SB
485

COMMITTEE REPORT

SENATE

5/11/81

FURTHER: None

Date: Jan. 27,

Mr. President:

The Committee on JUDICIARY has had SB 485

permitting the videotaping of testimony of young victims of sexual assault or sexual abuse of a minor

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[X] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for SB 485 [X] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

CHAIRMAN

S 60 (Rev. 12/78)

FILE

The view that children's testimony is not to be trusted in the courts may be an adult prejudice. In fact, studies show that they can recall events accurately enough to testify—if they are not confused by adults.

On a December day in 1976, nine-year-old Todd Bolin came running out of his house in a suburb of Columbus, Ohio, screaming, "My mother's trying to kill everybody." His playmate, a neighbor, watched as the boy's mother emerged and took Todd back inside. Then, the playmate heard two shots and a scream.

The playmate went to tell his mother, who, according to the police, did not believe him. Only later did the boy's father call the police. By that time Todd's sister had returned to the Bolin home to find the bodies of three family members. The mother was still there, reloading her gun. The girl narrowly escaped.

Adults often have a hard time determining the credibility of children. Small children in particular are known for their vivid imaginations, suggestibility, and willingness to stretch the truth; indeed, some psychologists argue that children remember events differently than adults do. The problem becomes a serious one in courts of law where children are called on to testify about events as consequential as murder, kidnapping, and assault.

Statistics gathered by the Department of Justice reveal that 21 percent of robberies and 24 percent of assaults in America occur in or near the home, where a child may be present. In major metropolitan areas, much of the crime is committed by juveniles, which means that the accused and their friends must often testify in juvenile or regular courts. Many lawyers and judges say that, with the expanding consciousness of children's rights in the United States, more cases of child abuse and sexual molestation are being prosecuted, which sometimes requires testimony by the young victim.

Judge Charles Stafford of the Washington State Supreme Court told us recently: "I believe the judicial system is beginning to see more cases in which children serve as witnesses because children are more sophisticated these days. While the rules of evidence concerning admission of children's testimony have not changed, the attitude of the court has. Consequently children seem to meet the test of competency at a younger age."

We have concluded from our own studies and those of others that children can be excellent witnesses—if conditions in the courtroom are as supportive as those in a laboratory, if parents do not impose their own views on their children's statements, and if lawyers did not ask them leading questions on the stand. Laboratory studies, moreover, suggest that jurors do not discount their testimony and, indeed, may give it as much weight as an adult's.

But courtroom procedures are not generally kind to the child witness. Typically, he or she is questioned over and over by parents and authorities both on and off the stand. Months, if not years, elapse between the event in question and testimony about it. Once in court, laws concerning testimony differ for adults and children. Perhaps the most amazing difference in legal procedure for adult and child witnesses is the freedom lawyers have to ask them leading questions. This is particularly surprising in view of children's presumed suggestibility.

That children are highly suggestible, that their memories can be easily manipulated, is supported by studies that go as far back as the turn of the century. A Belgian, J. Varendonck, one of the first psychologists to serve as an expert witness in a court, carried out a number of ingenious experiments using child witnesses that are regarded as classics in the field.

Varendonck had been called on to testify in one of a series of murders of young children that had beset the Belgian hamlet of Petit Gand (much like the recent chain of killings of young blacks in Atlanta). One of the victims in the case had been playing with two friends, ages 8 and 10, but had left them to go home shortly before the murder took place; her body was found the next day. When first questioned, the victim's playmates stated that they had not seen her after she

Photograph by Bill Binzen

"We're seeing more children as witnesses," says one judge, "because children are more sophisticated these days."

had left for home and so could not describe the murderer. Town officials interrogated them repeatedly, asking them questions like, "You certainly know the assassin; tell me who it was."

Eventually, the girls reluctantly made statements that, along with circumstantial evidence, led to the arrest of the father of one of the young witnesses. Varendonck's task as an expert witness was to testify about the credibility of a child witness under these circumstances, a crucial bit of testimony since the town was hysterical and the jury ready to convict. Before testifying, Varendonck went to the playground of an elementary school while the children were lining up for classes in the morning. Later, he talked to 22 pupils, all eight years old, who had been in line. "When you were standing in line in the yard, a man came up to me, didn't he?" he asked the whole group. "You surely saw who it was. Write his name on your paper." Seven of the 22 pupils wrote down a name. The experimenter then asked, "Was it not Mr. M———?": 17 of the 22 pupils now answered "Yes." In front of a panel of lawyers, these children were individually questioned, each gave full descriptions of the man's appearance, attire, and so on.

Actually, no one had approached Varendonck on the playground. When the results of this and other related experiments were presented at trial, the jurors became convinced of the children's suggestibility, and the defendant was acquitted.

Many other studies support the view that children are quite suggestible, but the most recent experiment found no sign of differences between the suggestibility of adults and children. Indeed Barbara Marin, Deborah Holmes, and several colleagues at Loyola University of Chicago reported in 1979 on a study that showed, surprisingly, children were less likely to make an inaccurate statement than were their adult counterparts.

