ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1623 HJ HB 576

cutions, or at least tempt prosecutors to use hearsay instead of live witnesses whose demeanor is unimpressive; or that it may induce prosecutorial negligence in securing witnesses by holding out the easy alternative of presenting their statements through other witnesses. Such pratices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach.

Fears of this sort would be allayed by a confrontation clause read not as a Delphic reference to the essence of the hearsay rule, but as a canon of prosecutorial behavior. The clause should be held to require that the prosecutor make a diligent, good-faith effort to produce witnesses to testify. So read, the clause would bind the prosecutor regardless of whether some exception to the rule against hearsay would allow the prospective witness' testimony to be recounted by others.[24]

The objection to the prosecutor's presentation of hearsay instead of an available witness is not that such hearsay necessarily is less reliable than the hearsay of an unavailable witness, but that the prosecutor has made the testimony less reliable than it might have been.[25]

Although the Supreme Court never has discussed confrontation explicitly in terms of prosecutorial behavior, its decisions strongly suggest such a rule. *Greene v. McElroy*[26] presents a striking example of objectionable failure by the government to present witnesses.[27] *Greene* dealt with the dismissal of an executive of a private company that held defense contracts solely because his security clearance had been revoked by a Defense Department security board. The revocation came after a hearing at which the government presented no witnesses. "It was obvious, however . . . that the Board relied on confidential reports which were never made available to petitioner. . . . Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements."[28] The Court sidestepped the constitutional

24. For example, although an excited utterance is admissible under conventional hearsay rules, McCormick, Evidence § 272 (1954), the prosecutor would be required under the proposed standard to produce an available witness.

25. *Cf.* Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

26. 360 U.S. 474 (1959).

27. Though petitioner suffered no criminal sanction, the loss of his job and the damage to his reputation that followed the loss of security clearance apparently were sufficient to warrant application by the Court of criminal trial standards. The government's failure in *Greene* to present witnesses was not unique. *See, e.g.*, Peters v. Hobby, 349 U.S. 331 (1955); Bailey v. Richardson 341 U.S. 918 (1951), *affirming per curiam by an equally divided court* 182 F.2d 46 (1950); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955). Compare Dayton v. Dulles, 357 U.S. 144 (1958).

28. 360 U.S. at 479.

question, holding that the Board was authorized by Congress and the President to conduct only the kind of security clearance program "which affords affected persons the safeguards of confrontation and cross-examination."[29]

A confrontation clause incorporated into the Fourteenth Amendment speaks not only to the threat of Big Government foreshadowed by the Defense Department's Industrial Security Board, but also to the homespun guile and sloth of local prosecutors. The obligation of federal prosecutors to present at trial the best available evidence was established in leading decisions under the confrontation clause before *Pointer* extended it to the states. Petitioner in *Kirby v. United States*[30] was charged with receiving stolen goods. The Court found error in the admission, to prove the property was stolen, of evidence that three other persons had been convicted of stealing it. In *Motes v. United States*,[31] petitioner's conviction was reversed because the trial judge admitted a transcript of testimony taken at a preliminary hearing after a showing that the witness' absence was due to the prosecutor's negligence. In both cases the prosecutors settled for second-hand evidence. In neither was there a showing that first-hand evidence was unavailable.

Pointer and its companion case, *Douglas v. Alabama*,[32] come within the compass of the earlier decisions. In *Pointer* the state where the trial was held and the state where the key witness had gone were signatories to the Uniform Act to Secure the Attendance of Witnesses from Without the State,[33] which, in effect, allows interstate service of process. Since the victim's hearsay testimony was the most damaging piece of evidence against petitioner, it was reasonable to require that the prosecutor undergo the slight inconvenience of using the act to insure the witness' presence. There is no indication that he attempted to do so.

In *Douglas* the prosecutor knew in advance that a witness he intended to call, a confessed accomplice of the defendant who had been convicted at a separate trial, would avoid damaging his chances for an appeal by refusing on Fifth Amendment grounds to testify. Nonetheless, he was called. When he refused to testify, the prosecutor read aloud from his confession, which incriminated the defendant, pausing

29. *Id.* at 506.
30. 174 U.S. 47 (1899).
31. 178 U.S. 458 (1900).
32. 380 U.S. 415 (1965).
33. CAL. PEN. CODE §§ 1334-34.6; TEX. CODE CRIM. PROC. art. 24.28 (1966).

at intervals to inc
the statements att
conviction.

It is arguable tl
present the best a
stand. When the
rely upon hearsay
tation with the he
hearsay that distu
missible under co
interest,[31] and in f
The prosecutor, t
fuse to testify, ca
confession by putt
mouth; that is, to
ventriloquism suc
credibility and nc
Court's major obj
cutor's reading an
The former indic
ness. This inferen
two policemen wl
the witness' relian
fession implicating
be tested because
refused to testify.[3

The cases in wl
frontation clause c
standard, and thu

34. See UNIFORM RU
35. 380 U.S. at 419-
versed a conviction afte
way that put it beyo
witnesses at a murder
which could not but fo
ians during the entire
Douglas, however, and
36. Snyder v. Massa
not to present confron
(judge, clerk and officia
had pleaded in trial co
the constitutional stand
testimony of deceased

at intervals to inquire whether the witness remembered having made the statements attributed to him. The Court reversed the defendant's conviction.

It is arguable that however cynical the prosecutor's charade, he did present the best available evidence by bringing a live witness to the stand. When the witness refused to testify, he had no choice but to rely upon hearsay testimony. So read, *Douglas* would equate confrontation with the hearsay rule. But it was not simply the introduction of hearsay that disturbed the Court. The confession might have been admissible under conventional hearsay law as a declaration against penal interest,[34] and in fact was described in the testimony of two policemen. The prosecutor, however, knowing in advance the witness would refuse to testify, called him simply to enhance the credibility of the confession by putting words in the witness' instead of the prosecutor's mouth; that is, to profit from the same illusion that for ages has made ventriloquism such an engaging folk art. It was this enhancement of credibility and not simply the presentation of hearsay that drew the Court's major objection. The Court distinguished between the prosecutor's reading and the witness' invocation of the Fifth Amendment. The former indicated only that the confession was made by the witness. This inference could be partially tested by cross-examining the two policemen who had testified that the confession was made. But the witness' reliance on the Fifth Amendment suggested that the confession implicating the defendant was true; that inference could not be tested because only the witness was competent to discuss it and he refused to testify.[35]

The cases in which the Court has denied claims based on the confrontation clause do not appear to involve violations of the proposed standard, and thus are consistent with it.[36] This frees the Court to

---

34. See Uniform Rules of Evidence 63(10).

35. 380 U.S. at 419-20. In Turner v. Louisiana, 379 U.S. 466 (1965), the Court reversed a conviction after the credibility of witnesses' testimony had been enhanced in a way that put it beyond attack by cross-examination. Two deputy sheriffs, important witnesses at a murder trial, had custody of the jury. ". . . [T]he relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Id.* at 474. The case pre-dated *Pointer* and *Douglas*, however, and the due process standard was employed.

36. Snyder v. Massachusetts, 291 U.S. 97 (1934) (view by jury of crime scene held not to present confrontation problem); Dowdell v. United States, 221 U.S. 325 (1911) (judge, clerk and official reporter who certified that defendants had been arraigned and had pleaded in trial court not "witnesses" within the meaning of a statute embodying the constitutional standard.); Mattox v. United States, 156 U.S. 237 (1895) (cross-examined testimony of deceased witnesses held admissible). *But cf.*, Salinger v. United States, 272

interpret the confrontation clause as a standard of prosecutorial behavior and to abandon the unwieldy and unwise hearsay-confrontation equation suggested by the rhetoric in *Pointer*.

U.S. 542 (1926) (letters from persons not called as witnesses admitted to explain replies by accused to them—perhaps a marginal case, though the most damaging evidence appears to have come from letters written by the accused).

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

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

The Confrontation Clause, Short Circuited

The case of *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975), is a test case. Its purpose is to test the constitutionality of the use of closed circuit television [hereinafter cited C.C.T.V.] in the examination of witnesses.[1] In deciding this case, the Missouri Supreme Court held, *inter alia*,[2] that the use of C.C.T.V. for the examination of an expert witness did not violate the defendant's right to confront his adverse witnesses under the Sixth Amendment of the United States Constitution.[3] While the *McCoy* decision involved a prosecution under a municipal ordinance for the possession of marijuana, its holding may open the door for the use of C.C.T.V. examination of witnesses in other prosecutions. The witness examined in this case was the state's expert witness who testified as to the chemical analysis of a substance alleged to be marijuana. This examination was conducted via C.C.T.V. even though the witness was only a few miles away in the police laboratory. Furthermore, there was no showing that the state had tried but was unable to produce the witness in person, or that the witness was otherwise unavailable for in-court examination.[4] In upholding the use of C.C.T.V. in this situation the Missouri court stressed:

> The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits, . . . being used against the prisoner in lieu of personal examination and cross-examination of the witness. . . .[5]

and that

> . . . a primary interest secured by it [the Confrontation Clause] the right of cross examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of *physical confrontation*.[6]

In further support of this position, the court cited a Massachusetts case wherein the use of a certificate from the state department of health attesting to the

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

2. The court also held that the use of C.C.T.V. equipment and the presence of reporters did not violate the defendant's Fifth and Fourteenth Amendment rights of due process under the United States Constitution. It based its holding upon the facts that the C.C.T.V. equipment was installed in an unobtrusive manner, judicial decorum was maintained, and the positioning of the equipment was such that attorney/client communications were not obstructed, and that therefore the defendant got a fair trial and his rights under the Due Process Clause were not denied. Answering the charge that the use of C.C.T.V. was a violation of the Code of Professional Responsibility and contrary to judicial ethics, the court said that the use of C.C.T.V. in this case is not the type of "televising" proscribed by Canon 3A(7) of Rule 2 of the Code of Ethics. Finally, the defendant argued that the marijuana seized from him was illegally seized, but the court dismissed this claim by reaffirming a prior decision [State v. Darabcsek, 412 S.W.2d 97 (Mo. 1967)], which held that a search made in conjunction with a booking procedure was a reasonable procedure and that evidence thus seized need not be suppressed.

3. 525 S.W.2d 336 at 337-39.

4. *Id.*

5. 525 S.W.2d at 338, quoting from Mattox v. United States, 156 U.S. 237, 242 (1895).

6. 525 S.W.2d at 338, quoting from Douglas v. Alabama, 380 U.S. 415, 418 (1965).

chemical analysis of an alleged drug had been held not violative of the defendant's right to confrontation under the United States Constitution.[7] From this case, the Missouri court reasoned that if a mere certificate could be upheld, then the use of C.C.T.V., which presumably grants a greater right, could not violate the defendant's right to confront witnesses. However, the court's analysis of the confrontation problem is superficial. The court failed to take into consideration the differences between the use of C.C.T.V. and actual physical confrontation, and they failed to show how these differences affect the purpose of the Confrontation Clause of the United States Constitution. This note is an attempt to analyze some of these deficiencies.

HISTORY AND PURPOSE OF THE CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution states, in pertinent part, that, "In all criminal prosecutions, the accused shall enjoy the right . . . ; to be confronted with the witness against him."[8] Since the time of the incorporation of this clause of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment,[9] the Confrontation Clause has been subject to increasing amounts of litigation.[10] Traditionally, the Confrontation Clause has been thought of as a bar against the use of ex parte affidavits against the accused in lieu of personal examination and cross-examination of the witness.[11] In addition, a substantial number of cases concern admissibility of hearsay evidence and its possible conflict with the Confrontation Clause. Generally, these cases state that evidence allowed by established exceptions to the hearsay evidence rules do not violate the defendant's right of confrontation where there is an adequate opportunity of cross examination.[12] However, even a well-established hearsay exception will not be tolerated when it "unnecessarily subvert(s) the opportunity to cross-examination."[13] Thus, for example, in *Barber v. Page*,[14] the defendant was deprived of his right to confront the witness where the witness was out of the trial court's jurisdiction but where the state had made no effort to procure his attendance. The Supreme Court stated that the witness is not unavailable "unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[15] In *Mancusi v. Stubbs*,[16] the Supreme Court distinguished *Barber* and held that there was no violation of the Confrontation Clause when the prior testimony of the witness is used in evidence where:

7. Commonwealth v. Harvard, 356 Mass. 452, 253 N.E.2d 346 (1969); *see also* Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465(1923); Annot., 29 A.L.R. 289 (1924).

8. U.S. Const. amend. VI.

9. Pointer v. Texas, 380 U.S. 400 (1965).

10. J. Israel and W. LaFave, Criminal Procedure, Constitutional Limitations sec. 6, at 58 (2d ed. 1975). [hereinafter cited as Criminal Procedure]

11. Mattox v. United States, 156 U.S. at 242; Kansas City v. McCoy, 525 S.W.2d at 338.

12. Pointer v. Texas, *supra* note 9; *see also* California v. Green, 399 U.S. 149 (1970); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); Criminal Procedure, *supra* note 10, at 59-60.

13. Criminal Procedure, *supra* note 10, at 59.

14. Barber v. Page, 390 U.S. 719 (1968).

15. *Id.* at 725.

16. Mancusi v. Stubbs, *supra* note 12.

1) the witness was out of the
trial, and 3) the defendant ha
the first trial. In both these c
prior testimony exception to t
in fact be unavailable.[17]

More recently, in *Califor*
again spoke of the purpose of

> Confrontation: (1) insures t
> oath—thus impressing him
> against the lie by the possibi
> to submit to cross-examinati
> discovery of the truth"; (3)
> fate to observe the demeanor
> the jury in assessing his cred

In sum, the purpose of the C
satisfactory basis for evaluati
insure maximum probability

CONFRONTAT

At this point it is impor
audiovisual media, in particu
cause though the two media o
have on an accused's right to
of videotape is important ina
mentaries approving its uses[2]
analysis of C.C.T.V. and its c

It is generally accepted t
a boon to the adjudicatory pr
achievements in this field. Th
audio and visual portions are
the use of a camera and spe
easily and can be replayed at
Videotape can and has been
at least four foreseeable ways

17. Barber v. Page; Mancusi v.
60.

18. California v. Green, 399 U.

19. *Id.* at 158.

20. *Id.*; *see also* Sermerjian, *Th*

21. State v. Lusk, 452 S.W.2
1970); Kornblum and Rush, *Televi*
[hereinafter cited Kornblum and R
tape Technology In Perspective, 6
(1974).

22. Kornblum and Rush, *supra*

23. 6 Creighton L. Rev. 214, *s*

24. Kornblum and Rush, *supra*

1) the witness was out of the country; 2) the witness had testified at the first trial, and 3) the defendant had the opportunity to cross-examine the witness at the first trial. In both these cases however, the Court stressed that before the prior testimony exception to the hearsay rule can be applied, the witness must in fact be unavailable.[17]

More recently, in *California v. Green*,[18] the United States Supreme Court again spoke of the purpose of the Confrontation Clause:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[19]

In sum, the purpose of the Confrontation Clause is to afford the trier of fact a satisfactory basis for evaluating the truth in the fact-finding process so as to insure maximum probability that the truth will emerge.[20]

CONFRONTATION: VIDEOTAPE vs. C.C.T.V.

At this point it is important to distinguish between C.C.T.V. and other audiovisual media, in particular, videotape. This distinction is important because though the two media outwardly seem very similar, the effect which they have on an accused's right to confrontation is very different. Also, a discussion of videotape is important inasmuch as there has been some case law and commentaries approving its uses[21] and an analysis of these can serve as a tool to the analysis of C.C.T.V. and its effect upon confrontation.

It is generally accepted that the increasing use of audiovisual aids has been a boon to the adjudicatory process.[22] Videotape is one of the newer technological achievements in this field. The term videotape refers to a process by which both audio and visual portions are transcribed onto magnetic tape. This is done with the use of a camera and special recording equipment. The tape can be stored easily and can be replayed at will on a monitor similar to a television monitor.[23] Videotape can and has been used in both civil and criminal cases.[24] There are at least four foreseeable ways in which it can be used, *i.e.* to record: (1) ex parte

---

17. Barber v. Page; Mancusi v. Stubbs, *supra* note 12; CRIMINAL PROCEDURE, *supra* note 10, at 69.

18. California v. Green, 399 U.S. 149 (1970).

19. *Id.* at 158.

20. *Id.*; *see also* Semerjian, *The Right of Confrontation*, 55 A.B.A.J. 152 (1969).

21. State v. Lusk, 452 S.W.2d 219 (Mo. 1970); State v. Hendricks, 456 S.W.2d 11 (Mo. 1970); Kornblum and Rush, *Television in the Courtroom and Classroom*, 59 A.B.A.J. 273 (1973) [hereinafter cited Kornblum and Rush]; Comment, *Nebraska Faces Videotape: The New Videotape Technology In Perspective*, 6 CREIGHTON L. REV. 214 (1972); Comment, 26 STAN. L. REV. 619 (1974).

22. Kornblum and Rush, *supra* note 21.

23. 6 CREIGHTON L. REV. 214, *supra* note 21.

24. Kornblum and Rush, *supra* note 21; 6 CREIGHTON L. REV. 214, *supra* note 21.

statements, for example, confessions, (2) depositions of witnesses, (3) testimony for trial, and (4) live testimony at the trial to prepare an appellate record.[25]

The use of videotape in presenting confessions of a defendant has been upheld by the Missouri Supreme Court.[26] Likewise, other uses are also thought to be non-violative of the defendant's constitutional rights.[27] The question of whether prerecorded videotaped testimony of an available witness violates the defendant's right to confront the witness will probably be answered soon.[28] In this last situation, it can be argued that where a witness testifies in front of a camera in the defendant's presence and the defendant has the opportunity to cross examine, and the videotape is played back to the trier of fact at the trial so that it can weigh the witness' demeanor, the purpose of producing the witness has been fulfilled and this procedure will not violate the defendant's right to confront the witness.[29] It is important to note that the use of videotape just described is the use most analogous to the use of C.C.T.V. in the *McCoy* case: henceforth, when the term videotape is used it will refer to this use.

Videotape and C.C.T.V., although similar in that they both transmit audio and visual messages, are different in their use and their effect upon confrontation. C.C.T.V. is the use of a camera, microphone, and broadcasting system by which audio and visual images are *instantaneously* broadcast to a remote monitor location.[30] The set-up in the *McCoy* case consisted of two such systems. In the courtroom there were two stationary television cameras, two monitors which appeared to be ordinary television sets, and microphones for the use of judge and counsel. In the laboratory, where the state's expert witness was located, was a camera, a monitor and microphone. During the examination of the witness, the witness could be heard and seen in the courtroom by the defendant, the attorneys, and the judge who sat as the trier of fact in this case. The witness could see and hear the examining attorney and he could hear the judge as well. There was no court official present with the witness; however, there were four other persons present in the room with him. The transmission of images and voices was instantaneous.[31]

From this description of the C.C.T.V. system used in *McCoy*, it is easy to see the striking contrast between it and the videotape system described above. First, in the videotape recording of the witness' testimony, the witness is physically confronted with the defendant at the time of the deposition. Second, the witness is physically confronted with both the defendant's and state's attorney. There is the physical presence of a court official who is to administer the oath.

