1622 HJ HB 576

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JIM SMITH
Attorney General
State of Florida

DEPARTMENT OF LEGAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

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 pendancy of said legislation.

Sincerely,

Jim Smith
Attorney General

Carolyn M. Snurkowski
Assistant Attorney General

CMS/sw

Aspen 12-1449

asper 12-1449 needs 2/3 vote @ leave 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)

IN THE HOUSE

HOUSE BILL NO. 576

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "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."

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

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

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

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

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

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

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

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

Sec. 12.45.048. EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of sexual assault in any degree or who is the alleged victim of sexual abuse of a minor. The order may be granted if the court finds that

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

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

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

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and his counsel;

(4) counsel for the state;

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HB576

(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. Bailiff; prosecutions "in ct. officer witness"

* 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.

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, HOLOHAN 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[ly] made by counsel than client and

see p. 149

counsels' 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 inprisonment 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. Babbitt, Atty. Gen. by William J. Schafer III, Cleon M. Duke, and Frank T. Galati, Asst. Attys. Gen., Phoenix, for appellee.

Clay G. Diamos, 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.R.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 Hagood, Jacqueline Knight, and Meredith Brown pr
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9. Did the court err in denying defendant a hearing concerning the in-court identification testimony of Eleanor Gallman 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, jewelery, 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 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*, 385 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-

fendant may not challenge the makeup of a jury panel merely because no blacks are represented, but must 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. Manacling 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. 253, 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 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; *Watt 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. Rei[illegible]ou don't have the right to pick and [illegible]se 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 Hagood 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 Hagood, 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

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 articles' 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 Masciari 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 pretrial 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 pretrial 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.

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-

...ny would be videotaped the following ...noon, 21 May 1974. The defendant ...d that there was insufficient time to ...for the deposition. Nevertheless, ...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. Wileynski*, 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 compiled with. In the instant case, it would appear from the record that these provisions were followed. Moreover, in

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 apropos:

"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 487

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.

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 accuseds' arrests; under such circumstances, accuseds 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(c); 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 ⇐266(2)

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 ⇐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
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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 deposition 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 10.52.060[1] 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 4.6[2] 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 deposition. 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 —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

3. In *State v. Newman*, 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. Newman*, *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 the photograph accurately portrays the subject illustrated.

The court admitted the video tape in the *Newman* 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, 300, 301 P.2d 769 (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

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 1¾ 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 appellants' 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, 449 P.2d 400 (1969). If the deposition identification is based upon pretrial 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 clearly 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 clause[2] to a Rule 15 video-taped deposition[3] used in lieu of deponent's personal appearance[4] at a federal criminal trial.

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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
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> (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

4. Fed. R. Crim. P. 15(e), *supra* note 3, also allows the use of a deposition at trial as sub-

The government charged Russell Benfield in a four-count indictment[5] 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

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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. FED. R. EVID. 804(a)(4) (applicable to FED. R. 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), *overruling* 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, 294-303 (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 COLUM. J. 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. J. PRAC. & PROC. 136 (1973).

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 18-42 *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-examination[26] 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*, 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); J.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 . . . .
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> On the whole, when we fully consider this matter, and fully investigate the powers

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29. *See* notes 30-

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30. 223 U.S. 442

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455.
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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]

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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. 1, 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; 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; TEXAS 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, 416 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 (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, forfeited[36] his right of confrontation and that the decision to remove him and proceed with the trial in the presence of his attorney

was proper.[37]

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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 35, 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 than [*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." 414 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. 435, 455 (1967).

37. 397 U.S. at 343
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38. 403 U.S. 204 (1

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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, unavailable[41] to testify at the second trial, had properly admitted the testimony

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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 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 Loses 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* . . . [400 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).

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 trial[44] if the deponent is unavailable to testify.[45]

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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. 403 (1976); 55 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. 984 (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); 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*

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

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Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (if testimony is critical to defense, "hearsay rule may not be applied mechanistically 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 (8th 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 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 Bifurcated Standard?*, 32 WASH. & LEE L. REV. 243 (1975); 38 LA. L. REV. 858 (1978); 40 MO. L. REV. 730 (1975); 33 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. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE at ¶ 800 [04] (1977); 5 WIGMORE, EVIDENCE §§ 1365, 1395-1400 (Chadbourn 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. 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.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 & Jacoubovitch, *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); Doret, *Trial by Videotape—Can Justice Be Seen to Be Done?*, 47 TEMP. L.Q. 228 (1974); Kennelly, *The Practical Uses of Trial-ition 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 DEN. 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 CREIGHTON 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-

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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-

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proposition is sound from a psychological standpoint is unclear. *See generally* C. KEETON, 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 a

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frontation right to pass constitutional muster."[64] The court ordered that Benfield's conviction be reversed[65] 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 cases[68] 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, 1969 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. Fliehman*, 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 ⇐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 ⇐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 enlisted men'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

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, A

No. 3178-II

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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This packet is just for your information.

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.

Alas

Source:

CSSCR 17

CONCURRE

Relating to peace offic
of rape victims.

BY THE LEGIS

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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 emotionnl 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 n naggressive 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 th 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.

A.R.: Florida Citrus Commission v. Griffin, Fla.App.1971, 249 So.2d 42; cf. Kelly v. State, Fla.App.1967, 202 So.2d 901; Adkins 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. Daniely, 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

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
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.

1. 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

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 ⇐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 ⇐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 ⇐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 wheth 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 ⇐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 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 Ill.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-

* *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 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.

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 house 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

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, 440 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 HOCKWOOD, JJ., concur.

107 Ariz. 557

PHOENIX NEWSPAPERS INCORPORATED, Petitioner,

v.

Honorable Renz 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.

1. 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 on 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)

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.

2. Criminal Law ⇐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.

3. Criminal Law ⇐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.

4. Criminal Law ⇐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).

5. Criminal Law ⇐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).

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

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

Before CHARLES CARROLL, HENDRY and HAVERFIELD, JJ.

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.

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.

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.

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

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 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 COMPANY, 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 confessors.[2] "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."[3] 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 § 1361, 6 *id.* § 1766 (3d ed. 1940); 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 preliminary hearing and pre
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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 witnessess . . . ,' "[7] 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*

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inary 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. 1958), *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 Bentham[12] 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. Heller, 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, 341-46 (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 Wigmore, *op. cit. supra* note 5, § 1420.

15. Mattox v. United States, 146 U.S. 140, 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.

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, [illegible] 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 progeny[20] 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 MODEL CODE OF EVIDENCE 221-22 (1942).

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 Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957). Rhetorically, however, the Court in *Schware* measured the sanity of bar examiners not the weight of evidence: "There is no evidence in the record which rationally justifies a finding that Schware 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 prose-

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).

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"It was obvious, he
reports which were
had no opportunity
reflected adversely o
who took their state

24. For example, alt
hearsay rules, McCorm
under the proposed sta

25. *Cf.* Napue v. Illi

26. 360 U.S. 474 (19

27. Though petitione
damage to his reputatio
sufficient to warrant ap
ment's failure in *Green*
349 U.S. 331 (1955); Bai
equally divided court 1
Compare Dayton v. Dul

28. 360 U.S. at 479.