Marin and Holmes asked a group of 96 children, adolescents, and adults to join an experimenter in a room, one at a time, for a psychological test. The conversation was interrupted by a man, an accomplice in the study, who entered the room and started an argument with the experimenter, claiming that the room had been assigned for his use at that hour.

When asked to recount the event later on, adults and adolescents described it in more detail than did the children. In fact, the youngest children (five-year-olds) could say only one or two things about the argument, which may account for their greater accuracy: since they reported only a few details of what had happened, they were likely to state the most obvious facts and to avoid making too many mistakes.

Children typically describe events incompletely, particularly when an event is not well understood. Yet when asked specific questions about the event, they often recall it quite well. Marin and Holmes asked their subjects specific questions about the man, such as "Did the man have a mustache?" or "Did the man knock before he came in?" Even the five-year-olds answered the questions as accurately as the adults. Another surprising finding was that children and adults, when presented with a photo lineup, identified the man who started the argument with equal accuracy.

The results of the Marin-Holmes study agree well with experiments that test children's memories for everyday actions like reading a book or writing a letter. One of us, Gail Goodman, has conducted several studies in which children and adults have viewed pictures of people doing these things. When later asked to describe the pictures in their own words, children recall fewer actions and details than do adults. But, like the adults, they can answer specific questions about the pictures. And they can point accurately to activities they have observed previously, even when the pose or the background is varied. For example, the experimenters showed children a picture of a person reading a book; then the children saw a second picture of the same person reading a book but sitting in a different position in a different room, and a third picture of the same person writing a letter. The majority were able to point to the second picture as portraying the same activity they had seen in the first. Nine-year-olds are actually more accurate than adults in recognizing details in the pictures.

Even if children do occasionally distort the truth, can we be sure that adult witnesses are any more reliable? Elizabeth Loftus, a psychologist at the University of Washington, has conducted numerous experiments in which misleading information suggested to adults was incorporated into their memory. Immediately after adults viewed pictures of a car-pedestrian accident, for example, they were asked a number of questions, including one that subtly introduced the idea that the car had been stopped at a yield sign. Actually, a stop sign had been pictured. Adults who had been exposed to the misleading information were much more likely to remember the presence of a yield sign than were adults who had not. According to Loftus: "We have altered people's memory. We can get people to tell us that red lights are green, that curly hair is straight, that barns exist where there are none. These results and many more like them have led me

In a recent study, children recalled fewer details of an event than did adults—but made fewer inaccurate statements.

and others to believe that adult memory is easy to manipulate."

Robert Buckhout of Brooklyn College of the City University of New York, another leader in the field of eyewitness testimony, has demonstrated how few adults can be considered reliable witnesses. During a TV special on eyewitness testimony, Buckhout staged a purse-snatching incident that appeared to be happening live on the set. Afterward, the station admitted it was an experiment and aired a lineup of six men as "suspects" in the theft. Viewers were asked to call the station to identify the assailant (or to indicate that he was not in the lineup). Of the nearly 2,000 people who called, only 14 percent identified the correct man, about the same percentage that could be expected if the viewers had merely been guessing.

Given that the accuracy of an adult's testimony can be so poor, more studies are needed to determine if, under normal courtroom conditions, children's testimony is any worse. As a practical matter, however, it is up to judges and jurors to decide in individual cases whether a child's testimony is to be believed.

In one highly publicized trial this year, a 12-member jury clearly did not believe a child witness. An eight-year-old girl in Jacksonville, Florida, testified that she had been sexually molested by Marine Private Robert Garwood after he took her out for an ice cream cone. The jury acquitted Garwood, who said that he had not been present in Jacksonville at the time of the alleged assault. The case received nationwide attention because Garwood had earlier been convicted by a military court of collaborating with the enemy in Vietnam.

But in another celebrated case this year, the testimony of a 14-year-old girl contributed to a first-degree murder conviction in Denver. Lewis Roger Moore was on trial for killing and dismembering a roommate, William Kidd, Jr. While admitting he had dismembered the body, Moore's attorneys suggested the victim had died of natural causes. The only evidence that Moore had contemplated murder was given by a neighbor who was 12 at the time of the incident and testified at the trial that she had overheard him warn the victim, "You better leave my old lady alone, or one of these days you're going to get killed."

Key witness: Timmy White, only six, helped to convict a man who had abducted him in 1980. The case was tried in an Alameda County, California, court.

Under our legal tradition, children have never been automatically barred from testifying in the courts. As early as 1778, courts in England proclaimed there was no precise age below which a child should be considered incompetent to serve as a witness. Then, as now, the decision to let a child take the stand was made in each case. In current U.S. practice, children under 14 years (10 years in some states) are interviewed by a judge and one or both attorneys to determine whether they possess a "reliable memory," are able to recount events, know the difference between truth and falsehood and that lying is morally wrong. Usually the interview takes place with the jury absent, and the judge then decides whether the child is competent to testify.

