vested in customs officers by this statute has no relevance to the search in this case.

Finally, the court rejects the argument that, the lack of authority for the search notwithstanding, application of the exclusionary rule is not appropriate. Aware of a long line of cases holding that technical violations of Fed.R.Crim.P. 41 do not warrant invocation of the exclusionary rule, the court observes that the primary question in this case is whether this was a "mere" technical violation.

For the answer, the court turns to U.S. v. Soto-Soto, 598 F2d 545 (CA9 1975), which held that one federal law enforcement officer may not use the statutory authority given by Congress to another agency and that the evidence so acquired would be inadmissible. "In reading Soto-Soto, it is apparent that the Ninth Circuit felt that a very important policy would be served by the application of the exclusionary rule to a search conducted by an officer without statutory authority to do so: it would deter individual officers from ignoring the

delegations of authority painstakingly created by Congress." (Page 2119)

Prior Testimony Usable

POTENTIAL WITNESS' PSYCHOLOGICAL PROBLEMS MADE HER "UNAVAILABLE"

Testifying in court, which can be an unpleasant and frightening ordeal for many witnesses, can present serious risk of psychological harm to some. Such witnesses can be considered "unavailable," just as if they could not be located, the D.C. Court of Appeals holds. If other conditions are met, the prior testimony of such a witness may be admitted at trial, thus sparing the witness the need to appear personally. (Warren v. U.S., 10/9/81)

The defendant in this case was convicted of rape in 1973, but the conviction was later reversed. One of the alleged victims was excused from testifying at the retrial on the basis of psychiatrists' statements that a court appearance could lead to permanent psychological injury. Instead, the transcript of her testimony from the first trial was repeated to the second jury.

Observing that the issue is one of common law in this jurisdiction, the court notes that only two cases have expressly sanctioned findings of unavailability under similar circumstances. *People v. Gomez*, 103 CalRptr 80 (CalApp 1972); *People v. Lombardi*, 332 NYS2d 749 (AppDiv 1972), aff'd 303 NE2d 705 (1973). As in the instant case, both *Gomez* and *Lombardi* involved rape victims whose precarious mental conditions might have been aggravated by the ordeal of testifying. These cases are instructive, the court notes, as are Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, both of which allow findings of unavailability on the basis of existing mental illness or infirmity.

Defining "unavailability" to include mental conditions such as this witness' is a reasonable construction of the common-law rule, the court says. "We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional and psychological effects as a result of testifying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony." The court identifies the following factors as relevant: "(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." (Page 2113)

sentencing judge," limiting the sentences to a maximum of two years' imprisonment for Hamm and a maximum of six months for the others. The record indicates, however, that in the prosecutor's zeal to convict the leaders of the conspiracy, he may have misled at least one defendant into believing that the judge had already agreed to follow these sentencing recommendations.

When the first defendant was brought before the court for sentencing, the trial judge stated that he had not been informed of the modified plea agreement and would not be bound by it. The government then moved to dismiss the indictments against all the defendants under Rule 48(a). The district judge denied the motion, refused to let the defendants withdraw their pleas, and sentenced them to terms of imprisonment.

Rule 48(a) states that a federal prosecutor "may by leave of court file a dismissal of an indictment * * * and the prosecution shall thereupon terminate."

[Text] Our determination of the meaning of the "leave of court" requirement is essential to the proper disposition of this appeal. In deciding in what situations that leave can be denied, we must balance the constitutional duty of government prosecutors, as members of the Executive Branch, to "take care that the laws [are] faithfully executed" with the constitutional powers of the federal courts, most particularly the sentencing power of trial judges.

We hold that the "leave of court" requirement of Rule 48(a) is primarily intended to protect the defendant against prosecutorial harassment. The district court may not deny a government motion to dismiss a prosecution, consented to by the defendant, except in those extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest. [End Text]

See *U.S. v. Cowan*. In *Rinaldi v. U.S.*, the Supreme Court held that if the prosecutor's motion to dismiss was not "tainted with impropriety," and was not "motivated by considerations * * * clearly contrary to manifest public interest," the trial court could not properly deny the prosecutor's motion.

[Text] We continue to hold that even when the defendant consents to the motion to dismiss, the trial court, in extremely limited circumstances in extraordinary cases, may deny the motion when the prosecutor's actions clearly indicate a "betrayal of the public interest." *U.S. v. Cowan*, 524 F.2d at 514. As the Supreme Court indicated in *Rinaldi*, the trial judge must look to the motivation of the prosecutor at the time of the decision to dismiss. * * * Unless the court finds that the prosecutor is clearly motivated by considerations other than his assessment of the public interest, it must grant the motion to dismiss.

In this case, we find no evidence that the prosecutor was motivated by any considerations other than his evaluation of the public interest. The appellants were the principal government informants and witnesses in the prosecutions of the leaders of a large drug-smuggling conspiracy. The service they provided to the Government greatly exceeded that expected, or required, by the initial plea-bargaining agreement. As a result of their cooperation, the lives of at least two of the appellants were threatened and the prosecutor expressed considerable concern for the appellants' safety in prison. The prosecutor also indicated that the continued cooperation of the appellants would be needed in the prosecution of additional leaders of the drug-smuggling conspiracy. * * *

When it became clear to the United States Attorney that he could not assure the appellants that they would receive favorable sentences, he concluded, after "re-evaluat[ing] the magnitude of the information [given by the appellants] and following actions by unknown persons which created concerns for the safety of the witnesses," that the public interest would best be served by dismissing the indictments against the appellants. It must be emphasized that this is not a case in which the prosecutor entered into any agreement with the appellants to dismiss the charges if the judge did not abide by the sentencing agreement or presented the judge with the alternative of either going along with the sentencing agreement or the prosecutor would dismiss the charges. Nothing to that effect has been said or implied. Instead, this is a case in which the Government, in consideration of the appellants' extraordinary past cooperation, and in order to assure their continued

cooperation, to protect their lives and to set a positive example for others who may decide to cooperate, decided that it would best serve the public interest to dismiss the indictments against the appellants. Neither this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest. As long as it is not apparent that the prosecutor was motivated by considerations clearly contrary to the public interest, his motion must be granted. * * *

The district court appears to have placed the burden on the prosecutor to show that dismissal itself would be in the public interest. The language of this court in *Cowan* and the Supreme Court in *Rinaldi* makes it clear that the motion should be granted unless the trial court has an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest. As the district judge acknowledged, the prosecutor is the first and presumptively the best judge of where the public interest lies. The trial judge cannot merely substitute his judgment for that of the prosecutor.

We also disagree with the district judge's notion that the public interest can never be served by dismissing an indictment because of the defendants' past cooperation. The decision to dismiss may be the prosecutor's way of letting future conspiracy defendants know of the possible advantages of cooperation with the Government. It may very well be crucial to the prosecutor's credibility in future cases involving informants or defendants who testify in return for lenient treatment. Moreover, as we have explained above, the prosecutor was motivated not only by a desire to reward past cooperation but also by the need to assure the appellants' future cooperation and to protect their lives. [End Text]

We need not reach the issue of whether the judge should have permitted the defendants to withdraw their guilty pleas. — Ainsworth, J.

Concurrence: It would be intolerable to grant the prosecutor practical power to bargain away the trial court's sentencing discretion in advance, and I recognize that we come perilously close to doing so in the very broad dismissal power that we recognize for the prosecutor. Any calculated or premeditated effort by the prosecutor to usurp the court's power must be brought to nothing. Since I see neither evidence nor finding of such an effort here, however, I concur. — Gee, J.

Dissent: The district judge expressly found that the government's motion to dismiss the indictments was "nothing more than a camouflaged attempt to limit the sentencing authority reserved to the judge." This finding is fully supported by the record. The prosecutor moved to dismiss because he disagreed with the sentences that he anticipated the judge would dispense. In federal courts, the determination of the length of a defendant's sentence is a function reserved to the district judge. Therefore, a dismissal motion inspired by the district judge's refusal to assess the sentence recommended by the prosecution is clearly contrary to manifest public interest and may be denied to protect the sentencing authority reserved to the judge.

The judge, however, should have allowed Butler, Evans, and Washington to withdraw their guilty pleas. These three relied on the prosecutor's statement that the judge had agreed to the recommended sentence. Although the record does not so clearly demonstrate that the two other defendants relied on this statement, the district court should reconsider their motions to withdraw. It is unclear whether, in denying the motions the first time, the judge considered our liberal interpretation of Fed.R.Crim.P. 32(d) in *U.S. v. Presley*, 478 F.2d 163 (1973). — Reayley, Garza Politz, and Sam D. Johnson, JJ.

(*U.S. v. Hamm*; CAS (former) CMA (en banc), 10/19/81)

MENTAL STATE MADE WITNESS UNAVAILABLE SO HER PRIOR TESTIMONY COULD BE USED

*But rape defendant's second trial was flawed
by disclosure of presentence report. ▶ 120.20
▶ 300.120*

Prior testimony of an alleged rape victim was properly admitted at the retrial of her assailant, the District of

Columbia Court of Appeals holds, under the common-law rule pertaining to "unavailable" witnesses. The victim was rendered "unavailable" for the second trial by her precarious mental condition, which made it dangerous for her to testify.

Only a few cases sanctioning this type of unavailability have been decided. However, the court considers those decisions sound and calls the trial court's action in this case "a reasonable construction of the witness unavailability rule." While not just any "adverse emotional or psychological effects" will excuse a witness from testifying, the expert testimony here showed that the risks faced by this witness were grave.

Nonetheless the defendant's trial was hampered by other errors that require reversal. In particular, the court stresses a violation of the local counterpart of Fed.R.Crim.P. 32, which forbids disclosure of the presentence report in advance of the verdict of guilt. Following the defendant's conviction at his first trial, he admitted to a probation officer that he had had sexual relations with two of the complainants; these admissions, contained in the presentence report, were read to the jury at the second trial. This amounted to a clear violation of the rule, the court says, and the error was extremely prejudicial. (Warren v. U.S., 10/9/81)

Digest of Opinion: Upon retrial before a jury after a prior reversal by this court, Davis v. U.S., 367 A2d 1234 (1976), defendant Warren was convicted of kidnapping while armed, rape while armed, and other offenses. Prior to the second trial, the motions judge ruled admissible the prior testimony of Marilyn Reed, one of the complainants, on the ground that she was "psychologically unavailable." Her testimony was presented by having a secretary from the U.S. Attorney's office play the complainant's role. The prosecutor read the questions asked at the first trial and the secretary responded by reading Reed's answers.

The prosecutor's principal argument at trial was the inconsistency between Warren's denial at the first trial of any knowledge of the complaining witnesses and his admission, in a presentence report, to sexual relations with two of the women, whom he alleged consented to those relations. In his defense, Warren argued only the likelihood of misidentification.

Warren argues that Reed was not "unavailable" within the meaning of the common law of his jurisdiction pertaining to admission of prior recorded testimony. See Henson v. U.S., 399 A2d 16, 19 (DC 1979). He argues first that admissibility of her testimony is governed by D.C. Code §14.303. However, that provision treats only the admissibility of former testimony of parties, not of former non-party witnesses.

He also argues that even under a common-law test, the introduction of the testimony was improper. While we are not bound by any statutory limitations, constitutional limitations have been set in Ohio v. Roberts, 448 U.S. 56, 27 CrL 3234 (1980). The constitutional question appears to be at what point, if any, it is no longer reasonable to require the government to produce witnesses at the risk of their psychological health. We need not resolve this question here, but pose it to underscore the inherent flexibility and ambiguity of the constitutional standard and to set the outer boundaries of our task of common-law interpretation.

Professor McCormick lists nine recognized categories of witness unavailability but adds that "[i]n principle probably anything which constitutes unavailability in fact ought to be considered adequate." Evidence, §253, at 609-12 (1972). To our knowledge, the type of witness unavailability in issue here has been expressly sanctioned in only two cases, both of which interpreted the meaning of medical unavailability under codified rules of evidence. People v. Gomez, 103 CalP.2d 80 (CalApp 1972); People v. Lombardi, 332 NYS2d 749 (AppDiv 1972), aff'd 303 N.E2d 705 (1973). In both cases the prior testimony of rape victims was admitted.

The trial judge's reference to these interpretations of out-of-state statutes was a proper means of obtaining guidance in formulating our common law. It is also useful to note Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, which provide that a declarant is unavailable if he "is unable to be present or to testify at the hearing because of death, or then existing physical or mental illness or infirmity." The mental infirmity part of this definition was applied in U.S. v. Benfield, 593 F2d 815, 25 CrL 2026 (CA8 1979). There a psychiatrist's testimony led the lower court to allow the witness to testify at a videotaped deposition at which defendant's counsel but not defendant would be present. The appellate court did not object to the finding of unavailability, but reversed on the basis of reliability.

[Text] In ruling as he did, Chief Judge Green cautiously extended the traditional definition of witness unavailability to include psychological unavailability of the type demonstrated in the case of Marilyn Reed, but to exclude the lesser degree of psychological infirmity demonstrated by Linda Jenkins. After evaluating the testimony of two psychiatrists, one of whom he personally appointed to obtain an independent, second opinion, he excused Reed from testifying because the experts agreed that she "would undergo far greater mental anguish than normally accompanies court appearances of the victims of rapes (and presumably other such crimes as kidnapping, terrorism, and hijacking) and that her appearance in court . . . would be likely to lead to severe psychosis, even possible suicide." [End Text]

The evidence supports this finding. Dr. Yochelson testified that Reed suffered from a severe mixed psychoneurosis with particular emphasis on depressive mood, phobic reaction and anxiety. He found that the depth of her depression had reached suicidal levels and that suicidal tendencies were still present. The trauma of another court appearance, he said, would most likely shatter her fragile adaptation to society, possibly leading to permanent psychological injury. The court also appointed an independent psychiatrist who substantially agreed with Dr. Yochelson's assessment of the severity of the injury that would befall Reed were she forced to relive the events of her rape through another court appearance.

[Text] The ruling below was not only supported by the evidence, but was also a reasonable construction of the witness unavailability rule. We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional or psychological effects as a result of testifying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony. The expert testimony relating to Reed's mental health established that there was both a high likelihood of temporary psychological injury, perhaps even psychosis, and a possibility of permanent psychological injury. We also are persuaded of the correctness of the trial court's ruling because of the experts' agreement on the comparative severity of this victim's probable reaction to testifying again. . . . [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 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. [End Text]

Warren also complains of the fact that the jury was permitted to hear statements made by him to a probation officer. The statements were contained in a presentence report prepared after the first trial and essentially read to the jury by the probation officer.

[Text] Superior Ct. Cr. R. 32(b)(1) states in relevant part, that a presentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty, or nolo contendere, or has been found guilty . . ." Our reversal of appellant's convictions from the first trial effectively meant that he had not yet been found guilty at the time Officer

Swepson gave his testimony before the jury at the second trial. Resort to the presentence report was therefore impermissible under Rule 32(b)(1), a restriction which evidently was not considered by the trial court. [End Text]

In *Gregg v. U.S.*, 394 U.S. 489 (1969), which interpreted our rule's federal counterpart, the Court said it was clear that the presentence report "must not, under any circumstances, be submitted to the court's before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes an error of the clearest kind."

[Text] In appellant's case, "error of the clearest kind" has been committed. Statements by appellant in the presentence report were not only heard by the trial judge, but also by the jury. The fact that the report was prepared after the jury's verdict in the first trial is of no import, since that verdict was nullified as to appellant. The report contained information elicited from the appellant concerning the same case for which he was later separately retried. The very nature of a presentence report is directly in conflict with the adversary nature of a trial. Information, quite often prejudicial, is obtained and used in making discretionary decisions about sentencing. The reports are informal documents. Information in them can be based on hearsay or pertain to separate matters having no relation to the crime with which defendant has been charged. Counsel is not present during the interview upon which the report is based. It would be the essence of unfairness to use such information as evidence against the appellant.

The purpose of the sentencing report is to aid in the sentencing process. "The primary objective of the presentence report is to focus light on the character and personality of the defendant and to discover those factors that underlie commission of the offense and defendant's conduct in general." Note, *Presentence Reports*, 58 GEO. L.J. 451, 455-56 (1970). This information is essential in making a discretionary decision of sentencing. Allowance of this information as evidence of defendant's guilt would have a chilling effect on the interview.

The evidentiary error committed with respect to allowance of Probation Officer Swepson's testimony must be characterized as highly prejudicial since the sole defense at trial was the unreliability of the complainant's identifications and, implicitly, the lack of connection between appellant and the crimes. The probation report testimony directly conflicted with this theory since it contained admissions by the defendant directly implicating him in two of the offenses. Swepson's testimony effectively removed the issue of identification from the case and left appellant with no credible theory of defense, unless jury could be convinced that appellant's statements to the probation officer were fabricated in hopes of a lenient sentence. This latter theory was unsuccessfully argued to the jury by defense counsel in closing. [End Text]

[In a section of the opinion not digested herein, the court also finds error in the admission of prior consistent hearsay statements. —ed.]

The cumulative impact of the errors noted in this case substantially influenced the jury's verdict. Accordingly, a new trial is necessary. —Kelly, J.

(*Warren v. U.S.*; DC CtApp, 10/9/81)

ERRORS IN CHOOSING GEORGIA FEDERAL GRAND JURIES HELD INSUBSTANTIAL

Statutory violations uncovered by defendants are not serious enough to require dismissal
▶50.10

Over a period of several years, selection of federal grand juries in the Northern District of Georgia failed to comply with the Jury Selection and Service Act, 28 USC 1861 et seq., the former U.S. Court of Appeals for the Fifth Circuit says. However, the court goes on to hold that none of the violations was "substantial" and that a district court therefore erred in dismissing a number of indictments earlier this year. See *U.S. v. Northside Real-*

ty Associates, Inc., 510 FSupp 668 [reported sub nom. *U.S. v. Alexander*, 29 CrL 2202]. The district court's key error was to confuse the "random selection" required by the Act with "statistical randomness."

Rather than select the "starting number" from a drum filled with cards, as she was required to do by the district's Local Plan for implementing the Act, the jury clerk chose numbers from her head or by flipping pages of a book. These methods produced starting numbers that were not "random" in a statistical sense.

But the legislative history of the Act explicitly states that a jury selection system is sufficiently "random" if it prevents impermissible discrimination against individuals or groups, the court points out. No such discrimination has been shown here, and there is almost no possibility of using the clerk's system for discriminatory purposes. With similar reasoning, the court declares that the clerk's failure to post public notices concerning the selection of the starting numbers was not a substantial violation of the Act.

Because of misinterpretations of the Local Plan, the clerk and her assistants erroneously excused, exempted, or disqualified about 500 persons, out of the some 30,000 qualified jurors. This number was insignificant in a quantitative sense, the court says; moreover, the errors did not introduce forbidden subjectivity into the selection process. For the same reasons, the court finds no substantial violation of the Act in the erroneous granting of some 200 permanent excusals from jury service (*U.S. v. Bearden*, 10/19/81)

Digest of Opinion: The government appeals from the dismissal of five of the indictments; those charging antitrust violations by the "real estate" and "garbage case" defendants, and three charging individual defendants with various federal crimes.

