ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1624 HJ HB 576 - HB 578

Massachusetts

General Laws Annotated

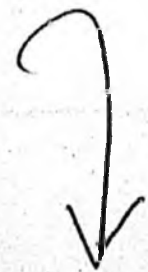
August 1980 Interim Annotation Service

Supplementing M.G.L.A. Pocket Parts For Use In 1980-1981

Massachusetts Rules of Court 1980 Pamphlet

NOTICE

For Laws of the 1980 Regular Session, see the Massachusetts Legislative Service for 1980 and table listing the M.G.L.A. Sections added, amended, or otherwise affected.



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

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2. In general

If closing all or part of trial for sex offenses involving minors under age of 18 were necessary to assure availability of evidence of fresh complaint, judge would be justified in ordering closure. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass.Adv.Sh. 455.

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

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.

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. 455.

4. Persons with a direct interest

The press does not have a sufficiently "direct interest" to be exempt from this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. Globe Newspaper Co. v. Superior Court (1980) 401 N.E.2d 360, 1980 Mass.Adv.Sh. 455.

5. Public trial

In prosecution for four counts of rape of a child under 16 years of age, where defendant claimed that he was denied his right to public trial because judge excluded public from his entire trial, burden was on defendant to demonstrate that public was excluded from trial after minor victim's 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. 455.

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. 455.

Any person to be excluded from the trial of sex offenses involving minors under age of 18 other than during victim's testimony should have opportunity to state objections to [illegible] [illegible] 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. 455.

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

search for controlled substances. (U.S. v. Harrington. 10/23/81)

In its original opinion, the court held that Reorganization Plan No. 2 of 1973, 87 Stat 1091, completely removed the Customs Service's authority to investigate drug law violations, placing all such authority in the hands of the Drug Enforcement Administration.

The court rejected then, as it does now, the government's attempt to rely on isolated portions of the plan and the presidential transmittal memorandum as indicating an intent to place "primary" drug enforcement authority in the DEA while leaving secondary authority in other agencies. Such an interpretation, the court says, would do violence not only to the plain language of the plan but also to the policy underlying it. "Once all intelligence, investigative, and law enforcement functions had been transferred from the Secretary of the Treasury to the Attorney General, Treasury had no such functions to perform. * * * [T]his court finds itself unable to read the [language of the plan] to mean less than it clearly says."

The court also rejects two new arguments raised by the government. First, the government claims that complete authority for the search can be found in the Currency and Foreign Transactions Reporting Act, 31 USC 1101. While it is true that the affidavit filed by the agent made a "fleeting" reference to the Act, the court is unable to conclude that the warrant was issued with any consideration of that statute. The affidavit made a bald assertion that the agent believed that the individuals under investigation were violating the Act, but pointed to no specific, articulable facts to establish such a violation. Accordingly, the authority vested in customs officers by this statute has no relevance to the search in this case.

Finally, the court rejects the argument that, the lack of authority for the search notwithstanding, application of the exclusionary rule is not appropriate. Aware of a long line of cases holding that technical violations of Fed.R.Crim.P. 41 do not warrant invocation of the exclusionary rule, the court observes that the primary question in this case is whether this was a "mere" technical violation.

For the answer, the court turns to U.S. v. Soto-Soto, 598 F2d 545 (CA9 1975), which held that one federal law enforcement officer may not use the statutory authority given by Congress to another agency and that the evidence so acquired would be inadmissible. "In reading Soto-Soto, it is apparent that the Ninth Circuit felt that a very important policy would be served by the application of the exclusionary rule to a search conducted by an officer without statutory authority to do so: it would deter individual officers from ignoring the delegations of authority painstakingly created by Congress." (Page 2119)

Prior Testimony Usable

POTENTIAL WITNESS' PSYCHOLOGICAL PROBLEMS MADE HER "UNAVAILABLE"

Testifying in court, which can be an unpleasant or frightening ordeal for many witnesses, can present serious risk of psychological harm to some. Such witnesses can be considered "unavailable," just as if they could not be located, the D.C. Court of Appeals holds. If other conditions are met, the prior testimony of such a witness may be admitted at trial, thus sparing the witness the need to appear personally. (Warren v. U.S., 10/9/81)

The defendant in this case was convicted of rape in 1973, but the conviction was later reversed. One of the alleged victims was excused from testifying at the retrial on the basis of psychiatrists' statements that a court appearance could lead to permanent psychological injury. Instead, the transcript of her testimony from the first trial was repeated to the second jury.

Observing that the issue is one of common law in this jurisdiction, the court notes that only two cases have expressly sanctioned findings of unavailability under similar circumstances. People v. Gomez, 103 CalRptr 80 (CalApp 1972); People v. Lombardi, 332 NYS2d 749 (AppDiv 1972), aff'd 303 NE2d 705 (1973). As in the instant case, both Gomez and Lombardi involved rape victims whose precarious mental conditions might have been aggravated by the ordeal of testifying. These cases are instructive, the court notes, as are Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, both of which allow findings of unavailability on the basis of existing mental illness or infirmity.

Defining "unavailability" to include mental conditions such as this witness' is a reasonable construction of the common-law rule, the court says. "We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional and psychological effects as a result of testfying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony." The court identifies the following factors as relevant: "(1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act." (Page 2113)

sentencing judge," limiting the sentences to a maximum of two years' imprisonment for Hamm and a maximum of six months for the others. The record indicates, however, that in the prosecutor's zeal to convict the leaders of the conspiracy, he may have misled at least one defendant into believing that the judge had already agreed to follow these sentencing recommendations.

When the first defendant was brought before the court for sentencing, the trial judge stated that he had not been informed of the modified plea agreement and would not be bound by it. The government then moved to dismiss the indictments against all the defendants under Rule 48(a). The district judge denied the motion, refused to let the defendants withdraw their pleas, and sentenced them to terms of imprisonment.

Rule 48(a) states that a federal prosecutor "may by leave of court file a dismissal of an indictment * * * and the prosecution shall thereupon terminate."

[*Text*] Our determination of the meaning of the "leave of court" requirement is essential to the proper disposition of this appeal. In deciding in what situations that leave can be denied, we must balance the constitutional duty of government prosecutors, as members of the Executive Branch, to "take care that the laws [are] faithfully executed" with the constitutional powers of the federal courts, most particularly the sentencing power of trial judges.

We hold that the "leave of court" requirement of Rule 48(a) is primarily intended to protect the defendant against prosecutorial harassment. The district court may not deny a government motion to dismiss a prosecution, consented to by the defendant, except in those extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest. [*End Text*]

See U.S. v. Cowan. In Rinaldi v. U.S., the Supreme Court held that if the prosecutor's motion to dismiss was not "tainted with impropriety," and was not "motivated by considerations * * * 'clearly contrary to manifest public interest,' " the trial court could not properly deny the prosecutor's motion.

[*Text*] We continue to hold that even when the defendant consents to the motion to dismiss, the trial court, in extremely limited circumstances in extraordinary cases, may deny the motion when the prosecutor's actions clearly indicate a "betrayal of the public interest." U.S. v. Cowan, 524 F.2d at 514. As the Supreme Court indicated in Rinaldi, the trial judge must look to the motivation of the prosecutor at the time of the decision to dismiss. * * * Unless the court finds that the prosecutor is clearly motivated by considerations other than his assessment of the public interest, it must grant the motion to dismiss.

In this case, we find no evidence that the prosecutor was motivated by any considerations other than his evaluation of the public interest. The appellants were the principal government informants and witnesses in the prosecutions of the leaders of a large drug-smuggling conspiracy. The service they provided to the Government greatly exceeded that expected, or required, by the initial plea-bargaining agreement. As a result of their cooperation, the lives of at least two of the appellants were threatened and the prosecutor expressed considerable concern for the appellants' safety in prison. The prosecutor also indicated that the continued cooperation of the appellants would be needed in the prosecution of additional leaders of the drug-smuggling conspiracy. * * * * * *

When it became clear to the United States Attorney that he could not assure the appellants that they would receive favorable sentences, he concluded, after "re-evaluat[ing] the magnitude of the information [given by the appellants] and following actions by unknown persons which created concerns for the safety of the witnesses," that the public interest would best be served by dismissing the indictments against the appellants. It must be emphasized that this is not a case in which the prosecutor entered into any agreement with the appellants to dismiss the charges if the judge did not abide by the sentencing agreement or presented the judge with the alternative of either going along with the sentencing agreement or the prosecutor would dismiss the charges. Nothing to that effect has been said or implied. Instead, this is a case in which the Government, in consideration of the appellants' extraordinary past cooperation, and in order to assure their continued cooperation, to protect their lives and to set a positive example for others who may decide to cooperate, decided that it would best serve the public interest to dismiss the indictments against the appellants. Neither this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest. As long as it is not apparent that the prosecutor was motivated by considerations clearly contrary to the public interest, his motion must be granted. * * *

The district court appears to have placed the burden on the prosecutor to show that dismissal itself would be in the public interest. The language of this court in Cowan and the Supreme Court in Rinaldi makes it clear that the motion should be granted unless the trial court has an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest. As the district judge acknowledged, the prosecutor is the first and presumptively the best judge of where the public interest lies. The trial judge cannot merely substitute his judgment for that of the prosecutor.

We also disagree with the district judge's notion that the public interest can never be served by dismissing an indictment because of the defendants' past cooperation. The decision to dismiss may be the prosecutor's way of letting future conspiracy defendants know of the possible advantages of cooperation with the Government. It may very well be crucial to the prosecutor's credibility in future cases involving informants or defendants who testify in return for lenient treatment. Moreover, as we have explained above, the prosecutor was motivated not only by a desire to reward past cooperation but also by the need to assure the appellants' future cooperation and to protect their lives. [*End Text*]

We need not reach the issue of whether the judge should have permitted the defendants to withdraw their guilty pleas. — Ainsworth, J.

Concurrence: It would be intolerable to grant the prosecutor practical power to bargain away the trial court's sentencing discretion in advance, and I recognize that we come perilously close to doing so in the very broad dismissal power that we recognize for the prosecutor. Any calculated or premediated effort by the prosecutor to usurp the court's power must be brought to nothing. Since I see neither evidence nor finding of such an effort here, however, I concur. — Gee, J.

Dissent: The district judge expressly found that the government's motion to dismiss the indictments was "nothing more than a camouflaged attempt to limit the 'sentencing authority reserved to the judge.' " This finding is fully supported by the record. The prosecutor moved to dismiss because he disagreed with the sentences that he anticipated the judge would dispense. In federal courts, the determination of the length of a defendant's sentence is a function reserved to the district judge. Therefore, a dismissal motion inspired by the district judge's refusal to assess the sentence recommended by the prosecution is clearly contrary to manifest public interest and may be denied to protect the sentencing authority reserved to the judge.

The judge, however, should have allowed Butler, Evans, and Washington to withdraw their guilty pleas. These three relied on the prosecutor's statement that the judge had agreed to the recommended sentence. Although the record does not so clearly demonstrate that the two other defendants relied on this statement, the district court should reconsider their motions to withdraw. It is unclear whether, in denying the motions the first time, the judge considered our liberal interpretation of Fed.R.Crim.P. 32(d) in U.S. v. Presley, 478 F.2d 163 (1973). — Reavley, Garza, Politz, and Sam D. Johnson, JJ.

(U.S. v. Hamm; CA5 (former) ~~CA5~~A (en banc), 10/19/81)

MENTAL STATE MADE WITNESS UNAVAILABLE SO HER PRIOR TESTIMONY COULD BE USED

But rape defendant's second trial was flawed by disclosure of presentence report. ► *120.20* ► *300.120*

Prior testimony of an alleged rape victim was properly admitted at the retrial of her assailant, the District of

Columbia Court of Appeals holds, under the common-law rule pertaining to "unavailable" witnesses. The victim was rendered "unavailable" for the second trial by her precarious mental condition, which made it dangerous for her to testify.

Only a few cases sanctioning this type of unavailability have been decided. However, the court considers those decisions sound and calls the trial court's action in this case "a reasonable construction of the witness unavailability rule." While not just any "adverse emotional or psychological effects" will excuse a witness from testifying, the expert testimony here showed that the risks faced by this witness were grave.

Nonetheless the defendant's trial was hampered by other errors that require reversal. In particular, the court stresses a violation of the local counterpart of Fed.R.Crim.P. 32, which forbids disclosure of the presentence report in advance of the verdict of guilt. Following the defendant's conviction at his first trial, he admitted to a probation officer that he had had sexual relations with two of the complainants; these admissions, contained in the presentence report, were read to the jury at the second trial. This amounted to a clear violation of the rule, the court says, and the error was extremely prejudicial. (Warren v. U.S., 10/9/81)

Digest of Opinion: Upon retrial before a jury after a prior reversal by this court, Davis v. U.S., 367 A2d 1254 (1976), defendant Warren was convicted of kidnapping while armed, rape while armed, and other offenses. Prior to the second trial, the motions judge ruled admissible the prior testimony of Marilyn Reed, one of the complainants, on the ground that she was "psychologically unavailable." Her testimony was presented by having a secretary from the U.S. Attorney's office play the complainant's role. The prosecutor read the questions asked at the first trial and the secretary responded by reading Reed's answers.

The prosecutor's principal argument at trial was the inconsistency between Warren's denial at the first trial of any knowledge of the complaining witnesses and his admission, in a presentence report, to sexual relations with two of the women, whom he alleged consented to those relations. In his defense, Warren argued only the likelihood of misidentification.

Warren argues that Reed was not "unavailable" within the meaning of the common law of his jurisdiction pertaining to admission of prior recorded testimony. See Henson v. U.S., 399 A2d 16, 19 (DC 1979). He argues first that admissibility of her testimony is governed by D.C. Code §14.303. However, that provision treats only the admissibility of former testimony of parties, not of former non-party witnesses.

He also argues that even under a common-law test, the introduction of the testimony was improper. While we are not bound by any statutory limitations, constitutional limitations have been set in Ohio v. Roberts, 448 U.S. 56, 27 CrL 3234 (1980). The constitutional question appears to be at what point, if any, it is no longer reasonable to require the government to produce witnesses at the risk of their psychological health. We need not resolve this question here, but pose it to underscore the inherent flexibility and ambiguity of the constitutional standard and to set the outer boundaries of our task of common-law interpretation.

Professor McCormick lists nine recognized categories of witness unavailability but adds that "[i]n principle probably anything which constitutes unavailabilty in fact ought to be considered adequate." Evidence, §253, at 609-12 (1972). To our knowledge, the type of witness unavailability in issue here has been expressly sanctioned in only two cases, both of which interpreted the meaning of medical unavailability under codified rules of evidence. People v. Gomez, 103 CalRptr 80 (CalApp 1972); People v. Lombardi, 332 NYS2d 749 (AppDiv 1972), aff'd 303 NE2d 705 (1973). In both cases the prior testimony of rape victims was admitted.

The trial judge's reference to these interpretations of out-of-state statutes was a proper means of obtaining guidance in formulating our common law. It is also useful to note Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, which provide that a declarant is unavailable if he "is unable to be present or to testify at the hearing because of death, or then existing physical or mental illness or infirmity." The mental infirmity part of this definition was applied in U.S. v. Benfield, 593 F2d 815, 25 CrL 2026 (CA8 1979). There a psychiatrist's testimony led the lower court to allow the witness to testify at a videotaped deposition at which defendant's counsel but not defendant would be present. The appellate court did not object to the finding of unavailability, but reversed on the basis of reliability.

[Text] In ruling as he did, Chief Judge Green cautiously extended the traditional definition of witness unavailability to include psychological unavailability of the type demonstrated in the case of Marilyn Reed, but to exclude the lesser degree of psychological infirmity demonstrated by Linda Jenkins. After evaluating the testimony of two psychiatrists, one of whom he personally appointed to obtain an independent, second opinion, he excused Reed from testifying because the experts agreed that she "would undergo far greater mental anguish than normally accompanies court appearances of the victims of rapes (and presumably other such crimes as kidnapping, terrorism, and hijacking) and that her appearance in court . . . would be likely to lead to severe psychosis, even possible suicide." *[End Text]*

The evidence supports this finding. Dr. Yochelson testified that Reed suffered from a severe mixed psychoneurosis with particular emphasis on depressive mood, phobic reaction and anxiety. He found that the depth of her depression had reached suicidal levels and that sucidal tendencies were still present. The trauma of another court appearance, he said, would most likely shatter her fragile adaptation to society, possibly leading to permanent psychological injury. The court also appointed an independent psychiatrist who substantially agreed with Dr. Yochelson's assessment of the severity of the injury that would befall Reed were she forced to relive the events of her rape through another court appearance.

[Text] The ruling below was not only supported by the evidence, but was also a reasonable construction of the witness unavailability rule. We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional or psychological effects as a result of testifying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony. The expert testimony relating to Reed's mental health established that there was both a high likelihood of temporary psychological injury, perhaps even psychosis, and a possibility of permanent psychological injury. We also are persuaded of the correctness of the trial court's ruling because of the experts' agreement on the comparative severity of this victim's probable reaction to testifying again. * * * [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.) *[End Text]*

Warren also complains of the fact that the jury was permitted to hear statements made by him to a probation officer. The statements were contained in a presentence report prepared after the first trial and essentially read to the jury by the probation officer.

[Text] Superior Ct. Cr. R. 32(b)(1) states in relevant part, that a presentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty, or nolo contendere, or has been found guilty . . ." Our reversal of appellant's convictions from the first trial effectively meant that he had not yet been found guilty at the time Officer

Swepson gave his testimony before the jury at the second trial. Resort to the presentence report was therefore impermissible under Rule 32(b)(1), a restriction which evidently was not considered by the trial court. [*End Text*]

In Gregg v. U.S., 394 U.S. 489 (1969), which interpreted our rule's federal counterpart, the Court said it was clear that the presentence report "must not, under any circumstances, be 'submitted to the court's before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes an error of the clearest kind."

[*Text*] In appellant's case, "error of the clearest kind" has been committed. Statements by appellant in the presentence report were not only heard by the trial judge, but also by the jury. The fact that the report was prepared after the jury's verdict in the first trial is of no import, since that verdict was nullified as to appellant. The report contained information elicited from the appellant concerning the same case for which he was later separately retried. The very nature of a presentence report is directly in conflict with the adversary nature of a trial. Information, quite often prejudicial, is obtained and used in making discretionary decisions about sentencing. The reports are informal documents. Information in them can be based on hearsay or pertain to separate matters having no relation to the crime with which defendant has been charged. Counsel is not present during the interview upon which the report is based. It would be the essence of unfairness to use such information as evidence against the appellant.

The purpose of the sentencing report is to aid in the sentencing process. "The primary objective of the presentence report is to focus light on the character and personality of the defendant and to discover those factors that underlie commission of the offense and defendant's conduct in general." Note, Presentence Reports, 58 GEO. LJ. 451, 455-56 (1970). This information is essential in making a discretionary decision of sentencing. Allowance of this information as evidence of defendant's guilt would have a chilling effect on the interview.

The evidentiary error committed with respect to allowance of Probation Officer Swepson's testimony must be characterized as highly prejudicial since the sole defense at trial was the unreliability of the complainant's identifications and, implicitly, the lack of connection between appellant and the crimes. The probation report testimony directly conflicted with this theory since it contained admissions by the defendant directly implicating him in two of the offenses. Swepson's testimony effectively removed the issue of identification from the case and left appellant with no credible theory of defense, unless jury could be convinced that appellant's statements to the probation officer were fabricated in hopes of a lenient sentence. This latter theory was unsuccessfully argued to the jury by defense counsel in closing. [*End Text*]

[In a section of the opinion not digested herein, the court also finds error in the admission of prior consistent hearsay statements. —ed.]

The cumulative impact of the errors noted in this case substantially influenced the jury's verdict. Accordingly, a new trial is necessary . —Kelly, J.