Very young children have on occasion been allowed to take the stand. In California last June, a six-year-old, Timmy White (photo at left), testified in the trial of a man accused of abducting him the previous year, Kenneth Parnell. The defense claimed police had unduly influenced the boy when they put him under hypnosis in an attempt to identify a second kidnapper. But the jury believed the child, and Parnell was convicted.

Decisions on the validity of a child's statements are made at several points in the legal process. When an incident is first reported, a police officer must decide whether to make a child's statements part of the official record. If a case goes to trial, a lawyer must decide whether to take the risk of putting a child on the stand. Once a child testifies, the judge or jury must decide what weight to give that testimony.

Our own research at the University of Denver suggests that children's testimony can be, under some circum-

Photograph by Wide World Photos

If children distort facts at times, are adults any better? Experiments show adult memory, too, can be changed by suggestion.

stances, as influential as an adult's. We first asked 48 subjects to read a description of the trial of John Sander (a fictional name) on negligent homicide charges. Sander was driving home from work when his car hit and killed a pedestrian. At the trial, several witnesses provided circumstantial evidence. For example, a fellow office worker recounted how Sander had been upset and distracted by marital problems the day of the accident. Then, about halfway through the trial, the only eyewitness to the event took the stand and provided crucial testimony. The mock jurors read that the eyewitness had claimed Sander "ran the red light" before hitting the pedestrian, who was crossing the street.

We gave three different versions of the trial description to the mock jurors. Some read that the eyewitness was six years old, others that the eyewitness was 10 years old, and still others that the eyewitness was 30 years old. In every other way, descriptions of the eyewitness were identical (the sex of the person was not specified). Finally, we asked each juror, individually, to gauge the guilt of the accused on a scale from one to seven, with seven being the most guilty.

John Sander was found just as guilty of negligent homicide, on the average, when a child provided the crucial testimony as when an adult did. The credibility of children was further substantiated when we changed the eyewitnesses' testimony to suggest that the defendant was really innocent. Another 48 mock jurors now read that the eyewitness had testified that the pedestrian "darted out in front of the car." While, as expected, the defendant was found less guilty, overall, than in the first, "red-light," condition, the estimation of guilt in this second trial again did not depend on the age of the eyewitness. The children's statements clearly influenced jurors' decisions as much as those of older witnesses.

Lawyers who hope to put a child on the stand hesitate to empanel jurors who might think children cannot be trusted to tell the truth. During jury selection, they ask potential jurors whether they would believe the statements of a child. If the person says no, he or she is often challenged by the lawyer and not seated on the jury. Our research indicates, however, that such juror statements reflect a conscious theory of the child's ability to testify, not the weight the juror would actually assign to the child's testimony.

We determined the credibility of each witness by asking our mock jurors how much they "relied on and valued" the eyewitness testimony presented in the trial. All of the respondents who read about a 30-year-old eyewitness agreed that the adult was highly credible. The 10-year-old witness received credibility ratings somewhat lower than the adult's. For the six-year-old eyewitness, a clear difference of opinion surfaced. About half of our mock jurors (the believers) claimed that they relied on and valued the child's statements, while the other half (the nonbelievers) claimed they did not. On further questioning, the believers stated that children were basically honest and that a child would have no reason to lie. The nonbelievers distrusted a six-year-old's memory. They felt that a child of tender years was subject to suggestion and distortion. Nevertheless, those same people found the defendant just as guilty whether it was an adult or child that had testified. Despite claims that they had not relied on and valued the child's testimony, the guilt decisions clearly reflected the influence of the children's statements.

In a second experiment we pitted the testimony of an adult eyewitness against that of a child. We discovered that the adult's testimony overshadowed the child's. This effect endured even when the adult witness's view of the car-pedestrian incident had been obstructed. From the two studies we concluded that when the child is the sole eyewitness, his or her statements are influential. But when given a choice between believing a child or an adult, jurors disregard the testimony of the child. In real cases this bias could be disastrous for any attorney using a child witness, whether for prosecution or defense.

Our findings are provocative, but the experiments are admittedly somewhat artificial. The mock jurors read a description of a trial but did not actually see a young, bewildered child groping to answer an intimidating attorney's leading questions. In fact, the actual performance of children on the stand is quite variable. Even after hours of preparation, it is never certain how a child will react in a court. Thus lawyers hesitate to call a child witness. The risk is that they will lose substantial ground, if not the whole case, solely on the basis of the child's performance. The gain occurs if jurors sympathize with the child.

In a *Washington Law Review* article, Judge Stafford cited a case in which a prominent citizen was charged with sexually molesting three young boys. The prosecuting attorney at first censored the story related by two of the young witnesses. Since the jury seemed unconvinced of the citizen's guilt, the prosecutor decided to let the third boy tell the story in his own words. According to Stafford, "The jury's reaction was almost electric. The facts were so sordid and disgusting in the uncensored version that one of the jurors almost became ill. The tide of the trial turned. . . ." On the other

hand, if the child had become confused or been discredited during questioning, the case might have been lost.