25. *Id.*

26. State v. Lusk, *supra* note 21; State v. Hendricks, *supra* note 21.

27. 26 Stan. L. Rev. 619, *supra* note 21, at 639-642, (This article gives a good discussion on the use of videotape and its relationship to the Confrontation Clause).

28. 6 Creighton L. Rev. 214, *supra* note 21. The National Center for State Courts plans to raise these issues on appeal in cases presently being prepared in Georgia and New Hampshire.

29. 26 Stan. L. Rev. 619, *supra* note 21, at 641; *see also, The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 115 (1970).

30. 21 Encyclopaedia Britannica, *Television* 812-13 (1973).

31. Record, Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975); note also that a videotape recording was made of the examination of the witness to preserve the record for any subsequent appeals.

[illegible] there is an advocacy atmosphere surrounding the taking of the videotape deposition by which the witness realizes the importance and seriousness of his testimony. For these reasons, some persons argue that in a videotape deposition the witness is produced for the purposes of the Confrontation Clause and that the transmission of this confrontation to the trier of fact is merely delayed.[32] This argument cannot be so easily made, however, when the medium used to present the witness' testimony is C.C.T.V. When C.C.T.V. is used, as in *McCoy*, the witness is never physically confronted with the defendant[33] or by the attorneys or judge or any court official; therefore, he is not under the same pressures as a witness who testifies via videotape. The atmosphere is much less adversary than when videotape is used. The witness is insulated in his own comfortable and familiar surroudings and there is no monitoring or control of any of the events that occur at the place of examination of the witness. As will be fully developed below, it is due to these differences (between videotape and C.C.T.V.) that the argument made for videotape's non-violative effect on confrontation cannot be made for C.C.T.V., and that C.C.T.V., as used in *McCoy*, fails to provide the defendant with his right to confront adverse witnesses.

THE PURPOSES OF CONFRONTATION, SHORT CIRCUITED

The argument that C.C.T.V. deprives the defendant of his right to confront the witness can be supported by applying the purpose of the Confrontation Clause to the use of C.C.T.V. in examining witnesses. In *California v. Green*, *supra*, the United States Supreme Court summarized the purpose of confrontation as: (1) insuring that testimony will be given under oath, (2) forcing the witness to submit to cross-examination, and (3) allowing the trier of facts to observe the witness' demeanor.[34] Each of these purposes will be discussed as they apply to the *McCoy* case.

Testimony Given Under Oath

The first purpose of confrontation is that it "insures the witness will give his statements under oath. . . ."[35] Confrontation undoubtedly has this effect when the witness is testifying in front of the court. He is physically present before the court and therefore is constantly reminded by his surroundings that he is testifying under oath. However, when videotape is used, there is a more relaxed atmosphere and this may cause the witness to be less mindful of the important purpose of his testimony.[36] Notwithstanding this fact, the witness is still reminded by the advocacy nature of the proceeding that his testimony is a serious matter. But the use of C.C.T.V. has a strikingly less profound effect upon the witness. There is virtually nothing to remind the witness that he is testifying under oath. The witness is not in the presence of the attorneys, judge, defendant

32. 26 STAN. L. REV. 619, *supra* note 21, at 641.

33. Record, *supra* note 31; the witness in this case did not even see the defendant's image on the monitor; all he saw was the image of the examining attorney.

34. 399 U.S. at 158.

35. *Id.*

36. Kornblum and Rush, *supra* note 21; 26 STAN. L. REV. 619, *supra* note 21, at 630.

or any court official. The witness is in his own familiar surroundings and all he has to remind him of the seriousness of the proceedings is a small television screen with the image of the examining attorney.[37] In fact, in the *McCoy* case the oath was not even properly administered. The examination of the witness was begun before the witness had the presence of mind to remind the court that he had not been given the oath.[38] This occurrence in itself shows the great deficiency of C.C.T.V. in insuring that the witness will give his statements under oath.

Cross-Examination

The Supreme Court has declared that another purpose of the Confrontation Clause is that it "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'."[39] Here the Supreme Court quotes Dean Wigmore who likens the purpose of cross-examination to the purpose that torture served in the medieval system,[40] that is, to put the witness under certain physical and psychological pressures to insure that he is telling the truth.[41] When an in-court examination or a videotape examination of a witness is made, all available pressure can be applied to the witness because the examining attorney is physically confronting him. However, when C.C.T.V. is used, the pressure that an attorney can exert upon a witness is significantly diminished. Besides disabling the examining attorney from applying certain physical and psychological pressures upon the witness, the use of C.C.T.V. has the additional effect of making cross-examination less effective by cutting off certain feedback the attorney would have received from the witness had the examination taken place within his/her physical presence.

Physical and psychological pressures can be placed upon the witness by means other than the mere asking of questions. One such pressure which requires physical confrontation of a witness is the actual physical closeness with which he is confronted. It seems unquestionably true that people's actions toward and interactions with other people are influenced by space.[42] When a person comes so close to another person that it invades his personal buffer zone it causes that person discomfort.[43] This principle has been known and applied by the police for years. One of their textbooks recommends the following:

> [T]he interrogator should sit close to the subject, with no table or desk between them, since "an obstruction of any sort affords the suspect a certain degree of relief and confidence not otherwise obtainable." At the beginning of the session the officer's chair may be two or three feet away, "but after the interrogation is underway the interrogator should move his chair in closer so that one of the subject's knees is just about between the interrogator's two knees."[44]

37. Record, *supra* note 31.
38. *Id.*
39. California v. Green, 339 U.S. at 158.
40. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974).
41. *Id.*
42. C. KLEINKE, FIRST IMPRESSIONS, THE PSYCHOLOGY OF ENCOUNTERING OTHERS, at 35 (1975) [hereinafter referred to as FIRST IMPRESSIONS]
43. *Id.*
44. *Id.* at 37.

This procedure is used by the police to apply pressure upon a suspect to ascertain the truth of his statements. Another pressure that can be placed upon a witness in a situation where there is physical confrontation is the use of gaze, *i.e.* the giving or receiving of steady, fixed eye contact.[45] The receiver of gaze will have an aversion to receiving it especially when it communicates threat or dominance.[46] Therefore, the astute attorney can use gaze to put pressure on a witness and thereby insure a more thorough investigation of that witness. In both an in-court examination of a witness and an examination on videotape, both the pressures of physical closeness and gaze can be applied to the witness due to the existence of actual physical confrontation. But where C.C.T.V. is used both types of pressure are effectively curtailed. The defense attorney is certainly not physically close to the witness and even if the television monitor could effectively convey the pressure of physical closeness it still is probably several feet away from the witness. Also, the witness is not subject to any of the effects of gaze because no eyes are upon him other than the impersonal eye of the television camera.

Because C.C.T.V. does not involve physical confrontation with the witness, certain non-verbal feedback is cut off to the examining attorney. This can be extremely important because studies have shown that people act differently when they act deceitfully, rather than truthfully, and these differences can be seen in their bodily movements.[47] This is true because most people have not learned to control their body "cues" as well as their verbal statements, and as a result often leak their true feelings via their body movements.[48] In one interesting experiment a number of judges were shown silent movies of patients known to be hiding their true feelings. Half of the judges viewed only the patients' heads and faces and the other half viewed only the patients' bodies. The judges who saw only heads and faces were much more often deceived than those who viewed only the bodies.[49] The reason for this result is that our society does not teach us to monitor our bodies as much as our faces when we are being deceitful.[50] As Freud put it, "if his lips are silent, he chatters with his finger tips; betrayal oozes out of him at every pore."[51] Besides cutting off this bodily feedback, C.C.T.V. also cuts off some facial feedback. When people are asked to lie to an audience they often look at the audience less than when they are asked to tell the truth.[52] A witness would have the same reactions when testifying in front of others. If the witness is being physically confronted by an examining attorney in either an in-court examination or one made on videotape, the attorney can pick up this feedback and use it to probe areas in which the witness shows signs of deceit. But where C.C.T.V. is used, the witness is not testifying in front of an audience or a group and the tendency to look or not look at the audience will

45. *Id.* at 22.
46. *Id.*
47. *Id.* at 54; *see* [illegible] D. McCarty, Psychology and the Law, 165-68 (1960).
48. First Impressions, *supra* note 42 at 54.
49. *Id.*
50. *Id.*
51. S. Freud, Fragment of an Analysis of a Case of Hysteria (1905).
52. First Impressions, *supra* note 42, at 27.

be negated. The witness may further avoid giving feedback by constantly looking in the direction of the camera or monitor. This action will effectively eliminate this feedback to both the examining attorney and the trier of fact. Inasmuch as the use of C.C.T.V. decreases the amount and degree of physical and psychological pressure that can be placed on a witness in that it eliminates the effects of physical closeness and gaze, and because it thwarts the examining attorney's attempts to get feedback from the witness, Wigmore's "greatest legal machine"[53] can effectively be short-circuited and the purpose of forcing the witness to submit to cross-examination as suggested in *Green* defeated.

Jury Evaluation

A third purpose of confrontation as stated in *Green* is that it permits the fact-finder to observe the witness' demeanor, thus aiding it in assessing his credibility.[54] The jury system has been a fundamental part of our legal framework. It is the duty of the jury to determine questions of fact. In order best to do this, the jury must be able to observe the witness under the pressure of the advocacy process. When an in-court examination of the witness is conducted, there is no doubt that this goal is accomplished. The witness is seen by the trier of fact as he is physically confronted with the defendant, the attorneys and the judge. The witness is well aware of the seriousness of his testimony and he is subject to maximum pressure by the defendant and his attorney. The trier of fact is able to watch his every action and it is able to weigh his demeanor and assess his credibility. Similarly, when videotape is used, the witness is physically confronted by the defendant and his attorney. The advocacy procedure puts the same type of pressure on the witness as an in-court examination. His reaction to this pressure can be seen and evaluated by the trier of fact on the videotape replay. The videotape procedure will capture the witness' demeanor much as it would be seen by the trier of fact in an in-court examination, the major difference being that the witness is seen by the trier of fact on a television monitor and not in person. Hence, the argument can be made that the witness is produced for the purpose of confrontation, and the trier of fact is able to weigh the witness' demeanor as it would have been weighed in an in-court confrontation. The two situations just described are, however, very different from the situation in which C.C.T.V. is used. When C.C.T.V. is used, the atmosphere in which the testimony is given is very relaxed and none of the physical and psychological pressures of a physical confrontation are present. The witness is shown to the trier of fact in the comfort of familiar surroundings and in a situation where there is no court control over his actions.[55] The trier of fact sees the witness as the witness wishes to be seen and not under the fire of an adverse cross-examination. Because of these deficiencies in the C.C.T.V. procedure, the

53. Wigmore, *supra* note 40, at 32.

54. 399 U.S. at 158.

55. Extreme abuses are possible; for example, the witness may be prompted in giving his answers by others in the room, he may resort to the use of notes or other memoranda in giving his answers, etc.

trier of fact is dis
his credibility. Th
feated.

The Missouri
limited circumsta
expert witness tes
municipal violati
court's opinion m
to those in the *M*
the door for the u
by the statement
witness against o
to require more t
many instances o
To have thus ope
with the use o C
accused to confro
points out that, "
of the use of clos
examination righ
grips with the p
and concludes th
in *McCoy*, falls s
insure that testi
cross-examinatio
witness.

56. 525 S.W.2d
57. *Id.* at 339.
58. *Id.* at 340 (d

trier of fact is disabled in weighing the demeanor of the witness and assessing his credibility. Therefore, anot. er of the purposes of cross-examination is defeated.

CONCLUSION

The Missouri Supreme Court has allowed the use of C.C.T.V. under the limited circumstances of the *McCoy* case, *i.e.* in an examination of the state's expert witness testifying to a routine chemical analysis for a prosecution of a municipal violation, a proceeding said to be "civil in nature."[56] However, the court's opinion may be read so as not to strictly limit the decision to facts similar to those in the *McCoy* case. The opinion can easily be interpreted as opening the door for the use of C.C.T.V. in more serious prosecutions. This is evidenced by the statement in the opinion that, "to require *physical* presence of an expert witness against one accused of violating a municipal police regulation would be to require more than the confrontation clause rights of an accused demand in many instances of prosecutions for felonies."[57] (emphasis supplied by the court) To have thus opened the door without a full analysis of the problems involved with the use of C.C.T.V. is indeed unfortunate, for it allows the right of the accused to confront his witnesses to be severely eroded. The dissenting opinion points out that, "the facts in this case do not portray a sufficiently clear picture of the use of closed circuit television with respect to confrontation and cross-examination rights under the Sixth Amendment for this court to really come to grips with the problem."[58] This note wholeheartedly agrees with that opinion and concludes that an examination of a witness via a C.C.T.V. system, as used in *McCoy*, falls short of the purpose of the Confrontation Clause as it does not insure that testimony will be given under oath, it severely hampers effective cross-examination, and it disables the jury from weighing the demeanor of the witness.

James R. Cage

56. 525 S.W.2d at 337-39.
57. *Id.* at 339.
58. *Id.* at 340 (dissenting opinion).

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

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

1981

West's Desk Copy

FLORIDA RULES OF COURT

STATE AND FEDERAL

WEST PUBLISHING COMPANY

See p. 136

(3) At any pre-trial conference; unless waived by Defendant in writing;

(4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

(5) At all proceedings before the court when the jury is present;

(6) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;

(7) At any view by the jury;

(8) At the rendition of the verdict;

(9) At the pronouncement of judgment and the imposition of sentence.

(b) Defendant Absenting Himself. If the defendant is present at the beginning of the trial and shall thereafter, during the progress of said trial or before the verdict of the jury shall have been returned into court, voluntarily absent himself from the presence of the court without leave of court, or is removed from the presence of the court because of his disruptive conduct during the trial, the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of said case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times.

(c) Defendant May Be Tried in Absentia for Misdemeanors. Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid.

(d) Presence of Corporation. A corporation may appear by counsel at all times and for all purposes.

Committee Note

Same as prior Rule except (3) added to conform to R. 3.220; other sections renumbered.

V. PRE-TRIAL MOTIONS AND DEFENSES

Rule 3.190. Pre-Trial Motions

(a) Pre-Trial Motions in General. Every pre-trial motion and pleading in response to a motion shall be in writing and signed by the party making the motion or the attorney for the party. This requirement may be waived by the court for good cause shown. Each such motion or other pleading shall state the ground or grounds on which it is based. A copy shall be served on the adverse party's attorney before the time the original is filed. A certificate of service must accompany the filing of any such pleading.

(b) Motion to Dismiss.

Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.

(c) Time for Moving to Dismiss. Unless the court grants him further time, the defendant shall move to dismiss the indictment or information either before or upon arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based upon fundamental grounds, every ground for motion to dismiss which is not presented by a motion to dismiss within the time hereinabove provided for shall be taken to have been waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:

(1) The defendant is charged with an offense for which he has been pardoned; or

(2) The defendant is charged with an offense for which he has previously been placed in jeopardy; or

(3) The defendant is charged with an offense for which he has previously been granted immunity; or

(4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

(d) Traverse or Demurrer. The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under (c)(4) of this rule shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss. Such demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

(e) Effect of Sustaining a Motion to Dismiss. If the motion to dismiss is sustained the court may order that the defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment or information. If a new indictment or information is not filed within the time specified in the order, or within such additional time as the court may allow for

... shown, the defendant, if in custody, shall be ...arged therefrom, unless some other charge jus... a continuation in custody. If he has been ...ed on bail he and his sureties shall be exonerat... if money or bonds have been deposited as bail ... money or bonds shall be refunded.

(f) Order Dismissing. For the purpose of con...ing Section 924.07(1), Florida Statutes (1969), the ...tory term "order quashing" shall be taken and ... to mean "order dismissing."

(g) Motion for Continuance.

(1) *Definition.* A continuance within the meaning ... this rule is the postponement of a cause for any ...d of time.

(2) *Cause.* The court on motion of the State or a ...endant or upon its own motion may in its discre... for good cause shown grant a continuance.

(3) *Time for Filing.* A motion for continuance ... be made only before or at the time the case is ...for trial, unless good cause for failure to so apply ...wn or unless the ground for the motion arose ...r the cause was set for trial.

(4) *Certificate of Good Faith.* A motion for con...nce shall be accompanied by a certificate of the ...ant's counsel that the motion is made in good ...th.

(5) *Affidavits.* The party applying for a continu...e may file affidavits in support of his motion, ... the adverse party may file counter-affidavits in ...ition to the motion.

(h) Motion to suppress Evidence in Unlawful Search.

(1) *Grounds.* A defendant aggrieved by an un...ful search and seizure may move to suppress ...thing so obtained for use as evidence because:

(1) The property was illegally seized without a ...rant, or

(2) The warrant is insufficient on its face, or

(3) The property seized is not that described in the ...ant, or

(4) There was no probable cause for believing the ...ence of the grounds on which the warrant was ..., or

(5) The warrant was illegally executed.

(2) *Contents of Motion.* Every motion to suppress ...ce shall clearly state the particular evidence ...t to be suppressed, the reasons for suppression ... general statement of the facts on which the ...on is based.

(3) *Hearing.* Before hearing evidence, the court ... determine if the motion is legally sufficient. If ...ot, the motion shall be denied. If the court ... the motion on its merits, the defendant shall ... evidence supporting his position and the ... may offer rebuttal evidence.

(4) *Time for Filing.* The motion to suppress shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial.

(i) Motion to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

(j) Motion to Take Deposition to Perpetuate Testimony.

see P.136

(1) After an indictment or information upon which a defendant is to be tried is filed, the defendant or the State may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

(2) If the defendant or the State desires to perpetuate the testimony of a witness living in or out of the State whose testimony is material and necessary to the case, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by him and filed in the trial court.

(3) If the deposition is taken on the application of the State, the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep him in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but his failure to appear after notice and tender of expenses shall constitute a

waiver of the right to be present. The State shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The State shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed that is in the possession of the State and that the State would be required to make available to the defendant if the witness were testifying at trial.

(4) The application and order to issue the commission may be made either in term time or in vacation. The commission shall be issued at a time to be fixed by the court.

(5) Except as otherwise provided, the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution and return of the commission and the opening of the depositions in civil actions shall apply in criminal cases.