The Act seeks to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service. It prescribes a general procedural scheme but provides that the details are to be worked out in the Local Plan adopted by each district. The Plan adopted by the Northern District of Georgia uses voter registration lists to create a master wheel computer tape. Qualified wheels are created for each of the district's four divisions, questionnaires for this purpose are mailed out and, when returned, are screened by the clerk's office.

To select a panel, an "increment" or "quotient" number is calculated by dividing the number of qualified jurors by the number needed. The clerk then selects a "starting number"; the first juror selected is the one whose place on the qualified wheel corresponds to the starting number. Thereafter the computer selects each qualified juror whose position falls one increment number farther down the list. Those selected have an opportunity to seek excusal on the basis of hardship or inconvenience.

The Act's timeliness requirement, §1867(a), requires that a motion to dismiss, plus a sworn affidavit, be filed before voir dire begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds for the motion, whichever is earlier. This requirement is to be strictly construed. The real estate defendants' challenges to the selection of the starting number and the failure to post notices do not appear to have been timely filed. A timely motion they filed did assert that there were not enough cards in the drum; but this is not sufficient to cause the violations they uncovered later to relate back to the original motion. Nor does it appear that they exercised diligence in investigating and inquiring about the selection of starting numbers and the posting of notices. However, it may be that they were misled or that infor-

ily, but placed certificate made out to plaintiff in compartment to which only he had access, there was insufficient evidence of donative intent and no inter vivos gift had taken place. *Chase v Blackstone Distributing Co.* (RI) 294 A2d 392.

[b] Delivery to third person in donee's behalf.

While generally, delivery to donor's agent is not deemed absolute since he holds property for donor subject to recall, it is otherwise where delivery is to third person as agent or trustee for benefit of donee, as where donor caused stock to be sent to issuing company for transfer on its records to stockholder's son, since stockholder did not intend to retain title in himself nor cause stock to be held subject to his right of recall and he must be deemed to have constituted company agent or trustee for son's benefit. *Kintzinger v Millin* (Iowa) 117 NW2d 68 (citing annotation).

§ 8. Formal instrument of gift, generally, p. 1421.

[b] Other formal instruments.

Requirements of gift *causa mortis* were met where decedents asked justice of the peace to arrange for donee to have automobile and the executed assignment thereof in presence of justice, although decedent did not put donee's name on assignment. *Re Ream's Estate*, 413 Pa 489, 198 A2d 556.

§ 9. Informal instrument, p. 1422.

Donor's delivery of deposit certificates to donee's son was sufficient delivery to constitute gift *causa mortis* where accompanied by instructions that donor wanted donee to have funds represented by certificates. *Atkins v Parker*, 7 NC App 446, 173 SE2d 38.

See *Re Ream's Estate*, 413 Pa 489, 198 A2d 556, *supra* § 8(b).

Letter requesting transfer of decedent's bank account if she should predecease her sister gave no delivery of possession but was testamentary in character and not a valid gift *causa mortis*. *Grace v Klein* (W Va) 147 SE2d 288.

48 ALR2d 1436-1455

Exclusion of public during criminal trial.

New sections and subsections added.

§ 4.3. Information justifiably withheld from public domain.

§ 9.3. Reprisal for violation of trial judge's guidelines.

§ 1. Introduction, p. 1437.

Broadcasting, recording, or photographing court proceedings. 100 ALR2d 1404.

Right of person accused of crime to exclude public from preliminary hearing or examination. 31 ALR3d 816.

Validity and construction of state court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses. 33 ALR3d 1041.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases. 39 ALR3d 852.

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Propriety of exclusion of press or other media representatives from civil trial. 79 ALR3d 401.

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 ALR Fed 871.

1 Am Jur Trials 303, *Controlling Trial Publicity*.

For case dealing with exclusion of all persons at time of preliminary hearing, see *McGonagill v Superior Court of San Diego County*, 214 Cal App 2d 192, 29 Cal Rptr 485.

Petitioner's contention that he was denied public trial based on fact that there were no spectators in courtroom during trial cannot be sustained where there was no evidence that public was in any way barred. *Henderson v Maxwell*, 176 Ohio St 187, 27 Ohio Ops 2d 59, 198 NE2d 456.

§ 2. General rules, p. 1437.

[a] Right to public trial and permissible extent of curtailment thereof, as to accused.

Although exclusion of defendant's infant daughter was not violation of right to public trial, exclusion of any portion of public, particularly member of defendant's family, without just cause is improper. *U.S. v Garland* (CA2 NY) 364 F2d 487 (exclusion held nonprejudicial), cert den 385 US 978, 17 L Ed 2d 440, 87 S Ct 521.

Court would not hold that defendant had been denied public trial where judge, after motion by defendant, stated that persons who were not witnesses, members of jury, or officers of court, "are going to have to leave."

where court reporter's transcript had no notation that any onlookers left courtroom, and there was no showing that public construed language used by judge as requiring them to leave or that public did leave. *Washburn v State* (Ala App) 150 So 2d 398.

Trial court could exercise its jurisdiction and limit number of spectators at rape prosecution trial in response to request of defendant, but fact that court did not give defendant secret trial as he requested violated no recognized right of defendant. *State v White*, 97 Ariz 196, 398 P2d 903.

A report recommending the adoption of a rule permitting taking of photographs or broadcasting by radio or television from courtroom, in discretion of trial judge, with the proviso that no witness or juror in attendance under subpoena or order of court should be photographed or have testimony broadcast over express objection, and also requiring that permission so photograph or broadcast be first obtained from trial judge, was approved and adopted. *Re Hearings Concerning Canon 35* (Co'o) 296 P2d 465.

Fight to public trial, whether guaranteed by constitution or statute, is substantial, and provisions are mandatory. *State v Schmit* (Minn) 139 NW2d 800 (citing annotation).

[b] Right to public trial and permissible extent of curtailment thereof, as to public generally.

Press and public generally have right of admission to courts-martial, at least where no issue of national security is involved. *U. S. v Brown*, 7 USCMA 251, 22 CMR 41.

Right is that of accused and not of general public. *Geise v U. S.* (CA9 Alaska) 265 F2d 659, supra, § 4.

Guilty plea must be made in public; constitution forbids exclusion of public from trial, except in cases of rape or assault to rape, and every presumption is indulged that trial was had in open court. *Woodard v State* (Ala) 171 So 2d 462.

Trial court erred in excluding press and public from voir dire examination of jurors based on request made by defense counsel to avoid adverse publicity for defendant; it would require unusual circumstances for right of public to ascertain whether officials were properly carrying out duties in responsibly and capably administering justice to be held subordinate to contention of a defendant that he would be prejudiced by public trial. *Commercial Printing Co. v Lee* (1977, Ark) 653 SW2d 270.

See *Oxnard Publishing Co. v Superior Court*

of Ventura County (Cal App) 68 Cal Rptr 83, infra § 3, hear gr by sup ct, app dismd.

Trial courts are vested with narrow discretion to close limited phases of criminal trial to public, and trial court's ruling that it could not constitutionally exclude press was technically incorrect, but court's refusal to exercise its discretion was not prejudicial. *People v Conley*, 268 Cal App 2d —, 73 Cal Rptr 673.

In proceeding involving motion to suppress evidence in criminal case, trial judge erred in failing to exercise discretion by denying defense request that court place several news reporters under oath as witnesses in case, without slightest showing that individuals involved were likely to be witnesses in proceedings, and exclude them from courtroom under rule authorizing sequestration of witnesses. *Gore Newspapers Co. v Reasbeck* (1978, Fla App D4) 363 So 2d 609.

[d] Application of Sixth and Fourteenth Amendments.

A much publicized financier tried before a state court in criminal proceedings of great notoriety was denied due process of law by televising and broadcasting of such proceedings over his objection. The purpose of Sixth Amendment's requirement of public trial is to guarantee that accused will be fairly dealt with and not unjustly condemned, and though maximum freedom must be allowed the press in carrying out its important function in a democratic society of informing the public, its exercise must necessarily be subject to maintenance of absolute fairness in judicial process. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628.

It violates the Sixth Amendment for federal courts to allow criminal trials to be televised to public at large. To satisfy constitutional requirement that trials be public it is not necessary to provide facilities large enough for all who might like to attend particular trial, or to permit observers to act as they please in courtroom. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628 (separate opinion of 3 justices).

A hearing which is held as part of a trial and after the jury has been sequestered falls within the constitutional guaranty and must be conducted as a public trial. *U. S. ex rel. Bennett v Rundle* (CA3 Pa) 419 F2d 599.

Exclusion of public from courtroom during portion of contempt proceeding against recalcitrant grand jury witness did not violate his Sixth Amendment right to public trial. *Re Di Bella* (CA2 NY) 518 F2d 955.

See *United States ex rel. Smallwood v La*

Valle (DC NY) 377 F Supp 1148 (citing annotation), *infra* § 8, and without op (CA2 NY) 508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Exclusion of all but near relatives of the parties, the press, and court officials during rape prosecution, was denial of constitutional right to public trial. *Thompson v People* (Colo) 399 P2d 776.

Scope of constitutional term "public trial" does not encompass conference between court and counsel in chambers respecting arguments and ruling on motion for acquittal. *State v Pullen* (Me) 266 A2d 222.

Exclusion of individual who resembled defendant during testimony of witnesses making in-court identification of defendant did not violate defendant's right to public trial under Sixth Amendment. *Young v State* (1977, Miss) 352 So 2d 815.

See *Price v State* (Tex Crim) 496 SW2d 103, *infra* § 8 (citing annotation).

See *Jones v Peyton*, 208 Va 378, 158 SE2d 179, *infra* § 9 (citing annotation).

§ 3. In general, p. 1442.

Public was properly excluded from that portion of contempt proceeding which involved reading of grand jury record, and where no objection was made to failure to reopen proceedings thereafter, right to public trial was waived and summary conviction of contempt in presence of court was proper. *Levine v U.S.* 362 US 610, 4 L Ed 2d 989, 80 S Ct 1038, reh den 363 US 858, 4 L Ed 2d 1739, 80 S Ct 1605.

In proceeding by manufacturer to enjoin corporation from disclosing trade secrets during criminal contempt proceeding arising out of corporation's alleged violation of prior consent decree in antitrust case, trial judge could properly impose limited *in camera* procedures for taking of testimony relating to trade secrets, without violating corporation's right to public trial, if judge should find that manufacturer were likely to suffer irreparable injury and that protection of its secrets could be achieved with minimal disruption of criminal proceedings. *Stamcarbon, N.V. v American Cyanamid Co.* (CA2 NY) 506 F2d 532.

See *U.S. ex rel. Bruno v Herold* (DC NY) 271 F Supp 491, *infra* § 8.

Order excluding general public from rape trial but allowing defendant, counsel, officers, members of press, bar, defendant's pastor and members of his family to remain, was proper in view of constitutional provision authorizing exclusion of all persons not necessary to con-

duct of trial. *Reeves v State*, 264 Ala 476, 88 So 2d 561, cert gr 352 US 965, 1 L Ed 2d 321, 77 S Ct 373.

No denial of right of public trial resulted in prosecution for assault of peace officer since court had discretion to permit prosecution to subpoena most of one defendant's family and then have them excluded under rule of sequestration. *Hill v State* (Ala App) 339 So 2d 601, cert den (Ala) 339 So 2d 610.

Defendant charged with homicide was not entitled to have reporters excluded from preliminary hearing on claim that their presence would result in harmful and prejudicial publicity which would endanger his right to fair trial, where he did not claim that evidence which would be inadmissible at trial would be introduced at hearing. *Phoenix Newspapers, Inc. v Jennings* 107 Ariz 557, 490 P2d 563.

Trial court has discretion to close portions of trial to public, even without consent of accused, when there is good cause based upon justice or protection of parties. *People v Cash*, 52 Cal 2d 841, 345 P2d 462.

Exclusion of public at trial is discretionary with trial court. *People v King*, 199 Cal App 2d 333, 18 Cal Rptr 624 (robbery prosecution).

Where murder trial did not fall within any statutory exceptions to requirement of public trial nor within any of usual common-law exceptions nor within those exceptions recognized under state case law, and absent showing of extraordinary circumstances that might create necessity for closed proceedings, such as record containing racial, religious, civil rights, or sexual overtones, neither refusal of defendant's girl friend to testify against him nor question of validity of conduct of lineup and whether witnesses present at lineup should be permitted to testify were subjects likely to generate prejudice against defendant such as to justify sacrifice of public trial. *Oxnard Publishing Co. v Superior Court of Ventura County* (Cal App) 68 Cal Rptr 83, hear gr by Sup Ct, app dismd.

Defendant could not complain of exclusion of certain friends and relatives from courtroom, where defendant had requested that state's witnesses be excluded, since trial court was merely making order evenhanded by applying it to both sides. *State v Dillon*, 93 Idaho 698, 471 P2d 553, cert den 401 US 942, 28 L Ed 2d 223, 91 S Ct 947.

Bailiff's exclusion of two local attorneys from courtroom during voir dire did not rise to level of constitutional violation where exclusion was inadvertent, resulting from misunderstanding between judge and sheriff's department concerning searching of specta-

tors for weapons, and where record did not indicate that anyone other than two attorneys were excluded from proceedings. *York v State* (1978, Ind App) 380 NE2d 1255.

Refusal by trial judge to prohibit children of deceased from being present in court room during closing arguments and instructions in murder trial was not error where prejudicial effect of their presence in court room was not shown to outweigh their right to be in attendance at trial. *State v Taylor* (La) 336 So 2d 855.

Order excluding all spectators except members of bar and press, over defendant's objection, on sole ground of obscene nature of offense charged and anticipated testimony, exceeded court's power and was violation of defendant's right to public trial guaranteed by state constitution. *State v Schmit* (Minn) 139 NW2d 800 (citing annotation).

Trial court should permit hearing of motions for bail and severance in chambers where defendants would be more protected from prejudice due to publicity. *State v Jackson*, 43 NJ 148, 203 A2d 1.

No abuse of discretion lay in court's refusal to permit private hearing on assault charge. *State v Velasquez*, 76 NM 49, 412 P2d 4.

Even though two spectators were wrongfully excluded from courtroom during testimony by witness for prosecution after witness had complained that spectators were harassing him, defendants were not prejudiced by action where there was no claim that spectators were assisting defendants or counsel at trial or that incident was used against defendants during trial and where other members of public were permitted to be present. *People v Hargrove* (1977) 60 App Div 2d 636, 400 NYS2d 184.

In a sensational kidnapping and murder case in which defendant moved for change of venue, for suppression of evidence, and to bar public and press from hearing on motion to suppress, trial court should have overruled motion to exclude public and press from hearing since such exclusion would abridge freedom of press; if, because of publicity generated by hearing, it appeared that defendant could not get fair trial, then motion for change of venue could be granted. *State ex rel. Dayton Newspapers, Inc. v Phillips*, 46 Ohio St 2d 457, 75 Ohio Ops 2d 511, 351 NE2d 127.

Ultimate determination of whether to exclude spectators, as well as determination of scope and duration of exclusion order, is left to sound discretion of trial court which properly cleared courtroom of all except reporters

and law students in murder prosecution during testimony of 14-year-old witness to double killing who was suffering emotional trauma. *Commonwealth v Knight* (Pa) 364 A2d 902 (citing annotation).

Exclusion from courtroom of spectators against whom were pending charges resulting from same facts as caused indictment of defendant was proper exercise of judicial discretion. *State v Mancini* (RI) 274 A2d 742.

Proceeding in juvenile court was not criminal proceeding and court was authorized to exclude public. *Re Lewis*, 51 Wash 2d 193, 316 P2d 907.

§ 4. Character of the charge or evidence, p. 1445.

Also recognizing that youthful spectators may be excluded:

U.S.—*U. S. v Brown*, 7 USCMA 251, 22 CMR 41.

Ind.—*Marshall v State*, 254 Ind 156, 258 NE2d 628 (citing annotation), reh den (Ind) 261 NE2d 566.

Minn.—*State v Schmit* (Minn) 139 NW2d 800 (citing annotation; dicta).

Pa.—*Commonwealth v Knight* (Pa) 364 A2d 902 (citing annotation).

General order excluding public from courtroom involving testimony as to obscenity was improper, although accused was given permission to have anyone he wanted admitted. *U. S. v Brown*, 7 USCMA 251, 22 CMR 41.

Exclusion of general public from statutory rape trial in which prosecuting witness was only 8 years old and other young witnesses were to be called was justified in trial court's discretion in view of age and difficulty of obtaining testimony from children before large audience. *Geise v U. S.* (CA9 Alaska) 262 F2d 151, reh den 265 F2d 659.

Some persons may properly be excluded from rape prosecution and accused making no request for revocation of exclusion order after minor witness had testified waived right to object thereto. *Geise v U. S.* (CA9 Alaska) 265 F2d 659.

In prosecution for possessing obscene pictures with intent to exhibit them, it was proper to exclude all members of public except newspaper reporters when alleged obscene film was shown in court. *Lancaster v U. S.* (App DC) 293 F2d 519.

Closing of courtroom to spectators during testimony of rape victim is a frequent and accepted practice when lurid details of crime

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must be related by a young lady. *Harris v Stephens* (CA8 Ark) 361 F2d 888, cert den 386 US 964, 16 L Ed 2d 113, 87 S Ct 1040.

Court's granting of prosecution witness' request that his mother be excluded from courtroom during his testimony was reasonable in view of court's opinion that her continued presence would hinder ascertainment of truth, and such exclusion did not deny defendant his right to public trial. *U. S. ex rel. Laws v Yeager* (CA3 NJ) 448 F2d 74, cert den 405 US 976, 31 L Ed 2d 251, 92 S Ct 1201.

Barring public from entire hearing on motion to suppress evidence of possession of heroin and cocaine which was seized by federal hijack prevention officials at boarding gate was error of constitutional magnitude where secret hijacker profile criteria evidence represented minute portion of hearing testimony. *United States v Clark* (CA2 NY) 475 F2d 240, later app (CA2 NY) 498 F2d 535.

Defendant's failure to object to exclusion order during retrial did not constitute waiver where state's highest court had sustained similar exclusion order during first trial; however, defendant was not denied right to public trial by judge's order excluding members of public excepting prosecutrix' relatives, defendant's relatives and clergyman. all persons necessary to conduct of trial, other attorneys, and press, where courtroom was at least three-fourths full, transcript of trial became public record, news media were admitted, and published reports of trial were lengthy and complete. *Aaron v Capps* (CA5 Ala) 507 F2d 685, cert den 423 US 878, 46 L Ed 2d 112, 96 S Ct 153.

Exclusion of public during testimony of undercover narcotics agents was within court's discretion and was justified by state's interest in preserving confidentiality where defendant did not indicate any particular person he wished to be present. *United States ex rel. Lloyd v Vincent* (CA2 NY) 520 F2d 1272, cert den 423 US 937, 46 L Ed 2d 269, 96 S Ct 296.