(Warren v. U.S.; DC CtApp, 10/9/81)

ERRORS IN CHOOSING GEORGIA FEDERAL GRAND JURIES HELD INSUBSTANTIAL

Statutory violations uncovered by defendants are not serious enough to require dismissal

▸50.10

Over a period of several years, selection of federal grand juries in the Northern District of Georgia failed to comply with the Jury Selection and Service Act, 28 USC 1861 et seq., the former U.S. Court of Appeals for the Fifth Circuit says. However, the court goes [illegible] to hold that none of the violations was "substantial [illegible] d that a district court therefore erred in dismissing a number of indictments earlier this year. See U.S. v. Northside Realty Associates, Inc., 510 FSupp 668 [reported sub nom. U.S. v. Alexander, 29 CrL 2202]. The district court's key error was to confuse the "random selection" required by the Act with "statistical randomness."

Rather than select the "starting number" from a drum filled with cards, as she was required to do by the district's Local Plan for implementing the Act, the jury clerk chose numbers from her head or by flipping pages of a book. These methods produced starting numbers that were not "random" in a statistical sense.

But the legislative history of the Act explicitly states that a jury selection system is sufficiently "random" if it prevents impermissible discrimination against individuals or groups, the court points out. No such discrimination has been shown here, and there is almost no possibility of using the clerk's system for discriminatory purposes. With similar reasoning, the court declares that the clerk's failure to post public notices concerning the selection of the starting numbers was not a substantial violation of the Act.

Because of misinterpretations of the Local Plan, the clerk and her assistants erroneously excused, exempted, or disqualified about 500 persons, out of the some 30,000 qualified jurors. This number was insignificant in a quantitative sense, the court says; moreover, the errors did not introduce forbidden subjectivity into the selection process. For the same reasons, the court finds no substantial violation of the Act in the erroneous granting of some 200 permanent excusals from jury service (U.S. v. Bearden, 10/19/81)

Digest of Opinion: The government appeals from the dismissal of five of the indictments: those charging antitrust violations by the "real estate" and "garbage case" defendants, and three charging individual defendants with various federal crimes.

The Act seeks to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service. It prescribes a general procedural scheme but provides that the details are to be worked out in the Local Plan adopted by each district. The Plan adop[illegible] by the Northern District of Georgia uses voter registration lists to create a master wheel computer tape. Qualified wheels are created for each of the district's four divisions, questionnaires for this purpose are mailed out and, when returned, are screened by the clerk's office.

To select a panel, an "increment" or "quotient" number is calculated by dividing the number of qualified jurors by the number needed. The clerk then selects a "starting number"; the first juror selected is the one whose place on the qualified wheel corresponds to the starting number. Thereafter the computer selects each qualified juror whose position falls one increment number farther down the list. Those selected have an opportunity to seek excusal on the basis of harship or inconvenience.

The Act's timeliness requirement, §1867(a), requires that a motion to dismiss, plus a sworn affidavit, be filed before voir dire begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds for the motion, whichever is earlier. This requirement is to be strictly construed. The real estate defendants' challenges to the selection of the starting number and the failure to post notices do not appear to have been timely filed. A timely motion they filed did assert that there were not enough cards in the drum; but this is not sufficient to cause the violations they uncovered later to relate back to the original motion. Nor does it appear that they exercised diligence in investigating and inquiring about the selection of starting numbers and the posting of notices. However, it may be that they were misled or that infor-

ily, but placed certificate made out to plaintiff in compartment to which only he had access, there was insufficient evidence of donative intent and no inter vivos gift had taken place. Chase v Blackstone Distributing Co. (RI) 294 A2d 392.

[b] Delivery to third person in donee's behalf.

While generally, delivery to donor's agent is not deemed absolute since he holds property for donor subject to recall, it is otherwise where delivery is to third person as agent or trustee for benefit of donee, as where donor caused stock to be sent to issuing company for transfer on its records to stockholder's son, since stockholder did not intend to retain title in himself nor cause stock to be held subject to his right of recall and he must be deemed to have constituted company agent or trustee for son's benefit. Kintzinger v Millin (Iowa) 117 NW2d 68 (citing annotation).

§ 8. Formal instrument of gift, generally, p. 1421.

[b] Other formal instruments.

Requirements of gift causa mortis were met where decedents asked justice of the peace to arrange for donee to have automobile and the executed assignment thereof in presence of justice, although decedent did not put donee's name on assignment. Re Ream's Estate, 413 Pa 489, 198 A2d 556.

§ 9. Informal instrument, p. 1422.

Donor's delivery of deposit certificates to donee's son was sufficient delivery to constitute gift causa mortis where accompanied by instructions that donor wanted donee to have funds represented by certificates. Atkins v Parker, 7 NC App 446, 173 SE2d 38.

See Re Ream's Estate, 413 Pa 489, 198 A2d 556, supra § 8[b].

Letter requesting transfer of decedent's bank account if she should predecease her sister gave no delivery of possession but was testamentary in character and not a valid gift causa mortis. Grace v Klein (W Va) 147 SE2d 288.

48 ALR2d 1436–1455

Exclusion of public during criminal trial.

New sections and subsections added:

§ 4.3. Information justifiably withheld from public domain.

§ 9.3. Reprisal for violation of trial judge's guidelines.

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§ 1. Introduction, p. 1437.

Broadcasting, recording, or photographing court proceedings. 100 ALR2d 1404.

Right of person accused of crime to exclude public from preliminary hearing or examination. 31 ALR3d 816.

Validity and construction of state court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses. 33 ALR3d 1041.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases. 39 ALR3d 852.

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Propriety of exclusion of press or other media representatives from civil trial. 79 ALR3d 401.

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 ALR Fed 871.

1 Am Jur Trials 303, Controlling Trial Publicity.

For case dealing with exclusion of all persons at time of preliminary hearing, see McGonagill v Superior Court of San Diego County, 214 Cal App 2d 192, 29 Cal Rptr 485.

Petitioner's contention that he was denied public trial based on fact that there were no spectators in courtroom during trial cannot be sustained where there was no evidence that public was in any way barred. Henderson v Maxwell, 176 Ohio St 187, 27 Ohio Ops 2d 59, 198 NE2d 456.

§ 2. General rules, p. 1437.

[a] Right to public trial and permissible extent of curtailment thereof, as to accused.

Although exclusion of defendant's infant daughter was not violation of right to public trial, exclusion of any portion of public, particularly member of defendant's family, without just cause is improper. U.S. v Garland (CA2 NY) 364 F2d 487 (exclusion held nonprejudicial), cert den 385 US 978, 17 L Ed 2d 440, 87 S Ct 521.

Court would not hold that defendant had been denied public trial where judge, after motion by defendant, stated that persons who were not witnesses, members of jury, or officers of court "are going to have to leave,"

where court reporter's transcript had no notation that any onlookers left courtroom, and there was no showing that public construed language used by judge as requiring them to leave or that public did leave. Washburn v State (Ala App) 150 So 2d 398.

Trial court could exercise its jurisdiction and limit number of spectators at rape prosecution trial in response to request of defendant, but fact that court did not give defendant secret trial as he requested violated no recognized right of defendant. State v White, 97 Ariz 196, 398 P2d 903.

A report recommending the adoption of a rule permitting taking of photographs or broadcasting by radio or television from courtroom, in discretion of trial judge, with the proviso that no witness or juror in attendance under subpoena or order of court should be photographed or have testimony broadcast over express objection, and also requiring that permission so photograph or broadcast be first obtained from trial judge, was approved and adopted. Re Hearings Concerning Canon 35 (Colo) 296 P2d 465.

Right to public trial, whether guaranteed by constitution or statute, is substantial, and provisions are mandatory. State v Schmit (Minn) 139 NW2d 800 (citing annotation).

[b] Right to public trial and permissible extent of curtailment thereof, as to public generally.

Press and public generally have right of admission to courts-martial, at least where no issue of national security is involved. U. S. v Brown, 7 USCMA 251, 22 CMR 41.

Right is that of accused and not of general public. Geise v U. S. (CA9 Alaska) 265 F2d 659, supra, § 4.

Guilty plea must be made in public; constitution forbids exclusion of public from trial, except in cases of rape or assault to rape, and every presumption is indulged that trial was had in open court. Woodard v State (Ala) 171 So 2d 462.

Trial court erred in excluding press and public from voir dire examination of jurors based on request made by defense counsel to avoid adverse publicity for defendant; it would require unusual circumstances for right of public to ascertain whether officials were properly carrying out duties in responsibly and capably administering justice to be held subordinate to contention of a defendant that he would be prejudiced by public trial. Commercial Printing Co. v Lee (1977, Ark) 553 SW2d 270.

See Oxnard Publishing Co. v Superior Court of Ventura County (Cal App) 68 Cal Rptr 83, infra § 3, hear gr by sup ct, app dismd.

Trial courts are vested with narrow discretion to close limited phases of criminal trial to public, and trial court's ruling that it could not constitutionally exclude press was technically incorrect, but court's refusal to exercise its discretion was not prejudicial. People v Conley, 268 Cal App 2d —, 73 Cal Rptr 673.

In proceeding involving motion to suppress evidence in criminal case, trial judge erred in failing to exercise discretion by denying defense request that court place several news reporters under oath as witnesses in case, without slightest showing that individuals involved where likely to be witnesses in proceedings, and exclude them from courtroom under rule authorizing sequestration of witnesses. Gore Newspapers Co. v Reasbeck (1978, Fla App D4) 363 So 2d 609.

[d] Application of Sixth and Fourteenth Amendments.

A much publicized financier tried before a state court in criminal proceedings of great notoriety was denied due process of law by televising and broadcasting of such proceedings over his objection. The purpose of Sixth Amendment's requirement of public trial is to guarantee that accused will be fairly dealt with and not unjustly condemned, and though maximum freedom must be allowed the press in carrying out its important function in a democratic society of informing the public, its exercise must necessarily be subject to maintenance of absolute fairness in judicial process. Estes v Texas, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628.

It violates the Sixth Amendment for federal courts to allow criminal trials to be televised to public at large. To satisfy constitutional requirement that trials be public it is not necessary to provide facilities large enough for all who might like to attend particular trial, or to permit observers to act as they please in courtroom. Estes v Texas, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628 (separate opinion of 3 justices).

A hearing which is held as part of a trial and after the jury has been sequestered falls within the constitutional guaranty and must be conducted as a public trial. U. S. ex rel. Bennett v Rundle (CA3 Pa) 419 F2d 599.

Exclusion of public from courtroom during portion of contempt proceeding against recalcitrant grand jury witness did not violate his Sixth Amendment right to public trial. Re Di Bella (CA2 NY) 518 F2d 955.

See United States ex rel. Smallwood v La

Valle (DC NY) 377 F Supp 1148 (citing annotation), infra § 5, affd without op (CA2 NY) 508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Exclusion of all but near relatives of the parties, the press, and court officials during rape prosecution, was denial of constitutional right to public trial. Thompson v People (Colo) 399 P2d 776.

Scope of constitutional term "public trial" does not encompass conference between court and counsel in chambers respecting arguments and ruling on motion for acquittal. State v Pullen (Me) 266 A2d 222.

Exclusion of individual who resembled defendant during testimony of witnesses making in-court identification of defendant did not violate defendant's right to public trial under Sixth Amendment. Young v State (1977, Miss) 352 So 2d 815.

See Price v State (Tex Crim) 496 SW2d 103, infra § 8 (citing annotation).

See Jones v Peyton, 208 Va 378, 158 SE2d 179, infra § 9 (citing annotation).

§ 3. In general, p. 1442.

Public was properly excluded from that portion of contempt proceeding which involved reading of grand jury record, and where no objection was made to failure to reopen proceedings thereafter, right to public trial was waived and summary conviction of contempt in presence of court was proper. Levine v U. S. 362 US 610, 4 L Ed 2d 989, 80 S Ct 1038, reh den 363 US 858, 4 L Ed 2d 1739, 80 S Ct 1605.

In proceeding by manufacturer to enjoin corporation from disclosing trade secrets during criminal contempt proceeding arising out of corporation's alleged violation of prior consent decree in antitrust case, trial judge could properly impose limited *in camera* procedures for taking of testimony relating to trade secrets, without violating corporation's right to public trial, if judge should find that manufacturer were likely to suffer irreparable injury and that protection of its secrets could be achieved with minimal disruption of criminal proceedings. Stamicarbon, N. V. v American Cyanamid Co. (CA2 NY) 506 F2d 532.

See U. S. ex rel. Bruno v Herold (DC NY) 271 F Supp 491, infra § 8.

Order excluding general public from rape trial but allowing defendant, counsel, officers, members of press, bar, defendant's pastor and members of his family to remain, was proper in view of constitutional provision authorizing exclusion of all persons not necessary to conduct of trial. Reeves v State, 264 Ala 476, 88 So 2d 561, cert gr 352 US 965, 1 L Ed 2d 321, 77 S Ct 373.

No denial of right of public trial resulted in prosecution for assault of peace officer since court had discretion to permit prosecution to subpoena most of one defendant's family and then have them excluded under rule of sequestration. Hill v State (Ala App) 339 So 2d 601, cert den (Ala) 339 So 2d 610.

Defendant charged with homicide was not entitled to have reporters excluded from preliminary hearing on claim that their presence would result in harmful and prejudicial publicity which would endanger his right to fair trial, where he did not claim that evidence which would be inadmissible at trial would be introduced at hearing. Phoenix Newspapers, Inc. v Jennings 107 Ariz 557, 490 P2d 563.

Trial court has discretion to close portions of trial to public, even without consent of accused, when there is good cause based upon justice or protection of parties. People v Cash, 52 Cal 2d 841, 345 P2d 462.

Exclusion of public at trial is discretionary with trial court. People v King, 199 Cal App 2d 333, 18 Cal Rptr 624 (robbery prosecution).

Where murder trial did not fall within any statutory exceptions to requirement of public trial nor within any of usual common-law exceptions nor within those exceptions recognized under state case law, and absent showing of extraordinary circumstances that might create necessity for closed proceedings, such as record containing racial, religious, civil rights, or sexual overtones, neither refusal of defendant's girl friend to testify against him nor question of validity of conduct of lineup and whether witnesses present at lineup should be permitted to testify were subjects likely to generate prejudice against defendant such as to justify sacrifice of public trial. Oxnard Publishing Co. v Superior Court of Ventura County (Cal App) 68 Cal Rptr 83, hear gr by Sup Ct, app dismd.

Defendant could not complain of exclusion of certain friends and relatives from courtroom, where defendant had requested that state's witnesses be excluded, since trial court was merely making order evenhanded by applying it to both sides. State v Dillon, 93 Idaho 698, 471 P2d 553, cert den 401 US 942, 28 L Ed 2d 223, 91 S Ct 947.

Bailiff's exclusion of two local attorneys from courtroom during voir dire did not rise to level of constitutional violation where exclusion was inadvertent, resulting from misunderstanding between judge and sheriff's department concerning searching of specta-

tors for weapons, and where record did not indicate that anyone other than two attorneys were excluded from proceedings. York v State (1978, Ind App) 380 NE2d 1255.

Refusal by trial judge to prohibit children of deceased from being present in court room during closing arguments and instructions in murder trial was not error where prejudicial effect of their presence in court room was not shown to outweigh their right to be in attendance at trial. State v Taylor (La) 336 So 2d 855.

Order excluding all spectators except members of bar and press, over defendant's objection, on sole ground of obscene nature of offense charged and anticipated testimony, exceeded court's power and was violation of defendant's right to public trial guaranteed by state constitution. State v Schmit (Minn) 139 NW2d 800 (citing annotation).

Trial court should permit hearing of motions for bail and severance in chambers where defendants would be more protected from prejudice due to publicity. State v Jackson, 43 NJ 148, 203 A2d 1.

No abuse of discretion lay in court's refusal to permit private hearing on assault charge. State v Velasquez, 76 NM 49, 412 P2d 4.

Even though two spectators were wrongfully excluded from courtroom during testimony by witness for prosecution after witness had complained that spectators were harassing him, defendants were not prejudiced by action where there was no claim that spectators were assisting defendants or counsel at trial or that incident was used against defendants during trial and where other members of public were permitted to be present. People v Hargrove (1977) 60 App Div 2d 636, 400 NYS2d 184.

In a sensational kidnapping and murder case in which defendant moved for change of venue, for suppression of evidence, and to bar public and press from hearing on motion to suppress, trial court should have overruled motion to exclude public and press from hearing since such exclusion would abridge freedom of press; if, because of publicity generated by hearing, it appeared that defendant could not get fair trial, then motion for change of venue could be granted. State ex rel. Dayton Newspapers, Inc. v Phillips, 46 Ohio St 2d 457, 75 Ohio Ops 2d 511, 351 NE2d 127.

Ultimate determination of whether to exclude spectators, as well as determination of scope and duration of exclusion order, is left to sound discretion of trial court which properly cleared courtroom of all except reporters and law students in murder prosecution during testimony of 14-year-old witness to double killing who was suffering emotional trauma. Commonwealth v Knight (Pa) 364 A2d 902 (citing annotation).

Exclusion from courtroom of spectators against whom were pending charges resulting from same facts as caused indictment of defendant was proper exercise of judicial discretion. State v Mancini (RI) 274 A2d 742.

Proceeding in juvenile court was not criminal proceeding and court was authorized to exclude public. Re Lewis, 51 Wash 2d 193, 316 P2d 907.

§ 4. Character of the charge or evidence, p. 1445.

Also recognizing that youthful spectators may be excluded:

U.S.—U. S. v Brown, 7 USCMA 251, 22 CMR 41.

Ind.—Marshall v State, 254 Ind 156, 258 NE2d 628 (citing annotation), reh den (Ind) 261 NE2d 566.

Minn.—State v Schmit (Minn) 139 NW2d 800 (citing annotation; dicta).

Pa.—Commonwealth v Knight (Pa) 364 A2d 902 (citing annotation).

General order excluding public from court-martial involving testimony as to obscenity was improper, although accused was given permission to have anyone he wanted admitted. U. S. v Brown, 7 USCMA 251, 22 CMR 41.

Exclusion of general public from statutory rape trial in which prosecuting witness was only 8 years old and other young witnesses were to be called was justified in trial court's discretion in view of age and difficulty of obtaining testimony from children before large audience. Geise v U. S. (CA9 Alaska) 262 F2d 151, reh den 265 F2d 659.

Some persons may properly be excluded from rape prosecution and accused making no request for revocation of exclusion order after minor witness had testified waived right to object thereto. Geise v U. S. (CA9 Alaska) 265 F2d 659.

In prosecution for possessing obscene pictures with intent to exhibit them, it was proper to exclude all members of public except newspaper reporters when alleged obscene film was shown in court. Lancaster v U. S. (App DC) 293 F2d 519.

Closing of courtroom to spectators during testimony of rape victim is a frequent and accepted practice when lurid details of crime

must be related by a young lady. Harris v Stephens (CA8 Ark) 361 F2d 888, cert den 386 US 964, 16 L Ed 2d 113, 87 S Ct 1040.

Court's granting of prosecution witness' request that his mother be excluded from courtroom during his testimony was reasonable in view of court's opinion that her continued presence would hinder ascertainment of truth, and such exclusion did not deny defendant his right to public trial. U. S. ex rel. Laws v Yeager (CA3 NJ) 448 F2d 74, cert den 405 US 976, 31 L Ed 2d 251, 92 S Ct 1201.

Barring public from entire hearing on motion to suppress evidence of possession of heroin and cocaine which was seized by federal hijack prevention officials at boarding gate was error of constitutional magnitude where secret hijacker profile criteria evidence represented minute portion of hearing testimony. United States v Clark (CA2 NY) 475 F2d 240, later app (CA2 NY) 498 F2d 535.

Defendant's failure to object to exclusion order during retrial did not constitute waiver where state's highest court had sustained similar exclusion order during first trial; however, defendant was not denied right to public trial by judge's order excluding members of public excepting prosecutrix' relatives, defendant's relatives and clergyman, all persons necessary to conduct of trial, other attorneys, and press, where courtroom was at least three-fourths full, transcript of trial became public record, news media were admitted, and published reports of trial were lengthy and complete. Aaron v Capps (CA5 Ala) 507 F2d 685, cert den 423 US 878, 46 L Ed 2d 112, 96 S Ct 153.