(6) No deposition shall be used or read in the evidence when the attendance of the witnesses can be procured. If it shall appear to the court that any person whose deposition has been taken has absented himself by procurement, inducement or threats of any person on behalf of the State or of the defendant or of any person on his behalf, the depositions shall not be read in evidence on behalf of the defendant.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

Repeal

Laws 1979, c. 79-69, § 3, provides for the repeal of Rule 3.190(j) "insofar as it is inconsistent with the provisions of this act." Section 4 of the law provides: "This act shall take effect upon becoming a law, except that section 3 shall take effect only if passed by a two-thirds vote of the membership of each house of the legislature." The law was passed with the requisite majority vote. The other provisions of the law will be designated as F.S.1979, § 918.17 which permits video-taping of testimony of certain minors in cases involving sexual battery or child abuse.

Committee Note

1972 Revision. Subdivision (a) is amended to require the defendant to specify the factual basis behind the grounds for a motion to suppress evidence. Subdivision (l) is amended to permit the State to take depositions under the same conditions that the defendant can take them. Former sections (j) and (k) transferred to Rules 3.150, 3.151 and 3.152. Sections (l) and (m) renumbered (j) and (k) respectively. Otherwise, same as prior rule.

1977 Amendment. The amendment resolves any ambiguity in the rule as to whether the State must file a general or a specific traverse to defeat a motion to dismiss filed under the authority of Rule 3.190(c)(4).

See State v. Kemp, 305 So.2d 853 (Fla.3d DCA 1974).

The amendment clearly now requires a specific traverse to specific material fact or facts.

Rule 3.191. Speedy Trial

(a)(1). Speedy Trial Without Demand. Ex... otherwise provided by this Rule, and subject ... limitations imposed under (b)(1) and (b)(2), ... person charged with a crime by indictment or ... mation shall without demand be brought t... within 90 days if the crime charged be a misde... or, or within 180 days if the crime charged ... felony, and if not brought to trial within such ... shall upon motion timely filed with the court ... jurisdiction and served upon the prosecuting ... ney be forever discharged from the crime; pr... the court before granting such motion, shall ... the required inquiry under (d)(3). The time p... established by this section shall commence ... such person is taken into custody as defined ... (a)(4). A person charged with a crime is entit... the benefits of this Rule whether such person ... custody in a jail or correctional institution of ... State or a political sub-division thereof or ... liberty on bail or recognizance. This sectio... cease to apply whenever a person files a val... mand for speedy trial under (a)(2).

(a)(2). Speedy Trial Upon Demand. Exce... otherwise provided by this Rule and subject ... limitations imposed under (b)(1) and (c), every p... charged with a crime by indictment or inform... shall upon demand filed with the court having ... diction and upon service of a copy of such de... upon the prosecuting attorney be brought to ... within 60 days, and if not brought to trial wi... such period of time following such demand ... upon motion timely filed with the court and ... on the prosecuting attorney be forever disc... from the crime; provided, the court before gra... such motion shall make the required inquiry ... (d)(3). The time period established by this ... shall commence when such demand has been ... ly filed and served. Trial may be scheduled ... time within the 60 day period except that tri... not be scheduled within 5 days of the filing of ... demand without the consent of the defendant a... the prosecuting attorney.

(a)(3). Commencement of Trial. A person ... be deemed to have been brought to trial if the ... commences within the time herein provided. ... trial is deemed to have commenced when the ... jury panel for that specific trial is sworn for ... dire examination, or, upon waiver of a jury ... when the trial proceedings begin before the ...

(a)(4). Custody. For purposes of this Rule, ... person is taken into custody, (i) when the person ... arrested as a result of the conduct or criminal ... sode which gave rise to the crime charged, or ... when the person is served with a notice to appear ... lieu of physical arrest.

(b)(1). Prisoners Outside Jurisdiction. A ... son who is in federal custody or incarcerated in ...

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

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

STATE OF NEW MEXICO
Office of the Attorney General
DEPARTMENT OF JUSTICE
P.O. Drawer 1508
Santa Fe, N. M. 87501

JEFF BINGAMAN
ATTORNEY GENERAL

October 28, 1981

Bill Cook
Box 3382
Anchorage, Alaska 99510

Dear Mr. Cook:

This is in response to your inquiry concerning the use of videotaped depositions of alleged rape victims who are under sixteen years of age.

The Legislative Council Service advised they have no history on this type of legislation. The only documents they have are prior laws and amendments to these laws.

Enclosed is a copy of Rule 29.1 of our Judicial Pamphlet. The annotations to this Rule might be of help to you.

If there is further we can do, please do not hesitate to contact this office.

Sincerely,

Diana Armijo

DIANA ARMIJO
Administrative Secretary

Enclosure

da

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

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

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

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

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

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. is to be applied in determining admissibility. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

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

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

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

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

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

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

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

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

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

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

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

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

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

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

NEW MEXICO SUPREME COURT

Dan Sosa, Jr.: *Chief Justice*
Mack Easley, *Justice*
H. Vern Payne, *Justice*
William R. Federici, *Justice*
Edwin L. Felter, *Justice*
Rose Marie Alderete, *Clerk*

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

With Amendments Through July 1, 1980
and Annotations Through 604 P.2d 1050

Judicial Pamphlet 6

1980 REPLACEMENT PAMPHLET

RULES OF CRIMINAL PROCEDURE COMMITTEE

Frederick Hart, *Chairman*
Richard C. Bosson
Byron Caton
Janet Clow
John B. Cooney
Charles Driscoll
Warren O.F. Harris
Bruce C. Herr
Jack L. Love
Michael F. McCormick
James V. Noble
Hon. William F. Riordan

Hon. H. Vern Payne, *Coordinating Justice*

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

See page 62

Although the defendant may not be compelled to produce evidence if it would result in a violation of his privilege against self-incrimination, this rule has been upheld as not contravening the privilege against self-incrimination or the right to due process of law guaranteed by the fifth amendment to the United States constitution. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974). See also, Jones v. Superior Court, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); Prudhomme v. Superior Court, 2 Cal.3d 320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970), Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); Wardius v. Oregon, 412 U.S. 470 (1973); United States v. Nobles, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

See Rule 27(f) for the definition of "statement" as used in this rule.

Cross-references. — For disclosure by government, see Rule 27. For forms on certificate and supplemental certificate of disclosure of information, see Criminal Forms 5.55 and 5.56 in Judicial Pamphlet 10A.

The 1980 amendment redesignated former Subdivisions (b) and (c)(3) as present Subdivisions (a)(3) and (c)(2), rewrote the introductory paragraph in Subdivision (a), inserted present Subdivision (b), deleted former Subdivision (c)(2), added Subdivision (d), in Subdivision (a)(3), deleted "Upon motion of the state, the court may order the defendant to furnish the state" at the beginning of the paragraph, substituted "the defendant" for "he" and added "together with any statement made by the witness" at the end of the paragraph.

Compiler's note. — Subdivision (c) is similar to Rule 16(b)(2) of the Federal Rules of Criminal Procedure.

Constitutionality of rule. — This rule is not an unconstitutional violation of U.S. Const., amend. V. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

Constitutional to permit disclosure of physician's analysis of polygraph results. — Disclosure of analysis and conclusions of doctor appointed on behalf of defendant to examine results of a polygraph examination would not deny defendant due process, interfere with his right to put on a defense, deny equal protection of the law nor violate his privilege against self-incrimination. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Defendant had burden of establishing lawyer-client privilege as to doctor's report. — Defendant objecting to discovery of a doctor's report, prepared for defendant's counsel under court order, has the burden of establishing the existence of the lawyer-client privilege. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Disclosure of witnesses. — Where the defendant failed to furnish the state a list of the names and addresses of the witnesses he intended to call at the trial as he had been ordered to do by the trial court pursuant to Subdivision (b) (now (a)(3)), the state objected to calling these witnesses and the trial court granted the state's motion, reserving reconsideration of the matter until the district attorney had spoken to the witnesses, but, without explanation, defendant did not call any of these witnesses to the stand, it was held that he voluntarily abandoned any further effort to have these witnesses appear and that he could not be heard on appeal to complain of error in their exclusion. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975) (decided prior to 1980 amendment).

Effect of omitting reference to limitation provisions from disclosure order. — Failure to copy into order pertaining to disclosure of evidence and witnesses a reference to Subdivision (c), pertaining to information not subject to disclosure, does not render the order beyond the jurisdiction of the court. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Am. Jur. 2d and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 331; 23 Am. Jur. 2d Depositions and Discovery § 97.

93 C.J.S. Criminal Law §§ 955 to 957.

Rule 29. Depositions.

(a) **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment or information, the district court may order the taking of the deposition of any person other than the defendant upon a showing that his testimony may be material and relevant to the offense charged, that it is necessary to take his deposition to prevent injustice, and either (1) the person will not cooperate in giving a statement to the moving party, or (2) the person may be unable to attend trial or a hearing.

(b) **Scope of discovery.** Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) **Time and place of deposition.** Unless otherwise stipulated to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court.

(d) **Persons before whom depositions may be taken.**

(1) **Within the United States.** Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken

before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(2) In foreign countries. In a foreign country, depositions may be taken (i) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (ii) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (iii) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(3) Disqualification for interest. No deposition shall be taken before a person who is a relative, employee, attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is interested in the action.

(e) Notice of examination; general requirements; nonstenographic recording. (1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place set for taking the deposition and the name and address of each person to be examined.

(2) The court may for cause shown enlarge or shorten the time previously set for taking the deposition.

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

(f) Record of examination. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness.

(g) Depositions of corporations, partnerships, and governmental agencies. A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules

(h) Examination and cross-examination; objections. Examination and cross-examination of witnesses may proceed as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. All objections made at time of the examination to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer taking the deposition who shall propound them to the witness and record the answers verbatim.

(i) **Motion to terminate or limit examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending, or the court in the district where the deposition is being taken, may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition pursuant to Rule 31. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(j) **Submission to witness; changes; signing.** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, the illness or absence of the witness, or the fact of the refusal by the witness to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(k) **Certification and filing by officer; copies; notice of filing.** (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(l) **Stipulations regarding discovery procedure.** Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, or (2) provide for other methods of discovery.

(m) **Attendance.** A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued. The deposition of any witness confined in prison shall be taken where the witness is confined.

(n) **Use of depositions.** At the trial, or at any hearing, any part or all of a deposition, as an exception to the hearsay rule of the Rules of Evidence applied as though the witness were then present and testifying, may be used:

(1) if the witness is dead;

(2) if the witness is unable to attend to testify because of illness or infirmity;

(3) if the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

(4) if the witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition; and

(5) to contradict or impeach the witness.

If only part of a deposition is offered in evidence by a party, any adverse party may require him to offer any other part or parts relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

(o) Objections to admissibility. Subject to the provisions of Rule 29(q)(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(p) Effect of taking or using depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(q) Effect of errors and irregularities in depositions.

(1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition. (i) Objections to the competency of a witness or admissibility of evidence are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written interrogatories submitted pursuant to this rule are waived unless served in writing upon the party propounding them within three days after service of the interrogatories.

(4) As to completion and return of depositions. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under this rule are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(r) Contempt. If a witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken, the refusal may be considered a contempt of that court. [As amended, effective July 1, 1973 and July 1, 1980.]

Committee commentary. — This rule was derived from Rule 3.220 of the Florida Rules of Criminal Procedure. See also, Rule 15 of the Federal Rules of Criminal Procedure, 62 F.R.D. 271, 298-301 (1974). Depositions are to be used in criminal cases only in exceptional circumstances. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979); State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

"Statement" as used in Subdivision (a) includes any statement given by a witness, including a videotape or recorded statement. See Rule 27 of these rules for the definition of "statement."

This rule provides for the use of a deposition when the party offering the deposition is unable to procure the attendance of the witness by subpoena. The state may not use the deposition of a witness who refuses to testify by asserting his privilege against self-incrimination. McGuinness v. State, supra.

The court of appeals has indicated that one of the purposes of a deposition is to enable the defense to impeach a witness on cross-examination at trial. State v. Billington, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974). However, under Subdivision (a), the right to take the deposition would appear to be limited to the situation where the person will not give a written statement. See State v. Billington, supra, 86 N.M. at 48-49 (dissenting opinion).

The use of a deposition at trial by the state requires strict compliance with Subdivision (a). See State v. Barela, supra; State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974). This is an exception to the hearsay rule. See Rule 802 of the Rules of Evidence. See also, Rule 801(d)(1) of the Rules of Evidence, California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), and Rule 804(a) of the Rules of Evidence. Rules 801 and 804 of the Rules of Evidence are superseded insofar as they relate to the use of depositions in criminal cases. See McGuinness v. State, supra. The

Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

The 1980 amendment deleted "voluntary, signed, written" preceding "statement" in Subdivision (a)(1), inserted "including by videotape" near the beginning of the first sentence of Subdivision (e)(3), substituted "as an exception to the hearsay rule of" for "so far as admissible under" in the introductory paragraph in Subdivision (h) and made minor punctuation changes throughout the rule.

Compiler's notes. — Subdivisions (a) to (c) are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Subdivision (h) is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The 1973 amendment amended only Subdivision (h).

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. State v. Williams, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Scope of authority to take depositions. — In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Where deposition not admissible. — As there was no showing that the presence of the witness who was out of the state could not be secured by subpoena or other lawful means, then his deposition is not admissible under this rule. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Generally as to use of depositions. — While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Use of deposition by state at trial requires strict compliance with Subdivision (h). McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

There must be strict compliance with Subdivision (h). Where deposition of absent witness was admitted absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. — Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Once a witness is permitted to claim his privilege against self-incrimination, he becomes unavailable as a witness under Rule 804(a)(1), N.M.R. Evid., and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

No error in continuing trial where no abuse of discretion and expert's deposition admitted. — Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and [illegible] of the expert was properly admitted at [illegible] v. D[illegible], 91 N.M. 425, 575 P.2d 612 ([illegible]).

Am. Jur. 2d, A.L.R. and C.J.S. references. — [illegible] Am. Jur. 2d Criminal Law §§ 340, 344, 345; 23 Am. Jur. 2d Depositions and Discovery § 1.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Production and inspection of premises, persons or things, 98 A.L.R.2d 909.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

23 C.J.S. Criminal Law § 1038.

Rule 29.1. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

(a) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that

the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

(b) At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, any part or all of the videotaped deposition of a child under thirteen years of age taken pursuant to Paragraph (a) of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

(c) In addition to the use of a videotaped deposition as permitted by Paragraph (b) of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph (a) of Rule 29. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and 30-9-17 NMSA 1978. The purpose of 30-9-17, supra, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico constitution or the United States constitution. See Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979); Estes v. Texas, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the Gannett decision, it was generally recognized that the right to a public trial under the United States constitution could not even be waived by the defendant. See constitution of the United States, congressional research service, 1973. There is also a right to a public trial under the New Mexico constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. See Rule 31.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule the child must be under the age of thirteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

Rule 29.2. Testimony before grand jury.

(a) At any time after indictment, on request of a party, the district court clerk shall furnish to the defendant:

(1) a copy of the record of defendant's testimony before the grand jury; and

(2) a copy of the record of the testimony of any witness on the state's witness list relating to the crime charged.

(b) At any time after indictment, on motion, the district court may order that a copy of the record or other portions of the record before the grand jury be given to the defendant or to the state by the clerk of the court upon a showing of particularized need. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the transcript of testimony of a defendant before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 27, the prosecution was required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"[O]nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged." Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), (cert. denied, 90 N.M. 637), quoting from State v. Sparks, 85 N.M. 429, 512 P.2d 1256 (Ct. App. 1973)

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

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

Historical Note

St.1923 c. 251. St.1931 c. 205.

Law Review Commentaries

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

Library References

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

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

Notes of Decisions

In general 2
Habeas corpus 6
Persons with a direct interest 4
Public trial 5
Requisites of proceedings 3
Validity 1

1. Validity

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

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

2. In general

This section is to be strictly construed in favor of general principle of publicity. Com. v. Marshall (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 848; Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

3. Requisites of proceedings

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

4. Persons with a direct interest

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

under 18 years of age, quoted phrase must be interpreted broadly and is not limited to parties, but includes counsel, witnesses, stenographers and usual court attendants; and it does not exclude a parent, husband, wife or guardian of defendant, or even a friend, whose presence defendant desires and who might give him legitimate assistance or comfort without interfering with trial. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

5. Public trial

The guarantee to an accused of "public trial" is a safeguard against any attempt to employ courts as instruments of persecution, and knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power. In re Oliver (1948) 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

Defendant whose counsel had requested that witnesses be sequestered and who had not asked his counsel to arrange to have particular available persons, friends, or relatives present at trial was not entitled to new trial on theory that he had been denied right to public trial. Com. v. Wells (1971) 274 N.E.2d 452, — Mass. —.

Excluding mother, sister, brother, and friend of defendant during trial for sex crimes was violation of Sixth Amendment which provides that in all criminal prosecutions accused shall enjoy the right to a speedy and public trial. Com. v. Marshall (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 848.

Under Fourteenth Amendment, Sixth Amendment right to a public trial was applicable to defendant's trial for sex crimes in state court. Id.

6. Habeas corpus

On petition for writ of habeas corpus brought by a petitioner who had been convicted in Massachusetts court of rape and carnal abuse of a female child, evidence did not establish that commonwealth prevented petitioner's wife from testifying in behalf of petitioner at petitioner's trial. Melanson v. O'Brien (C.A.1953) 203 F.2d 934.

§ 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

The presiding justice of a district court may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife.

Added by St.1949, c. 302.

Library References

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

Notes of Decisions

1. In general

Section 16A of this chapter providing that court may exclude general public admitting only such persons as may have a direct interest in trial, is to be strictly construed in favor of general principle of publicity. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

dicts finding defendant guilty of murder in the second degree and not guilty of armed robbery were not inconsistent. Id.

12.5 Instructions

Evidence in prosecution for armed robbery, did not require instruction on issue of defendants' guilt of lessor included offenses of unarmed robbery, larceny, or assault. Com. v. Hogg (1974) 311 N.E.2d 63, 365 Mass. 290.

Evidence in prosecution for, inter alia, larceny of a motor vehicle did not require instruction on issue of defendant's guilt of lesser included offense of use of motor vehicle without authority. Id.

Where defendant was charged with forcible rape of female under 16, but judge considered that evidence would have permitted finding either of forcible rape or of statutory rape as lesser included offense and instructed accordingly, he should have further instructed jury to specify offense should they find defendant guilty. Com. v. Franks (1974) 309 N.E.2d 879, 365 Mass. 74, appeal after remand 341 N.E.2d 660, 369 Mass. 608, appeal after remand 362 N.E.2d 895, 372 Mass. 866.

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

Supplementary Index to Notes

Findings 9
Objections 8
Purpose of law 2.5
Stage of proceedings 7

---

2. In general

If closing all or part of trial for sex offenses involving minors under age of 18 were necessary to assure availability of evidence of fresh complaint, judge would be justified in ordering closure. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass.Adv.Sh. 485.