In prosecution for rape, defendant was not prejudiced by exclusion of public during testimony of victim to protect her personal dignity where court stated that anyone who wished to remain could give name and reason for staying and where it was made clear that members of press were welcome. *United States ex rel. Latimore v Sietlaff* (1977, CA7 Ill) 561 F2d 691, cert den (US) 55 L Ed 2d 782, 98 S Ct 1203.

Exclusion of public from suppression hearing during time that evidence was presented on "profile" used to detect possible hijackers

was proper in view of fact that publicity of characteristics involved would seriously undermine effectiveness of hijacking system. *U. S. v Lopez* (DC NY) 328 F Supp 1077, 14 ALR Fed 252.

In rape prosecution, court, under constitutional provision, could properly exclude from courtroom all persons except defendant, members of his family, and officials. *Aaron v State* (Ala) 122 So 2d 360.

Constitutional provision authorizing exclusion of public in prosecution for rape and assault with intent to ravish did not extend to trial of charge of carnal knowledge of girl under 12. *Lang v State* (Ala) 122 So 2d 533.

Under constitutional provision that in all prosecutions for rape and assault with intent to ravish, court may in its discretion exclude from courtroom all persons except such as may be necessary in conduct of trial, trial court properly ordered courtroom cleared except for attorneys, court officials, newspapers, parents of defendant, and husband of prosecutrix. *Ex Parte Rudolph*, 276 Ala 392, 162 So 2d 486.

Order excluding all persons under age 18 from trial on charge of indecent molestation of child was improper even if exclusion of children of "tender" years may have been proper. *Reynolds v State* (Ala App) 126 So 2d 497.

Under court rule which provided that public could be excluded if "... an open proceeding presents a clear and present danger," trial court erred in excluding the press from prosecution for rape and lewd and lascivious conduct where, although testimony which would have been elicited may have been embarrassing to witnesses, there was very little pretrial publicity in case; on other hand, trial court was within discretion to exclude public since, inter alia, trial would appeal to the morbid and prurient. *Citizen Publishing Co. v Buchanan*, 22 Ariz App 521, 528 P2d 1280.

Defendant in prosecution for murder was not denied public trial by exclusion from court of all persons except court personnel, press, and members of family of defendant, victim, and witness, during eyewitness testimony by wife of victim, where, from character of charge and nature of evidence, public morality would be injuriously affected. *Douglas v State* (Fla) 328 So 2d 18, cert den 429 US 871, 50 L Ed 2d 151, 97 S Ct 185.

Defendant in prosecution for rape was not denied public trial where court excluded public during testimony of prosecutrix. *Bivins v State* (Fla App D4) 313 So 2d 474.

Defendant in rape prosecution was not denied public trial by exclusion of persons other than those with "specific interest" from court during testimony of complaining witness. *People v Latimore*, 33 Ill App 3d 812, 342 NE2d 209.

Where defendant asserted that trial court erred in overruling his motion to exclude a group of high school students from trial because deceased victim was high school student 16 years of age, and presence of other high school students in courtroom could prejudice and inflame jury, it was held that while it is true that court may be cleared to prevent interference with or obstruction of due administration of justice, there was no evidence establishing that these high school students were guilty of any misconduct or attempt to influence jury, and refusal of court to exclude students was not abuse of discretion. *De Boer v State (Ind)* 182 NE2d 250.

Statute providing that general public should be excluded from all cases involving children did not apply to hearings in "adult branch" of juvenile court in actions against adults for contributing to delinquency of minors. *Johnson v Simpson (Ky)* 433 SW2d 644.

Exclusion of mother, brother, sister, and friend of the defendant from trial violated defendant's constitutional right to public trial. *Commonwealth v Marshall (Mass)* 253 NE2d 333 (citing annotation).

Exclusion of adult spectators, except relatives and members of the bar and press, solely on grounds of obscene nature of crime (sodomy) and anticipated testimony, violated defendant's constitutional right to public trial and was impliedly prejudicial. *State v Schmit (Minn)* 139 NW2d 800 (citing annotation).

Locking of courthouse doors for 30 minutes while motions were being presented to court to suppress illegally obtained evidence and to quash illegally obtained declaration did not violate defendant's right to public trial where courtroom was not actually clear. *Norwood v State (Miss)* 258 So 2d 756.

See *Riley v State (Nev)* 429 P2d 59, *infra* § 8.

Audible order directing sergeant-at-arms to clear the courtroom of all people except witnesses in prostitution prosecution was error, where intended to exclude defendant's friends and executed to exclude all except lawyers and members of the press, and prejudice would be presumed, even though no objection was made by defendant. *State v Haskins*, 38 NJ Super 250, 118 A2d 707.

In prosecution for possessing and selling heroin, decision of trial court to exclude pub-

lic while undercover officers were testifying was not erroneous or unconstitutional. *People v Eason*, 40 NY2d 297, 366 NYS2d 673, 353 NE2d 587.

Trial court did not err in excluding public from courtroom during display to jury of allegedly obscene film in suit for violation of obscenity statute. *People v Nicholas*, 35 App Div 2d 18, 312 NYS2d 645.

In prosecution for criminal sale of dangerous drug, in absence of unusual circumstances, reversible error was committed when court excluded public during testimony of undercover officer on ground that he was still engaged in similar activities in same "general area." *People v Richards*, 48 App Div 2d 792, 369 NYS2d 162.

Exclusion of public during testimony of police officers actively engaged in on-going drug investigations did not constitute denial of public trial in prosecution for criminal sale of controlled substance. *People v Daniel*, 49 App Div 2d 683, 370 NYS2d 746.

Trial court did not abuse discretion by refusing to allow defendant's father to remain in courtroom during testimony of undercover officer. *People v Gillespie (197)*, 58 App Div 2d 893, 396 NYS2d 890.

In prosecution for possession of sale of controlled substance, trial court committed reversible error in summarily closing courtroom during testimony of undercover police officer on request of district attorney where greater part of lengthy trial was held in private and request for hearing out of presence of jury had been made. *People v Boyd (1977)* 59 App Div 2d 558, 397 NYS2d 150.

In trial for multiple felonies including, *inter alia*, rape, defendant was not denied public trial by district attorney's seeking to exclude visiting group of high school students from courtroom prior to victim's testimony of sordid details of sexual assault where, pursuant to prosecutor's request, trial judge informed students' teacher of situation whereupon she voluntarily removed her class from courtroom. *Commonwealth v Hodge (1977 Pa Super)* 369 A2d 815.

See *Price v State (Tex Crim)* 496 SW2d 103, *infra* § 8 (citing annotation).

§ 4.3. [New] Information justifiably withheld from public domain.

Exclusion of public during testimony regarding profile used by airline personnel and United States marshals in detecting potential hijackers was proper and necessary to perpetuate the secrecy of the profile, since its value

might be thereto w
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§ 5. Distu

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might be destroyed if information relating thereto were accessible to the public at large. *U. S. v Slocum* (CA3 NJ) 464 F2d 1180.

In trial for possession of dangerous weapon by one attempting to board airliner, exclusion of public and defendant from courtroom during testimony of ticket agent, which pertained to confidential hijacking "profile," constituted harmful error where substantial amount of testimony was wholly unrelated to profile. *United States v Ruiz-Estrella* (CA2 NY) 481 F2d 723.

Exclusion of general public for relatively brief period during testimony of undercover narcotics officer did not infringe upon right to public trial of defendant where public interest in controlling illegal drug traffic and personal safety of witness demanded non-disclosure of officer's identity. *People v Garcia*, 51 App Div 2d 329, 381 NYS2d 271.

§ 5. Disturbance, disorder, etc. p. 1448.

Also recognizing inherent power to preserve order:

U.S.—*U. S. ex rel. Bruno v Herold* (CA2 NY) 368 F2d 187. *United States v Akers* (CA9 Or) 542 F2d 770.

Ala.—*Williams v State*, 57 Ala App 158, 326 So 2d 686, cert den 295 Ala 428, 326 So 2d 692.

Mass.—*Commonwealth v Bohmer* (Mass) 1978 Adv Sheets 316, 372 NE2d 1381.

N.Y.—*People v Outcalt*, 32 App Div 2d 971, 303 NYS2d 213.

People v Devine, 80 Misc 2d 641, 364 NYS2d 71.

Wash.—*State v Collins*, 50 Wash 2d 740, 314 P2d 660 (citing annotation).

Bailiff's refusal to permit persons to enter or leave courtroom during jury arguments by counsel was not denial of defendant's right to public trial, where condition existed only for short time and was quickly changed by court when advised of bailiff's action. *Snyder v Coiner* (CA4 W Va) 510 F2d 224.

Court's clearing courtroom of public near end of trial over defendant's objections was reversible error, though court offered to permit defense attorney to designate persons necessary for defense to remain, where only ground was disturbance outside courtroom. *Sirratt v State* (Ark) 398 SW2d 63.

See *Wilson v State* (Del Sup) 305 A2d 312, *infra* § 7.

Except in the case of persons customarily excluded during a trial, no one may be removed from courtroom unless he is orderly or

by overt acts attempts to influence jury or otherwise interferes with orderly functioning of courts. *State v Hashimoto* (Hawaii) 389 P2d 146.

Defendant's right to a public trial was violated when the trial justice excluded from the courtroom anybody connected in any way with the defendant's case. *People v Outcalt*, 32 App Div 2d 971, 303 NYS2d 213.

In prosecution for robbery with firearms, defendant's right to public trial was not violated where acquitted co-defendant and his wife were requested to leave courtroom during closing argument after they began crying. *Elrod v State* (Okla Crim) 527 P2d 208.

Order that doors of courtroom be locked during closing argument of prosecutor so that jury would not be disturbed, where no actual prejudice was shown, would not justify reversal. *State v Collins*, 50 Wash 2d 740, 314 P2d 660 (citing annotation).

§ 6. Open violence, retaliation against persons testifying, or threats thereof, p. 1449.

No denial of right to public trial occurred where trial judge had good reason to believe that defendant's family and friends were attempting to intimidate and harass witnesses and otherwise disrupt proceedings. *U. S. ex rel. Orlando v Fay* (CA2 NY) 350 F2d 967.

Where principal witness for state had been intimidated and was likely to be further intimidated by mere presence of certain persons so as to stultify orderly court proceedings, clearing the courtroom was well within judge's discretion. *U. S. ex rel. Bruno v Herold* (CA2 NY) 368 F2d 187.

Exclusion of spectators many of whom were hostile to witness, for short period during his testimony, was not error. *U. S. ex rel. Bruno v Herold* (CA2 NY) 408 F2d 125, cert den 397 US 957, 25 L Ed 2d 141, 90 S Ct 947.

See *United States v Eisner* (CA6 Ky) 533 F2d 987, cert den (US) 50 L Ed 2d 286, 97 S Ct 314, *infra* § 8.

In prosecution of two police officers for beating and assaulting arrested crime suspects, trial court did not abuse discretion in excluding three fully uniformed police officers from courtroom for fear their presence might intimidate jury. *United States v Rios Ruiz* (1978, CA1 Puerto Rico) 579 F2d 670.

See *U. S. ex rel. Bruno v Herold* (DC NY) 271 F Supp 491, *infra* § 8.

See *United States ex rel. Smallwood v La Valle* (DC NY) 377 F Supp 1148 (citing annotation), *infra* § 8, *affd* without op (CA2 NY)

508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Court's decision to bar public during testimony of undercover police officer, whose safety might have been endangered if his identity had been publicly exposed, was reasonable resolution of conflict between defendant's interest in public trial and state's interest in encouraging complete and honest testimony under conditions in which witnesses will not feel intimidated or embarrassed; defendant waived right to object by consenting to exclusion of public during testimony of informant. U. S. ex rel. Maisonet v La Vallee (DC NY) 405 F Supp 925.

Temporary exclusion from court of public and members of press during testimony of two of state's relatively minor witnesses during murder trial was not violation of defendant's Sixth Amendment right to public trial where such exclusion was to protect witnesses, who were found to have sincere fear of reprisals from testifying, and where duration of exclusion was minimal. *Butler v Smith* (DC NY) 416 F Supp 1151.

In murder prosecution trial court did not abuse discretion in sealing courtroom during testimony of two chief prosecution witnesses where witnesses in question were in fear of their lives and were reluctant to testify in courtroom attended by large audience of defendants' friends and relatives. *Perez v Metz* (1977, SD NY) 459 F Supp 1131.

Where only evidence in support of claimant's denial of public trial because several Negroes were not allowed to enter the courtroom during trial of Negro defendant was that following an objection by defendant's attorney in this connection the trial judge stated that he saw no vacant seat and overruled the objection, no error was shown. *Payne v State*, 226 Ark 910, 295 SW2d 312.

See *State v Poindexter*, 231 La 630, 92 So 2d 390, *infra*, § 8 (citing annotation).

Defendants were not deprived of open trial when public was excluded only during testimony of witness who feared for his life because of threats made against him and who would not otherwise testify. *People v Hagan*, 24 NY2d 395, 300 NYS2d 835, 248 NE2d 588, cert den 396 US 886, 24 L Ed 2d 161, 90 S Ct 173.

Where, 11 months after notorious international jewel thief was convicted of burglary and grand larceny, trial judge, without warning and at request of defense counsel, cleared courtroom and conducted two-hour closed sentencing hearing, allowing press to return to

hear sentence pronounced—15 years probation, and where sealed record established cogent and compelling reasons to support judge's decision to seal proceedings based on eminent personal peril to lives and safety of witnesses, trial court nonetheless erred in procedure followed by holding secret sentencing hearing first and only later holding hearing to receive protests from media and media's demand that record be unsealed; although public's right to be informed continued beyond trial itself and also applied to sentencing proceedings, error in instant case was cured by hearing held to receive protests from press. *Miami Herald Publishing Co. v State* (1978, Fla App D4) 363 So 2d 603.

Exclusion of public during testimony of undercover agent where witnesses in courtroom were potential targets of future investigations, thus posing threat to life of undercover agent, was proper and not unconstitutional. *People v Hinton*, 31 NY2d 71, 334 NYS2d 885, 286 NE2d 265 (citing annotation), cert den 410 US 911, 35 L Ed 2d 273, 93 S Ct 970.

In prosecution for aggravated battery trial court's temporary exclusion of "spectators" (which term apparently did not include members of press and bar) upon being advised by district attorney that next witness was afraid to testify in open court for fear of bodily harm, was not abuse of discretion or violation of defendant's constitutional rights. *Lowe v State* (1977) 141 Ga App 433, 233 SE2d 807.

Defendant was not deprived of his right to public trial in murder prosecution by court's exclusion of all persons other than parties, jury, and court personnel during testimony of one witness where witness was first deposed by defense counsel, during which deposition she expressed reluctance or refusal to answer questions for fear of defendant's relatives and friends. *Hackett v State* (1977, Ind) 360 NE2d 1000 (citing annotation).

Exclusion of public from trial was warranted where undercover police officers were still operating in general area in which drug traffic in question had taken place, and where barring of public was necessary for protection and safety of officers. *People v Rickenbacker*, 50 App Div 2d 566, 374 NYS2d 672.

Conviction for possession and sale of controlled substance was reversed where court had granted prosecutor's request for clearing of courtroom during testimony of undercover officer without holding hearing or making findings and upon little more than bare application and conclusory recital of necessity for

relief. *People v* 383 NYS2d 62

Trial court did in prosecution of dangerous drug testimony of agent's life. *People v* 582, 391 NYS2d 4

Prosecution is showing of need room during testimony of agent where agent was assigned to was still operating criminals and dealt during know he was had been serious past six months narcotic investigation which witness capacity were of was specifically narcotics case members of such prosecution would have testified manner if process excluded during Misc 2d 641, 304

In prosecution tory group assault and battery of co-conspirators execution witness not constitute public trial, was wife of defendant had given various trial phases spiracy, evidence witness, and and of Black witness to taken exclusion of defendant's testimony of right to public immediately correction of the 459 Pa 550, 334

Trial judge excluding public courtroom while testifying in that witness her life in 204 SE2d 17

relief. *People v Morales*, 53 App Div 2d 517, 383 NYS2d 620.

Trial court did not commit prejudicial error in prosecution for possession and selling of dangerous drug in excluding public during testimony of undercover agent where disclosure of agent's identity could have jeopardized his life. *People v Medina* (1977) 56 App Div 2d 552, 391 NYS2d 454.

Prosecution in drug case made satisfactory showing of need to exclude public from courtroom during testimony by undercover police agent where affidavit disclosed that witness was assigned to police narcotics section and was still operating actively in community, criminals and informants with whom witness dealt during performance of duties did not know he was police officer, testifying officer had been seriously wounded by firearm within past six months during course of duties, other narcotic investigations and prosecutions in which witness had participated in undercover capacity were still pending, trial courtroom was specifically designed for prosecution of narcotics cases as to make it likely place for members of general public "interested" in such prosecutions to be present, and officer would have testified in fearful and distracted manner if general public had not been excluded during testimony. *People v Devine*, 80 Misc 2d 641, 364 NYS2d 71.

In prosecution against member of revolutionary group for murder, conspiracy, and assault and battery with intent to kill, exclusion of members of Black Panthers group and of co-conspirator's wife on day when key prosecution witness was scheduled to testify did not constitute denial of defendant's right to public trial, where key prosecution witness was wife of another co-conspirator in case and had given inconsistent statements during various trial phases regarding knowledge of conspiracy, co-conspirator's wife had threatened witness, and presence of co-conspirator's wife and of Black Panthers might have caused witness to change testimony out of fear; mistaken exclusion by prosecutor of members of defendant's family did not constitute violation of right to public trial where situation was immediately corrected when brought to attention of trial court. *Commonwealth v Burton*, 459 Pa 550, 330 A2d 833.

Trial judge did not abuse his discretion in excluding public and all spectators from courtroom while confidential informer was testifying in narcotics prosecution on ground that witness's public appearance would place her life in jeopardy. *State v Gee*, 262 SC 373, 204 SE2d 727 (citing annotation).

§ 7. Overcrowding, p. 1449.

Court properly issued passes to spectators each day of trial, limiting number to seating capacity of courtroom, where court was informed prior to trial of possibility that there might be disorder in courtroom, and where court had reason to believe that large number of people might want to attend trial and might create considerable noise and confusion in building. *Wilson v State* (Del Sup) 305 A2d 312.

In disorderly conduct prosecution, although more specific and complete record should have been made with respect to trial court's ruling excluding from courtroom group of similarly charged demonstrators, such exclusion was not error where small courtroom could not accommodate overflow crowd present and where such overflowing was due to presence of such group. *People v Pearl*, 66 Misc 2d 502, 321 NYS2d 986.

§ 8. Prevention of emotional disturbance of persons testifying, p. 1450.

Also recognizing right to exclude to prevent emotional disturbance of witness:

Cal.—*Kirstowsky v Superior Court*, 143 Cal App 2d 745, 300 P2d 163 (citing annotation).