Exclusion of public during testimony of undercover narcotics agents was within court's discretion and was justified by state's interest in preserving confidentiality where defendant did not indicate any particular person he wished to be present. United States ex rel. Lloyd v Vincent (CA2 NY) 520 F2d 1272, cert den 423 US 937, 46 L Ed 2d 269, 96 S Ct 296.

In prosecution for rape, defendant was not prejudiced by exclusion of public during testimony of victim to protect her personal dignity where court stated that anyone who wished to remain could give name and reason for staying and where it was made clear that members of press were welcome. United States ex rel. Latimore v Sielaff (1977, CA7 Ill) 561 F2d 691, cert den (US) 55 L Ed 2d 782, 98 S Ct 1266.

Exclusion of public from suppression hearing during time that evidence was presented on "profile" used to detect possible hijackers was proper in view of fact that publicity of characteristics involved would seriously undermine effectiveness of hijacking system. U. S. v Lopez (DC NY) 328 F Supp 1077, 14 ALR Fed 252.

In rape prosecution, court, under constitutional provision, could properly exclude from courtroom all persons except defendant, members of his family, and officials. Aaron v State (Ala) 122 So 2d 360.

Constitutional provision authorizing exclusion of public in prosecution for rape and assault with intent to ravish did not extend to trial of charge of carnal knowledge of girl under 12. Lang v State (Ala) 122 So 2d 533.

Under constitutional provision that in all prosecutions for rape and assault with intent to ravish, court may in its discretion exclude from courtroom all persons except such as may be necessary in conduct of trial, trial court properly ordered courtroom cleared except for attorneys, court officials, newspapers, parents of defendant, and husband of prosecutrix. Ex Parte Rudolph, 276 Ala 392, 162 So 2d 486.

Order excluding all persons under age 18 from trial on charge of indecent molestation of child was improper even if exclusion of children of "tender" years may have been proper. Reynolds v State (Ala App) 126 So 2d 497.

Under court rule which provided that public could be excluded if ". . . an open proceeding presents a clear and present danger," trial court erred in excluding the press from prosecution for rape and lewd and lascivious conduct where, although testimony which would have been elicited may have been embarrassing to witnesses, there was very little pretrial publicity in case; on other hand, trial court was within discretion to exclude public since, inter alia, trial would appeal to the morbid and prurient. Citizen Publishing Co. v Buchanan, 22 Ariz App 521, 528 P2d 1280.

Defendant in prosecution for murder was not denied public trial by exclusion from court of all persons except court personnel, press, and members of family of defendant, victim, and witness, during eyewitness testimony by wife of victim, where, from character of charge and nature of evidence, public morality would be injuriously affected. Douglas v State (Fla) 328 So 2d 18, cert den 429 US 871, 50 L Ed 2d 151, 97 S Ct 185.

Defendant in prosecution for rape was not denied public trial where court excluded public during testimony of prosecutrix. Bivins v State (Fla App D4) 313 So 2d 4[illegible].

Defendant in rape prosecution was not denied public trial by exclusion of persons other than those with "specific interest" from court during testimony of complaining witness. People v Latimore, 33 Ill App 3d 812, 342 NE2d 209.

Where defendant asserted that trial court erred in overruling his motion to exclude a group of high school students from trial because deceased victim was high school student 16 years of age, and presence of other high school students in courtroom could prejudice and inflame jury, it was held that while it is true that court may be cleared to prevent interference with or obstruction of due administration of justice, there was no evidence establishing that these high school students were guilty of any misconduct or attempt to influence jury, and refusal of court to exclude students was not abuse of discretion. De Boor v State (Ind) 182 NE2d 250.

Statute providing that general public should be excluded from all cases involving children did not apply to hearings in "adult branch" of juvenile court in actions against adults for contributing to delinquency of minors. Johnson v Simpson (Ky) 433 SW2d 644.

Exclusion of mother, brother, sister, and friend of the defendant from trial violated defendant's constitutional right to public trial. Commonwealth v Marshall (Mass) 253 NE2d 333 (citing annotation).

Exclusion of adult spectators, except relatives and members of the bar and press, solely on grounds of obscene nature of crime (sodomy) and anticipated testimony, violated defendant's constitutional right to public trial and was impliedly prejudicial. State v Schmit (Minn) 139 NW2d 800 (citing annotation).

Locking of courthouse doors for 30 minutes while motions were being presented to court to suppress illegally obtained evidence and to quash illegally obtained declaration did not violate defendant's right to public trial where courtroom was not actually clear. Norwood v State (Miss) 258 So 2d 756.

See Riley v State (Nev) 429 P2d 59, infra § 8.

Audible order directing sergeant-at-arms to clear the courtroom of all people except witnesses in prostitution prosecution was error, where intended to exclude defendant's friends and executed to exclude all except lawyers and members of the press, and prejudice would be presumed, even though no objection was made by defendant. State v Haskins, 38 NJ Super 250, 118 A2d 707.

In prosecution for possessing and selling heroin, decision of trial court to exclude public while undercover officers were testifying was not erroneous or unconstitutional. People v Eason, 40 NY2d 297, 386 NYS2d 673, 353 NE2d 587.

Trial court did not err in excluding public from courtroom during display to jury of allegedly obscene film in suit for violation of obscenity statute. People v Nicholas, 35 App Div 2d 18, 312 NYS2d 645.

In prosecution for criminal sale of dangerous drug, in absence of unusual circumstances, reversible error was committed when court excluded public during testimony of undercover officer on ground that he was still engaged in similar activities in same "general area." People v Richards, 48 App Div 2d 792, 369 NYS2d 162.

Exclusion of public during testimony of police officers actively engaged in on-going drug investigations did not constitute denial of public trial in prosecution for criminal sale of controlled substance. People v Daniel, 49 App Div 2d 683, 370 NYS2d 746.

Trial court did not abuse discretion by refusing to allow defendant's father to remain in courtroom during testimony of undercover officer. People v Gillespie (197[illegible]) 58 App Div 2d 893, 396 NYS2d 890.

In prosecution for possession of sale of controlled substance, trial court committed reversible error in summarily closing courtroom during testimony of undercover police officer on request of district attorney where greater part of lengthy trial was held in private and request for hearing out of presence of jury had been made. People v Boyd (1977) 59 App Div 2d 558, 397 NYS2d 150.

In trial for multiple felonies including, inter alia, rape, defendant was not denied public trial by district attorney's seeking to exclude visiting group of high school students from courtroom prior to victim's testimony of sordid details of sexual assault where, pursuant to prosecutor's request, trial judge informed students' teacher of situation whereupon she voluntarily removed her class from court room. Commonwealth v Hodge (197[illegible] Pa Super) 369 A2d 815.

See Price v State (Tex Crim) 496 SW2d 103, infra § 8 (citing annotation).

§ 4.3. [New] Information justifiably withheld from public domain.

Exclusion of public during testimony regarding profile used by airline personnel and United States marshals in detecting potential hijackers was proper and necessary to perpetuate the secrecy of the profile, since its value

might be destroyed if information relating thereto were accessible to the public at large. U. S. v Slocum (CA3 NJ) 464 F2d 1180.

In trial for possession of dangerous weapon by one attempting to board airliner, exclusion of public and defendant from courtoom during testimony of ticket agent, which pertained to confidential hijacking "profile," constituted harmful error where substantial amount of testimony was wholly unrelated to profile. United States v Ruiz-Estrella (CA2 NY) 481 F2d 723.

Exclusion of general public for relatively brief period during testimony of undercover narcotics officer did not infringe upon right to public trial of defendant where public interest in controlling illegal drug traffic and personal safety of witness demanded non-disclosure of officer's identity. People v Garcia, 51 App Div 2d 329, 381 NYS2d 271.

§ 5. Disturbance, disorder, etc. p. 1448.

Also recognizing inherent power to preserve order:

U.S.—U. S. ex rel. Bruno v Herold (CA2 NY) 368 F2d 187. United States v Akers (CA9 Or) 542 F2d 770.

Ala.—Williams v State, 57 Ala App 158, 326 So 2d 686, cert den 295 Ala 428, 326 So 2d 692.

Mass—Commonwealth v Bohmer (Mass) 1978 Adv Sheets 316, 372 NE2d 1381.

N.Y.—People v Outcalt, 32 App Div 2d 971, 303 NYS2d 213.

People v Devine, 80 Misc 2d 641, 364 NYS2d 71.

Wash.—State v Collins, 50 Wash 2d 740, 314 P2d 660 (citing annotation).

Bailiff's refusal to permit persons to enter or leave courtroom during jury arguments by counsel was not denial of defendant's right to public trial, where condition existed only for short time and was quickly changed by court when advised of bailiff's action. Snyder v Coiner (CA4 W Va) 510 F2d 224.

Court's clearing courtroom of public near end of trial over defendant's objections was reversible error, though court offered to permit defense attorney to designate persons necessary for defense to remain, where only ground was disturbance outside courtroom. Sirratt v State (Ark) 398 SW2d 63.

See Wilson v State (Del Sup) 305 A2d 312, infra § 7.

Except in the case of persons customarily excluded during a trial, no one may be removed from courtroom unless he is orderly or by overt acts attempts to influence jury or otherwise interferes with orderly functioning of courts. State v Hashimoto (Hawaii) 389 P2d 146.

Defendant's right to a public trial was violated when the trial justice excluded from the courtroom anybody connected in any way with the defendant's case. People v Outcalt, 32 App Div 2d 971, 303 NYS2d 213.

In prosecution for robbery with firearms, defendant's right to public trial was not violated where acquitted co-defendant and his wife were requested to leave courtroom during closing argument after they began crying. Elrod v State (Okla Crim) 527 P2d 208.

Order that doors of courtroom be locked during closing argument of prosecutor so that jury would not be disturbed, where no actual prejudice was shown, would not justify reversal. State v Collins, 50 Wash 2d 740, 314 P2d 660 (citing annotation).

§ 6. Open violence, retaliation against persons testifying, or threats thereof, p. 1449.

No denial of right to public trial occurred where trial judge had good reason to believe that defendant's family and friends were attempting to intimidate and harass witnesses and otherwise disrupt proceedings. U. S. ex rel. Orlando v Fay (CA2 NY) 350 F2d 967.

Where principal witness for state had been intimidated and was likely to be further intimidated by mere presence of certain persons so as to stultify orderly court proceedings, clearing the courtroom was well within judge's discretion. U. S. ex rel. Bruno v Herold (CA2 NY) 368 F2d 187.

Exclusion of spectators many of whom were hostile to witness, for short period during his testimony, was not error. U. S. ex rel. Bruno v Herold (CA2 NY) 408 F2d 125, cert den 397 US 957, 25 L Ed 2d 141, 90 S Ct 947.

See United States v Eisner (CA6 Ky) 533 F2d 987, cert den (US) 50 L Ed 2d 286, 97 S Ct 314, infra § 8.

In prosecution of two police officers for beating and assaulting arrested crime suspects, trial court did not abuse discretion in excluding three fully uniformed police officers from courtroom for fear their presence might intimidate jury. United States v Rios Ruiz (1978, CA1 Puerto Rico) 579 F2d 670.

See U. S. ex rel. Bruno v Herold (DC NY) 271 F Supp 491, infra § 8.

See United States ex rel. Smallwood v La Valle (DC NY) 377 F Supp 1148 (citing annotation), infra § 8, affd without op (CA2 NY)

508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Court's decision to bar public during testimony of undercover police officer, whose safety might have been endangered if his identity had been publicly exposed, was reasonable resolution of conflict between defendant's interest in public trial and state's interest in encouraging complete and honest testimony under conditions in which witnesses will not feel intimidated or embarrassed; defendant waived right to object by consenting to exclusion of public during testimony of informant. U. S. ex rel. Maisonet v La Vallee (DC NY) 405 F Supp 925.

Temporary exclusion from court of public and members of press during testimony of two of state's relatively minor witnesses during murder trial was not violation of defendant's Sixth Amendment right to public trial where such exclusion was to protect witnesses, who were found to have sincere fear of reprisals from testifying, and where duration of exclusion was minimal. Butler v Smith (DC NY) 416 F Supp 1151.

In murder prosecution trial court did not abuse discretion in sealing courtroom during testimony of two chief prosecution witnesses where witnesses in question were in fear of their lives and were reluctant to testify in courtroom attended by large audience of defendants' friends and relatives. Perez v Metz (1977, SD NY) 459 F Supp 1131.

Where only evidence in support of claimant's denial of public trial because several Negroes were not allowed to enter the courtroom during trial of Negro defendant was that following an objection by defendant's attorney in this connection the trial judge stated that he saw no vacant seat and overruled the objection, no error was shown. Payne v State, 226 Ark 910, 295 SW2d 312.

See State v Poindexter, 231 La 630, 92 So 2d 390, infra, § 8 (citing annotation).

Defendants were not deprived of open trial when public was excluded only during testimony of witness who feared for his life because of threats made against him and who would not otherwise testify. People v Hagan, 24 NY2d 395, 300 NYS2d 835, 248 NE2d 588, cert den 396 US 886, 24 L Ed 2d 161, 90 S Ct 173.

Where, 11 months after notorious international jewel thief was convicted of burglary and grand larceny, trial judge, without warning and at request of defense counsel, cleared courtroom and conducted two-hour closed sentencing hearing, allowing press to return to hear sentence pronounced—15 years probation, and where sealed record established cogent and compelling reasons to support judge's decision to seal proceedings based on eminent personal peril to lives and safety of witnesses, trial court nonetheless erred in procedure followed by holding secret sentencing hearing first and only later holding hearing to receive protests from media and media's demand that record be unsealed; although public's right to be informed continued beyond trial itself and also applied to sentencing proceedings, error in instant case was cured by hearing held to receive protests from press. Miami Herald Publishing Co. v State (1978, Fla App D4) 363 So 2d 603.

Exclusion of public during testimony of undercover agent where witnesses in courtroom were potential targets of future investigations, thus posing threat to life of undercover agent, was proper and not unconstitutional. People v Hinton, 31 NY2d 71, 334 NYS2d 885, 286 NE2d 265 (citing annotation), cert den 410 US 911, 35 L Ed 2d 273, 93 S Ct 970.

In prosecution for aggravated battery trial court's temporary exclusion of "spectators" (which term apparently did not include members of press and bar) upon being advised by district attorney that next witness was afraid to testify in open court for fear of bodily harm, was not abuse of discretion or violation of defendant's constitutional rights. Lowe v State (1977) 141 Ga App 433, 233 SE2d 807.

Defendant was not deprived of his right to public trial in murder prosecution by court's exclusion of all persons other than parties, jury, and court personnel during testimony of one witness where witness was first deposed by defense counsel, during which deposition she expressed reluctance or refusal to answer questions for fear of defendant's relatives and friends. Hackett v State (1977, Ind) 360 NE2d 1000 (citing annotation).

Exclusion of public from trial was warranted where undercover police officers were still operating in general area in which drug traffic in question had taken place, and where barring of public was necessary for protection and safety of officers. People v Rickenbacker, 50 App Div 2d 566, 374 NYS2d 672.

Conviction for possession and sale of controlled substance was reversed where court had granted prosecutor's request for clearing of courtroom during testimony of undercover officer without holding hearing or making findings and upon little more than bare application and conclusory recital of necessity for

relief. People v ...
383 NYS2d 62...

Trial court di... in prosecution ... dangerous dru... testimony of u... sure of agent's ... his life. People v ... 582, 391 NYS2d ...

relief. People v Morales, 53 App Div 2d 517, 383 NYS2d 620.

Trial court did not commit prejudicial error in prosecution for possession and selling of dangerous drug in excluding public during testimony of undercover agent where disclosure of agent's identity could have jeopardized his life. People v Medina (1977) 56 App Div 2d 582, 391 NYS2d 454.

Prosecution in drug case made satisfactory showing of need to exclude public from courtroom during testimony by undercover police agent where affidavit disclosed that witness was assigned to police narcotics section and was still operating actively in community, criminals and informants with whom witness dealt during performance of duties did not know he was police officer, testifying officer had been seriously wounded by firearm within past six months during course of duties, other narcotic investigations and prosecutions in which witness had participated in undercover capacity were still pending, trial courtroom was specifically designed for prosecution of narcotics cases as to make it likely place for members of general public "interested" in such prosecutions to be present, and officer would have testified in fearful and distracted manner if general public had not been excluded during testimony. People v Devine, 80 Misc 2d 641, 364 NYS2d 71.

In prosecution against member of revolutionary group for murder, conspiracy, and assault and battery with intent to kill, exclusion of members of Black Panthers group and of co-conspirator's wife on day when key prosecution witness was scheduled to testify did not constitute denial of defendant's right to public trial, where key prosecution witness was wife of another co-conspirator in case and had given inconsistent statements during various trial phases regarding knowledge of conspiracy, co-conspirator's wife had threatened witness, and presence of co-conspirator's wife and of Black Panthers might have caused witness to change testimony out of fear; mistaken exclusion by prosecutor of members of defendant's family did not constitute violation of right to public trial where situation was immediately corrected when brought to attention of trial court. Commonwealth v Burton, 459 Pa 550, 330 A2d 833.

Trial judge did not abuse his discretion in excluding public and all spectators from courtroom while confidential informer was testifying in narcotics prosecution on ground that witness's public appearance would place her life in jeopardy. State v Gee, 262 SC 373, 204 SE2d 727 (citing annotation).

§ 7. Overcrowding, p. 1449.

Court properly issued passes to spectators each day of trial, limiting number to seating capacity of courtroom, where court was informed prior to trial of possibility that there might be disorder in courtroom, and where court had reason to believe that large number of people might want to attend trial and might create considerable noise and confusion in building. Wilson v State (Del Sup) 305 A2d 312.

In disorderly conduct prosecution, although more specific and complete record should have been made with respect to trial court's ruling excluding from courtroom group of similarly charged demonstrators, such exclusion was not error where small courtroom could not accommodate overflow crowd present and where such overflowing was due to presence of such group. People v Pearl, 66 Misc 2d 502, 321 NYS2d 986.

§ 8. Prevention of emotional disturbance of persons testifying, p. 1450.

Also recognizing right to exclude to prevent emotional disturbance of witness:

Cal.—Kirstowsky v Superior Court, 143 Cal App 2d 745, 300 P2d 163 (citing annotation).

Conn.—State v Purvis, 157 Conn 198, 251 A2d 178, cert den 395 US 928, 23 L Ed 2d 246, 89 S Ct 1788.

La.—State v Poindexter, 231 La 630, 92 So 2d 390 (citing annotation).

Pa.—Commonwealth v Knight (Pa) 364 A2d 902 (citing annotation).

Commonwealth v Robb, 238 Pa Super 62, 352 A2d 515 (rape victim); Commonwealth v Hodge (1977, Pa Super) 369 A2d 815.

In covering trials all news media are entitled to same rights as general public, but defendant on trial for specific crime is entitled to his day in court, not in stadium, or city or nationwide arena. Estes v Texas, 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628, supra § 2[d], holding further, in separate opinion of 3 justices, that it is common knowledge that television can work profound changes in behavior of people it focuses on.

See Geise v U. S. (CA9 Alaska) 262 F2d 151, reh den 265 F2d 659, supra § 4.

Trial court did not abuse discretion in excluding spectators other than accredited members of press during portion of testimony of one witness where judge asserted that witness had fear of courtroom and persons that might be in it, although better course would have been for trial judge to hold evidentiary hear-

ing prior to deciding that there was sufficient reason to exclude spectators. United States v Eisner (CA6 Ky) 533 F2d 987, cert den (US) 50 L Ed 2d 286, 97 S Ct 314.

Where evidence failed to show waiver by or discussion with counsel or defendant prior to exclusion announcement, court erred in excluding public though judge was told that state's witness might not testify since he was in mortal fear of the "gang in the courtroom," many of whom were members of defendants' families who "leaned forward and grinned and grimaced," causing witness to tremble, turn white, and remain speechless; broad discretion of court in such cases is merely legal discretion to be exercised as a last resort. U.S. ex rel. Bruno v Herold (DC NY) 271 F Supp 491.