Of course, the risk of psychological trauma to the witness from such testimony must be a major consideration in deciding whether to put a child on the stand. It is commonly assumed that any courtroom appearance that requires reliving traumatic events, cross-examination, and the presence of strangers will be emotionally upsetting to a child. In divorce and child-custody cases, children are rarely allowed to testify for this reason (they are usually questioned privately, by the judge, in chambers).

We asked Judge Orrelle Weeks of Denver Juvenile Court whether she had observed situations in her courtroom that she considered risky to a child's emotional well-being. "The only time that children seem to be traumatized by serving as witnesses is when they have to recount in detail foul events to which they themselves have been the victim," she replied. "This is most pronounced for cases involving sexual molestation. Often the law requires that the specifics of the sexual act must be stated. We try to be as gentle and understanding as possible. If the child is testifying about an event that is not so personal, the child does not seem to be adversely affected by the experience."

The young witness's reaction will depend in large part on the attitudes of parents, judges, and attorneys. Parental anxieties are easily transmitted to children. Curbing these anxieties will relieve the child of undue pressure. As strangers to the child, judges and attorneys must take the time to establish rapport with the young witness and then gear their questions to his or her level of understanding. Too often during the trial, lawyers stop at nothing to win a case, and judges hesitate to interfere. What can result is a situation familiar to women in rape cases: the witness is put on trial instead of the defendant.

To protect child witnesses, some experts would like to see them represented by their own attorneys. This point is particularly well taken in cases of children who are victims of sexual molestation or other abuse, since one or both parents may be hostile to them if they do take the stand.

Without some form of emotional and legal support, the child's welfare may be sacrificed to the judicial battle.

Even when child witnesses are not victims of crime but only innocent bystanders, they should be well prepared for court procedure before taking the stand. Visiting an empty courtroom, rehearsing questions, and learning the role of court officials helps ease the possible tensions of a court appearance. It is also likely to improve the quality of the child's testimony.

Sometimes attorneys must weigh the potential trauma to the witness against the likelihood that an alleged criminal will go free—or that a child will remain in an abusive situation and cannot be protected by the courts. According to Donald Bross, counsel for the National Center for the Prevention and Treatment of Child Abuse and Neglect, many cases are abandoned at an early stage for fear of damaging the child psychologically. "The issue of children's testimony can become a pretext for not pursuing a case," Bross says. "When the case is an emotionally difficult one, such as child abuse, attorneys may fail to develop other evidence that might make the child's testimony unnecessary."

Many questions about children's testimony remain unanswered. How does a child's understanding of the judicial system affect performance on the stand? What types of questions best elicit a valid answer from a child? Is a child witness likely to be accurate about some kinds of events but not about others? Whatever the answers to such questions, it seems probable that more and more children will be allowed to testify in future cases. Given our present knowledge, we have no reason to believe that their testimony is not as valid and fair to the defendant as other kinds of courtroom evidence that must be weighed by judges and juries. Judge Stafford sums it up: "We need to know more about how children view and describe their world. . . . I have a sneaking suspicion that in some cases children are more accurate witnesses than adults."

Gail S. Goodman, a developmental psychologist, is a research associate and lecturer at the University of Denver. She has published a number of articles on children's cognition and memory. Joseph A. Michelli is a special investigator for the 10th Judicial District Court of the State of Colorado, who has worked on many criminal cases involving child victims.

Health, Education and Social Services Committee

Charlie Parr, Chairman
Terry Stimson, Vice-Chairman
Vic Fischer
Tim Kelly
Mike Colletta

Official Business

Alaska State Legislature

Senate

Pouch V
State Capitol
Juneau, Alaska 99811
465-4907
465-4908

May 8, 1981

M E M O R A N D U M

TO Senator Pat Rodey
Chairman, Senate Judiciary Committee

FROM: Senator Charles H. Parr CP
Chairman, Senate HESS Committee

RECEIVED
MAY 11 1981

SUBJECT: Senate Bill No. 485

The HESS Committee has passed out SB 485, which has a further referral to the Judiciary Committee. Also in the Judiciary Committee is SB 547, dealing with the same subject, but which the President did not give a HESS Committee referral. The HESS Committee recommends that the Judiciary Committee consider the following three points when acting on SB 485:

1 - Allowing the videotaping of a victim of sexual assault of any age; or, secondarily, raising the age in the bill to 18.

2 - Adding to the offenses for which videotaping is permissible, incest and sexual exploitation of a minor.

3 - Adding a provision for a priority in court calendaring.

CHP:vc

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 485
Title VideoTaping of Testimony
Requested by _____ Date _____

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						
500 EQUIPMENT		55.9				
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		61.5	6.0	6.6	7.2	8.0

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

SB 485 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 a 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 2/22/82 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

Official Business

Alaska State Legislature

Senate

Committee on Judiciary

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Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

JANUARY 29, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

SB 535 - "An Act relating to the criminal laws of the state."

SB 485 - "An Act permitting the videotaping of 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."