Although this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 is mandatory only as to victim's testimony, it is possible that trial judge might close other parts of trial; such decision to close any part of trial other than victim's testimony or to close entire trial is matter within judge's sound discretion. Id.

Because of the policy favoring publicity, an agreement between prosecution and defense to close a trial should not justify closure or even be relevant to judge's determination of necessity for a closure of trial for sex offenses involving minors under age of 18. Id.

Issue at a hearing on Commonwealth's motion to close parts or all of trial for sex offenses involving minors under age of 18 shall be whether such closure is necessary to preserve evidence required for just conviction. Id.

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. Ottaway Newspapers, Inc. v. Appeals Court (1977) 362 N.E.2d 1189, 372 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. Id.

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary. Id.

2.5 Purpose of law

Main purpose of this section, which provides for exclusion of general public from courtroom in trials involving sex crimes if the victim is under 18 years of age, is to assure that Commonwealth's case will not be destroyed by reason of witnesses' reluctance to testify before a miscellaneous audience. Com. v. Leo (1979) 393 N.E.2d 410, 1979 Mass.Adv.Sh. 2245.

Defendant, who was convicted of committing sexual offenses against 14-year-old girl, could not complain of an alleged violation of this section, in light of fact that such statute was not intended to benefit criminal defendants. Id.

3. Requisites of proceedings

Judge should hold hearing before entering order closing parts of trial other than victim's testimony under this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 485.

4. Persons with a direct interest

The press does not have a sufficiently "direct interest" to be exempt from this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. Globe Newspaper Co. v.

Superior Court (1980) 401 N.E.2d 360, 1980 Mass.Adv.Sh. 485.

5. Public trial

In prosecution for four counts of rape of a child under 16 years of age, where defendant claimed that he was denied his right to public trial because judge excluded public from his entire trial, burden was on defendant to demonstrate that public was excluded from trial after minor victims testified, but defendant was not obligated to demonstrate that he was prejudiced by closing of balance of his trial. Com. v Williams (1980) 401 N.E.2d 376, 1980 Mass. Adv.Sh. 515.

Defendant did not demonstrate his trial on four counts of rape of a child under 16 years of age was improperly closed, but remand was necessary for a determination of extent to which trial was closed to public, and, if it was, for consideration whether defendant properly waived his right to public trial, through his actions or actions of his counsel. Id.

7. Stage of proceedings

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 mandatorily requires closure of trial during victim's testimony. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 485.

In sex offenses involving minors under age of 18, Commonwealth bears burden of showing necessity for a closure of parts of trial other than victim's testimony or foreclosure of entire trial. Id.

In case in which this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 applies, Commonwealth may move for closure of parts of trial other than victim's testimony or foreclosure of entire trial. Id.

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 relates to closure of trial only during victim's testimony. Id.

8. Objections

Public need not receive prior notice of closure hearing for sex offenses involving minors under age of 18; however, court should hear a person who in timely fashion informs court of his desire to object to closure. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass. Adv.Sh. 485.

Any person to be excluded from the trial of sex offenses involving minors under age of 18 other than during victim's testimony should have opportunity to state objections to order; such person need not file formal motion to intervene. Id.

9. Findings

On conclusion of hearing requesting exclusion of public from trial for sex offenses involving minors under age of 18 during other than victim's testimony, judge should make findings of fact as appropriate and should rule on necessity for closure. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass.Adv.Sh. 485.

§ 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

1. In general

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. Ottaway Newspapers, Inc. v. Appeals Court (1977) 362 N.E.2d 1189, 372 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. Id.

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary. Id.

§ 16C. Exclusion of public from trial involving crime of incest or rape

To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof;

and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded.

Added by St.1978, c. 316.

1978 Enactment. St.1978, c. 316, was approved June 20, 1978.

Library References
Criminal Law ⟹635.
C.J.S.Criminal Law § 963.

§ 17. Repealed by St.1979, c. 344, § 43B

St.1979, c. 344, § 43B, an emergency act, repealing this section, was approved June 30, 1979, and by section 51 made effective July 1, 1979.

Prior to repeal, this section was amended by St.1978, c. 478, § 301.

See, now, c. 277, § 47A; Mass.R.Crim.P. Rule 13.

§ 18. Appeals in criminal cases to jury-of-six sessions; recognizance

Whoever is found guilty of a crime before a justice in a district court, or in the municipal court of the city of Boston, having filed the written waiver of trial by jury in the first instance provided by section twenty-six A of chapter two hundred and eighteen, may appeal the finding of guilty or the sentence imposed thereon to a jury-of-six session in accordance with section twenty-seven A of chapter two hundred and eighteen, and at the time of such finding of guilty or sentencing shall be notified of his right to take such appeal. The case shall be entered in the jury-of-six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at said jury session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case only for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court, or the municipal court of the city of Boston, may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with said section twenty-seven A.

Amended by St.1973, c. 657; St.1974, c. 107; St.1978, c. 478, § 302.

1973 Amendment. St.1973, c. 657, approved Aug. 20, 1973, in the first sentence, inserted "the finding of guilty or the sentence imposed thereon" and "or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen"; in the second sentence, substituted "released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six" for "committed to abide the sentence of said court"; in the third sentence, inserted "is not released on personal recognizance and"; deleted the former fourth sentence; and added the last sentence.

1974 Amendment. St.1974, c. 107, approved May 2, 1974, substituted "found guilty" for "convicted" and "such finding of guilty or sentencing" for "conviction" in the first sentence.

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

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

Introduced: 5/15/81.
Referred: Judiciary

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

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

26 (1) the judge presiding over the trial;

27 (2) the members of the jury;

28 (3) the defendant and his counsel;

29 (4) counsel for the state;

what's this?

1 (5) counsel for the child;

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

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

4 mony.

5 * Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of

6 changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence

7 of a young victim of sexual assault or sexual abuse of a minor to the list

8 of exceptions to the hearsay rule.

9

10

11 should we have a section making the

12

13 recorded

14 ~~[illegible]~~ testimony open to the public?

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

Introduced: 5/15/81
Referred: Judiciary

IN THE HOUSE

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

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 [illegible]aping 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 [illegible] the court finds that

(1) the child [illegible] at the time of the sexual assault; and

(2) there is a [illegible]t the child will suffer severe emotional [illegible] if required to testify in open court at the trial; there is [illegible] presumption [illegible]hat a child who is under the age of 16 at the time of an alleged sexual assault or sexual abuse will suffer se[illegible] 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

(Closed?

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) [illegible]e to the defendant, the state may [illegible]o the court for an [illegible] 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) [illegible] younger at the time of the alleged sexual assault or sexual abuse; and

(2) there is a [illegible]at 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 [illegible]

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and his counsel;

(4) counsel for the state;

Strike

(5) counsel for the child;

(6) the parents or legal guardians of the child; and [a support person for the child]

(7) court personnel essential for the taking of the testimony.

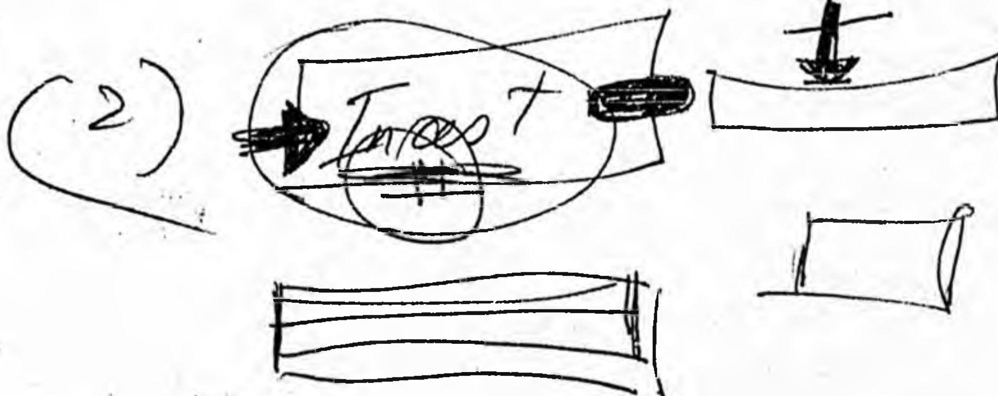
* Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence of a young victim of sexual assault or sexual abuse of a minor to the list of exceptions to the hearsay rule.

(c) the testimony of the child shall be made (public record)

media!

(1) Prohibits the public diss of a victim's name or a man in a sex assault

(2)



After notice to the a, the State may apply to the ct for an order allowing videotaping of the testimony of a child who is the alleged victim of sexual assault in any degree, incest, or who is the alleged victim of sexual abuse of a minor. The order may be granted if the ct finds that

(1) the child was ~~[illegible]~~ 16 years of age or younger at the time of the videotaped recording; and

(2) [there is...] ← strike

(this will cause tremendous harm to the victim because will subject her to psychiatrists)

(b) If the order is granted, the trial judge shall preside at the videotaping proceeding & shall rule on all questions as if at trial. The videotaping proceeding shall be closed to all persons except the judge presiding over the ~~trial~~ videotaping proceeding, ~~the members of the~~ ~~jury~~ the defendant and his counsel, ~~;~~ 's staff counsel for

taking of the testimony, the child witness, and the parents or ~~gu~~ legal guardians of the child and a support person for the child. ~~if requested~~

The Δ shall be afforded all rights applicable to defendants during trial, including the right to an attorney & the right to confront and cross examine the witness.

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

Sec 12.45.048

Showed

See page 420

39 Cal.App.3d 398

[398] PEOPLE of the State of California, Plaintiff and Respondent,

v.

William John MORAN, Defendant and Appellant.

Cr. 12122.

Court of Appeal, First District, Division 2.

May 23, 1974.

Rehearing Denied June 17, 1974.

Hearing Denied July 17, 1974.

Prosecution for murder. Defendant was convicted in the Superior Court, Contra Costa County, Richard E. Arnason, J., and appealed. The Court of Appeal, Taylor, P. J., held that where a witness who had testified at preliminary examination was not available to testify, and the entire video tape of the preliminary examination was reviewed by court and counsel before presentation and all motions and objections carefully considered, and a careful foundation was laid as to its technical aspects, accuracy and reliability, and ability of all to see the tape was carefully monitored and there was no editing or shortcutting, the video tape was properly admitted. Where photographs and a motion picture of grave sites and exhumation of bodies were in part gory but were not cumulative as evidence and permitted the prosecution to show that the bodies sustained no damage in the recovery process, such evidence was admissible.

Affirmed.

1. Criminal Law ⟹662(6)

Where it was known at time of preliminary examination that witness would probably not survive to testify at trial and it was expected that testimony at preliminary examination would be used at trial and there was extensive cross-examination, there was no denial of confrontation right by use, at trial, of video tape of preliminary examination. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, §§ 1290, 1291; U.S.C.A.Const. Amend. 6.

2. Criminal Law ⟹700

In view of expectation that, because witness was not expected to live until time of trial, his testimony at preliminary hearing would be used, and where cross-examination at preliminary hearing was accordingly extensive, objection that, because stenographic transcript was prepared, defense was lulled into false sense of security, i. e., that video tape of such testimony would not be used, was properly overruled. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, §§ 1290, 1291.

3. Criminal Law ⟹304(1)

Court in murder prosecution took judicial notice of existence of special state bar committee on video tape and judicial proceedings and of recent experiments with video taped trials conducted in the state. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 452.

4. Criminal Law ⟹438(8)

By enacting the more liberal concept of a "writing" in the Evidence Code, legislature intended to recognize widespread use of video tape and its relevance to legal proceedings. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 250; Fed.Rules Civ.Proc. rule 30(b)(4), 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

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

5. Criminal Law ⟹438(8)

Advantages and disadvantages of "filtering" effect of video tape fall equally on both sides, and there is no inherent unfairness in its use. Cal.Rules of Court, rules 980, 980(c); West's Ann.Evid.Code, § 250.

6. Criminal Law ⟹633(1)

Fair new procedures that facilitate proper fact finding are allowable, even if not traditional. West's Ann.Evid.Code, § 250.

7. Criminal Law ⟹304(1)

Court of Appeal could take judicial notice of the ubiquity of television sets, as revealed by the 1970 census, and recent

availability of low-cost television cameras. West's Ann.Evid.Code, §§ 250, 452(h).

8. Criminal Law ⟹438(8)

In homicide trial wherein witness who had testified at preliminary examination was not available to testify, and entire tape of preliminary examination was reviewed by court and counsel before presentation and all motions and objections carefully considered, and careful foundation was laid as to its technical aspects, accuracy and reliability, and ability of all to see tape was carefully monitored and there was no editing or shortcutting, video tape was properly admitted. Cal.Rules of Court, rules 980, 980(c).

9. Criminal Law ⟹438(6, 8)

Where photographs and motion picture of grave sites and exhumation of bodies were in part gory but were not cumulative as evidence and permitted prosecution to show that bodies sustained no damage in recovery process, such evidence was admissible in murder prosecution. West's Ann. Evid.Code, § 352.

10. Criminal Law ⟹627.8(6)

Where film was simply more complete depiction of photographs than defense had already seen and there was no bad faith in nondisclosure, and, though defense counsel expressed surprise there was no motion for continuance, there was no error in admitting film in evidence.

11. Criminal Law ⟹507(1, 2)

To be an accomplice, one must have guilty knowledge and intent with regard to commission of the crime.

12. Criminal Law ⟹742(2)

Under evidence, it was question for jury whether witnesses were accomplices to crime of murder, although one of them invited the victims to the meeting at which they were killed.

13. Criminal Law ⟹59(5), 507(1)

Mere presence, knowledge of the crime or failure to attempt to prevent it does not suffice to make one an aider or abetter and, therefore, an accomplice.

14. Criminal Law ⟹1170½(1)
Witnesses ⟹414(1)

Where witness had originally been charged with murders, as accessory, had suffered previous convictions and turned State's evidence, his credibility was major issue and it was permissible, for purpose of showing facts affecting his decision to testify, for State to elicit from him that a member of motorcycle club visited him in jail and warned him against testifying against any member of the club; in any event, there was no prejudice in view of court's immediate caution and overwhelming evidence of guilt.

15. Homicide ⟹231

Testimony that defendant participated in holding down murder victim and beating him for about an hour and aided and abetted another who refused medical care to victim was sufficient to show malice on defendant's part.

16. Homicide ⟹270, 273

In murder prosecution, issues with respect to intoxication, unconsciousness, compulsion and diminished capacity were properly left to jury.

17. Homicide ⟹126

Defense of compulsion was available to defendant at time of trial in murder prosecution, though death penalty had been temporarily abolished after murder but before defendant's trial. West's Ann.Pen. Code, §§ 26, 26, subd. 8.

Allan R. Frumkin, San Lorenzo (Court appointed Counsel), for defendant and appellant.

Evelle J. Younger, Atty. Gen. of Cal., Jack R. Winkler, Chief Asst. Atty. Gen.—Crim. Div., Edward P. O'Brien, Asst Atty. Gen., Derald E. Granberg, Clifford K. Thompson, Jr., Deputy Attys. Gen., San Francisco, for plaintiff and respondent.

[402] TAYLOR, Presiding Justice.

Defendant, W. J. Moran, appeals from a judgment of conviction entered on a jury verdict finding him guilty of first degree

murder of C. Baker and not guilty of the murder of T. Shull. He raises a question of first impression as to the propriety of the trial court's admission of a video tape of the preliminary hearing testimony of the main prosecution witness. He also asserts that the trial court abused its discretion in admitting into evidence photographs and a motion picture of the exhumation of the bodies; erred in its accomplice instructions, in the admission of the evidence of a threat to a prosecution witness by a third party, in denying his motion for acquittal as to the murder of Shull; and that the verdict was against the law as the jury rejected his defense of compulsion established as a matter of law by the prosecution; or, in the alternative, his defense of diminished capacity established as a matter of law by the defense. We have concluded that there is no merit to any of these contentions and that the judgment must be affirmed.

1 As there are no contentions concerning the sufficiency of the evidence to support the verdict and judgment, a brief summary of the pertinent facts will suffice. In September 1972, Hell's Angels member William "Whispering Bill" Pifer, met an old acquaintance, Frank Tiscareno, of the Pittsburgh police. Pifer had only six months to live as he had throat cancer, and explained that in January 1971, he and other members of the Richmond Hells Angels club had buried the victims of a double murder in a deep well on a ranch in Healdsburg. In late October 1972, Pifer led the authorities to the Wethern Ranch in Mendocino County where, as Pifer had predicated, the bodies of Baker and Shull were discovered beneath earth, timbers and lime. Although both bodies had decomposed so severely since their interment that the examining pathologist could not assign a cause of death, it was clear that Baker's skull had been fractured.

Pifer was granted immunity for a wide variety of federal and state crimes and testified at the preliminary hearing in November 1972 that the murders occurred at a party after a business meeting of the Richmond Hells Angels. At the meeting on January 15, 1971, in the clubhouse in El Sobrante, were the club president, "Rotten Richard" Barker; Frank "Badger" Mumm; "Junior" Carter; Rollin Crane; Pifer and his 16-year-old son, William, Jr.; "Big Frank" Herman; Angelo Borburia; defendant Moran and his common-law wife, Liz Ault; a woman named Carol; Chester Green; and the two victims, Tom Shull and Charlie Baker. Shull and Baker had been invited to the meeting by Green and arrived with him about 6 p. m.

After the business meeting, Barker decided to throw a party and supplied cocaine, which was snorted through a rolled-up $100 bill. Other drugs were also in general use. After Shull and Baker were sent out for beer and whiskey, Barker and Green slipped about 10 LSD tablets into Shull's coffee and a similar number into Baker's beer. About 6 o'clock the following morning, Shull became hysterical and paranoid; everyone began "playing games with his mind."

After Shull had been provoked to violence, Barker ordered: "Grab that son-of-a-bitch." Defendant and others held Shull while Barker telephoned club member Spann for seconal tablets to quiet Shull. The members attempted to force the tablets down Shull but he spat them out. For about 45 minutes, everyone took turns holding him down and trying to knock him out, but without success; there was blood all over the place. At Barker's direction, Shull was hog-tied and carried into a bedroom.

About 7:45 a. m., Barker summoned Green, who had left the party five hours earlier. When Green entered the clubhouse, he saw Shull screaming, hysterical and bleeding and struggling to remove his bonds. When Green suggested that Shull be taken to a hosptial, Barker refused. A few moments later, Pifer emerged from the bedroom and told Barker that Shull was dead. Barker, Crane and defendant then went into the bedroom to verify this fact.