Defendant in homicide prosecution was not denied public trial in violation of his Sixth and Fourteenth Amendment rights, where trial judge excluded public (six spectators) from trial during entire testimony of state's principal witness, a 15 or 16-year-old pregnant girl, but only during her testimony, where exclusion order was based partly on concern for welfare of young expectant mother and her unborn child and partly for her own subjective fear of reprisal—whether reasonable or unreasonable—if she testified in public. United States ex rel. Smallwood v La Valle (DC NY) 377 F Supp 1148 (citing annotation), affd without op (CA2 NY) 508 F2d 837, cert den 421 US 920, 43 L Ed 2d 788, 95 S Ct 1586.

Where witness, a penitentiary inmate, refused to testify unless other penitentiary personnel were excluded from courtroom, trial judge erred in denying such exclusion. State v Poindexter, 231 La 630, 92 So 2d 390 (citing annotation).

Clearing court of all but 2 reporters prior to rape victim's testimony when she lost her composure was not error where spectators were readmitted for balance of trial. Riley v State (Nev) 429 P2d 59.

See People v Devine 80 Misc 2d 641, 364 NYS2d 71, supra § 6.

In rape prosecution defendant was not deprived of constitutional rights or fair trial where judge excluded spectators from courtroom during testimony of victim, although victim was not of tender years. Price v State (Tex Crim) 496 SW2d 103 (citing annotation).

§ 9. Trial or part thereof at other than regular place or time, p. 1451.

Pretrial conference to determine whether defendant is to be represented by counsel is not part of trial, so that holding of such conference in chambers, instead of in open court, does not deprive defendant of right to public trial. Hayes v U. S. (CA8 Mo) 296 F2d 657, cert den 369 US 867, 8 L Ed 2d 85, 82 S Ct 1033.

Moving to judge's chambers for purpose of hearing tape recordings, because of bad acoustics in courtroom, did not amount to improper deprival where defense counsel agreed and there was no showing that public was actually excluded from chambers. People v Cash, 52 Cal 2d 841, 345 P2d 462.

Sentencing which took place in room designated as "lock-up" instead of "courtroom" was not illegal or unconstitutional where necessitated by defendant's own conduct and procedure was suggested by his own counsel. Szukiewicz v Warden, Maryland Penitentiary, 1 Md App 61, 227 A2d 47 (citing annotation).

Taking jury to small room from which public was excluded to permit them to listen to tape recording admitted in evidence, because of poor acoustics in court room, was reversible error. Benicelli v State (Okla Crim) 339 P2d 1063.

Defendant was denied right to public trial as guaranteed by Sixth and Fourteenth Amendments where robbery trial was held in chambers behind closed doors, the public did not have freedom of access to chambers at time of trial, persons present in chambers were attaches of the court and not members of the public, and members of defendant's family, 1 of whom was ready to testify in his behalf, waited in courtroom for trial to begin, unaware that trial was being held. Jones v Peyton, 208 Va 378, 158 SE2d 179 (citing annotation).

§ 9.3. [New] Reprisal for violation of trial judge's guidelines.

Trial judge abused discretion by excluding press and public from trial as reprisal for contumacious behavior of press who published article concerning defendant's alleged underworld affiliations in violation of judge's guidelines, where it was apparent that closed trial would not prevent such articles. Oliver v Postel, 30 NY2d 171, 331 NYS2d 407, 282 NE2d 306.

§ 10. Waiver, p. 1452.

Also recognizing waiver:

Minn.—State v Weigold, 281 Minn 73, 160 NW2d 577.

Va.—Caudill v Peyton (Va) 164 SE2d 674 (citing annotation).

See Geise v U. S. (CA9 Alaska) 265 F2d 659, supra, § 4.

In prosecution for conspiracy to transport obscene films in interstate commerce, any rights defendants may have had to object to exclusion of public from courtroom during showing of films was waived through failure to object at trial. U. S. v Cappello (CA2 NY) 327 F2d 378.

See Aaron v Capps (CA5 Ala) 507 F2d 685, supra § 4, cert den 423 US 878, 46 L Ed 2d 112, 96 S Ct 153.

See U. S. ex rel. Bruno v Herold (DC NY) 271 F Supp 491, supra § 8.

See U. S. ex rel. Maisonet v La Valle (DC NY) 405 F Supp 925.

Waiver of right to public trial resulted where defense attorney stated that court had discretion to clear courtroom, facts of sex crime were repulsive, alleged victim was eight years old, and where no objection was made to clearance. Wright v State (Ala App) 340 So 2d 69, revd (Ala) 340 So 2d 74, on remand (Ala App) 340 So 2d 80.

Juvenile is entitled to public trial under Alaska Constitution, and child therefore may open adjudicative hearings in juvenile proceedings to any individuals; where child's choice with respect to whether to have public trial may affect his rights, guardian ad litem may be appointed and court's discretion as to whether to exclude public exists only with respect to persons other than those whom the child wants present. RLR v State (Alaska) 487 P2d 27 (citing annotation).

Waiver may be by failure to object, no express waiver is necessary. People v Cash, 52 Cal 2d 841, 345 P2d 462.

Where defendant waived right to public trial and requested exclusion of public during testimony as to abnormal sexual practices on ground that because of emotional disturbance she would be unable to properly present testimony if public were present, trial judge had discretion to exclude public during her testimony but shoud not have extended exclusion to entire trial. Kirstowsky v Superior Court, 143 Cal App 2d 745, 300 P2d 163 (citing annotation).

Waiver would be assumed where there was no showing of objection in record. People v Blanco (Cal App) 339 P2d 906 (citing annotation).

Where counsel for codefendant requested that courtroom be closed for testimony of a witness, and defendant's counsel waived the right to public trial for this limited purpose, defendant's right to public trial was not violated by failure to reopen courtroom when defendant was placed on stand, since counsel had failed to request that the courtroom be reopened immediately. People v Moreland, 5 Cal App 3d 588, 85 Cal Rptr 215.

Where limited available space necessitated that public be excluded from courtroom during jury selection so that policy requiring separation of witnesses and prospective jurors could be properly carried out, and defense attorney was notified of this procedure by bailiff and did not object thereto, defendant could not subsequently complain of this procedure as a denial of his right to public trial. Anderson v People, 176 Colo 224, 490 P2d 47, cert den 405 US 1042, 31 L Ed 2d 583, 92 S Ct 1316.

Where defendant filed motion to exclude public from proceedings to decide motion to suppress certain evidence which defense contended would be prejudicial if wrongfully brought to attention of jurors at trial, it was within discretion of trial judge to deny motion to exclude public based upon determination that no substantial likelihood of prejudice would result from such a disclosure. Stapleton v District Court of Twentieth Judicial Dist. (Colo) 499 P2d 310.

Failure to object to trial court's closure to spectators during fondling prosecution and absence of objection in motion for new trial or assignments of error preclude consideration on appeal. Dixon v State (Fla App) 191 So 2d 94.

Where, upon motion by prosecution to clear courtroom because of nature of witness' testimony, defense attorney indicated that he desired to have all of his client's constitutional rights protected, but filed no objection when motion to exclude was granted, such silence constituted waiver insofar as right to presence of other individuals was concerned. Marshall v State, 254 Ind 156, 258 NE2d 628 (citing annotation), reh den 261 NE2d 566.

Defendant could not complain that relatives and friends were not present at his public trial where he had not made known his desires that they attend, no request was made to the trial judge on the subject, and there was no saving of any exception. Commonwealth v Wells (Mass) 274 NE2d 452.

Where counsel for defendant agreed to exclusion of public during trial, he thereby voluntarily waived defendant's right to a full public trial. State v Blake (NH) 305 A2d 300 (citing annotation).

In prosecution for burglary where doors of

courtroom were locked during hearing on motion to suppress evidence at defendant's request and remained locked after hearing and during trial due to misunderstanding and without knowledge of court, defendant waived right to public trial where defense counsel made deliberate tactical decision not to inform court or to object to locked doors because he felt it was to defendant's advantage, defendant agreed with this, and defendant was later given chance to object if he did not agree, but failed to inform court of fact and did not object until after guilty verdict. Martineau v Helgemoe (1977, NH) 379 A2d 1040.

See State v Haskins, 38 NJ Super 250, 118 A2d 707, supra § 4.

Appellate division's holding that newspapermen did not have right to insist that trial be open to public where defendant had specifically asked that public be excluded therefrom, since to allow such right would deprive accused of all power to waive his right to public trial and thereby prevent him from taking course which he may believe best for his own interests was erroneous as constituting unwarranted censorship of the press where there was no showing by defendant that presence of public would present serious and imminent threats to integrity of his trial, and Appellate Division's order would be modified to indicate dismissal of newspapermen's suit solely on ground of mootness. Oliver v Postel, 30 NY2d 171, 331 NYS2d 407, 282 NE2d 306, modg 37 App Div 2d 498, 327 NYS2d 444.

Accused does not have absolute right to waive public trial, and it is within discretion of trial court, considering effect of adverse publicity or other prejudice to accused, to determine whether accused's application for private trial is appropriate. Hansen v Kelley, 38 App Div 2d 722, 329 NYS2d 609.

Notwithstanding defendant's waiver of right to public trial, both public and press were admitted in order to protect public's right to know what transpires during prosecutions. People v Holder, 70 Misc 2d 31, 332 NYS2d 933.

Order excluding public from part of aggravated murder trial was not prejudicial to defendant, and any error was considered waived where defense supported order, and it was made primarily to enable defense to obtain answer to question posed to prosecution witness on cross-examination. State v Bayless, 48 Ohio St 2d 73, 2 Ohio Ops 3d 249, 357 NE2d 1035.

Public trial was effectively waived by court-appointed counsel. Commonwealth ex rel. Paylor v Cavell, 185 Pa Super 176, 138 A2d 246.

§ 11. Presumption of prejudice, p. 1454.

Also recognizing presumption of prejudice:

Iowa—State v Lawrence (Iowa) 167 NW2d 912 (citing annotation).

Defendant is not required to show actual prejudice where his right to public trial was violated over his timely objection. Sirratt v State (Ar) 398 SW2d 63.

A showing of prejudice is not necessary for reversal of a conviction which is not the result of public proceedings. Commonwealth v Marshall (Mass) 253 NE2d 333 (citing annotation).

Violation of defendant's fundamental right to public trial by exclusion of public implies prejudice. State v Schmit (Minn) 139 NW2d 800 (citing annotation).

See State v Haskins, 38 NJ Super 250, 118 A2d 707, supra, § 4.

48 ALR2d 1462–1465

Liability of owner of wires, poles, or structures struck by airplane for resulting injury or damage.

Measure of damages for destruction of or injury to airplane. 73 ALR2d 719.

Validity and construction of statute imposing absolute liability for injury or damage occurring on ground or water below from the fall, flight, or ascent of aircraft, or from the fall of object therefrom. 81 ALR2d 1058.

Status of injured adult as trespasser on land not owned by electricity supplier, as affecting its liability for injuries inflicted upon him by electric wires it maintains thereon. 30 ALR3d 777.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident. 35 ALR3d 614.

Reservation—Development and protection of premises—By lessor. 3 Am Jur Legal Forms 2d, Aviation § 34:72.

27 Am Jur Proof of Facts 215, Light Airplane Takeoff Accidents.

8 Am Jur Trials 173, Airline Passenger Death Cases.

13 Am Jur Trials 557, Light Aircraft Accident Litigation.

22 Am Jur Trials 517, Helicopter Accident Litigation.

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Digest of Opinion: Sears, Roebuck & Co. sold Lloyd Fullman, Jr., a rifle and ammunition, but did so in violation of Del. Code Ann. tit. 24, §904 (Michie 1975). At the time of this sale, §904 required two "freeholders resident in the county wherein the sale is made" to identify any purchaser of a deadly weapon. Fullman, however, did not produce two Delaware freeholders for the purpose of positively identifying him. He merely showed a Delaware driver's license with his picture on it and completed a Federal Firearm Transaction Record, Form 4473.

Although the Delaware statute does not define "freeholder," the term is generally understood to mean an owner of real property. Gebelein v. Nashold, Del. Ch., 406 A2d 279 (1979).) During the course of a robbery, Fullman shot plaintiff Hetherton in the head, severely wounding him. Hetherton sued Sears alleging that the corporation was negligent in selling the weapons to Fullman without requiring that he be identified by two freeholders.

Sears challenges the constitutionality of §904, but Hetherton claims Sears has no standing to do so.

Quoting from Baker v. Carr, 369 U.S. 186, 204 (1962), the Supreme Court observed that the " 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " Flast v. Cohen, 392 U.S. 83, at 99-100 (1968).

[Text] There is little question that Sears risks suffering injury in fact to an interest arguably within the zone of interest to be regulated by §904. As the district court wrote: "The statutory requirement which Sears is challenging here created for Sears a legal duty to require anyone purchasing a firearm from Sears to produce two freeholders who could identify the purchaser. Sears' failure to perform this duty is presently exposing it to a very large potential liability and could lead to criminal prosecution. Thus, the statute is clearly causing Sears injury in fact and Sears had a weighty personal interest in demonstrating that the law was unconstitutional." District Court Opinion at A-3. The existence of potential civil and criminal liability when combined with the statute's clear intention to regulate the vendors of deadly weapons assures us that Sears had presented the "concrete adverseness" envisioned by Flast and Baker. *[End Text]*

We now pass to the constitutional question.

[Text] The essence of Sears' argument is that the §904 requirement of two freeholder witnesses to the sale of a deadly weapon bears no rational basis to Delaware's legitimate interest in having purchasers positively identified and in deterring ex-felons, such as Fullman, who are not permitted to purchase firearms in Delaware, from buying guns. Hetherton counters that, since Delaware can totally ban the sale of firearms, non-freeholders are not being deprived of a right. Further, he contends the two freeholder requirement is rational in that it results in a more burdensome procedure for the purchase of weapons.

Hetherton's argument that Delaware has created no right to purchase firearms is misconceived. While it may be true that Delaware could ban the sale of all deadly weapons, it does not follow that the State, having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups. The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in the negative.

The Supreme Court has consistently looked askance at classifications based on the ownership of land. *[End Text]*

See, e.g., Turner v. Fouche, 396 U.S. 346 (1969), where the Court, using a rational relationship test, invalidated a Georgia statute limiting school board membership to freeholders. The Court found it difficult to envision legitimate reasons for distinguishing between property owners and non-property owners for purpose of school board membership.

[Text] It is clear to this court that Delaware's freeholder identification requirement is as anachronistic as the one in Fouche. As the lower court observed, many very responsible citizens in Delaware do not own property. Renting has become increasingly more popular and even necessary as the cost of real estate has grown prohibitive, particularly in urban areas, for the average wage earner. For Delaware to assume that only citizens with the wealth and/or interest in owning real property are capable of participating in the regulatory functions of §904 is simply not rational. A leaseholder is fully qualified to provide the needed identification and is capable of possessing the same "attachment to the community" as a freeholder. We therefore reject Hetherton's contention that the "right" of non-freeholders to serve as witnesses to the character of firearms purchasers is not unconstitutionally infringed upon by §904. We find the same irrationality present in the fact that Delaware residents who know only leaseholders would be barred by §904 from lawfully purchasing weapons.

Similarly, the argument that the freeholder requirement makes the buying of deadly weapons more burdensome does not meet the test of rationality. The state may have an interest in restricting the sale of firearms; however, it cannot do so by creating irrational and unconstitutional classifications. As noted earlier, there is no rational basis to conclude that a freeholder would take the responsibility of identifying weapons purchasers more seriously than a leaseholder. If Delaware desired to burden the sale of firearms by restricting them to persons who are non-felons or otherwise stable members of the community, it should have done so by a more narrowly tailored statute. *[End Text]*

We agree with the district judge's observation that there is no reason to believe "non-freeholders will be less willing than freeholders to attempt to protect their communities by helping to prevent those who should not possess firearms from purchasing them."

[Text] As a deterrent to our nation's escalating violence, certainly a legislature may prohibit the sale of handguns to individuals who have records such as Fullman and certainly they can impose substantial civil liability on gun sellers like Sears who breach the statutory obligations. * * * To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is no more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns. Thus, though Sears may have avoided legal liability here because of a technical deficiency in the statute, the human and moral issues raised by this case are deeply troubling and the issue of gun control is one certainly appropriate for further legislative inquiry and correction. *[End Text]* —Higginbotham, J.

Judge Weis dissents, arguing that Sears lacks standing to challenge §904.

(Hetherton v. Sears, Roebuck & Co.; CA3, 6/25/81)

MASS. LAW REQUIRING PARTS OF SEX OFFENSE TRIALS TO BE CLOSED IS VALID

Law serves valid state interests in protecting young victims, encouraging them to testify. ►90.70 ►278.05

A majority of the Massachusetts Supreme Judicial Court finds nothing in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 27 CrL 3261 (1980), to undermine a state statute that, as construed in an earlier opinion, requires the closing of certain phases of sex offense trials involving youthful victims. The law is therefore upheld as a permissible effort by the state to protect such victims and encourage them to testify.

In its previous opinion, 401 NE2d 360 (1980), the court interpreted the statute to require closure only during the testimony of minor complainants, and to grant trial courts discretion to consider requests for exclusion of the public during additional segments of the trial as well. On this remand, ordered by the Supreme Court near the beginning of the 1980-81 Term, 28 CrL 4033 (1980), the

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majority poses three questions, focusing on the tradition of open proceedings, the effect of closure on the flow of information, and the state interests the statute is supposed to serve.

The closure authorized by this statute does not conflict with tradition to the same extent as that authorized by the statute involved in Richmond Newspapers, the majority first concludes. The courts have long taken special steps, including closure, to compensate for the difficulty many sex offense victims, especially minors, have in testifying. Secondly, the flow of information about sex offense trials in general will not be completely cut off, the majority notes, since the statute does not apply to cases in which the complaint is an adult. Finally, the majority says the interests advanced by the state are properly adressed by the legislature through a statute of general application rather than, as the newspaper argues, by the courts on a case-by-case basis.

Justice Wilkins concurs for the most part but finds the mandatory aspect of the statute objectionable. (Globe Newspaper Co. v. Superior Court, 6/30/81)

Digest of Opinion: The statute, G.L.c. 278, §16A, reads in relevant part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, * * * the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." In our prior opinion, we interpreted the statute to require closure only during the testimony of complainants who are minors and to grant trial courts discretion to consider requests to exclude the public from additional segments of the trial. The Supreme Court vacated our decision and remanded the case for reconsideration in light of Richmond Newspapers.

The Globe does not deny that there are instances where a minor victim may be psychologically unable to testify if confronted with a large group of spectators, or if the minor is aware that the testimony will become a matter of wide public knowledge. But the Globe says such a determination can be constitutional only if made in a case-by-case manner after a hearing. Additionally, the paper asserts that the standards set forth in the first opinion do not give adequate weight to the interests of the press and the public.

[*Text*] To test the mandatory closing requirement of G. L. c. 278, §16A, against the standard of Richmond Newspapers requires a threefold inquiry. (1) Does the closing of the testimony of the minor victom of a sexual assault violate the same tradition of open proceedings as the closing of an entire murder trial; (2) to what extent does the restriction impede the flow of information necessary to the functioning of democratic institutions; (3) are there substantial State interests underlying the statute, and if there are, can they be furthered by more tightly drawn regulations that will intrude to a lesser degree on the constitutionally protected interests of the press and public? [*End Text*]

The tradition of open trials has long been a part of the common law of this commonwealth, but there is at least one notable exception. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult. See e.g., Latimore v. Sielaff, 561 F2d 691, 21 CrL 2530 (CA7 1977). It is no longer possible to justify such closings as attempts to protect the public from offensive information. But more typically the motivation has been to overcome the difficulty the victim may have in publicly testifying about the details of such crimes. Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial. A majority of the courts have upheld decisions to close parts of trials when a minor victim of a sexual assault is testifying.

Under the statute in question, courtroom testimony of minors who are the victims of sexual assaults cannot be the subject of contemporaneous reporting by members of the press. But closure is not automatic when the victim is an adult, so the public will be able generally to observe the judicial system dealing with sexual assault charges.