Conn.—*State v Purvis*, 157 Conn 198, 251 A2d 178, cert den 395 US 928, 23 L Ed 2d 246, 89 S Ct 1788.

La.—*State v Poindexter*, 231 La 630, 92 So 2d 390 (citing annotation).

Pa.—*Commonwealth v Knight* (Pa) 364 A2d 902 (citing annotation).

Commonwealth v Kobb, 238 Pa Super 62, 352 A2d 515 (rape victim); *Commonwealth v Hodge* (1977, Pa Super) 369 A2d 815.

In covering trials all news media are entitled to same rights as general public, but defendant on trial for specific crime is entitled to his day in court, not in stadium, or city or nationwide arena. *Estes v Texas*, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, supra § 2(d), holding further, in separate opinion of 3 justices, that it is common knowledge that television can work profound changes in behavior of people it focuses on.

See *Geise v U. S.* (CA9 Alaska) 262 F2d 151, reh den 265 F2d 659, supra § 4.

Trial court did not abuse discretion in excluding spectators other than accredited members of press during portion of testimony of one witness where judge asserted that witness had fear of courtroom and persons that might be in it, although better course would have been for trial judge to hold evidentiary hear-

ing price to deciding that there was sufficient reason to exclude spectators. *United States v Eisner* (CA6 Ky) 533 F2d 987, cert den (US) 50 L Ed 2d 286, 97 S Ct 314.

Where evidence failed to show waiver by or discussion with counsel or defendant prior to exclusion announcement, court erred in excluding public though judge was told that state's witness might not testify since he was in mortal fear of the "gang in the courtroom," many of whom were members of defendants' families who "leaned forward and grinned and grimaced," causing witness to tremble, turn white, and remain speechless; broad discretion of court in such cases is merely legal discretion to be exercised as a last resort. *U. S. ex rel. Bruno v Herold* (DC NY) 271 F Supp 491.

Defendant in homicide prosecution was not denied public trial in violation of his Sixth and Fourteenth Amendment rights, where trial judge excluded public (six spectators) from trial during entire testimony of state's principal witness, a 15 or 16-year-old pregnant girl, but only during her testimony, where exclusion order was based partly on concern for welfare of young expectant mother and her unborn child and partly for her own subjective fear of reprisal—whether reasonable or unreasonable—if she testified in public. *United States ex rel. Smallwood v La Valle* (DC NY) 377 F Supp 1148 (citing annotation), affd without op (CA2 NY) 508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Where witness, a penitentiary inmate, refused to testify unless other penitentiary personnel were excluded from courtroom, trial judge erred in denying such exclusion. *State v Poindexter*, 231 La 630, 92 So 2d 390 (citing annotation).

Clearing court of all but 2 reporters prior to rape victim's testimony when she lost her composure was not error where spectators were readmitted for balance of trial. *Riley v State* (Nev) 429 P2d 59.

See *People v Devine* 80 Misc 2d 641, 364 NYS2d 71, supra § 6.

In rape prosecution defendant was not deprived of constitutional rights or fair trial where judge excluded spectators from courtroom during testimony of victim, although victim was not of tender years. *Price v State* (Tex Crim) 496 SW2d 103 (citing annotation).

§ 9. Trial or part thereof at other than regular place or time, p. 1451.

Pretrial conference to determine whether

defendant is to be represented by counsel is not part of trial, so that holding of such conference in chambers, instead of in open court, does not deprive defendant of right to public trial. *Hayes v U. S.* (CA8 Mo) 296 F2d 657, cert den 369 US 867, 8 L Ed 2d 85, 82 S Ct 1033.

Moving to judge's chambers for purpose of hearing tape recordings, because of bad acoustics in courtroom, did not amount to improper deprivation where defense counsel agreed and there was no showing that public was actually excluded from chambers. *People v Cash*, 52 Cal 2d 341, 345 P2d 462.

Sentencing which took place in room designated as "lock-up" instead of "courtroom" was not illegal or unconstitutional where necessitated by defendant's own conduct and procedure was suggested by his own counsel. *Szukiewicz v Warden, Maryland Penitentiary*, 1 Md App 61, 227 A2d 47 (citing annotation).

Taking jury to small room from which public was excluded to permit them to listen to tape recording admitted in evidence, because of poor acoustics in court room, was reversible error. *Bonicelli v State* (Okla Crim) 339 P2d 1063.

Defendant was denied right to public trial as guaranteed by Sixth and Fourteenth Amendments where robbery trial was held in chambers behind closed doors, the public did not have freedom of access to chambers at time of trial, persons present in chambers were attaches of the court and not members of the public, and members of defendant's family, 1 of whom was ready to testify in his behalf, waited in courtroom for trial to begin, unaware that trial was being held. *Jones v Peyton*, 208 Va 378, 158 SE2d 179 (citing annotation).

§ 9.3. [New] Reprisal for violation of trial judge's guidelines.

Trial judge abused discretion by excluding press and public from trial as reprisal for contumacious behavior of press who published article concerning defendant's alleged underworld affiliations in violation of judge's guidelines, where it was apparent that closed trial would not prevent such articles. *Oliver v Postel*, 30 NY2d 171, 331 NYS2d 407, 282 NE2d 306.

§ 10. Waiver, p. 1452.

Also recognizing waiver:

Minn.—*State v Weigold*, 281 Minn 73, 160 NW2d 577.

Va.—*Caudill v* (citing annotation).

See *Geise v* supra, § 4.

In prosecution of obscene films where rights defendant's exclusion of public showing of films to object at trial. 327 F2d 378.

See *Aaron v* supra § 4, cert den 112, 96 S Ct 150.

See *U. S. ex rel. 271 F Supp 491*.

See *U. S. ex rel. NY* 405 F Supp

Waiver of right where defense at discretion to exclude crime were 10 years old, and to clearance. *Ward* 2d 69, rev'd 342 (Ala App) 348 S

Juvenile in Alaska Constitution open adjudication proceedings to allow choice with respect to trial may affect whether to object in respect to parent's child wanted. *Price* 487 P2d 27

Waiver of right to express waiver. *Cal* 2d 641, 342

Where defendant trial and requested testimony as to ground that he would be paid money if public discretion to exclude money but object to entire trial. 143 Cal App 2d annotation.

Waiver of right no showing of *Blanco* (Cal App 2d annotation).

Where counsel that counsel's witness, and

Va.—Caudill v Peyton (Va) 164 SE2d 674 (citing annotation).

See Geise v U. S. (CA9 Alaska) 365 F2d 639, supra, § 4.

In prosecution for conspiracy to transport obscene films in interstate commerce, any rights defendants may have had to object to exclusion of public from courtroom during showing of films was waived through failure to object at trial. U. S. v Cappello (CA2 NY) 327 F2d 378.

See Aaron v Capps (CA5 Ala) 507 F2d 685, supra § 4, cert den 423 US 878, 46 L Ed 2d 112, 96 S Ct 153.

See U. S. ex rel. Bruno v Herold (DC NY) 271 F Supp 491, supra § 8.

See U. S. ex rel. Maisonet v La Valle (DC NY) 405 F Supp 925.

Waiver of right to public trial resulted where defense attorney stated that court had discretion to clear courtroom, facts of sex crime were repulsive, alleged victim was eight years old, and where no objection was made to clearance. Wright v State (Ala App) 340 So 2d 69, rev'd (Ala) 340 So 2d 74, on remand (Ala App) 340 So 2d 80.

Juvenile is entitled to public trial under Alaska Constitution, and child therefore may open adjudicative hearings in juvenile proceedings to any individuals; where child's choice with respect to whether to have public trial may affect his rights, guardian ad litem may be appointed and court's discretion as to whether to exclude public exists only with respect to persons other than those whom the child wants present. RLR v State (Alaska) 487 P2d 27 (citing annotation).

Waiver may be by failure to object, no express waiver is necessary. People v Cash, 52 Cal 2d 841, 345 P2d 462.

Where defendant waived right to public trial and requested exclusion of public during testimony as to abnormal sexual practices on ground that because of emotional disturbance she would be unable to properly present testimony if public were present, trial judge had discretion to exclude public during her testimony but should not have extended exclusion to entire trial. Kirstowsky v Superior Court, 143 Cal App 2d 745, 300 P2d 163 (citing annotation).

Waiver would be assumed where there was no showing of objection in record. People v Blanco (Cal App) 339 P2d 906 (citing annotation).

Where counsel for codefendant requested that courtroom be closed for testimony of a witness, and defendant's counsel waived the

right to public trial for this limited purpose, defendant's right to public trial was not violated by failure to reopen courtroom when defendant was placed on stand, since counsel had failed to request that the courtroom be reopened immediately. People v Moreland, 5 Cal App 3d 588, 85 Cal Rptr 215.

Where limited available space necessitated that public be excluded from courtroom during jury selection so that policy requiring separation of witnesses and prospective jurors could be properly carried out, and defense attorney was notified of this procedure by bailiff and did not object thereto, defendant could not subsequently complain of this procedure as a denial of his right to public trial. Anderson v People, 176 Colo 224, 490 P2d 47, cert den 405 US 1042, 31 L Ed 2d 583, 92 S Ct 1316.

Where defendant filed motion to exclude public from proceedings to decide motion to suppress certain evidence which defense contended would be prejudicial if wrongfully brought to attention of jurors at trial, it was within discretion of trial judge to deny motion to exclude public based upon determination that no substantial likelihood of prejudice would result from such a disclosure. Stapleton v District Court of Twentieth Judicial Dist. (Colo) 499 P2d 310.

Failure to object to trial court's closure to spectators during fondling prosecution and absence of objection in motion for new trial or assignments of error preclude consideration on appeal. Dixon v State (Fla App) 191 So 2d 94.

Where, upon motion by prosecution to clear courtroom because of nature of witness' testimony, defense attorney indicated that he desired to have all of his client's constitutional rights protected, but filed no objection when motion to exclude was granted, such silence constituted waiver insofar as right to presence of other individuals was concerned. Marshall v State, 254 Ind 156, 258 NE2d 628 (citing annotation), reh den 261 NE2d 566.

Defendant could not complain that relatives and friends were not present at his public trial where he had not made known his desires that they attend, no request was made to the trial judge on the subject, and there was no saving of any exception. Commonwealth v Wells (Mass) 274 NE2d 452.

Where counsel for defendant agreed to exclusion of public during trial, he thereby voluntarily waived defendant's right to public trial. State v Blake (NH) 305 A2d 300 (citing annotation).

In prosecution for burglary where doors of

courtroom were locked during hearing on motion to suppress evidence at defendant's request and remained locked after hearing and during trial due to misunderstanding and without knowledge of court, defendant waived right to public trial where defense counsel made deliberate tactical decision not to inform court or to object to locked doors because he felt it was to defendant's advantage, defendant agreed with this, and defendant was later given chance to object if he did not agree, but failed to inform court of fact and did not object until after guilty verdict. *Martineau v Helgemoe* (1977, NH) 379 A2d 1040.

See *State v Haskins*, 38 NJ Super 250, 118 A2d 707, supra § 4.

Appellate division's holding that newspapermen did not have right to insist that trial be open to public where defendant had specifically asked that public be excluded therefrom, since to allow such right would deprive accused of all power to waive his right to public trial and thereby prevent him from taking course which he may believe best for his own interests was erroneous as constituting unwarranted censorship of the press where there was no showing by defendant that presence of public would present serious and imminent threats to integrity of his trial, and Appellate Division's order would be modified to indicate dismissal of newspapermen's suit solely on ground of mootness. *Oliver v Postel*, 30 NY2d 171, 331 NYS2d 407, 282 NE2d 306, mod'g 37 App Div 2d 498, 327 NYS2d 444.

Accused does not have absolute right to waive public trial, and it is within discretion of trial court, considering effect of adverse publicity or other prejudice to accused, to determine whether accused's application for private trial is appropriate. *Hansen v Kelley*, 38 App Div 2d 722, 329 NYS2d 609.

Notwithstanding defendant's waiver of right to public trial, both public and press were admitted in order to protect public's right to know what transpires during prosecutions. *People v Holder*, 70 Misc 2d 31, 332 NYS2d 933.

Order excluding public from part of aggravated murder trial was not prejudicial to defendant, and any error was considered waived where defense supported order, and it was made primarily to enable defense to obtain answer to question posed to prosecution witness on cross-examination. *State v Bayless*, 48 Ohio St 2d 73, 2 Ohio Ops 3d 249, 357 NE2d 1035.

Public trial was effectively waived by court-appointed counsel. *Commonwealth ex rel.*

Paylor v Cavell, 185 Pa Super 176, 138 A2d 246.

§ 11. Presumption of prejudice, p. 1454.

Also recognizing presumption of prejudice:

Iowa—*State v Lawrence* (Iowa) 167 NW2d 912 (citing annotation).

Defendant is not required to show actual prejudice where his right to public trial was violated over his timely objection. *Sirratt v State* (Ar.) 398 SW2d 63.

A showing of prejudice is not necessary for reversal of a conviction which is not the result of public proceedings. *Commonwealth v Marshall* (Mass) 253 NE2d 333 (citing annotation).

Violation of defendant's fundamental right to public trial by exclusion of public implies prejudice. *State v Schmit* (Minn) 139 NW2d 800 (citing annotation).

See *State v Haskins*, 38 NJ Super 250, 118 A2d 707, supra, § 4.

48 ALR2d 1462-1465

Liability of owner of wires, poles, or structures struck by airplane for resulting injury or damage.

Measure of damages for destruction of or injury to airplane. 73 ALR2d 719.

Validity and construction of statute imposing absolute liability for injury or damage occurring on ground or water below from the fall, flight, or ascent of aircraft, or from the fall of object therefrom. 81 ALR2d 1058.

Status of injured adult as trespasser on land not owned by electricity supplier, as affecting its liability for injuries inflicted upon him by electric wires it maintains thereon. 30 ALR3d 777.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident. 35 ALR3d 614.

Reservation—Development and protection of premises—By lessor. 3 Am Jur Legal Forms 2d, Aviation § 34:72.

27 Am Jur Proof of Facts 215, Light Airplane Takeoff Accidents.

8 Am Jur Trials 173, Airline Passenger Death Cases.

13 Am Jur Trials 557, Light Aircraft Accident Litigation.

22 Am Jur Trials 517, Helicopter Accident Litigation.

In damage suit for loss of airplane following collision with coast guard aerial span and

counterclaim for neither party, but each party Coast Guard and pilot's flying area could have El Paso Natural 343 F2d 145

Pilot's contributory negligence of existence of government's view of inspections. U.S. v W 72d 913.

Government's low elevation of any regular air traffic, and in failing to be liable for injury to low-flying helicopter. Power Administration 946.

There was question of utility company lines to warn of accident in favor of Weber v South 273, 497 P2d 11

Utility company pilot where utility respect to electrical transmission hazard to air traffic that poles are 98.6 and minimum no instrument private airstrip procedure required minimum altitude plane to strike in violation of safe flying laws. Inc. (La App 2d So 2d 279 and

Where power approach pattern not negligent with either party since owner was fortuitous case. Gunn v Edison App 42, 179 N.W.

Where student what appeared to be land struck by plane maintained by defendant

Digest of Opinion Sears, Roebuck & Co. sold Lloyd Fullman, Jr., a rifle and ammunition, but did so in violation of Del. Code Ann. tit. 24, §904 (Michie 1975). At the time of this sale, §904 required two "freeholders resident in the county wherein the sale is made" to identify any purchaser of a deadly weapon. Fullman, however, did not produce two Delaware freeholders for the purpose of positively identifying him. He merely showed a Delaware driver's license with his picture on it and completed a Federal Firearm Transaction Record, Form 4473.

Although the Delaware statute does not define "freeholder," that term is generally understood to mean an owner of real property. *Gebelin v. Nashold*, Del. Ch., 406A2d 279 (1979). During the course of a robbery, Fullman shot plaintiff Hetherton in the head, severely wounding him. Hetherton sued Sears alleging that the corporation was negligent in selling the weapons to Fullman without requiring that he be identified by two freeholders.

Sears challenges the constitutionality of §904, but Hetherton claims Sears has no standing to do so.

Quoting from *Baker v. Carr*, 369 U.S. 186, 204 (1962), the Supreme Court observed that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so urgently depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 85, at 99-100 (1968).

[Text] There is little question that Sears risks suffering injury in fact to an interest arguably within the zone of interest to be regulated by §904. As the district court wrote: "The statutory requirement which Sears is challenging here created for Sears a legal duty to require anyone purchasing a firearm from Sears to produce two freeholders who could identify the purchaser. Sears' failure to perform this duty is presently exposing it to a very large potential liability and could lead to criminal prosecution. Thus, the statute is clearly causing Sears injury in fact and Sears had a weighty personal interest in demonstrating that the law was unconstitutional." District Court Opinion at A-3. The existence of potential civil and criminal liability when combined with the statute's clear intention to regulate the vendors of deadly weapons assures us that Sears had presented the "concrete adverseness" envisioned by *Flast* and *Baker*. [End Text]

We now pass to the constitutional question.

[Text] The essence of Sears' argument is that the §904 requirement of two freeholder witnesses to the sale of a deadly weapon bears no rational basis to Delaware's legitimate interest in having purchasers positively identified and in deterring ex-felons, such as Fullman, who are not permitted to purchase firearms in Delaware, from buying guns. Hetherton counters that, since Delaware can totally ban the sale of firearms, non-freeholders are not being deprived of a right. Further, he contends the two freeholder requirement is rational in that it results in a more burdensome procedure for the purchase of weapons.

Hetherton's argument that Delaware has created no right to purchase firearms is misconceived. While it may be true that Delaware could ban the sale of all deadly weapons, it does not follow that the State, having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups. The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in the negative.

The Supreme Court has consistently looked askance at classifications based on the ownership of land. [End Text]

See, e.g., *Turner v. Fouche*, 396 U.S. 345 (1969), where the Court, using a rational relationship test, invalidated a Georgia statute limiting school board membership to freeholders. The Court found it difficult to envision legitimate reasons for distinguishing between property owners and non-property owners for purpose of school board membership.

[Text] It is clear to this court that Delaware's freeholder identification requirement is as anachronistic as the one in *Fouche*. As the lower court observed, many very responsible

citizens in Delaware do not own property. Hunting has become increasingly more popular and even necessary as the cost of real estate has grown prohibitive, particularly in urban areas, for the average wage earner. For Delaware to assume that only citizens with the wealth and/or interest in owning real property are capable of participating in the regulatory functions of §904 is simply not rational. A leaseholder is fully qualified to provide the needed identification and is capable of possessing the same "attachment to the community" as a freeholder. We therefore reject Hetherton's contention that the "right" of non-freeholders to serve as witnesses to the character of firearms purchasers is not unconstitutionally infringed upon by §904. We find the same irrationality present in the fact that Delaware residents who know only leaseholders would be barred by §904 from lawfully purchasing weapons.