SB 547 - "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."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:30 P.M. Committee members present were: Senators Rodey, Ray, and Parr. Senators Hohman and Bennett were absent.

The first item on the agenda was CSSB 485. Mr. Bruce explained the committee substitute draft. Mr. Victor Krumm, Department of Law testified in favor of this committee substitute.

Senator Ray moved that CSSB 485 pass from committee with a do pass. There was not objection and the bill was signed out of committee.

Chairman Rodey next brought CSSB 547 before the committee. Mr. Bruce explained the committee substitute. Mr. Victor Krumm, Department of Law testified in favor of CSSB 547.

Senator Ray moved to make the following amendment: Pg. 1, Line 15, add "under" before the word "16"; delete "or younger" between the words "age" and "at". On Pg. 2, Line 5, add "including those" before the word "essential". There was not objection to the amendment and it was adopted.

Victor Krumm suggests having the bill include court discretion to exclude the public from testimony of minors who are testifying.

Senator Bennett enters the room and his presence was noted for the record.

Senator Ray refers to Mr. Krumm's suggestion and suggests putting it in another bill to avoid any problems.

Chairman Rodey next called Ms. Paula Haley, testifying for the Alaska Network on Domestic Violence, before the committee. She stated that the Network was in support of CSSB 547.

Senator Ray moved that CSSB 547, as amended, be moved from committee. There was no objection and the bill was signed from committee.

Chairman Rodey next brought CSSB 485 before the committee for reconsideration. Senator Ray moved that on Pg. 1, Line 16, the word "under" be added before the word "16" and "or younger" between the words "age" and "at" be deleted. There was no objection to the amendment and it was adopted.

Senator Ray moved that CSSB 485, as amended, be passed from committee. There was no objection and the bill was passed.

The last item on the agenda was CSSB 535.

Testimony was heard from Barry Stern, representing the Department of Law. He relayed to the committee the Department's recommendations.

After having discussion on the bill, Chairman Rodey held CSSB 535 over and adjourned the meeting at 2:35 P.M.

SB485, SB547

3460 Barry Stein / Vic Krumm - Attorney General's
3030 Nina Kinney - Dept. of SS
86-6623 Karen Robinson - Women's Shelter
Jana Varrati - AWARE
586-2977 [redacted] - Women's Resource Center
Deborah Keller
4338 Paul Conger - Dept. of Public Safety
279-7541 Bob Stokes - Public Defender

SB 535

3460 Barry Stein - Dept. of Law
4338 Paul Conger - Dept. Public Safety
Gordon Evans - Board-Horizon
279-7541 Bob Stokes - Public Defender
279-2526 Nick Marcotes - AK Judicial Council
264-0550 Dick Depkaplane (sp?) - Alaska Court System
Called for info 1-18-82

Official Business

Alaska State Legislature

Senate

Committee on Judiciary

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Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

JANUARY 20, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

SB 545 - "An Act relating to release after conviction of an offense."

SB 547 - "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."

SB 485 - "An Act permitting the videotaping of 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."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:40 P.M. Committee members present were: Senator Rodey, Bennett, Ray, and Parr. Senator Hohman was absent.

First on the agenda was SB 545. Barry Stern, Department of Law, reported back to the committee on the instances of offenders released on bail prior to sentencing and subsequently apprehended for similar felonies.

The next witness called was James Sterling, Anchorage Police Department Employees Association. He reported his association was strongly in favor of this bill as written.

Senator Ray moved that the bill be amended to read that, Pg. 1, Line 12 between the word "kidnapping" and the phrase "a Class A felony", insert the word "or" and to delete the phrase "or a Class B felony". There was no objection to the amendment and it was adopted.

Senator Bennett moved that the bill be passed from committee. Members had the following recommendations: Chairman Rodey, do pass; Senator Bennett, do pass; Senator Ray, do pass; Senator Parr, no recommendation.

Senator Bennett was excused from the meeting due to Finance Committee meetings.

Chairman Rodey then took up Senate bills 485 and 547. Senator Bradley, prime sponsor of SB 547, was the first witness. He gave an overview of his legislation and explained the differences between the two bills. Senator Parr, sponsor of SB 485, also discussed the differences and a history of the proposed legislation.

The next witness was Barry Stern, Department of Law. He indicated the administration's support of both bills. He requested that the committee consider three changes to the legislation: 1.) He felt that the order allowing videotaping should be automatic rather than necessitating a hearing on the matter. 2.) He was concerned that the bill only spoke to a sexual assault and felt that additional offenses could be covered. 3.) The committee should consider expanding the use to young witnesses as well as victims.

James Sterling, APDEA, testified that the association was in full support of both bills and that they would like to see this provision applied to all victims of sexual assault.

Deborah Keller, parent of abused child, supported the legislation, but wanted to eliminate the presence of the defendent while the testimony was recorded.

John Pugh, Department of Health and Social Services, testified that the Department's position was favorable to both bills. He suggested the committee delineate which persons could be present during the videotaping of testimony.