The question we must resolve is whether the genuine state interests furthered by the statute justify this impact on First Amendment interests. Globe I identified the state interests as: (a) to encourage minor victims to come forward to institute complaints and give testimony; (b) to protect minor victims from public degradation, humiliation, demoralization, and psychological damage; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice; and (e) to preserve evidence and obtain just convictions.

We do not agree with the newspaper that a balancing of state interests against First Amendment rights is permissible only if undertaken on a case-by-case basis, and we perceive no such holding in Richmond Newspapers.

[*Text*] We believe that the Legislature, a coordinate branch of government, has power to act. We note additionally that, by their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial. Implicit also in the Globe's argument is that a State Legislature is without power to act to protect substantial State interests in the context of such trials. We do not believe Richmond Newspapers goes that far * * * and we are not disposed to reach such a conclusion. [*End Text*]

Nor do we agree that the statute is "underinclusive" because of its failure to prevent revelation of the victim's name. The statute is aimed at balancing the defendant's Sixth Amendment rights and the public's right to know against the minor victim's right to minimal harm in the process of testifying and the commonwealth's interests. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific state interest in protecting minors. This interest permits the state to protect juvenile offenders by closed hearings; it would be anomalous if the legislature were held to lack the power to protect juvenile victims of crime.

[*Text*] The statute, as it affects the testimony of minor victims, is fairly characterized as an attempt to reduce possible harm to a vulnerable group of individuals. Both precedent and empirical research support the Commonwealth's position that this concern is genuine and well-founded. * * * Logic and history indicate that the method chosen by the State will further this goal, while making increased reporting of sexual assaults more likely.

Balanced against this must be the impact that the closing of this testimony has on the public's knowledge about these trials. Although there is some temporary diminution of information, we cannot say that Richmond Newspapers requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims. [*End Text*] — Liacos, J.

Concurrence: I agree with most of what the court has said. But I am not certain that the mandatory closing of a trial of a case involving a minor victim of a sex crime during his or her testimony is constitutionally permissible without specific findings by the judge that the closing is justified by overriding or countervailing interests of the commonwealth. I would not

foreclose the judge from concluding, on proper findings, that the trial should be entirely public.—Wilkins, J.

(Globe Newspaper Co. v. Superior Court; Mass SupJudCt, 6/30/81)

BOSTON'S LICENSING SCHEME FOR "ADULT THEATERS" INVALID IN PART

One criterion for denial suffers from unconstitutional vagueness. ▶254.55

A Boston ordinance used to deny licenses to peep-show operators in the city's adult entertainment district or "Combat Zone" is unconstitutional in part, the U.S. Court of Appeals for the First Circuit says. Furthermore, the licensing denials involved in the present case are suspect despite the licensing authority's ostensible reliance on a provision that the court finds acceptable.

The ordinance provides in part that a license may be denied if its issuance would create a nuisance or "endanger the public health, safety, or order" by "unreasonably increasing" pedestrian traffic or noise, or by "increasing the incidence of disruptive conduct." While the "disruptive conduct" section skirts the edge of vagueness, these three sections are acceptable under First Amendment standards, at least on a facial analysis.

However the ordinance also provides for denial if a license would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." This standard is purely subjective and open-ended, with the result that the licensing authority has unbridled discretion. Where First Amendment interests are at stake, such an ordinance cannot be upheld.

The licenses here were denied on the basis of not only the fourth criterion but also the "disruptive conduct" section. However, the court perceives a considerable factual basis for the applicants' claim that the licensing authority did not really evaluate the potential for disruption but, instead, simply denied the licenses in order to pave the way for the applicants' eviction and the eventual redevelopment of their lessor's building. The district court must evaluate this claim on remand, with particular attention to the protection of the applicants' First Amendment rights. (Fantasy Book Shop, Inc. v. City of Boston, 6/16/81)

Digest of Opinion: Boston's zoning restricts so-called adult uses to a single downtown adult entertainment district, popularly known as the "Combat Zone." All "theatrical exhibitions, public shows, public amusements and exhibitions of every description" are required to obtain a license before they may operate for pay. This licensing requirement has been enacted pursuant to a 1979 Massachusetts statute. As reenacted, the statute makes it a crime to operate a public amusement for pay without a license, and delegates the power to grant or deny licenses to local governments. In material part, the statute provides that: "[T]he mayor or selectmen shall grant such license or shall deny such license upon a finding that issuance of such license would lead to the creation of a nuisance or would endanger the public health, safety or order by: (a) unreasonably increasing pedestrian traffic in the area in which the premises are located or (b) increasing the incidence of disruptive conduct in the area in which the premises are located or (c) unreasonably increasing the level of noise in the area in which the premises are located." The city ordinance quotes this statute but adds a fourth criterion, (d), allowing denial of a license that would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." The ordinance also adds a general condition providing that "no application shall be denied if the anticipated harm is not significant or if the likelihood of its occurrence is remote."

This action was brought by three adult book stores that offer coin-operated motion pictures whose operation is within the scope of the ordinance. Their license applications were denied after hearings at which virtually all testimony focused on nearby residents' objections to the activities in the Combat Zone as a whole. Other testimony, offered by organizations interested in purchasing and redeveloping the building in which the stores operated, emphasized the importance of redevelopment to the community's financial well being and asserted that the continuance of the applicants' activities would be incompatible with that redevelopment. Appellee White, the city's mayor, has publicly stated his intention to eliminate the Combat Zone as a whole.

Prevost, director of the licensing office, denied the applications in letters that closely tracked the second and fourth criteria of the ordinance. She also asserted that "the anticipated harm is significant and the likelihood of its occurrence is not remote."

On this appeal from the denial of the applicants' request for injunctive or declaratory relief, we first address their claim that the ordinance is an invalid prior restraint. While there is a heavy presumption against the validity of prior restraints on First Amendment protected activities, a regulation directed primarily at conduct or noncommunicative aspects of protected expression is permissible, despite an incidental prior burden on expression, if it is justified by sufficiently strong permissible government interests. U.S. v. O'Brien, 391 U.S. 367, 377 (1968). We think this ordinance is not per se impermissible as a prior restraint under the O'Brien test.

[*Text*] First, a law requiring the licensing of routine commercial operations in an attempt to limit noise, traffic and disruption is clearly within a state's constitutional power. Second and third, those interests may well be said to be important, and are in themselves entirely unrelated to the suppression of expression. Finally, since the interests thus defined require regulation of public amusements whose content is within the First Amendment no less than they require regulation of any other public amusements, and since the market for coin-operated adult films as a whole is "essentially unrestrained", the regulation's inclusion of the latter is not broader than is essential to the furtherance of those interests. [*End Text*]

The applicants next claim that this sort of licensing scheme must provide various safeguards before any decisions denying the license may be given effect, including adequate administrative procedures, licensor-initiated judicial review, and prompt appellate review of that decision. While the cases they rely on did not involve facially content-neutral regulations, they argue that the safeguards are necessary because the ordinance has a content-specific effect. The defendants, on the other hand, argue that any positive correlation between the stated criteria of noise, traffic, and disruption, on the one hand, and a particular kind of film content, on the other, is purely accidental.

We think that where the ordinance has both facially neutral criteria and effectively non-neutral impacts, the full panoply of procedural safeguards do not apply unless a rejected applicant can demonstrate that, either in general or in a particular case, the neutral criteria asserted serve as a mere pretext for what were in fact content-directed decisions. Absent such a showing, a statute must be accepted as a valid police power/land use regulation not directly implicating First Amendment values. Therefore such a statute need not provide for prior licensor-initiated judicial review. However, the regulation must provide for adequate administrative procedures, including notice and a hearing, and expeditious decision by the administrator, along with the availability of prompt judicial review of a denial and appellate review of that decision. We see no reason to conclude that the licensing scheme here is procedurally deficient.

In addition, a party asserting that facial neutrality is a mere ruse for de facto content discrimination must be given an opportunity to prove that claim. Resolution turns on the inquiry into the substantive criteria. In this case, we find the first three criteria acceptable but the fourth impermissibly vague.

0011-1341/81/500.50

Criminal Defendant Has Sixth Amendment Right to Physically Confront Witness at Video-Taped Deposition

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

In *United States v. Benfield*[1] the Eighth Circuit Court of Appeals clarified the application of the sixth amendment's confrontation clause[2] to a Rule 15 video-taped deposition[3] used in lieu of deponent's personal appearance[4] at a federal criminal trial.

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

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

3. Fed. R. Crim. P. 15 provides in relevant part:

Depositions

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

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

. . . .

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

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. . . .

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

The government charged Russell Benfield in a four-count indictment[5] with the federal crime of misprision of the kidnapping of Patricia Cady.[6] Several months after the kidnapping, but before the trial, Cady developed psychiatric problems resulting in her hospitalization and necessitating two trial continuances.[7]

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

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stantive evidence if "the witness gives testimony at the trial or hearing inconsistent with his deposition." This use of the deposition was not at issue in *Benfield* and the court did not discuss it. *But see* California v. Green, 399 U.S. 149, 159 (1970) (if witness testifies at trial, witness' prior statement is admissible even if not subject to confrontation when made, as long as defendant is assured of effective cross-examination at trial). *Accord,* Nelson v. O'Neil, 402 U.S. 622, 626-27 (1971). *See generally* Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565 (1977).

5. 593 F.2d at 817.

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

Misprision of felony

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

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

8. *Id.* at 817.

9. *Id.*

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

to confer with his counsel outside the deposition room.[11]

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

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

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

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

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

14. *Id.* at 821.

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

16. *See* note 2 *supra*. The Supreme Court declared the right of confrontation fundamental and applicable to the states in Pointer v. Texas, 380 U.S. 400 (1965), *overruling* Stein v. New York, 3[illegible] U.S. 156, 195-96 (1953), *and* West v. Louisiana, 194 U.S. 258, 264 (1904). For analyses testing rules of evidence by the standard of due process of law, see Chambers v. Mississippi, 410 U.S. 284, 294-303 (1973); Dutton v. Evans, 400 U.S. 74, 96-100 (1970) (Harlan, J., concurring); Greene v. McElroy, 360 U.S. 474, 506-08 (1959); *In re* Oliver, 333 U.S. 257, 273 (1948). *See generally* Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *The Burger Court and the Confrontation Clause: A Return to the Fair Trial Rule*, 7 J. MAR. J. PRAC. & PROC. 136 (1973).

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

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

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

18. "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244.

19. *Id.* at 243. *See* notes 38-42 *infra* and accompanying text.

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

21. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) ("the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment"); Dowdell v. United States, 221 U.S. 325, 330 (1911) (right of confrontation was "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him"); Kirby v. United States, 174 U.S. 47, 55 (1899) (defendant has trial right to confront witnesses "upon whom he [the accused] can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases").

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

23. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418. *See also* Bruton v. United States, 391 U.S. 123, 127-28 (1968); Brookhart v. Janis, 384 U.S. 1, 3 (1966); Pointer v. Texas, 380 U.S. 400, 406-07 (1965).

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

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

Id. at 158.

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

preting the confrontation clause dwell on the defendant's right to effective cross-examination[26] and refer to physical confrontation only incidentally.[27]

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

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

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

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

28. *See* notes 17-27 *supra* and accompanying text. The result of the Court's conflict is exemplified by the confusion within the Fifth Circuit. *Compare* Canal Zone v. P. (Pinto), 590 F.2d 1344, 1352 (5th Cir. 1979) ("cross-examination is the essential right secured by the confrontation clause"), *with* United States v. Amaya, 533 F.2d 188, 190 (5th Cir. 1976) ("[t]he primary object of the confrontation clause is to permit personal examination and cross-examination of the witness by the defendant"), *cert. denied*, 429 U.S. 1101 (1977).

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

Some commentators believe that the confrontation clause was designed to prevent the kind of abuse that characterized the trial of Sir Walter Raleigh in England in 1603. Raleigh was convicted and later executed for treason, based upon depositions and ex parte affidavits, with no opportunity to call his own witnesses or cross-examine those adverse to him. *See* United States v. Payne, 492 F.2d 449, 457-65 (4th Cir.) (concurring and dissenting opinion), *cert. denied*, 419 U.S. 876 (1974); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-06 (2d ed. 1969); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 216-29 (1926); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333-37 (1883); Stephen, *The Trial of Sir Walter Raleigh*, in 2 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 172-87 (4th ser. 1919); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959).

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

> Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.
>
> It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not . . . .
>
> The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.
>
> These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges . . . .
>
> On the whole, when we fully consider this matter, and fully investigate the powers

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

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

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

Many state constitutions or statutes expressly guarantee face-to-face meetings between defendant and the witnesses against him, thereby resolving any ambiguity that might otherwise exist concerning the physical aspect of confrontation. *See, e.g.*, ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; HAWAII REV. STAT. § 801-2 (1976); ILL. CONST. art. I, § 8; IND. CONST. art. 1, § 13; KAN. CONST. BILL OF RIGHTS § 10; MASS. CONST. pt. 1, art. 12; MASS. ANN. LAWS ch. 263, § 5 (Michie/Law. Co-op 1968); MICH. COMP. LAWS § 763.1 (1970); MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.D. CENT. CODE ANN. § 29-01-06 (1974); OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TENN. CODE ANN. 40-2405 (1975); WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

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

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

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

31. *Id.* at 453.

32. *Id.*

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

The Supreme Court went further in *Illinois v. Allen*.[34] During his trial for robbery, Allen continually disrupted the trial despite judicial warnings to behave.[35] The Court held that defendant, as a result of his misconduct, forfeited[36] his right of confrontation and that the decision to remove him and proceed with the trial in the presence of his attorney

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

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

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

35. *Id.* at 339-41. Allen was readmitted to the courtroom on several occasions, and the judge offered Allen the option of remaining at the trial if Allen would promise good behavior. Allen replied, "I'll promise you shit." Appendix to Petition for Certiorari at 38, Illinois v. Allen, 397 U.S. 337 (1970), *cited in The Supreme Court, 1969 Term, supra* note 25, at 91 n.6.

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

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

(citations omitted).

See also Note, Illinois v. Allen: *The Unruly Defendant's Right to a Fair Trial*, 46 N.Y.U. L. REV. 120, 132-34 (1971); 22 S.D. L. REV. 447 (1977); 28 U. PITT. L. REV. 443, 455 (1967).

was proper.[37]

The Supreme Court elucidated the final exception to the right of confrontation—the necessity exception—in *Mancusi v. Stubbs*.[38] Defendant Stubbs claimed that a Tennessee court, in retrying him for murder, had violated his constitutional right of confrontation by admitting the testimony of a witness at his previous trial.[39] The government argued that the witness, who had moved to Sweden before the retrial, was unavailable. Holding that the witness' testimony at the first trial bore "sufficient indicia of reliability,"[40] the Supreme Court ruled that the Tennessee court, after finding that the witness was, in fact, unavailable[41] to testify at the second trial, had properly admitted the testimony

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37. 397 U.S. at 343. With its strong emphasis on defendant's misbehavior, the forfeiture exception to the right of confrontation has been limited to extreme cases of misconduct by the accused. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 158 (1878) (defendant who voluntarily keeps a witness from testifying cannot insist on right of confrontation); United States v. Carlson, 547 F.2d 1346, 1359-60 (8th Cir. 1976) (witness' prior grand jury testimony held admissible despite absence of confrontation with defendant because defendant's intimidation of witness caused witness' unavailability at trial), *cert. denied*, 431 U.S. 914 (1977). United States v. Mayes, 512 F.2d 637, 648-51 (6th Cir.) (defendant who brings about denial of confrontation in furtherance of his own interests may not complain of violation of his constitutional rights), *cert. denied*, 422 U.S. 1008 (1975), *cf.* Parker v. Gladden, 385 U.S. 363 (1966) (per curiam) (bailiff's misconduct violated defendant's right of confrontation); Douglas v. Alabama, 380 U.S. 415, 418-20 (1965) (prosecutor's misconduct violated defendant's right of confrontation); State v. Collins, 265 Md. 70, 78-79, 288 A.2d 163, 168 (1972) (defendant's absence, through no fault of his own, at deposition of witness violated defendant's sixth amendment right of confrontation). Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 CRIM. L. BULL. 293 (1973) (if prosecutor refers to evidence outside the record in his summation, burden should be on prosecution to establish that error was harmless). *See also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 139 (1972) ("[a] defendant who murders a witness ought not be permitted to invoke the right of confrontation to prohibit the use of his accusation").

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

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

40. The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans* . . . [400 U.S. 74, 89 (1970)], and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green* . . . [399 U.S. 149, 161 (1970)]. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability" referred to in *Dutton*.

408 U.S. at 213.

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

into evidence at Stubb's retrial.[42]

The necessity exception to confrontation is reflected in Rule 15 of the Federal Rules of Criminal Procedure.[43] Under Rule 15 deposition evidence is admissible at trial[44] if the deponent is unavailable to testify.[45]

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cert. denied, 431 U.S. 918 (1977), *with* United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976) (witness who testified to lack of memory concerning material portion of subject matter of his prior testimony was "unavailable" at trial), *cert. denied*, 429 U.S. 1101 (1977), *and* United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971) (declarant who refused to take oath and made it clear that he would not testify was "unavailable" at trial), *cert. denied*, 410 U.S. 984 (1973).

See generally FED. R. EVID. 804(a), defining "unavailability as a witness" as including situations in which the witness

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of his statement; or
> . . . .
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

But see Barber v. Page, 390 U.S. 719, 722-25 (1968) (state must make good-faith effort at obtaining attendance of witness at trial before court may declare witness unavailable); Motes v. United States, 178 U.S. 458, 467-74 (1900) (witness' prior testimony inadmissible because negligence of prosecution caused declarant's absence at trial); United States v. Lynch, 499 F.2d 1011, 1022-23 (D.C. Cir. 1974) (party offering out-of-court statement carries burden of demonstrating unavailability of declarant); *but cf.* United States v. Bell, 500 F.2d 1287, 1290 (2d Cir. 1974) (trial court's unavailability ruling reviewable only for abuse of discretion).

See generally Symposium on the Proposed Federal Rules of Evidence: Part I, 15 WAYNE L. REV. 1076, 1101-06 (1969); Note, *The Unavailability Requirement for Exceptions to the Hearsay Rule*, 41 MO. L. REV. 404 (1976); 54 IOWA L. REV. 477 (1969).

42. 408 U.S. at 216.

43. *See* note 3 *supra*.

44. *See, e.g.*, United States v. King, 552 F.2d 833, 840-41 (9th Cir. 1976) (rejecting contention that confrontation clause prohibits use of witness' deposition at criminal trial), *cert. denied*, 430 U.S. 966 (1977); United States v. Ricketson, 498 F.2d 367, 374 (7th Cir.) (same), *cert. denied*, 419 U.S. 965 (1974); United States v. Singleton, 460 F.2d 1148, 1152-53 (2d Cir. 1972) (same), *cert. denied*, 410 U.S. 984 (1973). *See* 19 N.Y.L.F. 198 (1973); 1973 UTAH L. REV. 839. *See generally* Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 18-19 (1969).