Similarly, the argument that the freeholder requirement makes the buying of deadly weapons more burdensome does not meet the test of rationality. The state may have an interest in restricting the sale of firearms; however, it cannot do so by creating irrational and unconstitutional classifications. As noted earlier, there is no rational basis to conclude that a freeholder would take the responsibility of identifying weapons purchasers more seriously than a leaseholder. If Delaware desired to burden the sale of firearms by restricting them to persons who are non-felons or otherwise stable members of the community, it should have done so by a more narrowly tailored statute. [End Text]

We agree with the district judge's observation that there is no reason to believe "non-freeholders will be less willing than freeholders to attempt to protect their communities by helping to prevent those who should not possess firearms from purchasing them."

[Text] As a deterrent to our nation's escalating violence, certainly a legislature may prohibit the sale of handguns to individuals who have records such as Fullman and certainly they can impose substantial civil liability on gun sellers like Sears who breach the statutory obligations. * * * To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is no more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns. Thus, though Sears may have avoided legal liability here because of a technical deficiency in the statute, the human and moral issues raised by this case are deeply troubling and the issue of gun control is one certainly appropriate for further legislative inquiry and correction. [End Text] —Higginbotham, J. Judge Weis dissents, arguing that Sears lacks standing to challenge §904.

(*Hetherton v. Sears, Roebuck & Co.*; CA3, 6/25/81)

MASS. LAW REQUIRING PARTS OF SEX OFFENSE TRIALS TO BE CLOSED IS VALID

Law serves valid state interests in protecting young victims, encouraging them to testify. ▶90.70 ▶278.05

A majority of the Massachusetts Supreme Judicial Court finds nothing in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 27 CrL 3261 (1980), to undermine a state statute that, as construed in an earlier opinion, requires the closing of certain phases of sex offense trials involving youthful victims. The law is therefore upheld as a permissible effort by the state to protect such victims and encourage them to testify.

In its previous opinion, 401 NE2d 360 (1980), the court interpreted the statute to require closure only during the testimony of minor complainants, and to grant trial courts discretion to consider requests for exclusion of the public during additional segments of the trial as well. On this remand, ordered by the Supreme Court near the beginning of the 1980-81 Term, 28 CrL 4033 (1980), the

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majority poses three questions, focusing on the tradition of open proceedings, the effect of closure on the flow of information, and the state interests the statute is supposed to serve.

The closure authorized by this statute does not conflict with tradition to the same extent as that authorized by the statute involved in *Richmond Newspapers*, the majority first concludes. The courts have long taken special steps, including closure, to compensate for the difficulty many sex offense victims, especially minors, have in testifying. Secondly, the flow of information about sex offense trials in general will not be completely cut off, the majority notes, since the statute does not apply to cases in which the complaint is an adult. Finally, the majority says the interests advanced by the state are properly addressed by the legislature through a statute of general application rather than, as the newspaper argues, by the courts on a case-by-case basis.

Justice Wilkins concurs for the most part but finds the mandatory aspect of the statute objectionable. (*Globe Newspaper Co. v. Superior Court*, 6/30/81)

Digest of Opinion: The statute, G.L.c. 278, §16A, reads in relevant part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." In our prior opinion, we interpreted the statute to require closure only during the testimony of complainants who are minors and to grant trial courts discretion to consider requests to exclude the public from additional segments of the trial. The Supreme Court vacated our decision and remanded the case for reconsideration in light of *Richmond Newspapers*.

The *Globe* does not deny that there are instances where a minor victim may be psychologically unable to testify if confronted with a large group of spectators, or if the minor is aware that the testimony will become a matter of wide public knowledge. But the *Globe* says such a determination can be constitutional only if made in a case-by-case manner after a hearing. Additionally, the paper asserts that the standards set forth in the first opinion do not give adequate weight to the interests of the press and the public.

[Text] To test the mandatory closing requirement of G. L. c. 278, §16A, against the standard of *Richmond Newspapers* requires a threefold inquiry: (1) Does the closing of the testimony of the minor victim of a sexual assault violate the same tradition of open proceedings as the closing of an entire murder trial; (2) to what extent does the restriction impede the flow of information necessary to the functioning of democratic institutions; (3) are there substantial State interests underlying the statute, and if there are, can they be furthered by more tightly drawn regulation that will intrude to a lesser degree on the constitutionally protected interests of the press and public? [End Text]

The tradition of open trials has long been a part of the common law of this commonwealth, but there is at least one notable exception. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult. See e.g., *Latimore v. Siclaff*, 561 F.2d 91, 21 CrL 2530 (CA7 1977). It is no longer possible to justify such closings as attempts to protect the public from offensive information. But more typically the motivation has been to overcome the difficulty the victim may have in publicly testifying about the details of such crimes. Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial. A majority of the courts have upheld decisions to close parts of trials when a minor victim of a sexual assault is testifying.

Under the statute in question, courtroom testimony of minors who are the victims of sexual assaults cannot be the subject of contemporaneous reporting by members of the press. But closure is not automatic when the victim is an adult, so the public will be able generally to observe the judicial system dealing with sexual assault charges.

The question we must resolve is whether the genuine state interests furthered by the statute justify this impact on First Amendment interests. *Globe* identified the state interests as: (a) to encourage minor victims to come forward to institute complaints and give testimony; (b) to protect minor victims from public degradation, humiliation, demoralization, and psychological damage; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice; and (e) to preserve evidence and obtain just convictions.

We do not agree with the newspaper that a balancing of state interests against First Amendment rights is permissible only if undertaken on a case-by-case basis, and we perceive no such holding in *Richmond Newspapers*.

[Text] We believe that the Legislature, a coordinate branch of government, has power to act. We note additionally that, by their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial. Implicit also in the *Globe's* argument is that a State Legislature is without power to act to protect substantial State interests in the context of such trials. We do not believe *Richmond Newspapers* goes that far . . . and we are not disposed to reach such a conclusion. [End Text]

Nor do we agree that the statute is "underinclusive" because of its failure to prevent revelation of the victim's name. The statute is aimed at balancing the defendant's Sixth Amendment rights and the public's right to know against the minor victim's right to minimal harm in the process of testifying and the commonwealth's interests. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific state interest in protecting minors. This interest permits the state to protect juvenile offenders by closed hearings; it would be anomalous if the legislature were held to lack the power to protect juvenile victims of crime.

[Text] The statute, as it affects the testimony of minor victims, is fairly characterized as an attempt to reduce possible harm to a vulnerable group of individuals. Both precedent and empirical research support the Commonwealth's position that this concern is genuine and well-founded. . . . Logic and history indicate that the method chosen by the State will further this goal, while making increased reporting of sexual assaults more likely.

Balanced against this must be the impact that the closing of this testimony has on the public's knowledge about these trials. Although there is some temporary diminution of information, we cannot say that *Richmond Newspapers* requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims. [End Text] — Lincos, J.

Concurrence: I agree with most of what the court has said. But I am not certain that the mandatory closing of a trial of a case involving a minor victim of a sex crime during his or her testimony is constitutionally permissible without specific findings by the judge that the closing is justified by overriding or countervailing interests of the commonwealth. I would not

foreclose the judge from concluding, on proper findings, that the trial should be entirely public — Wilkins, J
(Globe Newspaper Co. v. Superior Court; Mass. Sup. Jud. Ct., 6/30/81)

BOSTON'S LICENSING SCHEME FOR "ADULT THEATERS" INVALID IN PART

One criterion for denial suffers from unconstitutional vagueness. ▶254.45

A Boston ordinance used to deny licenses to peep-show operators in the city's adult entertainment district or "Combat Zone" is unconstitutional in part, the U.S. Court of Appeals for the First Circuit says. Furthermore, the licensing denials involved in the present case are suspect despite the licensing authority's ostensible reliance on a provision that the court finds acceptable.

The ordinance provides in part that a license may be denied if its issuance would create a nuisance or "endanger the public health, safety, or order" or "unreasonably increasing" pedestrian traffic or noise, or by "increasing the incidence of disruptive conduct." While the "disruptive conduct" section skirts the edge of vagueness, these three sections are acceptable under First Amendment standards, at least on a facial analysis.

However the ordinance also provides for denial if a license would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." This standard is purely subjective and open-ended, with the result that the licensing authority has unbridled discretion. Where First Amendment interests are at stake, such an ordinance cannot be upheld.

The licenses here were denied on the basis of not only the fourth criterion but also the "disruptive conduct" section. However, the court perceives a considerable factual basis for the applicants' claim that the licensing authority did not really evaluate the potential for disruption but, instead, simply denied the licenses in order to pave the way for the applicants' eviction and the eventual redevelopment of their lessor's building. The district court must evaluate this claim on remand, with particular attention to the protection of the applicants' First Amendment rights. (Fantasy Book Shop, Inc. v. City of Boston, 6/16/81)

Digest of Opinion: Boston's zoning restricts so-called adult uses to a single downtown adult entertainment district, popularly known as the "Combat Zone." All "theatrical exhibitions, public shows, public amusements and exhibitions of every description" are required to obtain a license before they may operate for pay. This licensing requirement has been enacted pursuant to a 1979 Massachusetts statute. As reenacted, the statute makes it a crime to operate a public amusement for pay without a license, and delegates the power to grant or deny licenses to local governments. In material part, the statute provides that: "[t]he mayor or selectmen shall grant such license or shall deny such license upon a finding that issuance of such license would lead to the creation of a nuisance or would endanger the public health, safety or order by: (a) unreasonably increasing pedestrian traffic in the area in which the premises are located or (b) increasing the incidence of disruptive conduct in the area in which the premises are located or (c) unreasonably increasing the level of noise in the area in which the premises are located." The city ordinance quotes this statute but adds a fourth criterion, (d), allowing denial of a license that would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." The ordinance

also adds a general condition providing that "no application shall be denied if the anticipated harm is not significant or if the likelihood of its occurrence is remote."

This action was brought by three adult book stores that offer coin-operated motion pictures whose operation is within the scope of the ordinance. Their license applications were denied after hearings at which virtually all testimony focused on nearby residents' objections to the activities in the Combat Zone as a whole. Other testimony, offered by organizations interested in purchasing and redeveloping the building in which the stores operated, emphasized the importance of redevelopment to the community's financial well being and asserted that the continuance of the applicants' activities would be incompatible with that redevelopment. Appellee White, the city's mayor, has publicly stated his intention to eliminate the Combat Zone as a whole.

Prevost, director of the licensing office, denied the applications in letters that closely tracked the second and fourth criteria of the ordinance. She also asserted that "the anticipated harm is significant and the likelihood of its occurrence is not remote."

On this appeal from the denial of the applicants' request for injunctive or declaratory relief, we first address their claim that the ordinance is an invalid prior restraint. While there is a heavy presumption against the validity of prior restraints on First Amendment protected activities, a regulation directed primarily at conduct or noncommunicative aspects of protected expression is permissible, despite an incidental prior burden on expression, if it is justified by sufficiently strong permissible government interests. U.S. v. O'Brien, 391 U.S. 367, 377 (1968). We think this ordinance is not per se impermissible as a prior restraint under the O'Brien test.

[Text] First, a law requiring the licensing of routine commercial operations in an attempt to limit noise, traffic and disruption is clearly within a state's constitutional power. Second and third, those interests may well be said to be important, and are in themselves entirely unrelated to the suppression of expression. Finally, since the interests thus defined require regulation of public amusements whose content is within the First Amendment no less than they require regulation of any other public amusements, and since the market for coin-operated adult films as a whole is "essentially unrestrained", the regulation's inclusion of the latter is not broader than is essential to the furtherance of those interests. [End Text]

The applicants next claim that this sort of licensing scheme must provide various safeguards before any decisions denying the license may be given effect, including adequate administrative procedures, licensor-initiated judicial review, and prompt appellate review of that decision. While the cases they rely on did not involve facially content-neutral regulations, they argue that the safeguards are necessary because the ordinance has a content-specific effect. The defendants, on the other hand, argue that any positive correlation between the stated criteria of noise, traffic, and disruption, on the one hand, and a particular kind of film content, on the other, is purely accidental.

We think that where the ordinance has both facially neutral criteria and effectively non-neutral impacts, the full panoply of procedural safeguards do not apply unless a rejected applicant can demonstrate that, either in general or in a particular case, the neutral criteria asserted serve as a mere pretext for what were in fact content-directed decisions. Absent such a showing, a statute must be accepted as a valid police power/land use regulation not directly implicating First Amendment values. Therefore such a statute need not provide for prior licensor-initiated judicial review. However, the regulation must provide for adequate administrative procedures, including notice and a hearing, and expeditious decision by the administrator, along with the availability of prompt judicial review of a denial and appellate review of that decision. We see no reason to conclude that the licensing scheme here is procedurally deficient.

In addition, a party asserting that facial neutrality is a mere ruse for de facto content discrimination must be given an opportunity to prove that claim. Regulation turns on the inquiry into the substantive criteria. In this case, we find the first three criteria acceptable but the fourth impermissibly vague.

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P. 1118

CRIMINAL DEFENDANT HAS SIXTH AMENDMENT RIGHT TO
PHYSICALLY CONFRONT WITNESS AT VIDEO-TAPED
DEPOSITION

United States v. Benfield, 593 F.2d 815
(8th Cir. 1979)

In *United States v. Benfield*¹ the Eighth Circuit Court of Appeals clarified the application of the sixth amendment's confrontation clause² to a Rule 15 video-taped deposition³ used in lieu of deponent's personal appearance⁴ at a federal criminal trial.

1. 593 F.2d 815 (8th Cir. 1979).

2. U.S. CONST. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (emphasis added).

3. FED. R. CRIM. P. 15 provides in relevant part:

Depositions

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . .

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. . . . The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(e) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. . . .

4. FED. R. CRIM. P. 15(e), *supra* note 3, also allows the use of a deposition at trial as sub-

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5. 593 F.2d at 817.

6. *Id.* 18 U.S.C.

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The government charged Russell Benfield in a four-count indictment⁵ with the federal crime of misprision of the kidnapping of Patricia Cady.⁶ Several months after the kidnapping, but before the trial, Cady developed psychiatric problems resulting in her hospitalization and necessitating two trial continuances.⁷

Subsequently, the government filed a request to take a video-taped deposition of Cady's testimony and, at the hearing on that request, her psychiatrist testified that Cady's psychiatric problems were directly related to her kidnapping.⁸ He urged that if she must testify, the surroundings be less stressful than those of a courtroom and that she not be required to face Benfield.⁹ Granting the government's motion for a deposition, the trial court ordered that Benfield could be "present at the deposition but not within the vision of Mrs. Patricia Cady."¹⁰ Benfield, without Cady's knowledge, monitored her deposition from a separate room and, by sounding a buzzer, was able to interrupt the questioning

stantive evidence if "the witness gives testimony at the trial or hearing inconsistent with his deposition." This use of the deposition was not at issue in *Benfield* and the court did not discuss it. *But see California v. Green*, 399 U.S. 149, 159 (1970) (if witness testifies at trial, witness' prior statement is admissible even if not subject to confrontation when made, as long as defendant is assured of effective cross-examination at trial). *Accord*, *Nelson v. O'Neil*, 402 U.S. 622, 626-27 (1971). *See generally* *Graham, Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 *MICH. L. REV.* 1565 (1977).

5. 593 F.2d at 817.

6. *Id.* 18 U.S.C. § 4 (1976) provides:

Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

7. 593 F.2d at 817 & n.3. Following her rescue by law enforcement officers, Cady participated in a news conference and press interviews. Her subsequent illness, however, left her unable to cope with crowd situations or work. *Id.*

8. *Id.* at 817.

9. *Id.*

10. *Id.* FED. R. CRIM. P. 15(b), *supra* note 3, allows the trial court to fix the terms upon which the defendant may be present at the deposition if the defendant is not in custody. The court of appeals noted a possible equal protection problem because Rule 15(b) seems to allow greater restrictions upon the defendant's presence at a deposition when the defendant is not in custody than when he is in custody. Additionally, the trial court's conditional order for a deposition may have violated Rule 15(d), *supra* note 3, which provides that "the scope and manner of examination and cross-examination [at the deposition] shall be such as would be allowed in the trial itself." The court of appeals did not resolve these questions because the parties failed to argue them or sufficiently develop them in the appellate record. 593 F.2d at 820 n.7.

to confer with his counsel outside the deposition room.¹¹

The trial court admitted the video-taped deposition as substantive evidence against Benfield and allowed it to be shown to the jury.¹² Benfield was convicted and sentenced to two years in prison.¹³ The Court of Appeals for the Eighth Circuit reversed, remanded, and *held*: The sixth amendment's confrontation clause assures the active participation of the accused at all stages of his criminal trial, including at a deposition.¹⁴ Accordingly, in the absence of either a face-to-face meeting between defendant and witness or a showing that defendant had waived, forfeited, or lost by necessity his constitutional right of confrontation, the procedure that limited defendant's participation to monitoring the video-taped deposition and conferring with his attorney outside the deposition room after sounding a buzzer, without the deponent's knowledge, was unconstitutional.¹⁵

The sixth amendment guarantees the criminally accused the right to confront the witnesses against him.¹⁶ In *Mattox v. United States*¹⁷ the

11. 593 F.2d at 817. Benfield's lawyer was allowed to cross-examine Cady at the deposition. *Id.*

12. *Id.* at 817, 822. F.R.D. R. EVID. 804(a)(4) (applicable to F.R.D. R. CRIM. P. 15 deposition proceedings through Rule 15(c), *supra* note 3) defines "unavailability as a witness" to include situations in which the witness "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Benfield argued that the video-taped deposition's admission was improper because the government had failed to demonstrate the unavailability of Cady at the time of trial. See Brief for Appellant at 39-42. The court of appeals conceded that the government's showing of Cady's unavailability at trial was "marginal" because the government had relied passively on the failure of Cady's psychiatrist to inform it of an improvement in Cady's condition. Nevertheless, the court did not reverse Benfield's conviction on this ground, commenting that "[a]n additional showing of the witness' mental condition and availability on the trial date would have been a much better practice." 593 F.2d at 817 n.4. See also note 41 *infra*.

13. 593 F.2d at 816-17.

14. *Id.* at 821.

15. *Id.* at 817, 820-22.

16. See note 2 *supra*. The Supreme Court declared the right of confrontation fundamental and applicable to the states in *Pointer v. Texas*, 380 U.S. 400 (1965), *overriding* *Stem v. New York*, 357 U.S. 156, 195-96 (1953), and *West v. Louisiana*, 194 U.S. 258, 264 (1904). For analyses testing rules of evidence by the standard of due process of law, see *Chambers v. Mississippi*, 410 U.S. 284, 294-303 (1973); *Dutton v. Evans*, 400 U.S. 74, 96-100 (1970) (Harlan, J., concurring); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); *In re Oliver*, 333 U.S. 257, 273 (1948). See generally Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 COSS. L. REV. 529 (1974); Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *The Burger Court and the Confrontation Clause: A Return to the Fair Trial Rule*, 7 J. MAR. L. PRAC. & PROC. 136 (1973).