Sarah Felix, AWARE attorney, testified in favor of both bills. Her written testimony is attached.

Chairman Rodey directed staff to work with the Department of Law and have a committee substitute ready for the following week. The bills were laid on the table and the meeting was adjourned.

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-

More Supreme Court News: See Page 20

on to close the rest of the trial and to seal the trial transcript. The Supreme Court has agreed to take jurisdiction of 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*, 81-611.

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 hearing [illegible]

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.

...onality of the law. *Globe Newspaper Co. v. Superior Court for the 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 challenge, Albert [illegible] 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, *Gannett v. DePasquale*, 443 U.S. [illegible] 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

Alaska Network on Domestic Violence and Sexual Assault
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POSITION PAPER: Senate Bills 547 and 485

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit corporation composed of 17 domestic violence, sexual assault, and adult crisis intervention programs throughout the State. Network programs are funded in part through grants and contracts awarded by the recently established Council on Domestic Violence and Sexual Assault in the Department of Public Safety.

Network programs have had extensive experience dealing with the issue of sexual assault: programs are usually contacted directly by the victim after an assault, and program counselors and advocates participate in the entire reporting and judicial process. Additionally, some programs have established court monitoring programs in order to evaluate both judges' sentencing practices and convictions by jurors. Network programs also provide services to victims who choose not to report sexual assaults.

Based on experience with the issue and concern for the treatment of sexual assault victims and experience with the criminal justice system, the Network offers the following remarks regarding SB 547 and SB 485.

A. SB 547

1. The Network supports the purpose and principle of SB 547 to protect young victims of sexual assault or sexual abuse of a minor from the emotional distress of repeated or public testimony regarding the crime committed against her or him for the following reasons:

   a. Legislation of this kind protects a young victim of sexual assault from having to repeatedly re-live the experience of the sexual assault;

   b. This type of legislation protects the victim from suffering the initial feelings of shock experienced after the assault;

   c. Legislation of this kind generally mitigates the increased suffering from rape trauma syndrome which occurs as a result of the telling and re-telling of the story of the assault; and

   d. This kind of legislation makes the criminal proceedings less of a public humiliation and ordeal for the victim.

2. The Network also believes that such legislation fairly and intelligently balances the rights of the defendant and the rights of the victim. It offers a degree of protection to the victim of the assault, while leaving intact the defendant's rights to cross-examine and confront the victim.

3. This legislation will facilitate reporting and prosecution of sexual assault by providing the victim with necessary protection and lessening the trauma associated with criminal proceedings.

4. The Network believes that SB 547 is timely legislation which will be found to be constitutional. Other states have enacted similar legislation:

i. New Mexico
ii. Florida; and
iii. Massachusetts

Although the Massachusetts statute is presently being constitutionally challenged, SB 547 is distinguishable since it does not require mandatory closed hearings as the Massachusetts statute does.

5. Although the Network supports the concept behind SB 547, there are certain specific areas requiring further legislative attention. These include:

a. The crime of Incest (AS 11.41.450), a class C felony, is not included in either the videotaping of the exclusion of the public sections of the bill. Incest victims are often children and they should be afforded the same protection as sexual assault and sexual abuse of a minor victim.

b. SB 547 uses, as part of the standard for exclusion of the public or for videotaping testimony, the age of the child at the time of the assault. The Network suggests that the age of the victim at the time of testimony at the criminal proceedings be determinative, since this is the time when the victim will be subjected to the trauma and invasion of privacy associated with testimony. Further, we recommend that the age limit should be 18 years of age, rather than 16 years, since 18 years is the age of majority.

c. The Network would like to see a definition of "severe emotional distress" included in SB 547 since this is an amorphous concept and is used as part of the standard for both exclusion of the public and for videotaping testimony and we would be happy to work with committee staff to develop such a definition, if you so desire.

d. The presumption in Secs. 12.45.047 (a) (2) and 12.45.048 (a) (2) that a child who is under age 16 will suffer severe emotional distress if required to testify in open court should be omitted. Instead, the decision should be within the judge's discretion. This will lessen the possibility of constitutional challenges and still protect the victim.

e. Sec. 12.45.047 (a) (2) concerns videotaping, yet it appears that it also deals with exclusion of the public (page 1, line 27). Is there a dual purpose in this section? Does the bill give the judge the flexibility to order videotaping plus a closed courtroom or simply videotaping a victim's testimony which will be shown later in an open courtroom? The Network suggests the following persons be present during the videotaping and trial:

i. Judge;
ii. Defendant and counsel;
iii. Counsel for the state;
iv. Advocate for the child (i.e., victim-witness assistance person, attorney or rape crisis center staff person);
v. Parents or guardian of child; and
vi. Court personnel essential for taking of the testimony.