When Barker returned from the bedroom to the living room where Baker was seated, Barker pulled out his gun and instructed Pifer to kill Baker as "we don't want no witnesses." Pifer refused. When Baker stood up, Crane knocked him down by hitting him on the head with a chair leg. Defendant then strangled Baker at Barker's direction for about 15 minutes with his hands and then his belt. After remarking "This guy don't want to die," defendant finally placed a rope around Baker's neck, inserted a stick and twisted it. Green and young Pifer left the room.

Baker's body was subsequently stored with Shull's in the bedroom closet. Defendant joined the others in the removal of the blood-stained furnishings of the clubhouse and clean-up. The following Monday, the two bodies were stuffed into the trunk of Green's Cadillac, taken to the Wethern Ranch and buried by Crane, Pifer, Sr., Carter and Green, with Mitten and Barker both armed and standing guard. Carter was originally charged with the murders along with defendant; Green and Mitten were charged as accessories. Green testified for the prosecution at the trial.

Defendant testified that he never touched Shull and could not remember strangling Baker. He did, however, remember seeing Barker with a rope around Baker's neck. He also recalled seeing Baker lying on the floor and Barker saying "Get this guy out of here." Defendant was able to assist in removing Baker's body but could not remember any of the events of the evening or morning as he was bloated with large amounts of whiskey and drugs. Defendant repeatedly acknowledged that he would do as Barker directed to maintain his membership in the Hells Angels and to keep his Hells Angels "patch," his status symbol.

The major contention on appeal concerns the admission into evidence of the eight-hour video tape of Pifer's preliminary hearing testimony.[1] The question is one of first impression in this state.

⌊405 The record indicates that immediately after the prosecution indicated that it planned to introduce the video tape, defendant objected on several grounds, discussed below. Defendant clearly indicated that if the court determined that the video tape was admissible, the entire tape should be admitted into evidence without the excision of any portions contrary to the suggestion of the prosecution.

When defendant raised the threshold question of Pifer's availability for the trial, his physician, Dr. Cohen, indicated that Pifer had just been admitted to the hospital and was near death. In fact, Pifer died during the first days of the jury trial.[2] Pifer's condition was known at the time of the preliminary. Accordingly, it "was assumed by all concerned that Pifer would be dead by the time of trial." Defendant's counsel at the preliminary, Mr. Russell, indicated that his cross-examination of Pifer would be "considerably more lengthy" than that of the other attorneys. Mr. Russell was true to his word and made extensive efforts to impeach Pifer on the basis of his prior acts of misconduct, his consumption, sale and transportation of narcotics, the grant of transactional immunity for all state and federal offenses, his prior state-

1. The preliminary hearing was video taped pursuant to California Rules of Court, rule 980(c). California Rules of Court section 980 provides: "(a) Photographing, recording for broadcasting and broadcasting shall not be permitted within the courtroom while court is in session or during any mid-morning or mid-afternoon recess except as provided in subdivision (b) hereof.

"(b) Photographing, recording for broadcasting and broadcasting of judicial proceedings may be permitted by the court and under its supervision if such proceedings are designed and carried out primarily as ceremonial proceedings.

"(c) Photographing, recording for broadcasting and broadcasting within the courtroom when not prohibited by this rule shall be subject to such limitations as the court may prescribe."

2. Dr. Cohen also indicated that when he originally examined Pifer in November 1972, he then estimated that Pifer had only about five weeks to live.

ments, his physical condition and motive for testifying,[3] and his bias against defendant.

The record indicates that the entire eight hours of the video tape was carefully previewed by the court and all counsel. Almost the entire week of pretrial proceedings was spent on the viewing, and discussion of the issues relating to the video tape. The trial court then ruled that the entire video tape would be admitted. Thereafter, the parties stipulated that no additional reporter's transcript of the video tape was to be made at the trial since there was a correct transcript already in existence.[4] Prior to the |406 playing of the video tape before the jury, an extensive foundation was laid as to qualifications and exact procedures (including placement of the microphones) followed by J. P. Ruisinger, the special agent who recorded the video tape. Reisinger explained that Mr. Corson, an experienced and qualified lip reading interpreter, was used on the sound portion to clarify some of Pifer's whispered words on the tape. At all times, the court and counsel took extreme care to assure that everyone had a good view. Defendant expressly consented to the showing of the cross-examination of Pifer by all counsel. During the showing, Reisinger identified every reel.

[1] Defendant, citing Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, first contends that the use of the tape improperly deprived him of his Sixth Amendment right of confrontation. There is no merit to this contention. It is well established that pursuant to Evidence Code sections 1290, 1291, the testimony of an unavailable witness at the preliminary hearing is "former testimony" and may be admitted at the trial. (People v. Benjamin, 3 Cal. App.3d 687, 694, 83 Cal.Rptr. 764.) The requirements of the confrontation clause are satisfied if at the prior hearing the accused was afforded a complete and adequate opportunity to cross-examine (California v. Green, 399 U.S. 149, 165–168, 90 S.Ct. 1930, 26 L.Ed.2d 489). In the instant case, there is no question as to Pifer's unavailability at the trial. Nor, in view of the knowledge of Pifer's condition at the time of the preliminary, the announced expectation that the testimony would be used at the trial, and the unusually extensive cross-examination, was there any denial of confrontation rights.[5]

[2, 3] Defendant asserts that in any event, he was unduly prejudiced in view of the tactical considerations and purpose of the preliminary that involved four defendants, including Green, who later turned state's evidence. He further asserts that he had been lulled into a false sense of security (i. e., that the video tape would not be used) since a transcript of the preliminary had already been prepared. We think that under the particular circumstances of this case, detailed above, the trial court did not abuse its discretion in overruling these objections.

Defendant's contention concerning the "video tape" form of Pifer's testimony presents a question of first impression in this state.[6] He asserts |407 that the trial court

3. Pifer refused to testify until after he was granted complete immunity; subsequently, he asserted that his main motive was to prevent charges against his son.

4. We have augmented the record to include the transcript and have also viewed the video tape to satisfy ourselves as to all of the questions raised (cf. People v. Spencer, 60 Cal.2d 64, 70, 31 Cal.Rptr. 782, 383 P.2d 134). We noted that in some instances, the tape was more accurate than the transcript in which some words had been juxtaposed. We noted that while the questions and answers were clearly audible, the same was not consistently true of the objections and the court's rulings.

5. This is consistent with the interpretation that under Green, "the factfinder's observation of the witness' confrontation with the defendant is not constitutionally required." (The Supreme Court, 1969 term, 84 Harv. L.Rev. 1, 115 (1970).)

6. We may take judicial notice of the existence of a special State Bar Committee on Video Tape and Judicial Proceedings and recent experiments with video taped trials

abused its discretion in permitting Pifer's testimony to be presented to the jury in this form rather than in the usual reading of the transcript. He also argues that the tape was admitted below without any of the elaborate procedural safeguards that have been established by the courts of other jurisdictions in the past few years. He also urges that he was deprived of due process as the video tape medium unduly distorts the appearance and demeanor of its subject and, therefore, does not accurately transmit the demeanor of the witness and the dramatic components of the testimony.

Significantly, neither side has cited to us any specific provisions of California law that expressly authorizes the use of video tapes.[7] However, Evidence Code section 250 provides: "'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

Video tape recording differs from the ordinary methods of recording images in permanent form in that the image is recorded electronically rather than photographically. Instead of relying on light rays to convey an invisible image, which is then revealed through a chemical process as does standard photography, video tape employs a process whereby the image is sensed by the camera and changed into electrical impulses which can be recorded on the tape. Thus, as in sound recording, the tape used in video recording does not have to be processed and thus can be replayed instantly. Moreover, video tape can also be used to provide either still or motion pictures. (2 Scott, Photographic Evidence: Preparation & Presentation (2d ed. 1974 Supp.) § 714, pp. 9–11.)

Recently, recordings and photographic transparencies have been held within the scope of the statute (People v. Kageler, 32 Cal.App.3d 738, 108 Cal.Rptr. 235; People v. Enskat, 20 Cal.App.3d Supp. 1, 98 Cal. Rptr. 646). Even before the Evidence Code, our Supreme Court held that with ⌊408 a proper foundation and authentication, a film may be admitted not merely as illustrated evidence of a human witness but as substantive evidence of the commission of the criminal acts charged (People v. Bowley, 59 Cal.2d 855, 861, 31 Cal.Rptr. 471, 382 P.2d 591; People v. Bowley, 230 Cal. App.2d 269, 40 Cal.Rptr. 859). The courts of this state have long sanctioned the use of sound motion pictures (People v. Hayes, 21 Cal.App.2d 320, 71 P.2d 321; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1 (re-enactment of crime); and sound recordings (People v. Spencer, 60 Cal.2d 64, 31 Cal. Rptr. 782, 383 P.2d 134).

[4] We conclude, therefore, that by enacting the more liberal concept of a writing in the Evidence Code, the Legislature of this state (where the motion picture industry and its more recent off-shoot, the television industry, have flourished) recognized the widespread use of video tape in our society and its relevance to legal proceedings (cf. Kornblum, Videotape in Civil Cases, 24 Hastings L.J. 9, 11).

The leading and most thoughtful case on the use of video tapes in criminal proceedings is Hendricks v. Swenson (8 Cir. 1972)

conducted in this state (Evid.Code, § 452). To date, the work of the committee, like most of the commentators, has focused on video tapes in civil proceedings.

7. For example, since 1970, the Federal Rules of Civil Procedure, Rule 30(b)(4), applicable to criminal cases pursuant to Federal Rules of Criminal Procedure 15(a), specifically authorize the taking of depositions by other than stenographic means (Carson v. Burlington Northern Inc. (D.C.Neb.1971) 52 F.R.D. 492; Kallen v. Nexus Corporation (D.C.Ill. 1972) 54 F.R.D. 610); since January 15, 1972, Ohio has expressly permitted the use of video tape evidence (Ohio R.Civ.P. 40); specific guidelines are provided by Ohio Supreme Court Rule 15 (see J. A. Shutkin, Videotape Trials: Legal and Practical Implications, 9 Columbia Journal of Law and Social Problems (1973) 363 et seq.). The Michigan Supreme Court recently adopted a comprehensive rule to permit the use of video tape (Mich.Ct.R. 315). (See Videotape—The Michigan Experience, 24 Hastings L.J. 1.)

456 F.2d 503, where the court held that the use of a video taped confession in a first degree murder case did not impinge on a defendant's Fifth Amendment rights, where the statement was freely and voluntarily given and a proper foundation was laid. The court referred to the recently amended Federal Rules of Criminal Procedure, the rules requiring a person in lawful custody to submit to photographing and reviewed the history of the use of motion pictures in criminal proceedings.

After an extensive citation of authorities, the court said at 506: "Differing with our colleague, we suggest that a video tape is protection for the accused. If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not. Instead of denying a defendant his rights, we believe it is a modern technique to protect a defendant's rights.

"We do not agree with our colleague as to the need for make-up and other preparation to project a better image. To permit the applying of make-up would defeat the true purpose of a statement which is to present the facts as they are. It would place in the hands of any person willing to alter evidence the opportunity to eliminate cuts, bruises, or other signs, if any, of mistreatment.

"If a proper foundation is laid for the admission of a video tape by showing that it truly and correctly depicted the events and persons shown, [409] and that it accurately reproduced the defendant's confession, we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved.

"The dissent attempts to lump the video taping of a confession with all forms of visual aids or entertainment, such as television or movies. However, the video tape in question here is *not* a television broadcast or movie designed to entertain or manipulate an audience. It is *not* merely a 'packaging device for consumers,' as stated by Marshall McLuhan in referring to the press, movies, and radio. McLuhan, in his book quoted in the dissent, is talking about the electronic media's vast impact on today's audiences and of the vast opportunities to educate those audiences by means of the media.

"This does not mean that the principles to be employed in making it a more effective device for education defeat its use to correctly detail a voluntary confession.

"The dissent also indirectly calls attention to the television experiences of a certain Presidential candidate. We do not see a trial as a stage appearance or as a campaign presentation. We believe it a part of the procedure for obtaining justice, and emphasize the importance of a trial truly presenting the facts as they exist. We believe that this is best done whether video tape is used or whether the witnesses testify in court by presenting the events and the parties as they are."

After noting that it did not think a video tape was any more prejudicial to a defendant than the constitutionally permissible use of still photographs or blood or urine samples, the court continued at 507: "We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth. An after all, the end for which we strive in all trials is 'that the truth may be ascertained and the proceedings justly determined.'" [8]

8. Significantly, the dissent in Hendricks (456 F.2d at 507-509) focusing on the medium's unusual technical aspects (distortions), its powerful emotional effect and unusual sensory effect of fleeting images suggested that a video tape came dangerously close to self-incrimination, and therefore recommended additional minimal standards for the use of video taped confessions.

In State v. Newman, 4 Wash.App. 488, 484 P.2d 473, at 477, the Washington appellate court sanctioned the use of video taped lineup evidence on the basis of the same and less cumbersome foundation required ⊥410 for motion pictures and photographs, rather than the more stringent standard for sound recordings as the defense urged. The Washington court relied on Paramore v. State, Fla., 229 So.2d 855. Recently, a Florida appellate court was faced with the identical question here presented and resolved it in favor of the use of video tape (Hutchins v. State (Fla. Ct. of Appeal, Third Dist., Nov. 6, 1973) 286 So.2d 244 (rehearing den. Dec. 20, 1973.))

Another consideration was mentioned in Rubino v. G. D. Searle & Co. (Sup.Ct. 1973) 73 Misc.2d 447, 448, 340 N.Y.S.2d 574, at 576, quoting from Carson v. Burlington Northern, Inc., D.C., 52 F.R.D. 492, and noted: "'"[T]he finder of fact at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audiovisual devices. Moreover, a recording, a video tape, or a motion picture of a deposition will avoid the tedium that is produced when counsel read lengthy depositions into evidence at trial." . . .'"

Defendant attempts to argue that the use of the video tape in the instant case was error and particularly prejudicial in view of the seriousness of the offenses charged. As indicated above, the use of video tape in murder prosecutions has been sanctioned in other jurisdictions. We have indicated that we think the video tape of Pifer's testimony fulfilled the broad purposes of the confrontation clause and, therefore, need not consider defendant's additional assertion that the instant case is distinguishable from all of the other reported cases as the person video taped (usually the defendant) was available for cross-examination at the trial.

[5, 6] We turn next to defendant's due process contentions concerning the technical distortions of the medium and its failure to accurately transmit the demeanor of the witness and the dramatic components of the testimony. In general, the advantages and disadvantages of the "filtering" effect of the medium fall equally on both sides. Therefore, its use is "fair" and there is no inherent unfairness (Estes v. Texas, 381 U.S. 532, 542–543, 85 S.Ct. 1628, 14 L.Ed.2d 543).[9] Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury (see 26 Stan.L.Rev. 619, fns. 29–30, at p. 623). Video tape is sufficiently similar to live testimony to permit the jury to properly perform its function. Fair new procedures that facilitate proper factfinding are allowable, although not traditional (Byrne v. Matczak (3 Cir. 1958) 254 F.2d 525, at 528–529). In any event, we do not comprehend defendant's contention that the tape is less valid ⊥411 or less reliable than the reading of the written transcript of the preliminary hearing.

[7] We agree with the federal court in Hendricks that the video tape is a modern technique that better protects the rights of all concerned. We can also take judicial notice of the fact of the ubiquity of television sets, as revealed by the 1970 census,[10] and recent availability of low-cost television cameras[11] (Evid.Code, § 452, subd. (h)). With such a widespread availability of television comes a familiarity with its technical characteristics and distortions. Indeed, the television camera is a stranger only in the slower moving apparatus of justice.

[8] We have weighed all of defendant's contentions and reiterate that all of the procedural safeguards established by the

9. Even assuming that Pifer was made to look "rougher" by the video taping process, it could only inure to the benefit of defendant here.

10. 96 percent of all households had at least one black and white television set (Statistical Abstract of U.S. 1973, U.S.Dept. of Commerce, July 1973) p. 499).

11. The cost of equipment for making and showing black and white video tape is comparable to the cost of 16 mm motion picture film (Scott, Photographic Evidence, supra).

law of this state for photographs and motion pictures were followed in exemplary fashion by the trial court and counsel. The entire tape was carefully previewed by the court and counsel before its presentation to the jury and all motions and objections were carefully and throughly considered at that time. Prior to the viewing of the tape by the jury, a careful foundation was laid as to its technical aspects, accuracy and reliability. The ability of all concerned to see the video tape was carefully monitored. The entire eight hours were presented to the jury so that there were no opportunities for any misrepresentations of the testimony by editing or shortcutting. We think with all of these safeguards, the video tape of Pifer's preliminary hearing testimony was properly admitted.

[9] Defendant next contends that the trial court abused its discretion by admitting into evidence the photograph and short film pertaining to the exhumation of the bodies. The record indicates that the pictures were offered to buttress the credibility of Pifer's testimony and to corroborate the testimony of the autopsy surgeon. The defense objected on grounds that the photographs were gory and irrelevant, inflammable and prejudicial. The trial court reviewed the photographs and the motion picture and concluded that the motion picture was nonprejudicial and free from any gross matters that could be inflammatory and admitted it. The court also carefully reviewed the photographs and then exercised its broad discretion pursuant to Evidence Code section 352, admitted 15 of the photographs and excluded 7. The admission of both the photographs and the motion [412] picture was within the sound discretion of the trial court and its ruling will not be reversed unless the probative value is clearly outweighed by the prejudicial effect (People v. Murphy, 8 Cal.3d 349, 105 Cal.Rptr. 138, 503 P.2d 594). No abuse of discretion was shown here. Most of the photographs were not of the bodies but of the grave sites. The evidence was not cumulative as it permitted the prosecution to show that the bodies sustained no damage during the recovery procedures. Although counsel on both sides admitted that some of the photographs were gory, the nature of the case precluded the possibility of any other kinds of evidence. Hideous and grotesque photographs have been held properly admissible where relevant and not unduly prejudicial (People v. Smith, 33 Cal. App.3d 51, 108 Cal.Rptr. 698; cf. People v. Terry, 2 Cal.3d 362, 403, 85 Cal.Rptr. 409, 466 P.2d 961).

[10] In addition, defendant contends that the film should have been excluded because the district attorney did not tell the defense about it until after formal discovery proceedings were concluded. The record indicates that the prosecution and defense counsel had discussed the photographs and at one time the prosecution indicated there was nothing else. Subsequently at the trial, the prosecution reversed its intent to introduce the color film. Defense counsel expressed surprise but did not seek a continuance to investigate and produce available rebuttal evidence (People v. McRae, 256 Cal.App.2d 95, 102–105, 63 Cal.Rptr. 854). The record indicates no indication of wilful or bad faith by the prosecution to disclose the film. The film furthermore was simply a more complete depiction of the photographs that the defense had already seen. Accordingly, there was no error in admitting the film into evidence.