45. FED. R. CRIM. PROC. 15(e), *supra* note 3. *See* notes 12, 41 *supra*.

The Supreme Court has stated that the right of confrontation is not a mere codification of the hearsay rule and its exceptions. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.") (footnotes omitted); California v. Green, 399 U.S. 149, 155 (1970); Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). *But cf.* Salinger v. United States, 272 U.S. 542, 548 (1926) (purpose of confrontation clause is to preserve the common-law right and its exceptions). *See also*

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

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

Nevertheless, the policies underlying the necessity exception to confrontation and the exceptions to the hearsay rule are similar. *See, e.g.*, Dutton v. Evans, 400 U.S. at 80-83 (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); California v. Green, 399 U.S. at 165 (alternative holding) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness if defendant had opportunity to cross-examine that witness at time of recording); Delaney v. United States, 263 U.S. 586, 590 (1924) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); Mattox v. United States, 156 U.S. 237, 244 (1895) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness because defendant had opportunity to cross-examine at time of recording); Mattox v. United States, 146 U.S. 140, 151 (1892) (allowing admission at criminal trial of dying declaration); United States v. Martinez, 573 F.2d 529, 533 (8th Cir. 1978) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); McLaughlin v. Vinzant, 522 F.2d 448, 450-51 (1st Cir.) (allowing admission at criminal trial of spontaneous utterance), *cert. denied*, 423 U.S. 1037 (1975); United States v. Snow, 521 F.2d 730, 734-36 (9th Cir. 1975) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy), *cert. denied*, 423 U.S. 1090 (1976); United States v. Lipscomb, 435 F.2d 795, 802-03 (5th Cir. 1970) (allowing admission at criminal trial of entries in the regular course of business), *cert. denied*, 401 U.S. 980 (1971); Hanley v. United States, 416 F.2d 1160, 1167-68 (5th Cir. 1969) (same), *cert. denied*, 397 U.S. 910 (1970); United States v. Kelly, 349 F.2d 720, 770-71 (2d Cir. 1965) (allowing admission at criminal trial of recorded past recollection), *cert. denied*, 384 U.S. 947 (1966); Reed v. Beto, 343 F.2d 723, 724 (5th Cir. 1965) (allowing admission at criminal trial of public records of routine character). *But see, e.g.*, Barber v. Page, 390 U.S. 719, 722-25 (1968) (expanding "unavailability" concept beyond its traditional hearsay definition); Kirby v. United States, 174 U.S. 47, 53-56 (1899) (denying admission at criminal trial of record of conviction of thieves to prove that property received by defendant had been stolen); Phillips v. Neil, 452 F.2d 337, 343-48 (6th Cir. 1971) (refusing admission at criminal trial of entry in the regular course of business), *cert. denied*, 409 U.S. 884 (1972).

See generally Baker, *supra* note 16; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Griswold, *supra* note 16; Read, *The New Confrontation—The Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *supra* note 15; Younger, *Hearsay and Confrontation, Or, What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay*, 2 NAT'L J. CRIM. DEF. 65 (1976). Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense*, 56 GEO. L.J. 939 (1968); Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360 (1968); Note, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965); Note, *Hearsay and Confrontation: Can the Criminal Defendant's Rights Be Preserved Under a Bifurcated Standard?*, 32 WASH. & LEE L. REV. 243 (1975), 38 LA. L. REV. 858 (1978), 40 MO. L. REV. 150 (1975); 13 U.C.L.A. L. REV. 366 (1966), 31 VAND. L. REV. 682 (19[illegible]); 75 YALE L.J. 1434 (1966).

See also C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 252 (2d ed. 1972); J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE at ¶ 800 [04] (1977); 5 WIGMORE, EVIDENCE §§ 1365, 1395-1400 (Chadbourn rev. 1974).

trials.[46]

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

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

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

(emphasis added).

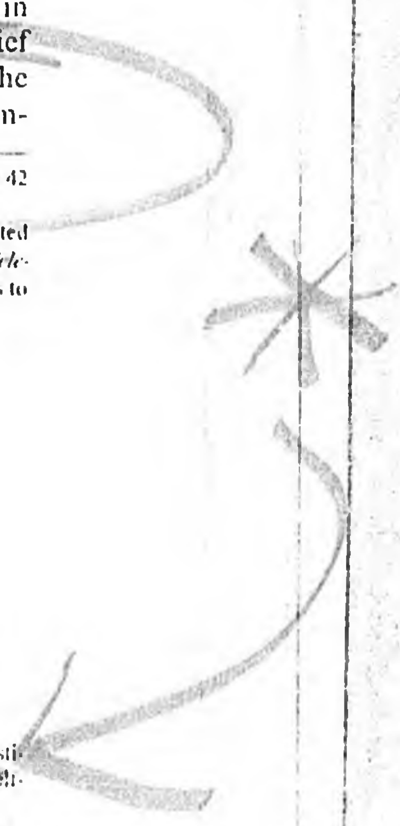
See State v. Reid, 114 Ariz. 16, 27-29, 559 P.2d 136, 147-49 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by non-key witness), *cert. denied*, 431 U.S. 921 (1977); People v. Moran, 39 Cal. App. 3d 398, 410, 114 Cal. Rptr. 413, 420 (1974) (allowing admission at criminal trial of video-taped testimony by main prosecution witness; "[v]ideo tape is sufficiently similar to live testimony to permit the jury to properly perform its function"); Hutchins v. State, 286 So.2d 244, 245-46 (Fla. Dist. Ct. App. 1973) (allowing admission at criminal trial of video-taped testimony by expert witness); State v. Hewett, 86 Wash. 2d 487, 490-98, 545 P.2d 1201, 1203-05 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by victim).

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

A wealth of material discussing the use of video tape at various stages of the trial process exists; most commentators advocate its use in the courtroom. *See generally* Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Bermant & Jacoubovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 HASTINGS L.J. 999 (1975); Cunningham, *Videotape Evidence: Technological Innovation in the Trial Process*, 36 ALA. LAW. 228 (1975); Doret, *Trial by Videotape—Can Justice Be Seen to Be Done?*, 47 TEMP. L.Q. 228 (1974); Kennelly, *The Practical Uses of Trialvision and Depovision*, 1972 TRIAL LAW. GUIDE 183; Kornblum & Rush, *Television in Courtroom and Classroom*, 59 A.B.A.J. 273 (1973); Leibson, *How and When to Use Video Tape Depositions*, 42 KY. BENCH & B. 30 (Apr. 1978); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463 (1973); Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45 (1972); Morrill, *Enter—The Video Tape Trial*, 3 J. MAR. J. PRAC. & PROC. 237 (1970); Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. L. & SOC. PROBS. 363 (1973); Note, *Nebraska Faces Videotape: The New Video Technology in Perspective*, 6 CREIGHTON L. REV. 214 (1972); Note, *Video-Tape Trials: A Practical*

In *United States v. Benfield*[47] the Eighth Circuit Court of Appeals asserted that both physical confrontation and concurrent cross-examination are essential elements of a defendant's sixth amendment right of confrontation.[48] Unless the defendant waives, forfeits, or loses by necessity this constitutional right, a confrontation that does not entail an actual face-to-face meeting between the accused and the witness does not meet the requirements of the sixth amendment.[49] In reaching this conclusion, the Court specifically relied upon *Mattox v. United States*,[50] *Kirby v. United States*,[51] *Dowdell v. United States*,[52] and *Snyder v. Massachusetts*.[53] Writing for a unanimous court, Chief Judge Gibson argued that, "While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment."[54]

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



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

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

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

48. *Id.* at 821.

49. *Id.* at 820-22.

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

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

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

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

54. 593 F.2d at 821.

55. *Id.*

56. *Id.*

> The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.

Id.

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

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

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

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

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

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proposition is sound from a psychological standpoint is unclear. *See generally* C. KLEINKE, FIRST IMPRESSIONS 27 (1975); M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 166-73 (1972); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967); 44 U.M.K.C. L. REV. 517, 521-25 (1976); *see also* United States v. West, 574 F.2d 1131, 114[?] (4th Cir. 1978) (Widener, J., dissenting) (undocumented statement that "we must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face").

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

58. *Id.* at 821-22.

59. *Id.* at 821.

60. *Id.* The court merely assumed, without deciding, that a grievous crime against a person could excuse the victim from facing the defendant while testifying. *Id.* Although noting that State v. Richey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971), allowed the examination, in defendant's absence, of a child abuse victim's competency to testify, the *Benfield* court found no indication that the child had given substantive testimony in the defendant's absence. 593 F.2d at 821 n.1[?]. The *Benfield* court concluded that "[t]o find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons." *Id.* at 821.

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

62. *Id.*

63. "Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming." *Id.* at 821.

frontation right to pass constitutional muster."[64] The court ordered that Benfield's conviction be reversed[65] and, after disposing of Benfield's objections against the government's ability to retry him,[66] remanded the case to the district court for further proceedings.[67]

Benfield's significance lies in the Eighth Circuit's reestablishment of the requirement of a face-to-face meeting between defendants and witnesses as an important part of the constitutional right of confrontation. The court's emphasis on defendants' right to personal, physical confrontation is consistent with the *Mattox* line of cases[68] and the holdings of *Diaz* and *Allen*.[69] The Supreme Court's recent focus on effective cross-examination as the essential element of confrontation, however, had shifted the requirement of physical confrontation to the background.[70] Thus, the *Benfield* court's reemphasis on face-to-face meetings absent a showing of waiver, forfeiture, or necessity indicates that physical confrontation has not been eliminated from the rights guaranteed by the sixth amendment.

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

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

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

65. *Id.* at 822.

66. *Id.*

67. *Id.*

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

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

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

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

72. *Cf. The Supreme Court, 1969 Term*, *supra* note 25, at 115 (when applied to *Benfield*, suggests that although video tape sufficiently exhibits a witness' demeanor, the Constitution may not require that the jury view demeanor).

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

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

UNITED STATES of America, Appellee,

v.

Russell Wayne BENFIELD, Appellant.

No. 78-1665.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 11, 1978.

Decided March 8, 1979.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, John F. Nangle, J., of misprision of felony, and he appealed. The Court of Appeals, Gibson, Chief Judge, held that: (1) where defendant was not allowed to be active participant in videotaped deposition and witness was deceived as to presence of defendant in building and defendant's ability to hear and view testimony as it was given, use of the videotape deposition at trial violated defendant's constitutional right to confrontation; (2) evidence was sufficient to support conviction for misprision of felony, and (3) Fifth Amendment did not present bar to retrial on misprision of felony charge, notwithstanding that defendant had been acquitted on charge of being accessory after the fact to kidnapping.

Reversed and remanded.

1. Criminal Law ⇨662(1)

Normally, the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇨662(1)

Constitutional right to confrontation requires cross-examination in addition to face-to-face meeting in that right of cross-examination reenforces importance of physical confrontation. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇨662(3)

Exclusion of defendant from deposition where testimony is taken for introduction at trial potentially conflicts with defendant's right to self-representation as well as to his right of confrontation. U.S.C.A. Const. Amend. 6; Fed.Rules Crim.Proc. rule 15, 18 U.S.C.A.

4. Criminal Law ⇨627.2

Although videotape deposition of witness supplied environment substantially comparable to trial, procedural substitute was constitutionally infirm where defendant was not permitted to be active participant in the video deposition and witness was deceived as to presence of defendant in building and his ability to hear and view testimony as it was given. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 15, 18 U.S.C.A.

5. Criminal Law ⇨662(1, 3)

Confrontation clause of Sixth Amendment contemplates active participation of accused at all stages of trial, including face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel; any exception should be narrow in scope and based on necessity or waiver. U.S.C.A.Const. Amend. 6.

6. Compounding Offenses ⇨6

Evidence was sufficient to support conviction for misprision of felony for failure to notify authorities once defendant had knowledge of kidnapping. 18 U.S.C.A. § 4.

7. Criminal Law ⇨1175

Inconsistent verdicts in a single trial do not form basis for reversal of conviction.

8. Judgment ⇨751

Criminal rule of collateral estoppel does not apply to verdicts of guilt and innocence rendered in a single trial.

9. Criminal Law ⇨186

Fifth Amendment did not clearly bar retrial of defendant following reversal of conviction for misprision of felony, notwithstanding that defendant was acquitted at trial on charge of being accessory after the fact to kidnapping. 18 U.S.C.A. §§ 3, 4; U.S.C.A.Const. Amend. 5.

John C. Pleban, London, Greenberg & Fleming, St. Louis, Mo., argued and on brief, for appellant.

David M. Rosen, Asst. U. S. Atty., St. Louis, Mo., (argued), and Robert D. Kingsland, U. S. Atty., St. Louis, Mo., on brief, for appellee.

Before GIBSON, Chief Judge, and BRIGHT and HENLEY, Circuit Judges.

GIBSON, Chief Judge.

A jury found Russell Wayne Benfield guilty of misprision of a felony in violation of 18 U.S.C. § 4[1] and acquitted him of being an accessory after the fact to kidnapping in violation of 18 U.S.C. § 3.[2] After being sentenced to prison for two years on the misprision charge, Benfield brings this appeal. We reverse and remand.

The events leading to the conviction of Benfield took place during February 1977. Prior to February 24, 1977, John Bates was an inmate at the Arizona State Penitentiary pursuant to his conviction for assault with a deadly weapon. On that date Bates broke out of the Arizona penitentiary with the assistance of his wife, Charlotte. The following day John and Charlotte Bates forcibly took Patricia Cady and her automobile from a hospital parking lot in Tucson, Arizon. The Bateses then drove the automobile, with Cady as a prisoner, to St. Louis, Missouri, where they arrived on February 27, 1977.

Prior to his arrival in St. Louis, John Bates telephoned Russell Benfield several times, both before and after kidnapping Cady. The substance of those conversations was disputed at trial. The Government's version came in through the testimony of Charlotte Bates and Patricia Cady as to what John Bates told them had been said. According to this version Bates told Benfield about the kidnapping during a phone call from Las Cruces, New Mexico, and Benfield told Bates to bring Cady to St. Louis. Benfield testified that he did not learn of the jailbreak or kidnapping until Bates arrived in Missouri.

In any event, Benfield did meet with Bates in St. Louis. Benfield rented a motel room for Bates in which Patricia Cady was held. Cady was blindfolded and only saw parts of Benfield's face and body. As in the case of the telephone conversations, the Government's version of the discussions between Benfield and John Bates was presented through Charlotte Bates's and Patricia Cady's recollections of what Bates recalled after Benfield had left. The Government presented evidence that Benfield gave John Bates sixty-six dollars, and promised to bring additional funds to him in Kennett, Missouri.

According to Benfield, once he learned of the kidnapping his efforts were directed at securing Cady's release unharmed and causing Bates to leave St. Louis. Benfield claims he told Bates he would supply money if Cady were released. Bates then agreed to release Cady in Memphis, Tennessee, and return to St. Louis for money received by Benfield from Bates's account in a Marine Corps credit union.

From St. Louis, John and Charlotte Bates took Patricia Cady to Kennett, Missouri,

1. 18 U.S.C. § 4 provides:

Misprision of felony

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

2. 18 U.S.C. § 3 provides:

Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

where John Bates met with Roger Benfield, Russell's brother, but failed to receive any aid from him. While the group was in Kennett, law enforcement officers apprehended Charlotte Bates and released Patricia Cady. John Bates took his own life. Patricia Cady then participated in a news conference and granted interviews with journalists and the broadcast media. Patricia Cady has commenced civil actions against the State of Arizona stemming from the abduction and Charlotte Bates has been convicted of aiding and abetting the kidnapping of Patricia Cady.

In a four-count indictment filed September 29, 1977, Benfield was charged with being an accessory after the fact to the kidnapping of Patricia Cady and to the interstate transportation of her stolen car and with misprision of those felonies. Trial was set for January 3, 1978, but was continued to February 27, 1978, due to the hospitalization of a Government witness, Patricia Cady. On February 23, 1978, the Government obtained a further continuance of the case to April 24, 1978, due to Cady's unavailability. In a letter dated January 30, 1978, Cady's psychiatrist, Dr. David B. Gurland, indicated that Cady should not be subpoenaed to appear for two or three months. Prior to April 24, 1978, Dr. Gurland again wrote the trial court, stating that Ms. Cady should not be required to endure a trial situation or face Benfield.

The Government then filed a request to take a videotape deposition of Patricia Cady in Arizona. On April 24, 1978, a hearing was held on this request and Dr. Gurland was called to testify. He stated that in his opinion Ms. Cady's psychiatric problems were directly related to her abduction.[3] He recommended that she not be required to testify or that circumstances less stressful than a trial courtroom be arranged. The trial court granted the request for a deposition and ordered that Benfield could be "present at the deposition but not within the vision of Mrs. Patricia Cady."

The deposition was held on May 11, 1978, in Tucson, Arizona. Benfield was excluded from the room in which the deposition took place. He was able to observe the proceedings on a monitor and halt the questioning by sounding a buzzer, at which time the deposition would be interrupted and Benfield's counsel would leave the room to confer with Benfield. The counsel was permitted to cross-examine Cady. However, Cady was apparently kept unaware of Benfield's presence in the building.

Thereafter, trial commenced in St. Louis on July 10, 1978. The videotaped deposition of Cady was admitted in evidence and played to the jury.[4] At the conclusion of the case, the trial court granted Benfield's motions for acquittal regarding the counts arising from interstate transportation of a stolen automobile. The remaining two counts were submitted to the jury and, as we have said, Benfield was convicted of misprision of felony but was acquitted of the charge of being an accessory after the fact.

Following the denial of various post-trial motions, Benfield brings this appeal. He raises several points. Because of the view we take of the case, we shall consider only two of the issues presented. First, were Benfield's constitutional rights as guaranteed by the sixth amendment violated by the procedures employed during the deposition of Patricia Cady? Second, under the facts of this case, is a second trial precluded by the acquittal of Benfield on the accessory after the fact charge?

The sixth amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him

3. Ms. Cady's infirmity began several months after the kidnapping. It gradually worsened until she could no longer tolerate crowd situations and was unable to work.

4. The Government made only a marginal showing of Cady's unavailability at trial. No new evidence of her condition was presented. Instead, the Government relied on the failure of Dr. Gurland to notify them of any improvement in her condition. An additional showing of the witness's mental condition and availability on the trial date would have been a much better practice.

* * *." These words express the commitment of our law to certain values in the determination of the guilt or innocence of those accused of crime. At first glance, the command that is embodied in that phrase seems so simple and unambiguous as to defy expression through any other words. It was adopted in response to supposed deficiencies in the original Constitution.[5] However, since the sixth amendment was ratified on December 15, 1791, it has been camouflaged by case law and nibbled by necessity. Today the Government urges that "face-to-face meetings" are not part of the rights guaranteed by the sixth amendment.

The courts have always been committed to giving obedience to constitutional commands. In *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), the Court interpreted the common-law and constitutional right of the accused to confront and challenge prospective jurors face to face. The Court seems to have been of the view that this and other sixth amendment rights were so important to the accused *and to the public* that they could not be waived. Twenty years later, the Court decided *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912). *Diaz* held that an accused who was not in custody could waive his right to be present at all times during the trial. *Diaz* distinguished and narrowly construed the holding of *Lewis*. 223 U.S. at 458, 13 S.Ct. 136.

The Supreme Court construed the sixth amendment's confrontation clause in at least three cases decided between 1895 and 1911. In *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), Mattox had been convicted at a trial in which the transcribed testimony of two witnesses given at a prior trial was admitted. At the time of the second trial, the witnesses were deceased. The Court recognized that the admission of this testimony was in conflict with the letter of the sixth amendment. However, the conviction was affirmed and the court stated:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. * * *

5. The complaints foreshadowing the sixth amendment were expressed by one anti-federalist, as follows:

> For the security of life, in criminal prosecutions, the bills of rights of most of the States have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he shall not be compelled to accuse, or furnish evidence against himself—the witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular State? The powers vested in the new Congress extend in many cases to life; they are authorized to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the State where the said crimes shall have been committed." No man is secure of a trial in the county where he is charged to have committed a crime; he may be brought from Niagara to New York, or carried from Kentucky to Richmond for trial for an offence supposed to be committed. What security is there, that a man shall be furnished with a full and plain description of the charges against him? That he shall be allowed to produce all proof he can in his favor? That he shall see the witnesses against him face to face, or that he shall be fully heard in his own defence by himself or counsel?

No. II, Letters of Brutus (1788), *reprinted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 508 (1971).

> *The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of,* and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven.

156 U.S. at 243–44, 15 S.Ct. at 340. (emphasis added).

The court again considered the right of confrontation in *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899). Kirby was charged with receipt of stolen property. At trial the Government introduced the record of the conviction of third parties for theft of the property to establish that it had been stolen. The Supreme Court held that this procedure deprived Kirby of his sixth amendment rights:

> The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

174 U.S. at 55, 19 S.Ct. at 577. It is clear that in *Kirby*, as in *Mattox* four years earlier, the Court viewed physical confrontation as an element of the sixth amendment guarantees. The same perception was expressed in *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911). There the Court noted that the constitutional provision was "intended to secure the right of the accused to meet the witnesses face to face, and thus to sift the testimony produced against him * * *." The *Dowdell* court noted there were well-recognized exceptions, one being where the appeal record was supplemented by the notes and recollections of the trial judge and court officials regarding events at trial. These cases show that prior to the availability of television, confrontation generally involved a face-to-face meeting with one's adversaries. *See also Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Curtis v. Rives*, 75 U.S.App.D.C. 66, 123 F.2d 936, 938 (1941); H. Underhill, Criminal Evidence § 411 (4th ed. J. Niblack 1935).