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Supreme Court noted that although the defendant's right of confrontation normally includes a face-to-face meeting with the witness and an opportunity to subject the witness to cross-examination,¹⁸ these constitutional safeguards must on occasion yield to "considerations of public policy and the necessities of the case."¹⁹ After balancing the interests of the defendant and the public, the Court held that the testimony of a now-deceased witness at defendant's earlier trial on the same charge was admissible at defendant's retrial.²⁰

Following *Mattox*, the Court repeatedly defined the essential elements of the confrontation clause as physical confrontation and cross-examination.²¹ In *Douglas v. Alabama*,²² however, the Court expressly stated that physical confrontation is not an indispensable part of the constitutional right.²³ Thereafter in *California v. Green*,²⁴ the Court omitted physical confrontation from its list of attributes of the confrontation clause.²⁵ The most recent decisions of the Supreme Court inter-

17. 156 U.S. 237 (1895).

18. "The substance of the constitutional protection is preserved to the prisoner 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." *Id.* at 244.

19. *Id.* at 243. See notes 38-42 *infra* and accompanying text.

20. 156 U.S. at 243-44.

21. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) ("the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment"); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (right of confrontation was "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him"); *Kirby v. United States*, 174 U.S. 47, 55 (1899) (defendant has trial right to confront witnesses "upon whom he [the accused] 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").

22. 380 U.S. 415 (1965).

23. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418. See also *Bruton v. United States*, 391 U.S. 123, 127-28 (1968); *Brookhart v. Janis*, 384 U.S. 1, 3 (1966); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

24. 399 U.S. 149 (1970).

25. 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. (citation omitted).

Id. at 158.

The Supreme Court has alluded to the demeanor aspect of confrontation on several occasions. See, e.g., *Barber v. Page*, 390 U.S. 719, 725 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). But see *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 115 (1970) (in light of the

preting the confrontation clause dwell on the defendant's right to effective cross-examination²⁶ and refer to physical confrontation only incidentally.²⁷

Despite the Court's conflicting statements about the requisites of confrontation,²⁸ it has emphasized the importance of the constitutional

holding in *California v. Green* allowing the admission into evidence of prior recorded testimony of a witness testifying at trial, and the consequent denial of the factfinder's opportunity to observe the witness' demeanor when he was giving his earlier testimony, "the factfinder's observation of the witness' confrontation with the defendant is not constitutionally required" (citations omitted).

26. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

27. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))).

28. See notes 17-27 *supra* and accompanying text. The result of the Court's conflict is exemplified by the confusion within the Fifth Circuit. Compare *Caamal Zone v. P. (Pinto)*, 590 F.2d 1344, 1352 (5th Cir. 1979) ("cross-examination is the essential right secured by the confrontation clause"), with *United States v. Amaya*, 533 F.2d 188, 190 (5th Cir. 1976) ("[t]he primary object of the confrontation clause is to permit personal examination and cross-examination of the witness by the defendant"), *cert. denied*, 429 U.S. 1101 (1977).

The documentary history of the sixth amendment sheds little light on the exact meaning of the confrontation clause. See generally *California v. Green*, 399 U.S. 149, 174-79 (1970) (Harlan, J., concurring) and sources cited therein.

Some commentators believe that the confrontation clause was designed to prevent the kind of abuse that characterized the trial of Sir Walter Raleigh in England in 1603. Raleigh was convicted and later executed for treason, based upon depositions and *ex parte* affidavits, with no opportunity to call his own witnesses or cross-examine those adverse to him. See *United States v. Payne*, 492 F.2d 449, 457-65 (4th Cir.) (concurring and dissenting opinion), *cert. denied*, 419 U.S. 876 (1974); F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 104-06 (2d ed. 1969); 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 216-29 (1926); F. J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 333-37 (1883); Stephen, *The Trial of Sir Walter Raleigh*, in 2 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 172-87 (4th ser. 1919); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959).

Before the Bill of Rights was added to the Constitution, a delegate at the Massachusetts convention objected to the lack of protections afforded the criminally accused. The nature of his arguments ultimately proved persuasive:

Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.

It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not . . .

The mode of trial is altogether indetermined: whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.

These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges . . .

On the whole, when we fully consider this matter, and fully investigate the powers

right as a whole. *States*³⁰ announced trial for homicide expressly consented. Diaz was awarded cross-examination error in permitting the Court expand right to confront

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30. 223 U.S. 442

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455. A

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right as a whole by limiting the exceptions thereunder.²⁹ *Diaz v. United States*³⁰ announced one such exception. On two occasions during his trial for homicide, defendant Diaz voluntarily left the courtroom, expressly consenting to the trial's continuation in his absence.³¹ While Diaz was away, two adverse witnesses testified against him and were cross-examined by his attorney.³² In ruling that the trial court did not err in permitting the trial to proceed despite the defendant's absence, the Court explained that a defendant could affirmatively waive his right to confront witnesses against him.³³

granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

(emphasis in original). 2 J. ELLIOT DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-11 (reprint 1974) (1st ed. 1836). See also I B. SCHWARTZ, THE BILL OF RIGHTS 505-10 (1971).

Many state constitutions or statutes expressly guarantee face-to-face meetings between defendant and the witnesses against him, thereby resolving any ambiguity that might otherwise exist concerning the physical aspect of confrontation. See, e.g., ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; HAWAII REV. STAT. § 801-2 (1976); ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. BILL OF RIGHTS § 10; MASS. CONST. pt. I, art. 12; MASS. ANN. LAWS ch. 253, § 5 (Michie/Law. Co-op 1968); MICH. COMP. LAWS § 763.1 (1970); MINN. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.D. CENT. CODE ANN. § 29-01-06 (1974); OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TERN. CODE ANN. 40-2405 (1975); WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

29. See notes 30-42 *infra* and accompanying text.

Consider the related problem of determining under what circumstances the right of confrontation is *not invoked*, whereby the question of the scope of the exceptions to confrontation is not reached. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (defendant not entitled to accompany jury at view of crime scene); *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911) (notes of trial judge and clerk pertaining to conduct of trial and supplementing appellate record not subject to confrontation); *Meadows v. New York*, 426 F.2d 1176, 1184 (2d Cir. 1970) (right of confrontation does not entitle accused to discovery of evidence that is not ultimately introduced by prosecution at trial), *cert. denied*, 401 U.S. 941 (1971); *United States v. Polisi*, 476 F.2d 573, 579 (2d Cir. 1969) (right of confrontation does not compel prosecution to call particular witnesses); *Eberhart v. United States*, 262 F.2d 421, 422 (9th Cir. 1958) (same); *United States v. Johnson*, 129 F.2d 954, 959 (3rd Cir. 1942) (defendant may be excluded from courtroom during argument on question of law), *aff'd on other grounds*, 318 U.S. 189 (1943); *Curtis v. Rives*, 123 F.2d 936, 938 (10th Cir. 1941) (right of confrontation does not compel prosecution to call particular witnesses).

30. 223 U.S. 442 (1912).

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455. *Accord*, *Taylor v. United States*, 414 U.S. 17, 20 (1973). Earlier Supreme Court opinions had implied that no aspect of a criminal trial could be held in a defendant's absence. See, e.g., *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial"); *Hopt v. Utah*, 110 U.S. 574, 579 (1884) ("[t]hat which the law makes essential in

The Supreme Court went further in *Illinois v. Allen*.³⁴ During his trial for robbery, Allen continually disrupted the trial despite judicial warnings to behave.³⁵ The Court held that defendant, as a result of his misconduct, forfeited³⁶ his right of confrontation and that the decision to remove him and proceed with the trial in the presence of his attorney

proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused").

Cf. *Brady v. United States*, 397 U.S. 742, 748 (1970) ("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" (footnote omitted)); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). See also *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (accused may waive right of confrontation by pleading guilty); *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959) (when defendant admitted truth of state attorney's statements of details of crime and of defendant's criminal record, defendant implicitly waived right of confrontation on those statements); *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973) (defendant may stipulate to admission of evidence and thus waive right to confront source of evidence), *cert. denied*, 417 U.S. 948 (1974).

34. 397 U.S. 337 (1970).

35. *Id.* at 339-41. Allen was readmitted to the courtroom on several occasions, and the judge offered Allen the option of remaining at the trial if Allen would promise good behavior. Allen replied, "I'll promise you shit." Appendix to Petition for Certiorari at 38, *Illinois v. Allen*, 397 U.S. 337 (1970), cited in *The Supreme Court, 1969 Term, supra* note 25, at 91 n.6.

36. Compare Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 U. Colo. L. REV. 171, 173 (1964) (arguing that repeated misconduct by defendant after warning amounts to voluntary waiver), with PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, ADVISORY COMMITTEE NOTE TO FED. R. CRIM. P. 43(b) (1978) (discussing proposed change in language concerning exceptions to requirement that defendant be present at every stage of his criminal trial).

Subdivision (b) is amended so as to deal with the situations included therein in terms of forfeiture rather than waiver. Although waiver terminology is commonly found in the cases, a defendant who absents himself or who engages in disruptive conduct does not really "agree" to be tried in his absence or "intentionally relinquish" his right to be present. Rather he loses or forfeits his right to be present by way of a penalty for violating certain obligations or conditions. This is more than a matter of semantics. In *Illinois v. Allen*, holding that a disruptive defendant may be excluded from his trial, the Court did not conclude that the defendant had waived his right to be present, but rather that [sic] he "lost his right" by virtue of his behavior "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." [397 U.S. at 346.] The court of appeals had reached the opposite result by analyzing the case in terms of waiver and concluding that so long as Allen insisted upon his right to be present, which he clearly did, he could not be held to have waived it because "the insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver." 413 F.2d 232, 235 (7th Cir. 1969).

(citations omitted).

See also Note, *Illinois v. Allen: The Unruly Defendant's Right to a Fair Trial*, 46 N.Y.U.L. REV. 120, 132-34 (1971); 22 S.D. L. REV. 447 (1977); 28 U. PITT. L. REV. 433, 455 (1967).

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The Supreme Court elucidated the final exception to the right of confrontation—the necessity exception—in *Mancusi v. Stubbs*.³⁸ Defendant Stubbs claimed that a Tennessee court, in retrying him for murder, had violated his constitutional right of confrontation by admitting the testimony of a witness at his previous trial.³⁹ The government argued that the witness, who had moved to Sweden before the retrial, was unavailable. Holding that the witness' testimony at the first trial bore "sufficient indicia of reliability,"⁴⁰ the Supreme Court ruled that the Tennessee court, after finding that the witness was, in fact, unavailable⁴¹ to testify at the second trial, had properly admitted the testimony

37. 397 U.S. at 343. With its strong emphasis on defendant's misbehavior, the forfeiture exception to the right of confrontation has been limited to extreme cases of misconduct by the accused. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (defendant who voluntarily keeps a witness from testifying cannot insist on right of confrontation); *United States v. Carlson*, 547 F.2d 1336, 1359-60 (8th Cir. 1976) (witness' prior grand jury testimony held admissible despite absence of confrontation with defendant because defendant's intimidation of witness caused witness' unavailability at trial), *cert. denied*, 431 U.S. 914 (1977); *United States v. Mayes*, 512 F.2d 637, 648-51 (6th Cir.) (defendant who brings about denial of confrontation in furtherance of his own interests may not complain of violation of his constitutional rights), *cert. denied*, 422 U.S. 1008 (1975), *cf.* *Parker v. Gladden*, 385 U.S. 263 (1966) (per curiam) (bailiff's misconduct violated defendant's right of confrontation); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965) (prosecutor's misconduct violated defendant's right of confrontation); *State v. Collins*, 265 Md. 70, 78-79, 288 A.2d 163, 168 (1972) (defendant's absence, through no fault of his own, at deposition of witness violated defendant's sixth amendment right of confrontation); *Carlson, Argument to the Jury and the Constitutional Right of Confrontation*, 9 *CRIM. L. BULL.* 293 (1973) (if prosecutor refers to evidence outside the record in his summation, burden should be on prosecution to establish that error was harmless). *See also* *Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another Case*, 8 *CRIM. L. BULL.* 99, 139 (1972) ("[a] defendant who murders a witness ought not be permitted to invoke the right of confrontation to prohibit the use of his accusation").

38. 408 U.S. 204 (1972).

39. *Id.* at 209. This case arose after Stubbs was convicted of a felony in a New York state court. In his habeas corpus petition, Stubbs alleged that because his earlier Tennessee conviction was unconstitutional, the New York state court could not use the Tennessee conviction as a predicate for a harsher punishment under New York's second offender laws. *Id.* at 205.

40. 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," *Dutton v. Evans*, . . . [400 U.S. 73, 89 (1970)], and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green*, . . . [399 U.S. 149, 161 (1970)]. 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" referred to in *Dutton*.

408 U.S. at 213.

41. *Compare* *United States v. Rogers*, 549 F.2d 490, 498-502 (8th Cir. 1976) (witness who testified to memory lapse and invoked fifth amendment privilege was not "unavailable" at trial),

into evidence at Stubb's retrial.⁴²

The necessity exception to confrontation is reflected in Rule 15 of the Federal Rules of Criminal Procedure.⁴³ Under Rule 15 deposition evidence is admissible at trial⁴⁴ if the deponent is unavailable to testify.⁴⁵

cert. denied, 431 U.S. 918 (1977), with *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976) (witness who testified to lack of memory concerning material portion of subject matter of his prior testimony was "unavailable" at trial), *cert. denied*, 429 U.S. 1101 (1977), and *United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971) (declarant who refused to take oath and made it clear that he would not testify was "unavailable" at trial), *cert. denied*, 410 U.S. 984 (1973).

See generally FED. R. EVID. 804(a), defining "unavailability as a witness" as including situations in which the witness

- (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

- (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.

But see *Barber v. Page*, 390 U.S. 719, 722-25 (1968) (state must make good-faith effort at obtaining attendance of witness at trial before court may declare witness unavailable); *Motes v. United States*, 178 U.S. 458, 467-74 (1900) (witness' prior testimony inadmissible because negligence of prosecution caused declarant's absence at trial); *United States v. Lynch*, 499 F.2d 1011, 1022-23 (D.C. Cir. 1974) (party offering out-of-court statement carries burden of demonstrating unavailability of declarant); *but cf.* *United States v. Bell*, 500 F.2d 1287, 1290 (2d Cir. 1974) (trial court's unavailability ruling reviewable only for abuse of discretion).

See generally *Symposium on the Proposed Federal Rules of Evidence: Part I*, 15 WAYNE L. REV. 1076, 1101-06 (1969); Note, *The Unavailability Requirement for Exceptions to the Hearsay Rule*, 41 MO. L. REV. 404 (1976), 57 IOWA L. REV. 477 (1969).

42. 408 U.S. at 216.

43. See note 3 *supra*.

44. See, e.g., *United States v. King*, 552 F.2d 833, 840-41 (9th Cir. 1976) (rejecting contention that confrontation clause prohibits use of witness' deposition at criminal trial), *cert. denied*, 430 U.S. 966 (1977); *United States v. Ricketson*, 498 F.2d 367, 374 (7th Cir.) (same), *cert. denied*, 419 U.S. 965 (1974); *United States v. Singleton*, 460 F.2d 1148, 1152-53 (2d Cir. 1972) (same), *cert. denied*, 410 U.S. 964 (1973). See 19 N.Y.L.F. 198 (1973), 1973 UTAH L. REV. 839. See generally *Carlson, Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 18-19 (1969).

45. FED. R. CRIM. PROC. 15(e). *Supra* note 3. See notes 12, 41 *supra*.

The Supreme Court has stated that the right of confrontation is not a mere codification of the hearsay rule and its exceptions. See, e.g., *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.") (footnotes omitted); *California v. Green*, 399 U.S. 149, 155 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). *But cf.* *Salinger v. United States*, 272 U.S. 542, 548 (1926) (purpose of confrontation clause is to preserve the common-law right and its exceptions). See also

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See also C. McC (1972), J. WELSHER EVIDENCE, §§ 1365,

Moreover, with recent technological advances in the field of electronics, depositions by video tape are gaining recognition at federal criminal

Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (if testimony is critical to defense, "hearsay rule may not be applied mechanically to defeat the ends of justice").

Nevertheless, the policies underlying the necessity exception to confrontation and the exceptions to the hearsay rule are similar. See, e.g., *Dutton v. Evans*, 400 U.S. at 80-83 (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *California v. Green*, 399 U.S. at 165 (alternative holding) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness if defendant had opportunity to cross-examine that witness at time of recording); *Delaney v. United States*, 263 U.S. 586, 590 (1924) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness because defendant had opportunity to cross-examine at time of recording); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (allowing admission at criminal trial of dying declaration); *United States v. Martinez*, 573 F.2d 529, 533 (8th Cir. 1978) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); *McLaughlin v. Vinzant*, 522 F.2d 448, 450-51 (1st Cir.) (allowing admission at criminal trial of spontaneous utterance), *cert. denied*, 423 U.S. 1037 (1975); *United States v. Snow*, 521 F.2d 730, 734-36 (9th Cir. 1975) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy), *cert. denied*, 423 U.S. 1090 (1976); *United States v. Lipscomb*, 435 F.2d 795, 802-03 (5th Cir. 1970) (allowing admission at criminal trial of entries in the regular course of business), *cert. denied*, 401 U.S. 980 (1971); *Hanley v. United States*, 416 F.2d 1160, 1167-68 (5th Cir. 1969) (same), *cert. denied*, 397 U.S. 910 (1970); *United States v. Kelly*, 349 F.2d 720, 770-71 (2d Cir. 1965) (allowing admission at criminal trial of recorded past recollection), *cert. denied*, 384 U.S. 947 (1966); *Reed v. Beto*, 343 F.2d 723, 724 (5th Cir. 1965) (allowing admission at criminal trial of public records of routine character). *But see, e.g., Barber v. Page*, 390 U.S. 719, 722-25 (1968) (expanding "unavailability" concept beyond its traditional hearsay definition); *Kirby v. United States*, 174 U.S. 47, 53-56 (1899) (denying admission at criminal trial of record of conviction of thieves to prove that property received by defendant had been stolen); *Phillips v. Neil*, 452 F.2d 337, 343-48 (6th Cir. 1971) (refusing admission at criminal trial of entry in the regular course of business), *cert. denied*, 409 U.S. 884 (1972).

See generally Baker, *supra* note 16; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Griswold, *supra* note 16; Read, *The New Confrontation—The Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *supra* note 15; Younger, *Hearsay and Confrontation, Or, What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay*, 2 NAT'L J. CRIM. DEF. 65 (1976). Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense*, 56 GEO. L.J. 939 (1968); Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360 (1968); Note, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970). Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965); Note, *Hearsay and Confrontation: Can the Criminal Defendant's Rights Be Preserved Under a Bifurcated Standard?*, 32 WASH. & LEE L. REV. 243 (1975); 38 LA. L. REV. 858 (1978); 40 MD. L. REV. 150 (1975); 13 U.C.L.A. L. REV. 366 (1966); 31 VAND. L. REV. 682 (1975); 75 YALE L.J. 1434 (1966).