[11] Defendant next contends that the court erred to his prejudice by failing to instruct the jury that Pifer, his son and Green were also accomplices as a matter of law to the murder of Baker. The record indicates that the court instructed the jury that: 1) accomplice testimony was to be distrusted and required corroboration; 2) an aider and abettor was guilty as a principal; and 3) as a matter of law, Pifer was an accomplice to the murder of Shull. The proper standard for an accomplice was recently discussed by our Supreme Court in People v. Gordon, 10 Cal.3d 460 at 466–467, 110 Cal.Rptr. 906, 516 P.2d 298. The court indicated that the mere fact that a witness was liable to prosecution for the identical offense charged against the defendant at the time the acts are committed

did not establish the accomplice status. In order to be included within the definition of an accomplice, the witness must have "guilty knowledge and intent" with regard to the commission of the crime. In the instant case, the trial court properly concluded that Pifer, Sr., his son and Green as accomplices of the ⌊413 murder of Baker were considerations of fact for the jury. The complicity of each was disputed and reasonably susceptible to a contrary inference.

Although Green invited Shull and Baker to the meeting, there was evidence that his invitation was innocent. He had warned them to avoid any "trick bag" [12] and then told the club members to treat the visitors well. Green left the clubhouse at 2:30 a. m. and did not return until after Shull had been carried to the bedroom and suggested to Barker that Shull be taken to a hospital. Green also testified that when Barker ordered Baker's death, he began to intervene to stop it and then left the room while defendant strangled Baker.

[12, 13] Pifer, Jr. feared for his own safety as he was not a member of the motorcycle club, and attempted to remain inconspicuous. He also left the room when defendant applied the rope and stick to Baker. Pifer, Sr. refused when Barker ordered him to kill Baker. This refusal was strong evidence that Pifer did not share the intent of the others and, therefore, was not an accomplice (People v. Crary, 265 Cal.App.2d 534, 541, 71 Cal.Rptr. 457). Mere presence, knowledge of the crime or failure to attempt to prevent it does not suffice to make one an aider or abettor and, therefore, an accomplice (People v. Williams, 10 Cal.App.3d 638, 641, 89 Cal. Rptr. 143). We conclude that as to Baker's murder, the accomplice status of Pifer, his son and Green were properly left to the jury as questions of fact.

[14] Defendant next complains that over his objection, the prosecution was permitted to elicit from its witness Green testimony concerning a pretrial jail house visit from Hells Angel Richard 'Indian" McGill. McGill told Green he was no longer a member and warned him not to testify about any one member of the Hells Angels club. The record indicates that the trial court promptly instructed the jury that this hearsay item was to be considered only for the purpose of showing background and motivation, incentive or other facts that resulted in Green's decision to testify. The prosecution did not attempt to show that defendant authorized McGill's action. In fact, it was shown that Green was no longer a member of the motorcycle club and had been granted immunity. Defendant contends that the evidence was not properly admitted, even for the limited purpose of assessing the credibility of Green. As indicated above, Green was originally charged as an accessory to the murders, had suffered prior convictions, and subsequently turned state's evidence. Accordingly, his credibility was a major issue at the trial.

Defendant cites People v. Terry, 57 Cal. 2d 538, 21 Cal.Rptr. 185, ⌊414 370 P.2d 985, and other authorities in each of which the jury was permitted to infer that a prosecution witness had been threatened or improperly influenced by a representative of the particular defendant and from that inference to further infer a consciousness of guilt. The instant case, however, is more like People v. Woodberry, 10 Cal.App.3d 695, 709–710, 89 Cal.Rptr. 330, where, unknown to the defendant, the witness, a Black Panther, was threatened by other Black Panthers. This evidence was admitted for the purpose of explaining the witness' refusal to continue testifying. Here, also Green's testimony concerning the threat was relevant and could have aided the jury in evaluating his decision to testify for the prosecution. In view of the court's immediate caution and the overwhelming evidence of defendant's guilt, even if the evidence was erroneously admitted, it was not prejudicial (People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243).

12. The term refers to a form of harassment that requires the subject to assert his manhood to escape from his predicament.

[15] Defendant also argues that the trial court erred to his prejudice by denying his motion for a judgment of acquittal on Count One relating to the murder of Thomas Shull. He urges that the trial court's denial of the motion at the close of the prosecution's case in chief was prejudicial error. The simple answer to the contention is that defendant was acquitted by the jury of the murder of Shull. He further argues, however, that there was insufficient substantial evidence of malice or intent on his part to torture or inflict cruel suffering on Shull.

As our above summary of the pertinent portions of the record indicates, there was substantial evidence to sustain a conviction of defendant's participation in the murder of Shull. Pifer indicated that defendant participated in holding down Shull and beating him for about an hour. Green described the hog-tied Shull as screaming, hysterical, bleeding and with lumps all over his head and face. Barker, whom defendant aided and abetted, refused medical care to Shull. From these circumstances, the jury could imply defendant's malice with respect to Shull (People v. Mattison, 4 Cal.3d 177, 182, 93 Cal.Rptr. 185, 481 P.2d 193; People v. Ricketts, 7 Cal.App.3d 441, 446, 86 Cal.Rptr. 647).

[16] Finally, defendant contends that the verdict was contrary to law as his asserted defenses of compulsion were established as a matter of law by the witnesses for the prosecution or, in the alternative, that his defense of diminished capacity was established as a matter of law by the testimony of his own witnesses. The record indicates that the trial court properly instructed the jury as set forth below[13] on intoxication, unconsciousness and compulsion.

|415 As to the defense of diminished capacity and intoxication, the record indicates that defendant's expert, Dr. Joel Fort, indicated

13. "In the crime of murder of which the defendant is accused, a necessary element is the existence in the mind of the defendant of the specific intent to kill a human being with malice aforethought.

"If the evidence shows that the defendant was intoxicated, at the time of the alleged offense, the jury should consider his state of intoxication, in determining if defendant had such specific intent.

"If from all the evidence, you have a reasonable doubt, whether defendant was capable of forming such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent."

"Intoxication of a person is voluntary if it results from his willing partaking of any intoxicating liquor, drug or other substance when he knows that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect as a possibility."

"Intoxication is involuntary when it is produced in a person without his willing and knowing use of intoxicating liquor, drugs or other substance, and without his willing assumption of the risk of possible intoxication."

"Proof of the involuntary intoxication of a defendant should be considered by the jury in determining whether the defendant had the capacity or ability to commit any crime or to form a criminal intent at the time the crime is alleged to have been committed.

"[Involuntary intoxication should also be considered in determining the existence of any motive or purpose for the commission of the alleged offense.]"

"In the crime of murder by torture of which the defendant is accused [in Count 1 of the information], a necessary element is the existence in the mind of defendant of knowledge that his conduct endangers the life of the victim.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

"In the crime of murder by torture, of which the defendant is accused in Count 1 of the information, a necessary element is the existence in the mind of the defendant of knowledge that his conduct endangered the life of the victim.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

that if in fact defendant had ingested the amount of drugs and alcohol claimed for the time in question, defendant would have been so intoxicated as to be unable to premeditate, entertain malice, appreciate the difference between right and wrong or even recognize that he was engaging in acts that had a high probability of resulting in another's death. Dr. Fort, however, acknowledged that he was relying on information furnished by defendant and that defendant's statement that the victim would not die made during the strangulation of Baker would tend to show a recognition of what was happening.

Accordingly, the question of defendant's diminished capacity was properly left to the jury.

As to the defense of compulsion, Green testified that when Barker directed the killing of Baker, he pointed a gun at Pifer and defendant. Defendant, however, stated he never saw the gun and Dr. Fort indicated that even if displayed, the gun would have been irrelevant to defendant, given his condition. In addition, Dr. Fort explained that the Hells Angels patch was defendant's "status badge." Defendant repeatedly acknowledged that he would do as Barker directed in order to maintain his membership in the Hells Angels. Thus, the defense of compulsion was also not established as a matter of law.

[17] The People raise the additional question of whether because of the temporary abolition of the death penalty (People v. Anderson, 6 Cal.3d 628, 657, fn. 45, 100 Cal.Rptr. 152, 493 P.2d 880) after the murder of Baker but before defendant's trial, the defense was available at all to defendant at the trial. Penal Code section 26, so far as pertinent, provides: "All persons are capable of committing crimes except those belonging to the following classes: . . .

"Eight—Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The People for the first time on appeal urge that the subsequent judicial abolition of the death penalty could not create a defense that did not exist at the time of trial. People v. Anderson, supra, footnote 45, at 657, 100 Cal.Rptr. 152, 493 P.2d 880, was made fully retroactive. The abolition of the death penalty rendered meaningless the exception pertaining to capital crimes of Penal Code section 26, subdivision Eight (Witkin, Calif. Crimes (1973 Supp.) § 155, p. 81).

Accordingly, the defense of compulsion was available to defendant at the time of trial. We conclude that the trial court properly concluded that the availability of the defense was a question of law.

The judgment is affirmed.

KANE and ROUSE, JJ., concur.

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"This rule of law applies only to cases of the unconsciousness of persons of sound mind, such as somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind."

"If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant acted as if he was conscious, you should find that he was conscious.

"However, if, notwithstanding the defendant's appearance of consciousness, the evidence raises a reasonable doubt whether he was in fact conscious, you should find that he was then unconscious."

"A person is not guilty of crime when he commits an act or engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

"1. Where the threats and menaces are such that they would create in the mind of a reasonable person the fear that his life would be in imminent and immediate danger, if he did not commit the act or engage in the conduct charged, and

"2. If such person then believed that his life would be so endangered.

"This rule does not apply to threats, menaces, and fear of future danger to his life."

Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

The 1980 amendment deleted "voluntary, signed, written" preceding "statement" in Subdivision (a)(1), inserted "including by videotape" near the beginning of the first sentence of Subdivision (e)(3), substituted "as an exception to the hearsay rule of" for "so far as admissable under" in the introductory paragraph in Subdivision (n) and made minor punctuation changes throughout the rule.

Compiler's notes. — Subdivisions (a) to (c) are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Subdivision (n) is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The 1973 amendment amended only Subdivision (h).

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. State v. Williams, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Scope of authority to take depositions. — In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Where deposition not admissible. — As there was no showing that the presence of a witness who was out of the state could not be secured by subpoena or other lawful means, then his deposition is not admissible under this rule. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Generally as to use of depositions. — While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Use of deposition by state at trial requires strict compliance with Subdivision (n). McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

There must be strict compliance with Subdivision (n). Where deposition of absent witness was admitted absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. — Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Once a witness is permitted to claim his privilege against self incrimination, he becomes unavailable as a witness under Rule 804(a)(1), N.M.R. Evid., and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

No error in continuing trial where no abuse of discretion and expert's deposition admitted. — Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and a deposition of the expert was properly admitted at trial. State v. DeSantos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 340, 344, 345; 23 Am. Jur. 2d Depositions and Discovery § 1.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Production and inspection of premises, persons or things, 98 A.L.R.2d 909.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

23 C.J.S. Criminal Law § 1038.

Rule 29.1. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

(a) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that

the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

(b) At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under thirteen years of age, any part or all of the videotaped deposition of a child under thirteen years of age taken pursuant to Paragraph (a) of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

(c) In addition to the use of a videotaped deposition as permitted by Paragraph (b) of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph (a) of Rule 29. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and 30-9-17 NMSA 1978. The purpose of 30-9-17, supra, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico constitution or the United States constitution. See Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979); Estes v. Texas, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the Gannett decision, it was generally recognized that the right to a public trial under the United States constitution could not even be waived by the defendant. See constitution of the United States, congressional research service, 1973. There is also a right to a public trial under the New Mexico constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. See Rule 31.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule the child must be under the age of thirteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

Rule 29.2. Testimony before grand jury.

(a) At any time after indictment, on request of a party, the district court clerk shall furnish to the defendant:

(1) a copy of the record of defendant's testimony before the grand jury; and

(2) a copy of the record of the testimony of any witness on the state's witness list relating to the crime charged.

(b) At any time after indictment, on motion, the district court may order that a copy of the record or other portions of the record before the grand jury be given to the defendant or to the state by the clerk of the court upon a showing of particularized need. [Adopted, effective July 1, 1980.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the transcript of testimony of a defendant before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 27, the prosecution was required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"[O]nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged." Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), (cert. denied, 90 N.M. 637), quoting from State v. Sparks, 85 N.M. 429, 512 P.2d 1256 (Ct. App. 1973).

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

JAY S. HAMMOND, GOVERNOR

POUCH N
ROOM 312, GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811
PHONE:

March 11, 1982

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

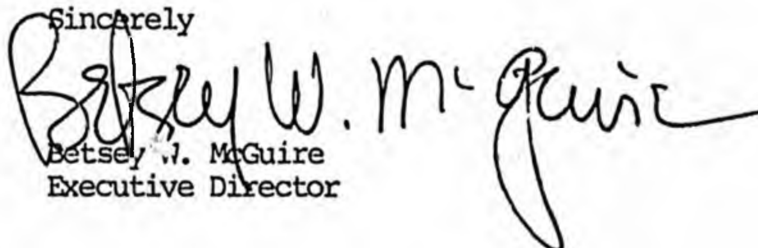
Dear Representative Barnes:

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

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

Your assistance will be appreciated.

Sincerely



Betsey W. McGuire
Executive Director

BWMc

12-L16LH

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

HOUSE BILL NO. 576

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

House Bill No. 576 provides that a child 16 years of age or younger who is a victim of sexual assault or sexual abuse could provide testimony by videotape rather than having to appear in open court. The Bill provides a presumption that a child under the age of 16 will suffer severe emotional distress if required to testify in open court. The judge presides at the videotaping proceeding and rules on all questions as if at trial, and the defendent has the right to an attorney and to confront and cross-examine the witness. In addition, this Bill provides that the public may be excluded from the courtroom while the testimony of a child is taken.

The Department has seen an increase in reporting of sexual abuse cases over the last year, including a 300% increase in Anchorage and a 240% increase in Fairbanks. Cases of sexual assault often have sensational aspects which bring curiosity-seekers and the press to the courtroom. To testify before a crowded courtroom can be emotionally harmful to a child who has already suffered trauma from the assault or abuse. This Bill would provide protection for the child from some of the more harmful aspects of such testimony. Therefore, the Department is in full support of House Bill No. 576. However, the following recommendations are made:

1. The Department recommends including incest and sexual exploitation to the crimes for which this option applies.

2. In Sec. 12.45.047 it is recommended that the statute delineate which persons will be allowed to be present during the videotaping.

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

DATE: 1/25/82

APPROVED BY: Helen D. Beirne
Helen D. Beirne
Commissioner

DATE: 1/26/82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Bill No. 576
Title "videotaping testimony of young victims of sexual abuse/assault..."
Requested by ______ Date ______

II. FISCAL DETAIL
Agency Affected Department of Health and Social Services
Program Category Affected Social Services
BRU, Program, Or Subprogram(s) Affected Various
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

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

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

House Bill No. 576 has no fiscal impact on the Department of Health and Social Services.

IV. DATE 1/25/82 PREPARED BY John R. Pugh, Director
AGENCY Division of Family and Youth Services
PHONE 465-3170

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

Kara Robinson
Favors bill

Introduced: 5/15/81
Referred: Judiciary

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

1 IN THE HOUSE

2 HOUSE BILL NO. 576

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

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

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

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

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

Barry Stern — In some other section of law.

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

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

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

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

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

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

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

26 (1) the judge presiding over the trial;

27 (2) the members of the jury;

28 (3) the defendant and his counsel;

29 (4) counsel for the state;

1 (5) counsel for the child;

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

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

4 mony.

5 * Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of

6 changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence

7 of a young victim of sexual assault or sexual abuse of a minor to the list

8 of exceptions to the hearsay rule.

9

10 Robinson → Add section Speed up cases → Make

11 them priority for the courts.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

I would also like to address the difficulty in the process of serving the assailants. We would like to suggest that legislation be passed that makes it manditory that all peace officers be required to serve process so the victims can be protected and not find out upon his appearance that in fact this has not occured.

HB 573 Tampering with a witness - making this a Class C Felony

We support this bill as in crimes such as domestic violence and sexual assault the only witness is the victim. It is not uncommon to have an assailant threaten or actually assault the victim again in order to have them revoke their testimony.

HB 578 Release on bail after certain crimes

We support this bill as many times victims are reluctant to press charges for fear of retaliation in the time before sentencing or pending appeal. Experience attests to the fact that the victims are in extreme danger, and the crime committed again, before they appear for trial.

HB 576 Regards the videotaping or the exclusion of the public during testimony of young victims of sexual assault or abuse.

We firmly support this bill for the fact that young victims are often traumatized by public testimony.

We would like to suggest that this bill be amended to include all victims of sexual assault.

In addition to this we would ask that crimes of this nature be given first proirity on the court calendar.

We have found that both public testimony as well as long, protracted trials traumatize not only the victim under 16, but all victims of sexual assault and/or abuse.

Valley Women's Res. Ctr

CITY OF KOTZEBUE

P.O. BOX 46
KOTZEBUE, ALASKA 99752

KOTZEBUE POLICE DEPARTMENT
907-442-3551

September 22, 1981

576

Representative Ramona L. Barnes, Chairman
House Judiciary Committee
P.O. Box 3382
Anchorage, Alaska 99510

Dear Representative Barnes:

I regret I cannot attend personally but would like to present my written comments to the House Judiciary Committee.

I would like to lend my support to all but one of the proposals. I would especially give my highest recommendation to the Governors Drug Bill, House Bill #180, It is badly needed.

My one reservation is in regard to House Bill # 572 on Domestic Violence.

Most often the Police Officer answering domestic dispute calls is acting as an arbitrator and/or mediator. Injecting the Officer further into the dispute by requiring the Officer to assist one party or the other will remove their "impartial" stature and make their job harder in the future as the Officer will be viewed as an adversary by the other party involved.

The Court must be presented the documents before service and I feel the court is the proper place for assistance to be rendered the party seeking injunctive relief.

Donald E. Buehler
DONALD E. BUEHLER
Chief of Police

cc: AS Revisions file
Sgt Jones
Sgt Wallace

DEB/dew

"GATEWAY TO NORTHWEST ALASKA"

Edward Leslie STORES, Appellant,

v.

STATE of Alaska, Appellee.

No. 3595.

Supreme Court of Alaska.

Dec. 19, 1980.

Defendant was convicted in the Superior Court, Third Judicial District, C. J. Occhipinti, J., of rape, and he appealed. The Supreme Court, Connor, J., held that: (1) conduct of prosecutor, who was aware of missing witness' plans to depart for Hawaii prior to trial and also of her willingness to appear at trial as subpoenaed, in failing to subpoena witness precluded a finding that diligence was exercised; thus, witness' videotaped deposition was inadmissible at rape trial under applicable criminal rule, and (2) improper admission of videotaped deposition testimony of victim's family doctor, which was highly corroborative of victim's testimony, constituted reversible error.