In recent years, the Supreme Court and this court particularly have considered two aspects of the sixth amendment relevant to this case. In some situations it has been held that the accused forfeited or waived his confrontation rights. Other cases have held evidence admissible because of its reliability and importance despite the sixth amendment guarantee. The first aspect was clearly expressed in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), which held "that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. at 343, 90 S.Ct. at 1060. The Court went on to say that the right could be reclaimed as soon as the defendant agreed to conduct himself properly. In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977), this court held that the defendant had waived his right of confrontation when he intimidated the prospective witness prior to trial. As a result of the intimidation, the witness refused to testify at trial and the Government was permitted to introduce the witness's grand jury testimony as substantive evidence of the defendant's guilt. 547 F.2d at 1358–60.

In *Carlson* we also discussed several of the Supreme Court cases that have con-

sidered the conditions under which out-of-court statements may be admitted as evidence despite absence of confrontation with the accused. 547 F.2d at 1356–57. Without prolonging this opinion with a discussion of those cases, we note that it has been held that when a witness is actually unavailable at trial his prior testimony may be admitted if sufficient indicia of reliability are present. *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 722, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); 5 Wigmore, Evidence § 1398 (Chadbourn rev. 1974).

The above exception to trial confrontation is reflected in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. Fed.R.Evid. 804(a) defines witness unavailability to include situations in which the declarant is unable to testify at the hearing because of then-existing physical or mental illness or infirmity. Fed.R.Crim.Proc. 15[6] provides for the taking of depositions and their use at trial if the witness is unavailable at trial under Fed.R.Evid. 804(a). Rule 15 ensures the right of the defendant to be present at the taking of the deposition. If the defendant is in custody he is to be transported to the place of the deposition and be present at its taking unless he persists in disruptive behavior after being warned to act properly. If the defendant is not in custody he has the right to be present, "subject to such terms as may be fixed by the court."[7] In the present case the terms fixed by the trial court were that Benfield not be "within the vision" of witness Cady. As interpreted by the attorneys, this apparently extended to deceiving

6. Fed.R.Crim.Proc. 15 provides in pertinent part:

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

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

* * * * * *

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

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. [Emphasis added.]

7. An argument can be made that the deposition of Cady violated Rule 15 in that the examination and cross-examination were not in the manner "such as would be allowed in the trial itself." However, as noted in the text, the rule permits the court to fix the terms governing the presence at the deposition of an accused who is not in custody. We decline to decide the case on this basis, in part because Benfield has not pressed this particular argument, but also because the terms of the rule apparently permit greater restriction of the presence of an accused who is not in custody than of the presence of an accused who is in custody. We do not wish to consider the equal protection impact of the rule on this record.

the witness as to the presence of Benfield in the building and his ability to hear and view the testimony as it was given.

[1–4] After carefully considering the sixth amendment, applicable case law, and this record, we are satisfied that the rights of Benfield were abridged by the above procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. *Mattox*, *Kirby*, *Dowdell*, and *Snyder*, which were discussed above, all support that view. While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.[8] While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgment of the defendant's rights.[9] A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.

[5] In the present case there can be no serious contention that Benfield waived his right to be present voluntarily or through misconduct. Even if we assume that the alleged involvement of a defendant charged with a crime against persons could be so heinous as to excuse the victim from facing him while testifying, the present case does not involve conduct of that magnitude.[10] Benfield did not threaten or personally harm Patricia Cady. To find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons.

Here the right of confrontation was considerably curtailed by the procedures employed. What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct. Too great an abridgment was made of defendant's confrontation right to pass constitutional muster. Basically the confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel. A further exception to the face-to-face aspect of the confrontation clause urged by the Government presents a too severe curtailment of this constitutional right. Any exception should be narrow in scope and based on necessity or waiver.

Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming. Here the

8. Exclusion of the defendant from a deposition where testimony is taken for introduction at trial also potentially conflicts with the defendant's right of self-representation. 28 U.S.C. § 1654. *See generally Faretta v. California*, 422 U.S. 806, 816, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

9. The parties cited no cases specifically dealing with the absence of a defendant from a deposition due to no fault of the defendant. Our research revealed only *Collins v. State*, 12 Md. App. 239, 278 A.2d 311 (1971), which supports our conclusion. *See also State v. Hewett*, 86 Wash.2d 487, 545 P.2d 1201, 1204 (1976).

10. *State v. Richey*, 107 Ariz. 552, 490 P.2d 558 (1971) held that it was permissible to examine the competency of a seven-year-old child abuse victim in the absence of the defendant. There is no suggestion that the child's substantive testimony was given without the defendant's presence. That case also involved a non-jury trial.

defendant was not allowed to confront the witness face to face and the witness was apparently unaware that her testimony was being monitored by the defendant.[11] While we do not doubt the truthfulness of Patricia Cady or that she has suffered a terrible ordeal, the accuracy of her perception of the events during the kidnapping and her recollection and expression of those events was crucial to the Government's case. The partial confrontation allowed was inadequate to test those features of her testimony. The conviction must be reversed.

[6] The issue that remains is whether the Government should be permitted to retry Benfield if it so chooses. Benfield contends that the evidence was insufficient to support the conviction. We disagree. While some factual details and Benfield's intent were disputed, the jury was fully justified in reaching a guilty verdict. In fact, the record clearly discloses that Benfield had at some point knowledge of the kidnapping and made no attempt to notify the authorities, but on the contrary did, albeit reluctantly, aid and assist the kidnappers in carrying on and concealing the offense. Thus, while his intent remains an issue for jury determination, the undeniable facts support a conviction for misprision of felony.

[7, 8] It is also suggested that the acquittal on the accessory after the fact charge and the conviction on the misprision of felony charge were inconsistent. Even if we assume that the two were inconsistent, it is clear that inconsistent verdicts in a single trial do not form the basis for reversal of a conviction. *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *United States v. Wetzel*, 488 F.2d 153 (8th Cir. 1973). Similarly, the criminal rule of collateral estoppel found in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), does not apply to verdicts of guilt and innocence rendered in a single trial. In this case Counts I and II do charge distinct crimes. We are reluctant to decide whether Benfield's acquittal on the accessory after the fact charge collaterally prevents a conviction on the misprision charge at a second trial. Our reluctance is grounded in our usual hesitancy to decide questions not fully briefed and argued by the parties as well as our knowledge that the question will be moot if the Government now declines to prosecute Benfield or if a second jury should acquit. Also, we are reluctant further to enlarge the collateral estoppel doctrine in cases involving multiple counts where the admitted facts are at odds with the jury finding conjectured by the plaintiff. This could lead to an absurd result.

[9] On the record now before us, the fifth amendment issue does not present a clear bar to a retrial of the misprision count. Although not obligated to, Benfield could have notified the authorities of the kidnapping offense when he learned of it and before engaging in any of the affirmative actions of assistance or concealment.

The cause is reversed and remanded to the District Court for further proceedings consistent with this opinion.[12]

11. It is possible that face-to-face confrontation through two-way closed circuit television might be adequate. By a four to three vote, the Missouri Supreme Court has approved the use of such testimony by an expert witness in a case involving violation of a municipal ordinance, despite a defense based on the sixth amendment. *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo.1975). Among the more disturbing aspects of the decision is that there was no showing of extraordinary circumstances necessitating reliance on the procedure.

12. In the interest of brevity we have omitted discussion of other issues raised on appeal. The argument raised by Benfield concerning pretrial delays is meritless. The other contentions, even if valid, would not prevent a second trial.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

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

II. FISCAL DETAIL

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

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
FULL TIME						
PART TIME						
TEMPORARY						

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

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

IV. DATE 1/12/82 PREPARED BY Richard P. Barrier [signature]
AGENCY Alaska Court System
PHONE 264-0545

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

THE LEGISLATURE OF [illegible]

TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 576

Title Videotaping of testimony of victims of sexual assault

Requested by House Judiciary Committee Date 1/7/82

II. FISCAL DETAIL

Agency Affected Department of Law

Program Category Affected Administration of Justice

BRU, Program, Or Subprogram(s) Affected

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

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

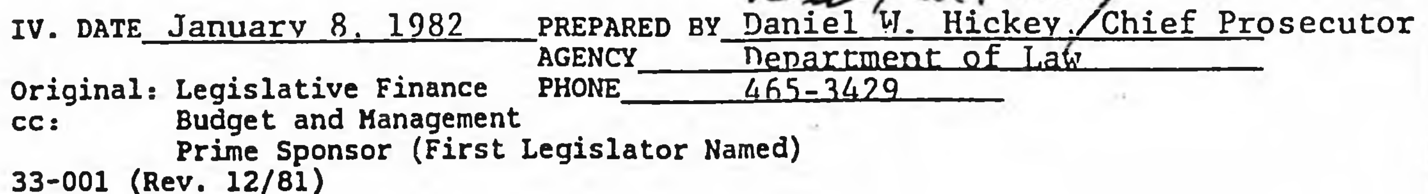
	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

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

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

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



IV. DATE January 8, 1982 PREPARED BY Daniel W. Hickey, Chief Prosecutor

AGENCY Department of Law

PHONE 465-3429

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

(Other types of federal procedural rules were published from time to time in various volumes of *F.R.D.*).

E. ANNOTATED REPORTS

1. SYSTEM OF SELECTED AND ANNOTATED REPORTS

Each generation of lawyers has tended to feel that the number of law books has, at last, reached impossible and unmanageable proportions. With both the number and cost of these volumes rising each year, systems of selected case reports have become increasingly important in legal research. As the name implies, these reports have been selected by the law book publishers from the great mass of decisions as those having the greatest and broadest legal significance.

To these decisions, the publishers have added statements or annotations, listing and analyzing other cases dealing with a particular point of law. Over the years, these annotations have become more complex and detailed, growing from very brief notes in the early volumes to extensive articles today, sometimes over a hundred pages in length. The major publisher of annotated reporters is the Lawyers Cooperative Publishing Company, which issues *American Law Reports (A.L.R.)* and *American Law Reports Federal.* These reporters are known collectively as the annotated reports system, and the sets in this system are listed below with the dates of the decisions covered:

Selected and Annotated Reports

Trinity Series	
American Decisions (Am.Dec.) 100 vols.	1760–1869
American Reports (Am.Rep.) 60 vols.	1869–1887
American State Reports (Am.St.Rep.) 140 vols.	1887–1911
Annotated Cases	
American & English Annotated Cases (Ann.Cas.) 53 vols.	1906–1918
Lawyers Reports Annotated	
Lawyers Reports Annotated, First Series, (L.R.A.) 70 vols.	1888–1906
Lawyers Reports Annotated, New Series, (L.R.A., N.S.) 52 vols.	1906–1914
Lawyers Reports Annotated, Dated Series, (L.R.A. 1915 etc.) 24 vols.	1915–1918
American Law Reports	
American Law Reports Annotated (A.L.R.) 175 vols.	1919–1948
American Law Reports, Annotated, Second Series, (A.L.R.2d)	1948–1965
American Law Reports, Annotated, Third Series, (A.L.R.3d)	1965–
American Law Reports Federal (ALR Federal)	1969–

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

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

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

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

POSITIONS

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

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

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

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

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

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

33-001 (Rev. 12/81)

III. ANALYSIS (Continued)

Salary:

Anchorage:

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

Fairbanks

1 Clerk I at Range 8 ($19,356):	19,356
	$73,104
Benefits:	$24,698
Total Personnel	$97,802

Equipment:

4 desks, chairs typewriters	6,672

AK Statutes

SEC. 09.25.120 - Inspection and Copying of Public Records

⇓

all records are public EXCEPT (3) types -

#3 records pertaining to juveniles

Administ. Rule 37.5 - re: access to public records

EXCEPT - those that are kept confidential by a special court order

(per S.C. ruling implemented Feb 8, 1982)

S.C. Rule 49 (CrR-151) - administrative director w/ approval of c.j. makes rules regarding administration etc. of records

HB
577

CITY OF KOTZEBUE

P.O. BOX 46
KOTZEBUE, ALASKA 99752

KOTZEBUE POLICE DEPARTMENT
907-442-3351

September 22, 1981

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

Dear Representative Barnes:

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

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

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

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

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

Donald E. Buehler
DONALD E. BUEHLER
Chief of Police

cc: AS Revisions file
Sgt Jones
Sgt Wallace

DEB/dew

"GATEWAY TO NORTHWEST ALASKA"

Introduced: 5/15/81
Referred: Judiciary

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

IN THE HOUSE

HOUSE BILL NO. 577

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act repealing provisions relating to justification of the use of force in resisting or interfering with arrest."

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

Sec. 1. The following laws are repealed: AS 11.81.400(a)(2), 11.81.400(c), and 11.81.400(d).

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 577
Title An Act Repealing Provisions - Use of Force - Arrest
Requested by House Judiciary Committee Date 1/8/82

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

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

HB 577 repeals certain provisions of AS 11.81.400 relating to justification of the use of force in resisting arrest. This bill will have no fiscal impact on the Alaska Court system.

IV. DATE 1/12/82 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

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

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 577
Title Repealing the right to resist an unlawful arrest.
Requested by House Judiciary Committee Date 1/7/82

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

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

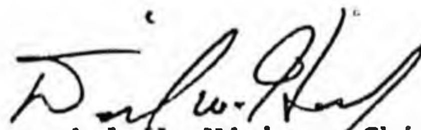
	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

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

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

This legislation repeals the right to resist an unlawful but otherwise peaceful arrest. This statutory change will result in no additional costs and expenditures and possibly result in several shorter trials a year by eliminating this issue from litigation.



IV. DATE January 8, 1982 PREPARED BY Daniel W. Hickey / Chief Prosecutor
AGENCY Department of Law
PHONE 465-3429

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

33-001 (Rev. 12/81)

See page 426 et seq.

Terry Glenn MILLER, Appellant,
v.
STATE of Alaska, Appellee.
No. 986.

Supreme Court of Alaska.
Dec. 15, 1969.

The defendant was convicted of stabbing at another with intent to wound. The Superior Court, Third Judicial District, Ralph E. Moody, J., rendered judgment, and defendant appealed. The Supreme Court, Connor, J., held that a private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether arrest is illegal in circumstances of the occasion; this rule has no application when arrestee apprehends bodily injury, or when unlawful arrest is attempted by one not known to be a peace officer.

Affirmed.

1. Indictment and Information ⇐10.1(2)

Indictment was not defective because grand jury foreman served for a few months, was temporarily excused, and then resumed service a few months later. Rules of Criminal Procedure, rule 6(e) (2), (*l*).

2. Arrest ⇐63(3)

An arrest for a misdemeanor made by an officer without a warrant is valid if offense is committed in his presence. AS 12.25.030(1).

3. Arrest ⇐63(3)

A warrantless arrest is lawful where peace officer has perceived facts which would lead a reasonable man to believe that arrestee has committed or attempted to commit an offense in his presence. AS 12.25.030(1).

4. Arrest ⇐63(3)

Where experienced police officer, late at night, set out to investigate automobile parked in lot of bowling alley which had closed for night, he stopped automobile when it started to move away, he recognized boy and girl who were in automobile and knew that they were minors, and officer noticed case of beer on floor behind driver's seat, he could arrest the boy without a warrant on charge of being minor in possession of alcoholic beverage. AS 12.25.030(1).

5. Obstructing Justice ⇐3

A private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether arrest is illegal in circumstances of the occasion; this rule has no application when arrestee apprehends bodily injury, or when unlawful arrest is attempted by one not known to be a peace officer.

6. Criminal Law ⇐686(2)

Record failed to show that trial court abused its discretion in allowing state, after it had rested its case, to call additional witnesses.

7. Criminal Law ⇐1169(3)

As respects whether there was probable cause for warrantless arrest of defendant as a minor in possession of alcoholic beverage, introduction of defendant's birth certificate, if it were error, could not have amounted to harmful error, where defendant testified that, at time of trial on charge of stabbing arresting officer with intent to wound, he was 20 years of age. AS 11.15.150.

8. Criminal Law ⇐419(3)

As respects whether there was probable cause for officer's warrantless arrest of defendant as minor in possession of alcoholic beverage, officer's testimony that on a previous occasion he had seen defendant's driver's license and had observed the birth date stated on it was not inadmissible hearsay but was admissible under doctrine which permits statements by third party declarant when they are offered to show state of mind of the one who hears the statement.

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Digest

9. Criminal Law ⚷706

Where witness testified on cross-examination that he did not recall certain words in his statement to police, on redirect examination, after refreshing his recollection with the statement, he testified that he had used such words, and on recross-examination the trial court sustained state's objection to defendant's attempt to question witness about another portion of statement on ground that question was outside scope of redirect examination, the state's offer to put whole statement in evidence was not ground for mistrial in that defendant was responsible for offer.

10. Witnesses ⚷250

In prosecution for stabbing officer who had made warrantless arrest of defendant as minor in possession of alcoholic beverage, officer's statement, volunteered in answering question in somewhat narrative form, that he had had contacts with defendant on occasions previous to the evening in question and that he was able to perceive that defendant was "under the influence" was not ground for mistrial.

11. Criminal Law ⚷627.6(4)

In prosecution for stabbing officer who had made warrantless arrest of defendant as minor in possession of alcoholic beverage, officer's notes as to defendant's age, made in course of investigation of gun accident in which defendant had shot himself, were not "statement" or "report" for purposes of statutes relating to discovery and production of statement or report in possession of state. AS 12.45.050, 12.45.060, 12.45.080.

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

12. Criminal Law ⚷800(4)

Where issue was whether officer had probable cause for warrantless arrest of defendant as minor in possession of intoxicating beverage and trial court instructed jury to effect that it was misdemeanor for minor to possess or control alcoholic beverage, failure to include in instruction the language of statute defining crime of giving liquor to minors as not including a parent as to his own child was not error, in that statute had no relevancy to instant prosecution for stabbing the arresting officer. AS 04.15.080(b), 11.15.150.

13. Criminal Law ⚷770(3)

In prosecution for stabbing officer who had made warrantless arrest of defendant as minor in possession of alcoholic beverage, requested instructions that intoxicating liquor contains more than 1% of alcohol by volume and that beverage cannot be determined to be alcoholic in content by sight alone were properly refused in that they would only have confused issue whether officer had probable cause to believe that defendant was in unlawful possession of alcoholic beverage. AS 11.15.150.

14. Criminal Law ⚷881(2)

Where indictment charged that defendant attempted to stab police officer and statute under which indictment was brought used the term "stab at another" in defining offense, and verdict found defendant guilty of attempting to stab with intent to wound but did not include words "at another", there was no material variance. AS 11.15.150.

15. Criminal Law ⚷986

Record failed to show that in sentencing defendant the court improperly relied upon mere contacts with police not resulting in convictions.

Denis R. Lazarus, Anchorage, for appellant.

Douglas B. Baily, Dist. Atty., Keith E. Brown, Asst. Dist. Atty., Anchorage, for appellee.

Before DIMOND, RABINOWITZ, BONEY, and CONNOR, JJ.

OPINION

CONNOR, Justice.

Appellant was convicted by a jury verdict of the crime of stabbing at another with intent to wound, in violation of AS 11.15.150. The one at whom the stabbing

was directed was Trooper Russell Anderson of the Alaska State Police, who was attempting to effect an arrest of appellant at the time of the attempted stabbing.

The incident out of which the indictment resulted took place in the parking lot of a bowling alley in Soldotna, Alaska, shortly before midnight on March 18, 1967.

At about 11:30 that evening Trooper Anderson and a friend, Ed Meyer, left Anderson's home in Soldotna to remove a dead moose from the Sterling Highway. On the way, they happened to notice a car parked in the lot of a bowling alley which had closed for the night. Anderson decided to check it out; and as he drew near in his patrol car, the other car made a U-turn and proceeded to the back of the bowling alley building. Anderson activated the red light on his patrol car and the other car stopped.