See also C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 252 (2d ed. 1972); J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE at § 800 [04] (1977); 5 WIGMORE, EVIDENCE §§ 1365, 1395-1400 (Chadbourne rev. 1974).

trials.⁴⁶

46. See, e.g., *United States v. King*, 552 F.2d 833, 841 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); cf. *Hendricks v. Swenson*, 456 F.2d 503, 505-07 (8th Cir. 1972) (allowing admission at criminal trial of video-taped confession by defendant).

FED. R. CIV. P. 30(b)(4) (applicable to criminal trials through FED. R. CRIM. P. 15(d), *supra* note 3, provides:

The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(emphasis added).

See *State v. Reid*, 114 Ariz. 16, 27-29, 559 P.2d 136, 147-49 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by non-key witness), cert. denied, 431 U.S. 921 (1977); *People v. Moran*, 39 Cal. App. 3d 398, 410, 114 Cal. Rptr. 413, 420 (1974) (allowing admission at criminal trial of video-taped testimony by main prosecution witness; "[v]ideo tape is sufficiently similar to live testimony to permit the jury to properly perform its function"); *Hutchins v. State*, 286 So.2d 244, 245-46 (Fla. Dist. Ct. App. 1973) (allowing admission at criminal trial of video-taped testimony by expert witness); *State v. Hewitt*, 86 Wash. 2d 487, 490-94, 545 P.2d 1201, 1203-05 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by victim).

In *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (en banc), the Supreme Court of Missouri sustained, as consistent with the confrontation clause, the use of closed circuit television in the examination of an absent witness at a criminal trial. The city's expert witness testified from the crime laboratory while the judge, parties and counsel watched from the courtroom. As noted by the Supreme Court of Missouri, the two-way closed circuit television system causes the transmission of pictures and voices to be instantaneous. *Id.* at 337. In contrast, a video-taped deposition is not a present event, but a record of a past event. See Weis, *Electronics Expand Courtrooms' Walls*, 63 A.B.A. J. 1713, 1715 (1977). The distinction might be significant in light of the requirement that a witness be unavailable at a federal criminal trial before the trial court may admit a deposition by that witness as substantive evidence against the accused. See FED. R. CRIM. P. 15(e), *supra* note 3. When using closed circuit television, because the witness is testifying at the time of the trial, it might be unnecessary to show that the witness is unavailable to testify in the courtroom. But see 44 U.M.K.C. L. Rev. 517 (1976) (arguing that due to the unique characteristics of closed circuit television, its use at a criminal trial, unlike the use of video tape, violates the defendant's right of confrontation).

A wealth of material discussing the use of video tape at various stages of the trial process exists; most commentators advocate its use in the courtroom. See generally Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Bermant & Jacobovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 HASTINGS L.J. 999 (1975); Cunningham, *Videotape Evidence: Technological Innovation in the Trial Process*, 30 ALA. LAW. 228 (1975); Doret, *Trial by Videotape—Can Justice Be Seen to Be Done?*, 47 TEMPLE L.Q. 228 (1974); Kennelly, *The Practical Uses of Trialvision and Deposition*, 1972 TRIAL LAW GUIDE 183; Kornblum & Rush, *Television in Courtroom and Classroom*, 59 A.B.A.J. 273 (1973); Leibson, *How and When to Use Video Tape Depositions*, 42 KY. BENCH & B. 30 (Apr. 1978); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DES. L.J. 463 (1973); Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45 (1972); Morrill, *Enter—The Video Tape Trial*, 3 J. MAR. J. PRAC. & PROC. 237 (1970); Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. L. & SOC. PROBS. 363 (1973); Note, *Nebraska Faces Videotape: The New Video Technology in Perspective*, 6 CRIGHTON L. REV. 214 (1972); Note, *Video-Tape Trials: A Practical*

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In *United States v. Benfield*⁴⁷ the Eighth Circuit Court of Appeals asserted that both physical confrontation and concurrent cross-examination are essential elements of a defendant's sixth amendment right of confrontation.⁴⁸ Unless the defendant waives, forfeits, or loses by necessity this constitutional right, a confrontation that does not entail an actual face-to-face meeting between the accused and the witness does not meet the requirements of the sixth amendment.⁴⁹ In reaching this conclusion, the Court specifically relied upon *Mattox v. United States*,⁵⁰ *Kirby v. United States*,⁵¹ *Dowdell v. United States*,⁵² and *Snyder v. Massachusetts*.⁵³ Writing for a unanimous court, Chief Judge Gibson argued that, "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."⁵⁴

In the opinion of the court, physical confrontation is of primary importance because it guarantees to the accused the right to participate in the conduct of his defense.⁵⁵ Moreover, the court expressed the belief that the accuracy of an adverse witness' testimony is sharpened by the presence of the defendant.⁵⁶ Cross-examination is an essential com-

Evaluation and a Legal Analysis, 26 STAN. L. REV. 619 (1974); 20 DE PAUL L. REV. 924 (1971); 42 MO. L. REV. 121 (1977).

See also G. CHU & W. SCHRAMM, LEARNING FROM TELEVISION 84-86 (1968) (study indicated that media instruction to students matches effectiveness of live instruction); Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCH. 655 (1965) (discussing use of video-taped interviews to determine legal competency).

47. 593 F.2d 815 (8th Cir. 1979).

48. *Id.* at 821.

49. *Id.* at 820-22.

50. 156 U.S. 237 (1895). See note 18 *supra* and accompanying text.

51. 174 U.S. 47 (1899). See note 21 *supra* and accompanying text.

52. 221 U.S. 325 (1911). See note 21 *supra* and accompanying text.

53. 291 U.S. 97 (1934). See note 21 *supra* and accompanying text.

54. 593 F.2d at 821.

55. *Id.*

56. *Id.*

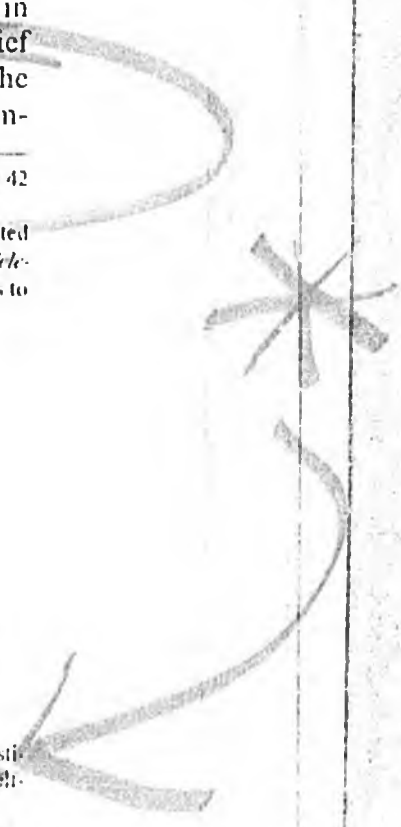
The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.

Id.

In a footnote, the court noted that "[e]xclusion of the defendant from a deposition where testimony is taken for introduction at trial also potentially conflicts with the defendant's right of self-representation." *Id.* at 821 n.8 (citations omitted).

The court cited no authority to support its contention that a face-to-face meeting between defendant and witness increases the likelihood that the witness will truthfully relate the facts. Whether effective cross-examination by counsel produces the same result, and whether the court's

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panion to physical confrontation, but it is not independently sufficient to satisfy the requirements of the sixth amendment.⁵⁷

Once the court established that physical confrontation was required, it turned to the question of whether Benfield, verbally or through his actions, had lost the protection of his constitutional right. The court found that Benfield had not waived, forfeited, or lost by necessity his right to physically confront Cady at the deposition.⁵⁸ No evidence of an affirmative waiver by Benfield existed,⁵⁹ and the court did not find the charge against Benfield so heinous as to excuse the prosecutrix from facing defendant while testifying.⁶⁰ Shifting its focus to the specific procedure used at the deposition, the court found that the absence of a face-to-face meeting between Benfield and Cady, and the latter's unawareness that during the course of the deposition she was being monitored by defendant, resulted in only an imperfect confrontation.⁶¹ As such, it was insufficient to test the accuracy of Cady's perceptions and expressions of her ordeal.⁶²

The court carefully noted that it did not condemn the use of electronic devices in the courtroom.⁶³ Instead, the court's concern stemmed from the particular procedure employed. The deposition procedure used was "[t]oo great an abridgement . . . of defendant's con-

proposition is sound from a psychological standpoint is unclear. See generally C. KLEBKE, FIRST IMPRESSIONS 27 (1975); M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 166-73 (1972); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967); 44 U.M.K.C. L. REV. 517, 521-25 (1976); see also United States v. West, 574 F.2d 1131, 1141 (4th Cir. 1978) (Widener, J., dissenting) (undocumented statement that "we must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face").

57. 593 F.2d at 821. "The right of cross-examination reinforces the importance of physical confrontation." *Id.*

58. *Id.* at 821-22.

59. *Id.* at 821.

60. *Id.* The court merely assumed, without deciding, that a grievous crime against a person could excuse the victim from facing the defendant while testifying. *Id.* Although noting that *State v. Richey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971), allowed the examination, in defendant's absence, of a child abuse victim's competency to testify, the *Benfield* court found no indication that the child had given substantive testimony in the defendant's absence. 593 F.2d at 821 n.17. The *Benfield* court concluded that "[t]o find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons." *Id.* at 821.

61. 593 F.2d at 821-22.

62. *Id.*

63. "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." *Id.* at 821.

frontation that Benfield's objection mandated the *Benfield* the requirements as a The court's confrontation of *Diaz* as cross-examination had shifted ground.⁷⁰ In the absence of physical confrontation by the

The decision approved the procedure, which is actively in the capable of being taped,⁷¹ and proposition

A deposition

64. *Id.* "It is employed. What is the factual context

65. *Id.* at 821

66. *Id.*

67. *Id.*

68. See note 11 *supra*.

69. In neither case was the defendant satisfied by the procedure. In *Benfield*, the defendant's forfeiture exception was not accompanied by text. In *Diaz*, note 11 *supra*, the defendant was satisfied.

70. See note 11 *supra*.

71. See note 11 *supra*.

72. *Cf. The* suggests that although the requirements do not require that the



frontation right to pass constitutional muster."⁶⁴ The court ordered that Benfield's conviction be reversed⁶⁵ and, after disposing of Benfield's objections against the government's ability to retry him,⁶⁶ remanded the case to the district court for further proceedings.⁶⁷

Benfield's significance lies in the Eighth Circuit's reestablishment of the requirement of a face-to-face meeting between defendants and witnesses as an important part of the constitutional right of confrontation. The court's emphasis on defendants' right to personal, physical confrontation is consistent with the *Mattox* line of cases⁶⁸ and the holdings of *Diaz* and *Allen*.⁶⁹ The Supreme Court's recent focus on effective cross-examination as the essential element of confrontation, however, had shifted the requirement of physical confrontation to the background.⁷⁰ Thus, the *Benfield* court's reemphasis on face-to-face meetings absent a showing of waiver, forfeiture, or necessity indicates that physical confrontation has not been eliminated from the rights guaranteed by the sixth amendment.

The decision in *Benfield* is also important because the court expressly approved the use in criminal trials of video-taped depositions that comply with the terms of Rule 15 and allow the defendant to participate actively in the proceeding. Commentators generally agree that a jury is capable of satisfactorily viewing a deponent's demeanor through video tape,⁷¹ and the court's decision exhibits a willingness to accept this proposition.⁷²

A deposition proceeding plays a significant role in the ultimate deter-

64. *Id.* "Here the right of confrontation was considerably curtailed by the procedures employed. What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct." *Id.*

65. *Id.* at 822.

66. *Id.*

67. *Id.*

68. See notes 18, 21 *supra* and accompanying text.

69. In neither *Diaz* nor *Allen* did the Supreme Court declare defendant's confrontation right satisfied by vicarious representation through counsel. Instead, the Court devised the waiver and forfeiture exceptions, respectively, to the right of confrontation. See notes 30-37 *supra* and accompanying text. Thus, the ability of Benfield's attorney to cross-examine Gady at the deposition, see note 11 *supra*, could not properly support a finding that Benfield's right to confrontation was satisfied.

70. See notes 22-21 *supra* and accompanying text.

71. See cases and other authority cited note 46 *supra*.

72. Cf. *The Supreme Court, 1987 Term, supra* note 25, at 115 (when applied to *Benfield*, suggests that although video tape sufficiently exhibits a witness' demeanor, the Constitution may not require that the jury view demeanor).



mination of a defendant's guilt or innocence. Thus, the *Benfield* court's careful scrutiny of the procedure employed during the victim's deposition is commendable. The court's holding that confrontation between defendants and witnesses must be complete precludes a step backward toward a judicial system in which ex parte affidavits and depositions would be sufficient to support a criminal conviction.⁷³

73. See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); note 28 *supra*.

INVERS

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UNITED STATES of America, Appellee,
v.

Russell Wayne BENFIELD, Appellant.

No. 78-1665.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 11, 1978.

Decided March 8, 1979.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, John F. Nangle, J., of misprision of felony, and he appealed. The Court of Appeals, Gibson, Chief Judge, held that: (1) where defendant was not allowed to be active participant in videotaped deposition and witness was deceived as to presence of defendant in building and defendant's ability to hear and view testimony as it was given, use of the videotape deposition at trial violated defendant's constitutional right to confrontation; (2) evidence was sufficient to support conviction for misprision of felony, and (3) Fifth Amendment did not present bar to retrial on misprision of felony charge, notwithstanding that defendant had been acquitted on charge of being accessory after the fact to kidnapping.

Reversed and remanded.

1. Criminal Law ⇨662(1)

Normally, the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇨662(1)

Constitutional right to confrontation requires cross-examination in addition to face-to-face meeting in that right of cross-examination reenforces importance of physical confrontation. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇨662(3)

Exclusion of defendant from deposition where testimony is taken for introduction

at trial potentially conflicts with defendant's right to self-representation as well as to his right of confrontation. U.S.C.A. Const. Amend. 6; Fed.Rules Crim.Proc. rule 15, 18 U.S.C.A.

4. Criminal Law ⇨627.2

Although videotape deposition of witness supplied environment substantially comparable to trial, procedural substitute was constitutionally infirm where defendant was not permitted to be active participant in the video deposition and witness was deceived as to presence of defendant in building and his ability to hear and view testimony as it was given. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 15, 18 U.S.C.A.

5. Criminal Law ⇨662(1, 3)

Confrontation clause of Sixth Amendment contemplates active participation of accused at all stages of trial, including face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel; any exception should be narrow in scope and based on necessity or waiver. U.S.C.A.Const. Amend. 6.

6. Compounding Offenses ⇨6

Evidence was sufficient to support conviction for misprision of felony for failure to notify authorities once defendant had knowledge of kidnapping. 18 U.S.C.A. § 4.

7. Criminal Law ⇨1175

Inconsistent verdicts in a single trial do not form basis for reversal of conviction.

8. Judgment ⇨751

Criminal rule of collateral estoppel does not apply to verdicts of guilt and innocence rendered in a single trial.

9. Criminal Law ⇨186

Fifth Amendment did not clearly bar retrial of defendant following reversal of conviction for misprision of felony, notwithstanding that defendant was acquitted at trial on charge of being accessory after the fact to kidnapping. 18 U.S.C.A. §§ 3, 4; U.S.C.A.Const. Amend. 5.

John C. Pleban, London, Greenberg & Fleming, St. Louis, Mo., argued and on brief, for appellant.

David M. Rosen, Asst. U. S. Atty., St. Louis, Mo., (argued), and Robert D. Kingsland, U. S. Atty., St. Louis, Mo., on brief, for appellee.

Before GIBSON, Chief Judge, and BRIGHT and HENLEY, Circuit Judges.

GIBSON, Chief Judge.

A jury found Russell Wayne Benfield guilty of misprision of a felony in violation of 18 U.S.C. § 4¹ and acquitted him of being an accessory after the fact to kidnapping in violation of 18 U.S.C. § 3.² After being sentenced to prison for two years on the misprision charge, Benfield brings this appeal. We reverse and remand.

The events leading to the conviction of Benfield took place during February 1977. Prior to February 24, 1977, John Bates was an inmate at the Arizona State Penitentiary pursuant to his conviction for assault with a deadly weapon. On that date Bates broke out of the Arizona penitentiary with the assistance of his wife, Charlotte. The following day John and Charlotte Bates forcibly took Patricia Cady and her automobile from a hospital parking lot in Tucson, Arizona. The Bateses then drove the automobile, with Cady as a prisoner, to St. Louis, Missouri, where they arrived on February 27, 1977.

Prior to his arrival in St. Louis, John Bates telephoned Russell Benfield several times, both before and after kidnapping Cady. The substance of those conversa-

tions was disputed at trial. The Government's version came in through the testimony of Charlotte Bates and Patricia Cady as to what John Bates told them had been said. According to this version Bates told Benfield about the kidnapping during a phone call from Las Cruces, New Mexico, and Benfield told Bates to bring Cady to St. Louis. Benfield testified that he did not learn of the jailbreak or kidnapping until Bates arrived in Missouri.

In any event, Benfield did meet with Bates in St. Louis. Benfield rented a motel room for Bates in which Patricia Cady was held. Cady was blindfolded and only saw parts of Benfield's face and body. As in the case of the telephone conversations, the Government's version of the discussions between Benfield and John Bates was presented through Charlotte Bates's and Patricia Cady's recollections of what Bates recalled after Benfield had left. The Government presented evidence that Benfield gave John Bates sixty-six dollars, and promised to bring additional funds to him in Kennett, Missouri.

According to Benfield, once he learned of the kidnapping his efforts were directed at securing Cady's release unharmed and causing Bates to leave St. Louis. Benfield claims he told Bates he would supply money if Cady were released. Bates then agreed to release Cady in Memphis, Tennessee, and return to St. Louis for money received by Benfield from Bates's account in a Marine Corps credit union.

From St. Louis, John and Charlotte Bates took Patricia Cady to Kennett, Missouri,

ceives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

1. 18 U.S.C. § 4 provides:

Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

2. 18 U.S.C. § 3 provides:

Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, re-

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where John Bates met with Roger Benfield, Russell's brother, but failed to receive any aid from him. While the group was in Kennett, law enforcement officers apprehended Charlotte Bates and released Patricia Cady. John Bates took his own life. Patricia Cady then participated in a news conference and granted interviews with journalists and the broadcast media. Patricia Cady has commenced civil actions against the State of Arizona stemming from the abduction and Charlotte Bates has been convicted of aiding and abetting the kidnapping of Patricia Cady.

In a four-count indictment filed September 29, 1977, Benfield was charged with being an accessory after the fact to the kidnapping of Patricia Cady and to the interstate transportation of her stolen car and with misprision of those felonies. Trial was set for January 3, 1978, but was continued to February 27, 1978, due to the hospitalization of a Government witness, Patricia Cady. On February 23, 1978, the Government obtained a further continuance of the case to April 24, 1978, due to Cady's unavailability. In a letter dated January 30, 1978, Cady's psychiatrist, Dr. David B. Gurland, indicated that Cady should not be subpoenaed to appear for two or three months. Prior to April 24, 1978, Dr. Gurland again wrote the trial court, stating that Ms. Cady should not be required to endure a trial situation or face Benfield.