VII. JURY

PART IV. RIGHT TO PRESENCE OF STEPPING IV.

f. Because SB 547 may be subject to a successful constitutional challenge, the Network advocates addition of a severability clause to the bill, which would provide that if one section of the statute were found unconstitutional, it could be eliminated, while the rest of the statute would remain in effect. The severability clause is especially important if the presumption language in Secs. 12.45.047 (a) (2) and 12.45.048 (a) (2) is retained.

g. Regarding Sec. 12.45.048 Exclusion of Public, (b) on line 25. The Network suggests that the definition of "public" be expanded to include the advocate for the child as stated earlier in this testimony regarding videotaping. We believe it is especially important for child victims of sexual assault to have emotional support throughout the criminal proceedings. Their advocates from rape crisis centers or victim-witness assistance programs who have worked with them throughout the crisis should be present during the proceedings. This is very important in incest situations where the non-offending parent is often suffering from tremendous personal stress and trauma and may be unable to adequately support their child.

h. Concern has been expressed within the Network over disposition of the videotape. To mitigate the invasion of privacy the victim suffers, we recommend that the tape be transcribed into a written record and be destroyed after the defendant has exhausted the appeals process; or that the tape be ordered sealed by the judge.

- B. SB 485

1. The comments regarding SB 547 are applicable to SB 485, the only difference in the bills being that the exclusion factor is not present in SB 485.

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 975 (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.

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 30, 1978.

Library References
Criminal Law ⇐635.
C.J.S. Criminal Law § 163.

§ 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 [redacted] 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. 167; 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. 167, 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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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 18 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 cloture, 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;

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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. 608, 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 860, 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. 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 cloture, 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 860, 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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under 18 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 455, 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 persons, 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 848.

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

C 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 ⇐635.
C.J.S. Criminal Law § 903.
Comments.
Exclusion of the public from certain trials, see M.P.S. vol. 30, Smith, § 1031.
Sequestration of witnesses, see M.P.S. vol. 10, 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 455, 324 Mass. 564.

§ 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. 295.

Law Review Commentaries

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

Library References

Criminal Law ⇐635.
C.J.S. Criminal Law § 963.
Comments.
Exclusion of public from certain trials, M.P.S. vol. 30, Smith, § 1031.
Sequestration of witnesses, see M. P.S. vol. 19, Hughes, § 109.

Notes of Decisions

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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 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. 504.

2. In general

This section is to be strictly construed in favor of general principle of publicity. 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

918.14 Tampering with witnesses

(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. 75-208, § 44, eff. Oct. 1, 1975.

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

Laws 1975, c. 75-208, rewrote subsec. (1).

Index to Notes

1. In general

There was no such crime as attempted tampering with a witness. Hestor v. State, App., 363 So.2d 20 (1978).

Witnesses have personal right to either invoke or not invoke Fifth Amendment and may waive such right. Lawley v. State, App., 330 So.2d 784 (1976).

Coercing 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 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., 344 So.2d 868 (1977).

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(4) as well as Fla.St.1979, § 918.15 as amended by Laws 1979, c. 79-330 and c. 79-400. Section 918.15 was added by Laws 1977, c. 77-312, § 4.

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. Marshall H. Kapp, 52 Fla.Bar J. 49 (1978).

Library References

Criminal Law ⇐635.
C.J.S. Criminal Law § 869.

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 11 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 11 years of age or younger who has been the victim of aggravated child abuse under s. 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. 79-69, §§ 1 to 3, eff. May 22, 1979.

Laws 1979, c. 79-69, § 4, 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, 3.371 et seq.