Reversed.

Matthews, J., filed dissenting opinion.

1. Criminal Law ⇔419(5)

Under federal standard, out-of-court statements may be used at trial upon showing that the client is unavailable and that the statements bear adequate indicia of reliability. U.S.C.A.Const. Amend. 6.

2. Witnesses ⇔6

Witness, who presumably went to Hawaii on a vacation, was not beyond jurisdiction of court to compel her appearance at rape trial. AS 12.50.010 to 12.50.080.

3. Criminal Law ⇔627.2

Showing required to establish unavailability of a witness for purpose of rule governing use of deposition at trial parallels the showing required under federal constitutional law. Rules of Criminal Procedure, Rule 15(d); U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇔1134(3)

Determination of whether witness is unavailable for purposes of rule governing admission of deposition at criminal trial must be made independently by reviewing court. Rules of Criminal Procedure, Rule 15.

5. Criminal Law ⇔627.2

Requirement of good-faith, diligent efforts to secure presence of a witness before preliminary hearing testimony may be introduced against an accused in a criminal trial applies with equal force to use of a deposition taken prior to trial. Rules of Criminal Procedure, Rule 15.

6. Criminal Law ⇔627.2

Conduct of prosecutor, who was aware of missing witness' plans to depart for Hawaii prior to trial and also of her willingness to appear at trial if subpoenaed, in failing to subpoena witness precluded a finding that diligence was exercised; thus, witness' videotaped deposition was inadmissible at rape trial under applicable criminal rule. Rules of Criminal Procedure, Rule 15.

7. Criminal Law ⇔1169.2(1)

Reviewing court must examine evidentiary error to determine whether jury was substantially influenced or swayed in its verdict by introduction of improperly admitted evidence in the context of entire trial record; if properly admitted evidence is merely cumulative, and state's case is otherwise very strong, error may be deemed harmless, even if of constitutional dimension but where disputed evidence appreciably affects jury's verdict, error requires reversal.

8. Criminal Law ⇔627.2, 1166(1)

Improper admission of videotaped deposition testimony of victim's family doctor, which was highly corroborative of victim's testimony in rape trial, constituted reversible error. Rules of Criminal Procedure, Rule 15.

Christine Schleuss, Asst. Public Defender, John M. Murtagh, Asst. Public Defender,

and Brian Shortell, Public Defender, Anchorage, for appellant.

John Scukanec, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., CONNOR and MATTHEWS, JJ., and DIMOND, Senior Justice.

OPINION

CONNOR, Justice.

This appeal requires us to decide whether it was proper to admit into evidence the videotaped deposition of a key prosecution witness who was out of the state at the time of trial.

In March, 1977, Edward Stores was charged with one count of rape.[1] The state's case consisted primarily of the testimony of three witnesses. The prosecutrix, a high school student, testified that the defendant, a stranger, approached her in the school parking lot and asked for a lift to his home because he had been injured in a fight. He claimed that his lip had been split. When they arrived at his residence, she agreed to accompany him inside to explain to his mother the circumstances of his return home in the early afternoon. Stores asked her to wait in the living room, and when he returned he put his arm around her neck and forced her into the back bedroom. He ordered her, at knifepoint, to undress, and then raped her. The act of sexual intercourse was very brief. The two got dressed, left the house together, and she gave the defendant a ride to another location. The defendant asked her for a date but she declined. The victim then returned to school, knocked on a classroom door, and told the teacher she needed to see her friend who was in the class. Since the victim was crying, the teacher excused the friend from class. The victim then related the foregoing story. The friend informed the victim's mother, who arranged for an immediate gynecological examination for her daughter. The victim's parents also telephoned the police.

This version of events was disputed by another prosecution witness, Mrs. Hughes, the defendant's cousin and legal guardian. Mrs. Hughes testified on direct examination that the defendant informed her that the alleged victim had consented to the sexual act, but that afterwards she became angry with the defendant when he refused her demand for oral sex because of his lip injury. Stores and the young woman argued, and Stores had to force her to leave by brandishing a knife. She threatened that she would "get even with him" for his failure to accommodate her.

On the critical issue of consent, a key prosecution witness was Dr. Sydnam, a family practitioner, whose testimony was presented to the jury on videotape, over the objection of the defense. On the videotape, Dr. Sydnam testified on direct examination that she performed a pelvic examination of the victim shortly after the alleged rape and observed redness and contusion of the vulva, which was tender, and a copious amount of sperm within the vagina, signifying that intercourse had occurred within several hours of the examination. The bruises on the outer walls of the vagina were not, she testified, customarily associated with intercourse between willing partners, but were consistent with forcible intercourse. In addition, she related that the alleged victim "is ordinarily ... very self-assured, calm," but that on the day of this examination, "she was very, very different.... She was not composed and she was not calm, and—and she was visibly upset, and as I described before, crying and—and distraught."

On cross-examination, Dr. Sydnam testified that consensual intercourse could produce the same symptoms "[o]nly if there's

1. Former AS 11.15.120 provides:

"A person who (1) has carnal knowledge of a female person, forcibly and against her will ... is guilty of rape."

The new Criminal Code, effective January 1, 1980, reclassifies rape in AS 11.41.410-.440.

something the matter with the (indiscernible) of the people involved, I think." On re-direct, she repeated that "it's extremely unlikely [that a consenting female could sustain these injuries during intercourse] unless it's extremely prolonged and brutal intercourse, and by extremely prolonged, I mean over a matter of, you know, hours."

The defense rested after the conclusion of the state's case. Stores was convicted by the jury and he was sentenced to seven years' imprisonment.[2]

On appeal, the defendant contends that it was reversible error to admit Dr. Sydnam's videotaped deposition at trial. We must examine this claim of error in the context of the particular factors in this case.

On May 3, 1977, six days before the commencement of trial, the state informed the court that Dr. Sydnam, its key witness, would be out of the state and unavailable to testify at the trial. The prosecutor moved for an order to take her deposition. He gave the following grounds as "good cause" for ordering the deposition:

> "I have reviewed the police report in connection with Dr. Sydnam's examination of the alleged victim, ... and feel that her testimony would be *highly corroborative of the victim's complaint.* Dr. Sydnam basically would testify that the victim did sustain some injury to the vaginal area of her body....
>
> The State feels that Dr. Sydnam's testimony would be *absolutely necessary to corroborate the victim's statement that she was forcibly raped, and to counter the anticipated defense of consent.*" (emphasis added).

Since it was evident to the defendant that the purpose of the deposition was to preserve Dr. Sydnam's testimony, he objected, not to the taking of the deposition, but to its anticipated use at trial, as a violation of the defendant's right of confrontation and Alaska Rule of Criminal Procedure 15. The defense suggestion of a continuance was opposed by the state and denied by the court. The court granted the state's motion and on May 5, 1977, Dr. Sydnam's deposition was recorded on videotape.

Defendant and his counsel were present. In response to preliminary questioning by the prosecutor, the witness testified that she had long-standing vacation plans to spend in excess of two weeks in Hawaii, that she would leave the state of Alaska "next Tuesday evening or Wednesday morning," that she had made arrangements to share a condominium with three other persons, who, if she cancelled her trip, would be financially obligated to pay her pro-rata share of the rental fee. The witness was asked and she answered:

> "Q. Okay. All right. Assuming that you were to be subpoenaed to remain here in Anchorage say, next Tuesday or next Wednesday, I take it that you would abide by that subpoena and remain here and frustrate your plans, is that correct?
>
> A. I suppose so."

At trial, the defendant renewed his objections to the use of the videotape. The objections were overruled and the tape was played for the jury.[3]

On appeal, the defendant maintains that the admission of the pre-trial deposition under these circumstances violated both his confrontation rights guaranteed by the sixth amendment and Alaska Rule of Criminal Procedure 15. The state, on the other hand, argues that since the witness was not present at the trial and "presumably" beyond the jurisdiction of the court, it was proper to admit her pre-recorded testimony as substantive evidence. The state also maintains that the defendant's cross-examination of the witness at the time of the deposition satisfies his sixth amendment rights.

We note that the United States Supreme Court has never expressly authorized the

2. Former AS 11.15.130(c) authorized a sentence of one to twenty years upon conviction for forcible rape of an unrelated female over the age of 16 by a person over the age of 19.

3. The videotape was played on a 21-inch television screen, in black and white, with a synchronized audio portion played on a tape recorder. Testimony was given from the witness stand.

use of an absent witness' deposition in lieu of viva voce testimony in a criminal trial, although it has allowed the use, in narrow circumstances, of testimony from a prior trial, *e. g., Mancusi v. Stubbs,* 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); or testimony from a preliminary hearing, *e. g., Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). From the very first, the Court has recognized that

> "[t]he primary object of the [Confrontation Clause] ... was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look upon him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief."

Mattox, 156 U.S. at 242–43, 15 S.Ct. at 339, 39 L.Ed. at 411. While a definitive history of the sixth amendment remains to be written,[4] we adopt the observation of Justice Harlan that "[f]rom the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers and absentee witnesses." *California v. Green,* 399 U.S. 149, 179, 90 S.Ct. 1930, 1946, 26 L.Ed.2d 489, 509 (1970) (Harlan, J., concurring).[5]

We think that one of the purposes which the Confrontation Clause serves is to relieve prosecutors of the temptation to use pre-recorded testimony instead of live witnesses.[6]

4. It has been suggested that the reason for adoption of the Confrontation Clause as a bulwark against the use of letters and other second-hand accounts by the prosecution when the actual accusing witnesses were in fact available was the practice at common law whereby "the proof was usually given by reading depositions, letters and the like; and this occasioned frequent demands by the prisoner to have his accusers, i. e., the witnesses against him, brought before him face to face." 1 J. Stephen, A History of the Criminal Law of England 326 (1883). *See* Baker, *Right to Confrontation, the Hearsay Rules and Due Process—a Proposal for Determining When Hearsay May Be Used in Criminal Trials,* 6 Conn.L. Rev. 529, 532 n.10 (1974); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim.L. Bull. 99, 130 (1972); Graham, *The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again,* 9 Alaska L.J. 3 (Jan. 1971); Graham, *The Right of Confrontation and Rules of Evidence: The Return of the Portuguese Gentleman,* 9 Alaska L.J. 3 (May 1971).

5. History supports this interpretation. *See State v. McO'Blenis,* 24 Mo. 402, 421 (1857) (Ryland, J.) ("There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witnesses are reproduced in the form of deposition."). See Lord Strafford's plea in his November, 1680, impeachment: "I beg your lordships that he [the witness Dugdale] may look me in the face, and give his evidence, as the law is.... I desire the letter of the law, which says, my accuser shall come face to face." 7 Howell's State Trials 1293, 1341 (Cobbett's ed. 1810). See also the trial of Sir Walter Raleigh for treason in 1603, where the following repartee took place between the accused and the court after the Crown introduced the statement of Lord Cobham, Raleigh's principal accuser, who was absent from the trial:

> "The proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done."

Raleigh's demand for confrontation was answered by Justice Warburton:

> "I marvel, Sir Walter, that you being of such experience and wit should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses."

2 Howell's State Trials 15–16, 18 (1816).

6. One commentator has expressed concern that liberal use of hearsay "may induce prosecutorial negligence in securing witnesses.... Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach." Note, *Confrontation and the Hearsay Rule,* 75 Yale L.J. 1434, 1438–39 (1966).

Thus, we are in agreement with Professor Westen's conclusion that

> "the confrontation clause is not merely a constitutional rule governing the attendance of witnesses; it also embodies constitutional controls on the manner by which the state presents its case against the accused. ..
>
> This broader notion of confrontation not only is consistent with the Court's language, but serves an important procedural purpose. It requires the state, wherever possible, to present its evidence against the accused in what is traditionally considered the most reliable form, that of direct testimony in open court." (footnote omitted).

Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv.L.Rev. 567, 578 (1978).[7]

[1] There are, however, certain instances where the interests embodied in the Confrontation Clause give way to a competing interest, namely, the state's "strong interest in effective law enforcement ...." *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, 607 (1980). Thus, under the federal standard, out-of-court statements may be used at trial if a two-tier test is met. First, the Confrontation Clause requires a showing that the declarant is unavailable. Second, the statements are admissible only if they bear adequate "indicia of reliability." *Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539, 65 L.Ed.2d at 608. Often, where the evidence falls within an established hearsay exception, reliability can be inferred. *Id.* In other cases, the evidence must be excluded, "absent a showing of particular guarantees of trustworthiness." *Id.*

We need not reach, however, the constitutional issue presented, since Alaska Rule of Criminal Procedure 15 serves a purpose similar to that of the Confrontation Clause with regard to the use of depositions in criminal cases. Each conditions the use of such out-of-court testimony upon an initial showing of unavailability. The rule permits the deposition of a prospective witness to be taken for discovery purposes upon order of the court for good cause shown.[8] But the use at trial of a deposition is conditioned upon either the stipulation of the parties, or the unavailability of the witness.[9] Under Criminal Rule 15(e) a witness is unavailable when he is:

> "(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) Persistent in refusing to testify despite an order of the judge to do so; or
>
> (3) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

7. In his article, Professor Westen proposes the following rule to limit the state's discretion in presenting evidence against the accused

> "Before it may use a witness' out-of-court statements against the accused at trial, the state has an obligation to make a 'good faith effort' to produce the witness in person and, having produced the witness, to try to elicit his evidence in the form of direct testimony under oath and in the presence of the jury."

91 Harv.L.Rev. at 579.

8. Criminal Rule 15(a) provides in pertinent part:

> "*When Taken.* Upon order of the court for good cause shown, the testimony of a prospective witness may be taken by either party for discovery upon notice and after the deposing party has disclosed all statements, exhibits, and witness lists required by Rule 16."

This differs from the analogous Federal Rule of Criminal Procedure 15 which authorizes the use of depositions not for discovery purposes, but only to preserve evidence. *U. S. v. Steffes,* 35 F.R.D. 24 (D.Mont.1964), and from Alaska Rule of Civil Procedure 27(a) which permits the taking of depositions for the purpose of perpetuating testimony. The defendant has not raised the use of the deposition to preserve evidence as a ground of appeal.

9. Criminal Rule 15(d). This rule also permits the use of a deposition at trial for impeachment purposes. *Compare* Alaska Rule of Civil Procedure 32(a)(3) authorizing use at trial of a deposition for "exceptional circumstances [which] make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used...."

(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance."[10]

[2] The question is thus narrowed to an inquiry of unavailability, that is, whether the state, the proponent of the witness in this case, "exercised reasonable diligence but [was] unable to procure [her] attendance" at *trial*.[11] Alaska R.Crim.P. 15(e)(4).

In *Fresneda v. State*, 483 P.2d 1011 (Alaska 1971), we addressed ourselves to the standard of "due diligence" which must be exercised by the proponent of a witness' statement to secure the presence of a witness at trial before it seeks to introduce former testimony of that witness. In *Fresneda*, one of the state's witnesses who testified at the first trial[12] was absent at the retrial. The state made no sincere effort to locate this witness until seven days prior to the retrial when a check of police records in Juneau and Anchorage, where the witness was believed to reside, revealed no trace of him.

Two days prior to trial, the court attache was assigned to the search. His inquiries disclosed the possibility that the witness had enlisted in the Army, but he did not follow up on his request for verification of this fact. On the day of trial, the prosecutor's secretary learned that the witness had in fact enlisted in the Army approximately seven months earlier, and had been sent to Fort Lewis, Washington, for eight weeks of basic training. Her source of information, a major in the Army National Guard, had no actual knowledge of the witness' location, but suggested that he might be in Vietnam. The trial court apparently assumed that the witness was in fact in Vietnam and admitted the former testimony.

[3] We held this ruling to be error on the part of the trial court, *id.* at 1018;[13] we found that the prosecution's efforts to locate the witness[14] did not measure up to the standards of due diligence recently announced by the United States Supreme Court in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).[15] We now

10. It is significant to note that the 1975 Committee Notes to the Federal Rule of Criminal Procedure 15, from which the Alaska Rule is derived, specifically state: "The committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from the witness on the witness stand." 8 Moore's Federal Practice ¶ 15.01[3], at 15-10 (Rev. ed. 1978).

11. We think it is clear that the witness was not beyond the jurisdiction of the court to compel appearance.

For witnesses not in prison, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one state can obtain an order from a court in the state where the witness is found, directing the witness to appear in court in the first state to testify. The state seeking his appearance must pay the witness a specified sum as a travel allowance and compensation for his time. AS 12.50.010-.080.

12. We reversed the first conviction in *Fresneda v. State*, 458 P.2d 134 (Alaska 1969).

13. *Fresneda* modified our holding in *McBride v. State*, 368 P.2d 925, 927 (Alaska 1962) that

"[t]he question of diligence or lack of it on the part of the state in attempting to find the witness is in the first instance a question of fact for the trial judge to decide, and we shall reverse his decision only if there has been a clear abuse of discretion."

14. We noted that

"United States Army Reg. 27-45 provides a method for obtaining the return of Army personnel to testify in civil and criminal cases." 483 P.2d at 1018 n.26.

15. *Barber* reversed an Oklahoma conviction which rested in part on the state's use at trial of a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in a federal prison in Texas. The state made no attempt to subpoena the witness, claiming instead that use of the former testimony was proper where a witness was unavailable to testify merely because he was outside the jurisdiction, if the defendant had been afforded his right of cross-examination at the time the testimony was given. (The Court assumed the defendant waived his right to cross-examine at the preliminary hearing. 390 U.S. at 722, 88 S.Ct. at 1320, 20 L.Ed.2d at 259). The United States Supreme Court found this contention to be constitutionally untenable:

"We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he

reiterate our position that the showing required under Criminal Rule 15(e) to establish unavailability parallels the showing required under federal constitutional law.

[4] In light of the constitutional basis of the decision in *Roberts* and *Barber*, the determination of whether the witness was unavailable must be made independently by the reviewing court. *Green v. State*, 579 P.2d 14, 16–17 (Alaska 1978). In *Green*, a witness subpoenaed by the district attorney failed to appear at trial. Even though the district attorney had advance knowledge that the witness might not show up at trial,[16] he took no action to secure her presence until the initial trial date.[17] A bench warrant was issued and state troopers, who had learned of the witness' move to California, checked with authorities in two cities there. They never located the witness, and the trial court admitted into evidence her preliminary hearing testimony. We reversed on the ground that the trial court had erroneously concluded that the state's efforts to locate the missing witness were adequate. We concluded that the state's failure to check with the witness' last known employer or the post office for a forwarding address demonstrated lack of due diligence,[18] which precluded the use at trial of the witness' preliminary hearing testimony.

[5] The requirement of good-faith, diligent efforts to secure the presence of the witness before preliminary hearing testimony may be introduced against an accused in a criminal trial applies with equal force to

was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d ed. 1940).

Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law....

In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial.... In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (footnotes omitted).

390 U.S. at 723–24, 88 S.Ct. at 1321, 20 L.Ed.2d at 259–60.

Subsequently, in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court allowed the use of a preliminary hearing transcript in a criminal trial. Unlike the facts of *Barber*, in *Roberts* the state made a sufficient good-faith effort to locate the witness so as to enable the court to reasonably conclude she was unavailable. In *Roberts*, five separate subpoenas for the witness were issued for four different trial dates; each was served at the home of the witness' parents, her last known address. The state contacted the parents four months before trial in an effort to locate the witness. Her parents did not know her whereabouts, nor did they know how to locate her. *Id.* at 75, 100 S.Ct. at 2543, 65 L.Ed.2d at 613. In fact, no one in the witness' family had been able to locate the witness in over a year. *Id.* at 75, 100 S.Ct. at 2544, 65 L.Ed.2d at 614.

16. The witness had informed the process server that she might be leaving the state and he in turn conveyed this information to the district attorney. 579 P.2d at 17.

17. The trial was stayed for four months pending decision on a petition for review. 579 P.2d at 17 n.4.

18. In *Fresneda*, 483 P.2d 1017, we relied upon the following language, which we cited with approval in *Green*, 579 P.2d at 18:

> "The word 'diligence' connotes persevering application, untiring efforts in good earnest. There must be evidence of a substantial character to support the conclusion of due diligence. [What is required is] a thorough, painstaking and systematic attempt to locate the witnesses."

Quoting *People v. Redston*, 139 Cal.App.2d 485, 293 P.2d 880, 886 (1956).

the use of a deposition taken prior to trial.[19] As we said in *Fresneda*,

> "While we recognize that there is a difference between testimony elicited at preliminary hearings and testimony introduced at trial in terms of completeness and depth of cross-examination, we find that this difference should not be the basis for the requirement of a different standard of due diligence in each case."

483 P.2d at 1017 n.25.

[6] Applying the standards of due diligence developed in *Fresneda* and *Green* to the instant case, we find that the state failed to make any effort to secure the presence of Dr. Sydnam at trial even though it had advance knowledge not only of her plans to depart, but also of her willingness to appear at trial if subpoenaed. The sole purpose of taking the deposition was to create former testimony to be used in lieu of live testimony. We will not sanction such an evasion of the constitutionally based preference for live testimony in open court which is embodied in Criminal Rule 15. The conduct of the state in failing to subpoena the witness precludes a finding that due diligence was exercised.[20] The deposition was inadmissible under Criminal Rule 15.

The state asks us to relax the specific requirements of Criminal Rule 15(e), and the preference for in personam testimony embodied in former Criminal Rule 26,[21] in accordance with the provision of Criminal Rule 53[22] "to facilitate business and ad-

19. There is, however, a distinction between former trial testimony and a deposition taken prior to trial:

> "First, at the time a deposition of a prosecution witness is taken the defense may not be prepared adequately to cross-examine, while prior trial testimony is used only at a time when the defendant is presumably ready for trial. The second difference is that the testimony of a witness at a prior trial has been subjected at least once to the crucible of in-court scrutiny by judge and jury. This is, perhaps, another way of saying that testimony in the solemn, impressive atmosphere of a ... courtroom, before the eyes of a keen judge and an observant jury, may be given with a little more care, deliberation and accuracy on the part of the witness than it might be given [otherwise]." (footnotes omitted). *United States v. Singleton*, 460 F.2d 1148, 1155 (2d Cir. 1972) (Oakes, J., dissenting), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1506, 36 L.Ed.2d 180 (1973).

20. We reject the state's claim in this case that its failure to subpoena the witness was "reasonable." First, as we said in *Fresneda*, "we find it inappropriate to encourage any but the best efforts to [secure the presence of] witnesses in view of the qualitative differences between live and recorded testimony." 483 P.2d at 1018 n.24. Second, the case upon which the state relies, *State v. Reid*, 559 P.2d 136 (Ariz. 1976), is distinguishable on the facts.

In that case, prior to Reid's trial for murder, armed robbery, burglary and theft of a motor vehicle, the prosecution moved for an order to videotape the testimony of the coroner's pathologist who planned to be out of the country for extended travel during the dates set for trial. The motion was granted and the videotaped deposition was used at trial. The Arizona Supreme Court upheld the use of the deposition in lieu of viva voce evidence because the deposition was "used for a purely foundational matter."

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

Id. at 148.

The Arizona court took pains to note that a different result might be warranted if the testimony sought to be had by deposition were "crucial." *Id.* at 149. Dr. Sydnam's testimony goes far beyond merely foundational matters.

Nor does *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) compel a different result. Unlike the facts in *Roberts*, here, Dr. Sydnam's whereabouts were fully known. The only "unavailability," if any, was temporary. The state had the ability to compel her attendance, but chose not to exercise that power. Such conduct hardly constitutes due diligence.

21. At the time of trial Criminal Rule 26(a) provided, in pertinent part:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules."

Criminal Rule 26 was rescinded effective August 1, 1979 by Supreme Court Order 369.

22. Criminal Rule 53 states:

> "*Relaxation of Rules.* These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be

vance justice." Since the application of the rule came before the trial court, it would have been up to the trial judge to relax the rules. In this instance, however, if the trial court had indicated that the rules were being relaxed, we would have to find such ruling to be an abuse of discretion.

While relaxation of the rules is not tantamount to rewriting a rule, even if we felt free to rewrite Criminal Rule 15,[23] we would refuse to do so in this case. First, the defendant is entitled to the benefit of the procedural rights which this court has conferred upon him. Second, trial by deposition under these circumstances would not advance justice.[24] We are sympathetic to the inconveniences which may attend adherence to the rules, but we are also mindful that "the giving of testimony and the attendance upon court . . . are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned.... The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979, 982–83 (1919). If fear for the safety of one's self and family is not a valid excuse for failure to appear in court to testify, *Piemonte v. United States*, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed.2d 1028 (1961), then disruption of vacation plans is surely insufficient.

[7] The erroneous admission of the videotaped deposition must compel reversal unless harmless. Although evidentiary error may be harmless in some circumstances, *Fresneda v. State*, 483 P.2d 1011, 1018 (Alaska 1971), it is not so here. Reversal based upon non-constitutional, evidentiary error revolves around "what the error might have meant to the jury." *Love v. State*, 457 P.2d 622, 630 (Alaska 1969). Under the *Love* test, we must examine the error to determine whether the jury was substantially influenced or swayed in its verdict by the introduction of the evidence in the context of the entire trial record. If improperly admitted evidence is merely cumulative, and the state's case is otherwise very strong, the error may be deemed harmless, even if of constitutional dimension, *e. g., Burford v. State*, 515 P.2d 382, 384 (Alaska 1973); but where the disputed evidence "appreciably affect[s] the jury's verdict," the error requires reversal. *Stevens v. State*, 582 P.2d 621, 626 (Alaska 1978).

[8] Significant differences exist between testimony by videotape and testimony face-to-face with the jury. Videotape may affect the jurors' impressions of the witness' demeanor and credibility.[25] Such

manifest to the court that a strict adherence to them will work injustice."

23. We have declined to rewrite the Rules of Criminal Procedure from the bench, noting that expansion of the rules is appropriately accomplished by amendment upon recommendation of the Rules Committee, the bench and the bar. *Buchanan v. State*, 561 P.2d 1197, 1209 (Alaska 1977).

24. Indeed, it may subvert justice, as is suggested in Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 Or.L.Rev. 567, 570–72 (1976). Both the Ninth and Second Circuit Courts of Appeals have held that videotaped pre-trial depositions of witnesses may be used in lieu of personal appearance before the jury where the defendant was present with counsel and given an opportunity to cross-examine and the prosecution has made a "good faith" effort to produce the witness at trial. *United States v. King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977) (videotaped depositions of two unindicted co-conspirators unavailable to testify because they were incarcerated in Japan were admissible); *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1506, 36 L.Ed.2d 180 (1973) (videotaped deposition of critically ill prosecution witness admissible). However, the Eighth Circuit has expressed some doubt on the constitutionality of use of a videotaped deposition at a criminal trial. *United States v. Benefield*, 593 F.2d 815, 821 (8th Cir. 1979).

25. As one commentator has pointed out, there is a potential for distortion of a juror's perception of a witness whose testimony is presented by videotape.

"Some courts and legal commentators have assumed that evidence recorded on videotape can simply be transported from courtroom to television monitor with little or no effect upon it. In reality, however, the camera unintentionally becomes the juror's

considerations are of particular importance when the demeanor and credibility of the witness are crucial to the state's case. We cannot agree with the dissent that this "is not a case involving the testimony of a crucial eyewitness, when it might be important at trial to test the witness's powers of observation, memory, or possible bias." To the contrary, Dr. Sydnam was a crucial eyewitness to the aftermath of the alleged rape, who testified not only to the physical condition of the victim, but also to her distraught emotional state. The doctor's testimony that injuries to the victim's vaginal areas were inconsistent with willing intercourse, but consistent with forcible rape, was the most compelling evidence offered by the state on the issue of consent. In addition, as the victim's family doctor, there was a possible basis for bias. Thus, there were many aspects of Dr. Sydnam's testimony as to which her "powers of observation, memory, or possible bias" were very much at issue here. Given her testimony, we conclude the jury was substantially influenced in its verdict by the introduction of the videotaped deposition.

Moreover, there is a further distinction between trial testimony and videotaped testimony taken prior to trial which may have significance here. With videotape, the witness cannot be cross-examined in the context of other evidence and testimony which has been presented at trial. Store's counsel may have taken a different approach to the cross-examination of Dr. Sydnam had her testimony been taken as part of the prosecution's entire case. If the doctor had been available at trial, the defense would have had the opportunity to explore any discrepancies between the testimony of various witnesses and to recall the doctor to clarify any medical questions that might have arisen during the course of the trial.

The use of videotape, in the trial process is relatively new. Its real impact remains undetermined. This is not to say that a videotaped deposition should never be used at trial; in fact, it may provide the most reliable and accurate means of preserving testimony when the witness is truly unavailable for trial. It is quite a different matter, however, to conclude that the erroneous admission of a videotaped deposition of a crucial witness, who was available to testify at trial, had no effect on the outcome of the trial.

We have not hesitated to reverse where an error flows from prosecutorial violation of the Rules of Criminal Procedure. *Stevens v. State*, 582 P.2d 621 (Alaska 1978). In view of the requirements of *Love* and the concomitant substantial effect that the deposition must have had on the jury's verdict, reversal is required.

We find the other contentions advanced by the defendant on appeal to be without merit.

REVERSED.

BOOCHEVER and BURKE, JJ., not participating.

MATTHEWS, Justice, dissenting.

I disagree with the majority's opinion that the admission of Dr. Sydnam's videotaped deposition was not harmless error beyond a reasonable doubt.

The question is not simply whether the state might have obtained a conviction without Dr. Sydnam's testimony. It appears plain that had the state or the trial

eyes, necessarily selecting and commenting upon what is seen....

Evidence distortion is most serious when videotaping a witness because the picture conveyed may influence a juror's feelings about guilt or believability.... Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question, all of which are potentially important to jury decision making. Whether testimony is taped in black and white or in more expensive color may also be of critical importance.

Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded while the focus is on another part of the body or another witness." (footnote omitted).

Note, *supra* note 24, at 574-76.

judge insisted, Dr. Sydnam would have appeared in court. It is also abundantly clear that had Dr. Sydnam testified in court her testimony would have been admissible. Therefore, the critical question is whether there was a significant difference between the testimony as it was actually presented to the jury on the videotape and as it might have been presented had Dr. Sydnam appeared in person at Stores' trial.

The videotaped testimony was prepared within less than a week of trial. It was clear to the defendant and his lawyer that the purpose of the taping session was to preserve the doctor's testimony for use at trial. Thus, this is not a case where the defendant's lawyer did not have adequate time to prepare, or where the issue to be proved or the quantum of proof needed was different from that at trial. Such might be the case if testimony from a preliminary examination or a deposition believed to be for discovery purposes were used.[1]

The defendant had the assistance of the same lawyer at both the taping session and at trial. A trial judge was present and ruled on objections raised by both parties. Defendant's lawyer freely cross-examined the witness.

A videotape records the demeanor of a witness with even more faithfulness than a sound recording. With regard to the latter, we said in *McBride v. State*, 368 P.2d 925, 928-29 (Alaska 1962) (footnotes omitted), *cert. denied*, 374 U.S. 811, 83 S.Ct. 1702, 10 L.Ed.2d 1035 (1963):

> The entire direct and cross-examination were played back through a high fidelity loudspeaker mounted on the courtroom wall. The jury was able to hear the inflections of voice which are so often important. They were able to note the readiness and promptness of the witness's answers or the reverse; the distinctness of what he related or lack of it; the directness or evasiveness of his answers; the frankness or equivocation; the responsiveness or reluctance to answer questions; the silences; the explanations; the contradictions; and the apparent intelligence or lack of it. These are vital elements touching upon the witness's veracity which are available in this jurisdiction to be noted and weighed by a jury even when the witness is not present in person. To a large extent, then, demeanor evidence is available for a subsequent jury; it is no longer wholly "elusive and incommunicable" as in the case of manual reporting of former testimony.

Finally, Dr. Sydnam testified as an expert witness concerning the results of her medical examination of the victim. This was not a case involving the testimony of a crucial eyewitness to the events of the crime, where it might be important at trial to test the witness's powers of observation, memory, or possible bias.[2]

1. "A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1323, 20 L.Ed.2d 255, 260 (1968).

2. In *State v. Reid*, 559 P.2d 136, 149 (Ariz. 1976), *cert. denied*, 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977), the Arizona Supreme Court allowed the testimony of a coroner to be videotaped prior to trial. The court noted:

> We find no error in allowing Dr. Hirsch to testify by videotape under the appropriate safeguards contained herein. In deciding as we do, we wish to emphasize that our decision might be different were he an eyewitness to the events of the crime. Such a crucial witness should not be lightly excused from attendance at the trial itself. When 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 speciality, 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.

There is no reason to doubt the truth or accuracy of Dr. Sydnam's testimony, nor does the defendant suggest her testimony was in any way unreliable. The defendant has not suggested that some profitable line of cross-examination was left unexplored. Under the circumstances, admitting the videotape was harmless error. Accordingly I would affirm the conviction.

ALASKA STATE HOUSING AUTHORITY, Appellant,

v.

WALSH & COMPANY, INC., Appellee.

WALSH & COMPANY, INC., Cross-Appellant,

v.

ALASKA STATE HOUSING AUTHORITY, Cross-Appellee.

Nos. 3679, 3680.

Supreme Court of Alaska.

Dec. 19, 1980.

Contractor brought suit against State Housing Authority to recover balance due and added expenses allegedly incurred in road construction project. The Superior Court, Third Judicial District, Anchorage, Peter J. Kalamarides, J., rendered judgment from which the housing authority appealed and the contractor cross-appealed. The Supreme Court, Connor, J., held that: (1) trial court's determination that the contract was substantially performed did not result from a misallocation of the burden of proof; (2) trial court's determination that there was substantial performance by the contractor was not clearly erroneous, particularly in view of evidence that the road was substantially serving its intended purpose and did not require rebuilding; (3) for deficiencies in the construction work, the trial court utilized an improper measure of damages in merely awarding housing authority the value of omitted road base materials; (4) in regard to what gravel surface material was required, an ambiguity existed in the contract; (5) contract's technical specifications did not unambiguously require that the road base material used be mechanically crushed and, therefore, the contractor did not act improperly in attempting to incorporate material that satisfied only the requirements of Alaska Method T-7; and (6) since none of the technical specifications required contractor to submit for approval samples of "Crushed Surfacing, Type A," contractor had no duty to furnish such a sample to housing authority.

Affirmed in part, reversed in part, and remanded.

1. Contracts ⇐294

Doctrine of substantial performance permits recovery by contractor who has substantially, though imperfectly, performed his contractual undertaking; in such circumstances, the contractor is entitled to recover contract price, less reasonable cost of remedying defects in the work or materials.

2. Contracts ⇐322(1)

Initial burden of proving substantial performance is on contractor, and if his evidence shows substantial performance, burden is then on owner to prove that certain deficiencies in the work require recoupment or setoff.

3. Contracts ⇐294

Substantial performance is determined by considering such factors as character of performance that was promised, purpose that contract was meant to serve, and extent to which any nonperformance by contractor has defeated purposes or ends which were meant to be achieved.

4. Contracts ⇐294

In many cases, substantial performance becomes a matter of degree, to be determined by weighing a number of factors together.

5. Highways ⇐113(4)

In suit brought by contractor against State Housing Authority to recover balance due and added expenses allegedly incurred

TWELFTH LEGISLATURE

FISCAL NOTE Amended 2/18/82

I. REQUEST
Bill/Resolution No. HB 576
Title Videotaping of Testimony
Requested by House Judiciary Date 2/18/82

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

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.6	6.0	6.6	7.2	8.0
400 COMMODITIES		55.9				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		61.5	6.0	6.6	7.2	8.0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		61.5	6.0	6.6	7.2	8.0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

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

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

At the time the original fiscal note for this bill was prepared, the Court System policy was to not provide any new video equipment for the use of the police or district attorneys. This policy was necessitated by the disparity of types of equipment being purchased by the local police and state agencies around the state, and the inability of the Court System to provide and maintain compatible equipment in all locations. However, since that time the State Troopers and district attorneys have agreed to utilize a consistent 3/4 inch U-matic format, and to procure similar units for the local police. As a result of that effort toward standardization, the Court System has revised its policy against purchasing new video equipment, and will now be supplying this equipment in many court locations.

HB 576 envisions the State producing video recordings for playback at trials. As the bill now stands, and with the current Court System policy about purchasing video equipment, the Court will be required to provide the necessary cameras and playback units in at least all the Superior Court locations, as well as the locations where Superior Court cases are frequently held, such as Barrow or Palmer. This will require a minimum of 13 complete video units at the cost of $4,300 each. The annual maintenance cost is estimated at $5,600. The first year cost will therefore be $61,500, with ongoing costs of $5,600 plus inflation.

IV. DATE 2/18/82 PREPARED BY Richard P. Barrier /RPB
AGENCY Alaska Court System
PHONE 264-0545

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

33-001 (Rev. 12/81)

III. ANALYSIS (Continued)

Salary:

Anchorage:

2 Clerk I at Range 8 ($17,196):	$34,392
1 Clerk II at Range 10 ($19,356):	19,356

Fairbanks

1 Clerk I at Range 8 ($19,356):	19,356
	$73,104

Benefits:	$24,698
Total Personnel	$97,802

Equipment:

4 desks, chairs typewriters	6,672

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.