The Government then filed a request to take a videotape deposition of Patricia Cady in Arizona. On April 24, 1978, a hearing was held on this request and Dr. Gurland was called to testify. He stated that in his opinion Ms. Cady's psychiatric problems were directly related to her abduction.³ He recommended that she not be required to testify or that circumstances less stressful than a trial courtroom be arranged. The trial court granted the request for a deposi-

tion and ordered that Benfield could be "present at the deposition but not within the vision of Mrs. Patricia Cady."

The deposition was held on May 11, 1978, in Tucson, Arizona. Benfield was excluded from the room in which the deposition took place. He was able to observe the proceedings on a monitor and halt the questioning by sounding a buzzer, at which time the deposition would be interrupted and Benfield's counsel would leave the room to confer with Benfield. The counsel was permitted to cross-examine Cady. However, Cady was apparently kept unaware of Benfield's presence in the building.

Thereafter, trial commenced in St. Louis on July 10, 1978. The videotaped deposition of Cady was admitted in evidence and played to the jury.⁴ At the conclusion of the case, the trial court granted Benfield's motions for acquittal regarding the counts arising from interstate transportation of a stolen automobile. The remaining two counts were submitted to the jury and, as we have said, Benfield was convicted of misprision of felony but was acquitted of the charge of being an accessory after the fact.

Following the denial of various post-trial motions, Benfield brings this appeal. He raises several points. Because of the view we take of the case, we shall consider only two of the issues presented. First, were Benfield's constitutional rights as guaranteed by the sixth amendment violated by the procedures employed during the deposition of Patricia Cady? Second, under the facts of this case, is a second trial precluded by the acquittal of Benfield on the accessory after the fact charge?

The sixth amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him

stead, the Government relied on the failure of Dr. Gurland 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.

3. Ms. Cady's infirmity began several months after the kidnapping. It gradually worsened until she could no longer tolerate crowd situations and was unable to work.

4. The Government made only a marginal showing of Cady's unavailability at trial. No new evidence of her condition was presented. In-

• • •" These words express the commitment of our law to certain values in the determination of the guilt or innocence of those accused of crime. At first glance, the command that is embodied in that phrase seems so simple and unambiguous as to defy expression through any other words. It was adopted in response to supposed deficiencies in the original Constitution.⁵ However, since the sixth amendment was ratified on December 15, 1791, it has been camouflaged by case law and nibbled by necessity. Today the Government urges that "face-to-face meetings" are not part of the rights guaranteed by the sixth amendment.

The courts have always been committed to giving obedience to constitutional commands. In *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), the Court interpreted the common-law and constitutional right of the accused to confront and challenge prospective jurors face to face. The Court seems to have been of the view that this and other sixth amendment rights were so important to the accused and to the public that they could not be waived. Twenty years later, the Court decided *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912). *Diaz* held that an accused who was not in custody could waive his right to be present at all times during the trial. *Diaz* distinguished and narrowly construed the holding of *Lewis*. 223 U.S. at 458, 13 S.Ct. 136.

5. The complaints foreshadowing the sixth amendment were expressed by one anti-federalist, as follows:

For the security of life, in criminal prosecutions, the bills of rights of most of the States have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he shall not be compelled to accuse, or furnish evidence against himself—the witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular State? The powers vested in the new Congress extend in many cases to life; they are authorized to provide for the punishment of a variety of capital crimes, and no restraint is laid

The Supreme Court construed the sixth amendment's confrontation clause in at least three cases decided between 1895 and 1911. In *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), Mattox had been convicted at a trial in which the transcribed testimony of two witnesses given at a prior trial was admitted. At the time of the second trial, the witnesses were deceased. The Court recognized that the admission of this testimony was in conflict with the letter of the sixth amendment. However, the conviction was affirmed and the court stated:

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. • • •

upon them in its exercise, save only, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the State where the said crimes shall have been committed." No man is secure of a trial in the county where he is charged to have committed a crime; he may be brought from Niagara to New York, or carried from Kentucky to Richmond for trial for an offence supposed to be committed. What security is there, that a man shall be furnished with a full and plain description of the charges against him? That he shall be allowed to produce all proof he can in his favor? That he shall see the witnesses against him face to face, or that he shall be fully heard in his own defence by himself or counsel?

No. 11, Letters of Brutus (1788), reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 508 (1971).

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Cite as 593 F.2d 815 (1979)

The substance of the constitutional protection is preserved to the prisoner 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. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven.

156 U.S. at 243-44, 15 S.Ct. at 340. (emphasis added).

The court again considered the right of confrontation in *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899). Kirby was charged with receipt of stolen property. At trial the Government introduced the record of the conviction of third parties for theft of the property to establish that it had been stolen. The Supreme Court held that this procedure deprived Kirby of his sixth amendment rights:

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 offence 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.

174 U.S. at 55, 19 S.Ct. at 577. It is clear that in *Kirby*, as in *Mattox* four years earlier, the Court viewed physical confrontation as an element of the sixth amendment guarantees. The same perception was expressed in *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911). There the Court noted that the constitutional provision was "intended to secure the right of the accused to meet the witnesses face to face, and thus to sift the

testimony produced against him * * *."

The *Dowdell* court noted there were well-recognized exceptions, one being where the appeal record was supplemented by the notes and recollections of the trial judge and court officials regarding events at trial. These cases show that prior to the availability of television, confrontation generally involved a face-to-face meeting with one's adversaries. See also *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Curtis v. Rives*, 75 U.S.App.D.C. 66, 123 F.2d 936, 938 (1941); H. Underhill, *Criminal Evidence* § 411 (4th ed. J. Niblack 1935).

In recent years, the Supreme Court and this court particularly have considered two aspects of the sixth amendment relevant to this case. In some situations it has been held that the accused forfeited or waived his confrontation rights. Other cases have held evidence admissible because of its reliability and importance despite the sixth amendment guarantee. The first aspect was clearly expressed in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), which held "that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. at 343, 90 S.Ct. at 1060. The Court went on to say that the right could be reclaimed as soon as the defendant agreed to conduct himself properly. In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977), this court held that the defendant had waived his right of confrontation when he intimidated the prospective witness prior to trial. As a result of the intimidation, the witness refused to testify at trial and the Government was permitted to introduce the witness's grand jury testimony as substantive evidence of the defendant's guilt. 547 F.2d at 1358-60.

In *Carlson* we also discussed several of the Supreme Court cases that have con-

sidered the conditions under which out-of-court statements may be admitted as evidence despite absence of confrontation with the accused. 547 F.2d at 1356-57. Without prolonging this opinion with a discussion of those cases, we note that it has been held that when a witness is actually unavailable at trial his prior testimony may be admitted if sufficient indicia of reliability are present. *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 722, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); 5 Wigmore, Evidence § 1398 (Chadbourn rev. 1974).

The above exception to trial confrontation is reflected in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. Fed.R.Evid. 804(a) defines witness unavailability to include situations in

which the declarant is unable to testify at the hearing because of then-existing physical or mental illness or infirmity. Fed.R.Crim.Proc. 15⁶ provides for the taking of depositions and their use at trial if the witness is unavailable at trial under Fed.R.Evid. 804(a). Rule 15 ensures the right of the defendant to be present at the taking of the deposition. If the defendant is in custody he is to be transported to the place of the deposition and be present at its taking unless he persists in disruptive behavior after being warned to act properly. If the defendant is not in custody he has the right to be present, "subject to such terms as may be fixed by the court."⁷ In the present case the terms fixed by the trial court were that Benfield not be "within the vision" of witness Cady. As interpreted by the attorneys, this apparently extended to deceiving

6. Fed.R.Crim.Proc. 15 provides in pertinent part:

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition. * * *

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. * * *

The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner

provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. [Emphasis added.]

7. An argument can be made that the deposition of Cady violated Rule 15 in that the examination and cross-examination were not in the manner "such as would be allowed in the trial itself." However, as noted in the text, the rule permits the court to fix the terms governing the presence at the deposition of an accused who is not in custody. We decline to decide the case on this basis, in part because Benfield has not pressed this particular argument, but also because the terms of the rule apparently permit greater restriction of the presence of an accused who is not in custody than of the presence of an accused who is in custody. We do not wish to consider the equal protection impact of the rule on this record.

Cite as 593 F.2d 815 (1979)

the witness as to the presence of Benfield in the building and his ability to hear and view the testimony as it was given.

[1-4] 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*, which were discussed above, 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.⁸ 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.⁹ 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.

[5] In the present case there can be no serious contention that Benfield waived his right to be present voluntarily or through

8. Exclusion of the defendant from a deposition where testimony is taken for introduction at trial also potentially conflicts with the defendant's right of self-representation. 28 U.S.C. § 1654. See generally *Faretta v. California*, 422 U.S. 806, 816, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

9. The parties cited no cases specifically dealing with the absence of a defendant from a deposition due to no fault of the defendant. Our research revealed only *Collins v. State*, 12 Md. App. 239, 278 A.2d 311 (1971), which supports

misconduct. Even if we assume that the alleged involvement of a defendant charged with a crime against persons could be so heinous as to excuse the victim from facing him while testifying, the present case does not involve conduct of that magnitude.¹⁰ Benfield did not threaten or personally harm Patricia Cady. To find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons.

Here the right of confrontation was considerably curtailed by the procedures employed. What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct. Too great an abridgment was made of defendant's confrontation right to pass constitutional muster. Basically the confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel. A further exception to the face-to-face aspect of the confrontation clause urged by the Government presents a too severe curtailment of this constitutional right. Any exception should be narrow in scope and based on necessity or waiver.

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. Here the

our conclusion. See also *State v. Hewett*, 86 Wash.2d 487, 545 P.2d 1201, 1204 (1976).

10. *State v. Richey*, 107 Ariz. 552, 490 P.2d 574 (1971) held that it was permissible to examine the competency of a seven-year-old child abuse victim in the absence of the defendant. There is no suggestion that the child's substantive testimony was given without the defendant's presence. That case also involved a non-jury trial.

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.¹¹ While we do not doubt the truthfulness of Patricia Cady or that she has suffered a terrible ordeal, the accuracy of her perception of the events during the kidnapping and her recollection and expression of those events was crucial to the Government's case. The partial confrontation allowed was inadequate to test those features of her testimony. The conviction must be reversed.

[6] The issue that remains is whether the Government should be permitted to retry Benfield if it so chooses. Benfield contends that the evidence was insufficient to support the conviction. We disagree. While some factual details and Benfield's intent were disputed, the jury was fully justified in reaching a guilty verdict. In fact, the record clearly discloses that Benfield had at some point knowledge of the kidnapping and made no attempt to notify the authorities, but on the contrary did, albeit reluctantly, aid and assist the kidnapers in carrying on and concealing the offense. Thus, while his intent remains an issue for jury determination, the undeniable facts support a conviction for misprision of felony.

[7, 8] It is also suggested that the acquittal on the accessory after the fact charge and the conviction on the misprision of felony charge were inconsistent. Even if we assume that the two were inconsistent, it is clear that inconsistent verdicts in a single trial do not form the basis for reversal of a conviction. *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *United States v. Wetzel*, 488 F.2d 153 (8th Cir. 1973). Similarly, the criminal

11. It is possible that face-to-face confrontation through two-way closed circuit television might be adequate. By a four to three vote, the Missouri Supreme Court has approved the use of such testimony by an expert witness in a case involving violation of a municipal ordinance, despite a defense based on the sixth amendment. *Kansas City v. McCaig*, 525 S.W.2d 336 (Mo.1975). Among the more disturbing aspects of the decision is that there

rule of collateral estoppel found in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), does not apply to verdicts of guilt and innocence rendered in a single trial. In this case Counts I and II do charge distinct crimes. We are reluctant to decide whether Benfield's acquittal on the accessory after the fact charge collaterally prevents a conviction on the misprision charge at a second trial. Our reluctance is grounded in our usual hesitancy to decide questions not fully briefed and argued by the parties as well as our knowledge that the question will be moot if the Government now declines to prosecute Benfield or if a second jury should acquit. Also, we are reluctant further to enlarge the collateral estoppel doctrine in cases involving multiple counts where the admitted facts are at odds with the jury finding conjectured by the plaintiff. This could lead to an absurd result.

[9] On the record now before us, the fifth amendment issue does not present a clear bar to a retrial of the misprision count. Although not obligated to, Benfield could have notified the authorities of the kidnapping offense when he learned of it and before engaging in any of the affirmative actions of assistance or concealment.

The cause is reversed and remanded to the District Court for further proceedings consistent with this opinion.¹²



was no showing of extraordinary circumstances necessitating reliance on the procedure.

12. In the interest of brevity we have omitted discussion of other issues raised on appeal. The argument raised by Benfield concerning pretrial delays is meritless. The other contentions, even if valid, would not prevent a second trial.

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THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 576
 Title An Act Permitting the Videotaping of Testimony
 Requested by House Judiciary Committee Date 1/8/82

II. FISCAL DETAIL

Agency Affected Alaska Court System
 Program Category Affected _____
 BRU, Program, or Subprogram(s) Affected _____

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

HB 576 allows the use of video taped testimony in certain cases, or the exclusion of the public during certain testimony. Neither of these elements should have a fiscal impact on the Alaska Court System. However, the District Attorney or other agencies choosing to utilize videotaped testimony should budget for the necessary cameras, recorders, and playback equipment.

IV. DATE 1/12/82 PREPARED BY Richard P. Barrier
 AGENCY Alaska Court System
 Original: Legislative Finance PHONE 264-0545
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. HB 576
 Title Videotaping of testimony of victims of sexual assault
 Requested by House Judiciary Committee Date 1/7/82

II. FISCAL DETAIL
 Agency Affected Department of Law
 Program Category Affected Administration of Justice
 BRU, Program, Or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

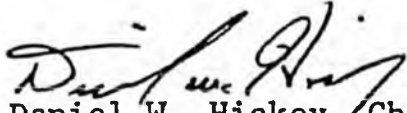
	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill authorizes the videotaping of the testimony of a young victim of a sexual assault outside the presence of the jury for playback at a criminal trial. The bill also permits the public to be excluded from a criminal trial under limited circumstances when a young victim of a sexual assault testifies in person. The bill should not result in any additional expenditures.

IV. DATE January 8, 1982 PREPARED BY  Daniel W. Hickey Chief Prosecutor
 AGENCY Department of Law
 Original: Legislative Finance PHONE 465-3429
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/81)

(Other types of federal procedural rules were published from time to time in various volumes of *F.R.D.*).

E. ANNOTATED REPORTS

1. SYSTEM OF SELECTED AND ANNOTATED REPORTS

Each generation of lawyers has tended to feel that the number of law books has, at last, reached impossible and unmanageable proportions. With both the number and cost of these volumes rising each year, systems of selected case reports have become increasingly important in legal research. As the name implies, these reports have been selected by the law book publishers from the great mass of decisions as those having the greatest and broadest legal significance.

To these decisions, the publishers have added statements or annotations, listing and analyzing other cases dealing with a particular point of law. Over the years, these annotations have become more complex and detailed, growing from very brief notes in the early volumes to extensive articles today, sometimes over a hundred pages in length. The major publisher of annotated reporters is the Lawyers Cooperative Publishing Company, which issues *American Law Reports (A.L.R.)* and *American Law Reports Federal*. These reporters are known collectively as the annotated reports system, and the sets in this system are listed below with the dates of the decisions covered:

Selected and Annotated Reports

Trinity Series

American Decisions (Am.Dec.) 100 vols.	1760-1869
American Reports (Am.Rep.) 60 vols.	1869-1887
American State Reports (Am.St.Rep.) 110 vols.	1887-1911

thru 1869
only - no 1977-C312
1979-C69

Annotated Cases

American & English Annotated Cases (Ann.Cas.) 53 vols.	1906-1918
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Lawyers Reports Annotated

Lawyers Reports Annotated, First Series, (L.R.A.) 70 vols.	1888-1906
Lawyers Reports Annot. ted, New Series, (L.R.A., N.S.) 52 vols.	1906-1911
Lawyers Reports Annotated, Dated Series, (L.R.A., 1915 etc.) 24 vols.	1915-1918

American Law Reports

American Law Reports Annotated (A.L.R.) 175 vols.	1919-1948
American Law Reports, Annotated, Second Series, (A.L.R.2d)	1948-1965
American Law Reports, Annotated, Third Series, (A.L.R.3d)	1965-
American Law Reports Federal (ALR Federal)	1969-

I. REQUEST
 Bill/Resolution No. HB 576
 Title Videotaping of Testimony
 Requested by House Judiciary Date 2/18/82

II. FISCAL DETAIL
 Agency Affected Alaska Court System
 Program Category Affected Administration of Justice
 BRU, Program, Or Subprogram(s) Affected Trial Courts
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.6	6.0	6.6	7.2	8.0
400 COMMODITIES		55.9				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		61.5	6.0	6.6	7.2	8.0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		61.5	6.0	6.6	7.2	8.0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

At the time the original fiscal note for this bill was prepared, the Court System policy was to not provide any new video equipment for the use of the police or district attorneys. This policy was necessitated by the disparity of types of equipment being purchased by the local police and state agencies around the state, and the inability of the Court System to provide and maintain compatible equipment in all locations. However, since that time the State Troopers and district attorneys have agreed to utilize a consistent 3/4 inch U-matic format, and to procure similar units for the local police. As a result of that effort toward standardization, the Court System has revised its policy against purchasing new video equipment, and will now be supplying this equipment in many court locations.

HB 576 envisions the State producing video recordings for playback at trials. As the bill now stands, and with the current Court System policy about purchasing video equipment, the Court will be required to provide the necessary cameras and playback units in at least all the Superior Court locations, as well as the locations where Superior Court cases are frequently held, such as Barrow or Palmer. This will require a minimum of 13 complete video units at the cost of \$4,300 each. The annual maintenance cost is estimated at \$5,600. The first year cost will therefore be \$61,500, with ongoing costs of \$5,600 plus inflation.

IV. DATE 2/18/82 PREPARED BY Richard P. Barrier
 AGENCY Alaska Court System
 Original: Legislative Finance PHONE 264-0545
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/81)

III. ANALYSIS (Continued)

Salary:

Anchorage:

2 Clerk I at Range 8 (\$17,196): \$34,392
1 Clerk II at Range 10 (\$19,356): 19,356

Fairbanks

1 Clerk I at Range 8 (\$19,356): 19,356
\$73,104

Benefits:

\$24,698

Total Personnel

\$97,802

Equipment:

4 desks, chairs typewriters 6,672

HC Statutes

Sec. 09.25.120 - Inspection and Copying of Public Records

all records are public
except (#) types -
#3 records pertaining
to juveniles

Administrative Rule 37.5 - re: access

to public records
except - those that are
kept confidential by a
special court order

PER. S.C. ruling
implemented
Feb #, 1982

S.C. Rule 49 (CR-151) - administrative
director w/ approval of C.J. makes
rules regarding administration etc.
of records