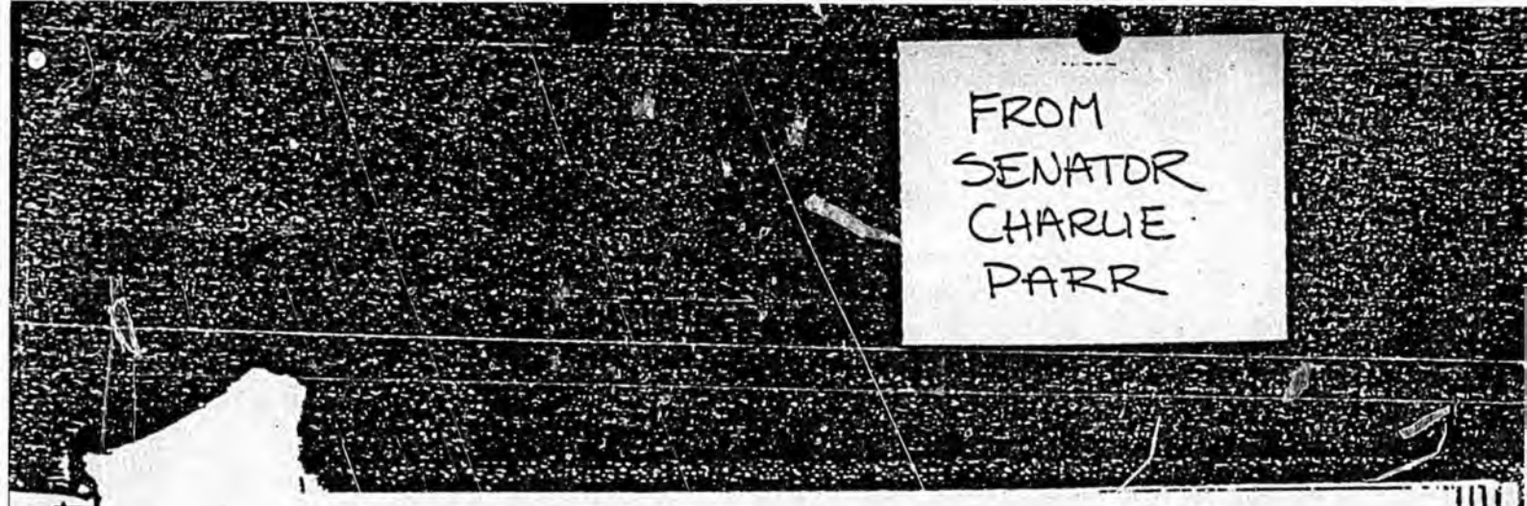
CHAPTER 921. SENTENCE

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);



[1]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 11 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 11 years of age or younger who has been the victim of aggravated child abuse under s. 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.

History.—ss. 1, 2, ch. 79-69.

[1]Note.—Section 3, ch. 79-69, repeals Rule 3.190(j), Florida Rules of Criminal Procedure, ". . . insofar as it is inconsistent with the provisions of this. . . ." section.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. Senate Bill No. 547
Title Videotaping of Testimony of Young Victims of Sexual Assault
Requested by Senators Parr and Fischer Date 4/20/81

II. FISCAL DETAIL
Agency Affected Department of Public Safety
Program Category Affected Administration of Justice
BRU, Program, or Subprogram(s) Affected Detachment and CIB
(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	[illegible]TIES		.1	.1	.1	.1	.2
500	[illegible]		36.0				10.0
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		36.1	.1	.1	.1	10.2

FUNDING (Thousands of Dollars)

GENERAL FUND		36.1	.1	.1	.1	10.2
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

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

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

The Division's review of the potential impact of this Bill upon its operations indicates the need 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'86 assuming the bill became effective in FY'82. The commodities noted above would cover the estimated cost of the video cassette tapes.

DATE [illegible] PREPARED [illegible]

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

SENATE BILL NO. 485

"An Act permitting the videotaping of testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions of the hearsay rule."

Senate Bill No. 485 allows for victims of sexual assault who are 16 years of age or younger to provide testimony out of court through videotape means when there is likelihood the child will suffer severe emotional distress if required to testify in open court. It further specifies that the trial judge shall preside at the videotape proceedings and shall rule on all questions as if at trial, and specifies at what point testimony will take place, if granted. In addition, this Bill changes Rule 804, Alaska Rules of Evidence, specifying this as an exception to the hearsay rule.

While the Department supports this provision, it prefers that Senate Bill No. 547 be enacted with recommended changes, because that Bill provides for the exclusion of the public during testimony, as well as providing for the videotaping of the victim's testimony.

RECOMMENDED BY: _____
John R. Pugh, Director
Division of Family & Youth Services

DATE: 1/18/82

APPROVED BY: _____
Helen D. Beirne
Commissioner

DATE: 1/20/82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SENATE BILL NO. 485
Title "videotaping of young victims of sexual assault or abuse, changing Rule 804..."
Requested by Parr and Fischer 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 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-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Fund 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-

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

Senate Bill No. 485 has no fiscal impact on the Department of Health and Social Services.

IV. DATE 1/18/82 PREPARED BY John R. Pugh, Director
AGENCY Division of Family and Youth Services
PHONE 465-3170

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/80)

.olling Sto... .
Richfield Coliseum
first of two sold-out s... .
plays in the background.

Porn

(Continued from page I-1)

First Amendment right to attend criminal trials. Only "compelling" circumstances could justify closing part or all of a criminal trial, Chief Justice Warren Burger wrote for the court.

Now, in the Globe Newspaper case, the court has an opportunity to explain what such "compelling" circumstances are.

Under a strict Massachusetts law, which lawyers say is the only one of its kind, the trial of Albert Aladjem was closed — even though the prosecution did not request closure and the defense wanted the press and public admitted.

Aladjem was acquitted of the forcible rape of three young girls, two 16-year-olds and one 17-year-old.

The Boston Globe, having protested unsuccessfully before the trial, carried its free press arguments to the highest court in Massachusetts — and lost again. Sparing young victims the embarrassment of publicity and encouraging them to report sexual assaults were more important than unfettered public access to the trial, the court ruled.

Globe lawyers contend that the constitutional right of the press to attend criminal trials means that a courtroom cannot be closed unless the government interest is overriding, there is no alternative to closure and a hearing is conducted first.

The newspaper lawyers also argue that the constitutional promise of a public trial means the courtroom cannot be closed over a defendant's objection unless such closing is "inescapably necessary to safeguard a state interest of the highest order."

Globe lawyers said they were unable to find any other state law that makes exclusion of the press and public mandatory.

ALA
GRANT I.

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