Anderson then walked to the driver's side of the car and found Darlene Heatherton behind the wheel and the car's owner, Terry Glenn Miller, next to her. The trooper testified that he knew both of them, and that he knew they were both minors. When he asked Miss Heatherton for her driver's license, he noticed what appeared to be a case of Lucky Lager beer on the floor behind the driver's seat. Anderson told Heatherton and Miller to get out of the car and informed them that they were under arrest for being minors in possession of an alcoholic beverage. He then took possession of the case of beer, and he noticed at that time that several of the bottles of beer were empty.

Miss Heatherton got into the patrol vehicle, but appellant became argumentative. After a scuffle, appellant returned to his car. Anderson removed appellant forcibly from his car and managed to jostle him to the patrol car where he was planning to handcuff appellant. They slipped to the ground and appellant came up wielding a bayonet. Trooper Anderson testified that Miller slashed at him with the bayonet and that his clip-on necktie might have been knocked loose by the bayonet.

Because he was now wary of appellant and the bayonet, Trooper Anderson stepped backward, unsnapped his revolver and ordered appellant to drop his weapon. Thus the investigation of an automobile parked after hours near a bowling alley had mushroomed into a serious event.

While Trooper Anderson and appellant were standing off from each other, Anderson repeatedly told appellant to drop the weapon and appellant told Anderson to leave him alone. Miss Heatherton then went to appellant to try to convince him to submit to the officer. According to the testimony of Anderson, Miller was so upset that he threatened Miss Heatherton. Finally, the impasse ended when Miller and Miss Heatherton got into Miller's car, and a few moments later the bayonet was dropped out of the car window. About this time Trooper Provine of the Alaska State Police arrived in another patrol car. Anderson and Provine then were able to remove appellant from the car, advise him that he was under arrest for attempting to stab Anderson, and turn him over to custody of Corporal English, who had just come upon the scene.

Appellant specified a number of errors in the prosecution and trial of his case. Although twelve errors are specified, these are not correlated with the body of the argument in appellant's brief. Accordingly, we must deal with the claims of error as we are best able to discern them.

I

[1] Appellant's first contentions can be grouped under the proposition that the indictment was defective because of irregularities in the constitution and administration of the grand jury. Appellant moved to dismiss the indictment on the grounds that the grand jury was extended beyond the five-month limitation prescribed by Rule 6 of the Rules of Criminal Procedure, that the foreman of the grand jury and one other grand juror were not qualified to sit as grand jurors because they had served beyond the five-month limitation,

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that the witness before the grand jury that indicted appellant was never properly sworn because the foreman was not qualified to administer the oath to the witness, and that the endorsement of the indictment was defective because the foreman was not qualified to act.

The record is clear that the grand jury foreman served in the months of August and September of 1966, that he was excused from service in October, but again served in January and March of 1967. His actual service did not exceed four separate months. He acted as foreman in January and March of 1967. It is also plain that 15 members of the grand jury voted for the indictment against appellant. Under Criminal Rule 6(c) (2) the disqualification of one or two grand jurors would not invalidate the indictment. Crawford v. State, 408 P.2d 1002, 1011 (Alaska 1965).

We see no harm inflicted on appellant because the grand jury foreman served for a few months, was temporarily excused, and then resumed service a few months later. We find this to be in substantial compliance with the pertinent rule.[1]

A case similar to this one is People v. Whalen, 26 Misc.2d 714, 208 N.Y.S.2d 130 (1960). In that case an indictment returned by a grand jury containing two unqualified members was held to be valid. The court noted that a grand jury can act through a de facto foreman without violating any constitutional rights of the accused.

The role of the foreman was described by the court in People v. Whalen, supra, in the following terms

> "The foreman of the grand jury is appointed by the judge of the court which impaneled the grand jury. He occupies roughly the same position as the foreman of a petit jury. He has no greater or lesser powers than any other grand juror. Each paneled grand juror is a distinct legal entity and the identity of the foreman is merged along with the other jurors.
>
> "The foreman is, in the absence of the courts, the presiding officer of the inquiry; he is merely the instrumentality through which the proceedings and actions of the grand jury are reported to the court, and the most important of his duties is to report all indictments which are returned by the grand jury and to endorse on such bills, as foreman, whether or not they are true bills." 208 N.Y.S. 2d, at 132.

Thus, even if the foreman was somehow not qualified, it would require a greater showing of prejudice to appellant before we would be willing to invalidate the indictment on the ground that the foreman was disqualified and that he had no power to administer oaths or sign indictments.

II

Appellant contests the validity of his arrest, made without a warrant, on the misdemeanor charge of being a minor in possession of an alcoholic beverage.

His claims of error are based upon the rejection by the trial court of appellant's exhibit B, offered to show that the misdemeanor charge against him had been dismissed, the denial of a motion for mistrial based upon the judge's statement in the presence of the jury that the only issue about the legality of the arrest was whether the officer had probable cause to believe that appellant had committed a misdemeanor in his presence, and that the court erred in instructing the jury on the legality of the arrest. Additionally, appellant claims that there was no probable cause to justify the arrest itself.

1. Crim.R. 6(l) provides: "Discharge and Excuse. A grand jury shall serve until discharged by the presiding superior court judge of the judicial district but no grand jury may serve more than 5 months, unless for good cause such period is extended. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the presiding judge may excuse a juror either *temporarily* or permanently, and in the latter event said judge may impanel another person in place of the juror excused." (Emphasis supplied.)

[2] The relevant arrest statute, AS 12.-25.030(1), authorizes a private citizen or a police officer, without a warrant, to make an arrest for a crime "committed or attempted in his presence." An arrest for a misdemeanor made by an officer without a warrant is valid if the offense is committed in his presence. Rubey v. City of Fairbanks, 456 P.2d 470, 474 (Alaska 1969); Herrin v. State, 449 P.2d 674, 677 (Alaska 1969); Drahosh v. State, 442 P.2d 44, 46 (Alaska 1968).

Appellant contends that "an officer who arrests without a warrant on a misdemeanor charge acts at his peril, since the arrest will be unlawful if the offense was actually not committed, even though the officer acted on reasonable grounds and in good faith." Under appellant's theory, Anderson's arrest of appellant on the misdemeanor charge without a warrant was lawful only if the prosecution proved that the offense was actually committed in Anderson's presence. We disagree.

In Rubey v. City of Fairbanks, supra, we held that an arrest for a misdemeanor committed in the presence of an officer was valid where what the officer observed was sufficiently indicative that an offense was in the course of commission as to lead to the logical conclusion that it was in progress. Support for that ruling was found in United States v. Viale, 312 F.2d 595 (2d Cir. 1963), in which the United States Court of Appeals applied the New York statute. The New York statute is similar to our own. In *Viale*, the court said:

"It is now clear under New York law that one person may without a warrant justifiably arrest another who commits a misdemeanor in his 'presence' only when the arrestor actually observed acts which were 'in themselves sufficiently indicative of a crime being in the course of commission * * *.' [T]he arrestor must have perceived 'indications of the commission of the offense sufficient to induce reasonable belief of the fact.'" (Citations and footnote omitted.) 312 F.2d, at 600.

In Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876 (1952), the California Supreme Court construed the applicable statute, which was also similar to AS 12.25.-030(1), as allowing an officer to make a warrantless arrest for a misdemeanor where the officer had probable cause to believe the arrestee was committing the offense in his presence. The court held that the arrest is proper when circumstances exist that would cause a reasonable person to believe that a crime had been committed in his presence. The court explained the policy reasons underlying its interpretation:

"When an arrest for a misdemeanor is made upon the complaint of one other than the arresting officer, it is proper to require the securing of a warrant to justify the arrest. * * * However, to make the same requirement, when the officer sees that in all probability a public offense is being committed in his presence, would be to hamper law enforcement officers in their everyday enforcement of the law. Peace officers would be reluctant to make arrests for fear that they would be held liable for having made an honest and reasonable mistake. It is thus manifest that the day to day problems of law enforcement require that peace officers be allowed to act without fear of being held liable upon the facts as they see them, provided such facts would lead a reasonable person to conclude that he was witnessing the commission of a public offense by the person arrested." 239 P.2d, at 879–880.[2]

[3, 4] We find these authorities persuasive. We hold that an arrest under AS 12.25.030(1) is lawful where the peace officer has perceived facts which would lead a reasonable man to believe that the

2. The statute dealt with in Coverstone v. Davies, supra, was amended in 1957 to authorize warrantless arrests where the officer reasonably believes that an offense is being committed or attempted in his presence. See California Penal Code, Sec. 836.

arrestee has committed or attempted to commit an offense in his presence. We further hold that appellant's arrest on the charge of being a minor in possession of an alcoholic beverage was lawful.[3] Anderson, an experienced police officer, properly set out to investigate a car parked adjacent to a closed business, late at night, and stopped it when it started to mov. away. He recognized both occupants and while questioning them saw a partially open case of beer on the floor behind the driver's seat. These facts reasonably indicated that the offense was being committed in his presence.

[5] Lastly, we take up the question of whether one can resist a peaceful arrest even though the arrest is unlawful. The weight of authoritative precedent supports a right to repel an unlawful arrest with force. United States v. Di Re, 332 U.S. 581, 594, 68 S.Ct. 222, 92 L.Ed. 210 (1948); John Bad Elk v. United States, 177 U.S. 529, 537, 20 S.Ct. 729, 44 L.Ed. 874 (1900); United States v. Heliczer, 373 F.2d 241, 248 (2d Cir. 1967), cert. den. 388 U.S. 917, 87 S.Ct. 2133, 18 L.Ed.2d 1359; 1 Wharton, Criminal Law & Procedure, Sec. 216 (1957). This was the rule at common law. It was based upon the proposition that everyone should be privileged to use reasonable force to prevent an unlawful invasion of his physical integrity and personal liberty.

But certain imperfections in the functioning of the rule have brought about changes in some jurisdictions. A new principle of right conduct has been espoused. It is argued that if a peace officer is making an illegal arrest but is not using force, the remedy of the citizen should be that of suing the officer for false arrest, not resistance with force. The legality of a peaceful arrest may frequently be a close question. It is a question more properly determined by courts than by the participants in what may be a highly emotional situation. Because officers will normally overcome resistance with necessary force, the danger of escalating violence between the officer and the arrestee is great. What begins as an illegal misdemeanor arrest may culminate in serious bodily harm or death.[4]

The control of man's destructive and aggressive impulses is one of the great unsolved problems of our society. Our rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful behavior by all.

The common law rule was developed in a time when self-help was a more necessary remedy to resist intrusions upon one's freedom.

"[It] was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in English jails were then such that a prisoner had an excellent chance of dying of disease before trial." Warner, "The Uniform Arrest Act," 28 Va. L.Rev. 315 (1942).

Section 5 of the Uniform Arrest Act provides:

"If a person has reasonable ground to believe he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest."

That provision, or its equivalent, has been enacted as statutory law in California,

3. It is recognized, of course, that the grounds for arresting a person without a warrant for a misdemeanor committed in the presence of an officer are considerably more restricted than those which would constitute probable cause for a felony arrest without a warrant. By our opinion today we do not mean to imply any change in the rules concerning felony arrests.

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Rhode Island, New Hampshire, and Delaware. The Model Penal Code Section 3.04(2)(a)(i) similarly prohibits the use of force to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful." In support of this provision Judge Learned Hand stated:

> "The idea that you may resist peaceful arrest * * * because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine, * * * [is] not a blow for liberty but on the contrary, a blow for attempted anarchy." 1958 Proceedings, American Law Institute, at 254.

At least one state court has adopted the recommended rule as a matter of its common law development. State v. Koonce, 89 N.J.Super. 169, 214 A.2d 428 (1965). The legal literature contains discussions on how much force may be used by either an officer making a lawful arrest or by an unlawfully arrested person in resisting arrest. "Justification for the Use of Force in the Criminal Law," 13 Stan.L.Rev. 566 (1961); "Criminal Law: Force That May be Used to Resist an Illegal Arrest," 9 Okl.L.Rev. 60 (1956). At best only elastic standards can be employed, as so much depends upon the exigencies of the situation, the gravity of the offense, and the amount of force and counterforce used or threatened.

To us the question is whether any amount of force should be permitted to be used by one unlawfully but peaceably arrested. We feel that the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets. It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court. Such a rule helps to relieve the threat of physical harm to officers who in good faith but mistakenly perform an arrest, as well as to minimize harm to innocent bystanders. The old common law rule has little utility to recommend it under our conditions of life today. We hold that a private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether the arrest is illegal in the circumstances of the occasion.[4]

Under this standard appellant was given the benefit of instructions to the jury more favorable than that to which he was entitled, as the case was submitted on the theory that one has a right to resist with force an unlawful arrest. We reject the claims of error both for the reason that the arrest was proper and because appellant in any event had no right to resist a peaceable arrest.

III

[6] Appellant asserts that the trial court erred in unduly assisting the prosecution, particularly in advising the prosecutor, after he had rested his case, that the proof was not sufficient to withstand a motion for a judgment of acquittal and that he should request leave to reopen his case in order to cure evidentiary deficiencies which had been noted by the court.

The record is somewhat unclear as to what occurred, as there was a conference between court and counsel held at the bench but not on the record.

It appears that at the close of the cross-examination of Trooper English the state's attorney advised the court that the state had no further witnesses but would like to read into evidence several pertinent statutes. A brief conference at the bench, off the record, then ensued, during which appellant claims that the court advised the state's attorney that his evidence was insufficient in proving appellant's age. It appears that the state then continued exam-

4. It should be noted that the rule we formulate today has no application when the arrestee apprehends bodily injury, or when an unlawful arrest is attempted by one not known to be a peace officer. Quite different problems are then presented.

ining English, who was on the witness stand, thereafter recalled Trooper Anderson, and called a custodian of vital statistics records to establish that Anderson reasonably believed that appellant was a minor at the time of the arrest.

Whether this can be characterized as a reopening of the prosecution's case is not clear from the record. The defendant's case had not yet commenced. But in any event, we do not find in this case that the court abused its discretion in allowing the state to call the additional witnesses.

> "The trial court has a large discretion with respect to order of proof in permitting a party to reopen after it has rested. * * * There is no suggestion that this surprised the appellant, or that any further preparation was necessary to meet this testimony." Massey v. United States, 358 F.2d 782, 786 (10th Cir. 1966).

In the case just quoted the trial court had twice permitted the government to reopen its case and to introduce testimony to identify a stolen automobile, after the government had clearly rested. In the case before us we are unable to find that appellant was prejudiced by the trial court's action.

We cannot pass upon appellant's claim that the court improperly aided the state by advising it of the evidentiary deficiency because there is nothing in the record to substantiate such a claim. Appellant, in his brief, states that an objection was made, but a review of the record reveals no such objection. If one was made off the record, appellant's trial counsel should have seen to it that an additional objection was registered for the record.

IV

[7] In support of the proposition that there was probable cause for the arrest, the state attempted to introduce the birth certificate of appellant, which indicated appellant was under twenty-one at the time of the arrest. As foundation for the introduction of the document, the state produced Mrs. Louise Hoffer. Mrs. Hoffer testified that she was the Vital Statistics Clerk in Anchorage, that she was the custodian of the birth certificate which she had been required by subpoena to bring to court. The certificate was admitted, although appellant objected on various grounds.[5]

Appellant testified that at the time of the trial he was twenty years of age. Because of this testimony the introduction of the birth certificate, if it were error, could not have amounted to harmful error under Love v. State, 457 P.2d 622 (Alaska 1969). The effect of this birth certificate was completely cumulative, insofar as appellant's actual age was a relevant issue at all. For these reasons we will not give further consideration to this point.

V

[8] The trial court permitted Trooper Anderson, over appellant's objection, to testify that on an occasion previous to the evening of the arrest he had seen appellant's driver's license and had observed the birth date stated on it. This evidence was offered for the purpose of establishing that Trooper Anderson had probable cause to arrest appellant for the misdemeanor of being a minor in possession of alcoholic beverages.

Appellant objected to this testimony on the ground that it violated the hearsay rule. It appears to us that for the purposes for which this testimony was offered the hearsay rule never came into play. We view this testimony as falling under the doctrine which permits statements by a third party declarant when they are offered to show the state of mind of the

5. The document in court was a carbon copy of an original which is kept in Juneau. Appellant in effect claimed this carbon copy should not be considered a duplicate original but simply an uncertified copy of an original. He further claimed he was not served in advance with a copy of the document and that it was introduced contrary to "the statutes and regulations."

one who hears the statement. C. McCormick, Evidence § 228 (1954). This testimony was clearly admissible to show that Trooper Anderson possessed such knowledge as would reasonably lead him to believe that the offense was being committed in his presence. Once again, we are unable to find any error committed by the trial court.

VI

Appellant makes a number of claims of error which we have examined and find to be of little merit. In many instances appellant sets forth a scant discussion of the legal reasoning of the authorities on which the claim of error is based. We have, nevertheless, examined these points to be certain that plain error was not committed which might affect the integrity of appellant's conviction.

[9] The claim is made that during the cross-examination of the witness Meyer, who had accompanied Trooper Anderson on the night in question, he was asked whether he recalled using in his report to the police some words to the effect that appellant had stabbed or threatened Anderson with the bayonet. His first answer was that he did not recall any such words. On redirect examination, after refreshing his recollection with the written statement he had made the morning after the ar- arrest, Meyer answered that he did use such words in his report to the police. On recross-examination, defense counsel attempted to question Meyer about another portion of his written statement, but the court sustained the appellee's objection on the ground that the question was outside the scope of the redirect examination.

Finally the state offered to put the whole statement in evidence. Appellant's counsel then moved for a mistrial, which was denied. In his brief, appellant claims that the state knew that the entire statement would be hearsay and inadmissible and that its offer to place the statement in evidence was in itself enough to require the granting of a mistrial. We find, as did the trial court, that appellant himself was responsible for the state's offer because he had gone beyond the scope of redirect examination, thus causing the question of what was in the statement to be left unanswered. We conclude that the denial of the motion for mistrial was proper.

[10] During the direct examination of Trooper Anderson, in answering a question in a somewhat narrative form, he volunteered the statement that he had had contacts with appellant on occasions previous to the evening in question and that he, therefore, was able to perceive that appellant was "under the influence," presumably of alcohol. The prosecutor stopped the witness at this point. Appellant's counsel then moved for a mistrial. Appellant argues that such evidence was irrelevant and prejudicial and that a mistrial should have been granted. The state argues that the statement was not prejudicial because the officer was stopped before his statement was completed, and it is pointed out that no request was made by appellant to strike the testimony or to have the jury instructed to disregard it.

Not every volunteered statement becomes a ground for mistrial. In the particular circumstances of this case we are unable to conclude that the statement objected to required the granting of a mistrial, particularly in view of appellant's failure to seek other remedies to cure any harm which might have been done by the words uttered by the witness.

[11] Trooper Anderson testified that a few months prior to the arrest he had seen appellant's driver's license in the course of investigating a gun accident in which appellant had shot himself and that he knew appellant was a minor at the time of the arrest. On cross-examination Anderson said he had made notes at the time he saw the driver's license. Appellant's counsel moved for a production of Trooper Anderson's notes under AS 12.-

45.060.[6] Trooper Anderson said that he did not know where his notes were, and the prosecutor said that the state had no idea where they might be. Appellant moved to strike the testimony of Trooper Anderson or in the alternative to declare a mistrial under AS 12.45.080.[7] The denial of this motion is claimed as error.

Anderson's notes of appellant's age made in the course of an investigation not related to the present criminal charge are not a "statement" or "report" for purposes of AS 12.45.060 and .070. The trial court properly denied appellant's motion to invoke the sanction under AS 12.45.080.[8]

[12] The court instructed the jury to the effect that it was a misdemeanor for a minor to possess or control alcoholic beverages. Alaska Administrative Code, Title 15, Ch. 4, § 4073. Appellant claims that the instruction was not complete and should have included the language of AS 04.15.080(b), which defines the crime of giving liquor to minors as not including a parent as to his own child. This latter offense had no relevancy to the case at bar. It may have been appellant's theory that he could be in lawful control of alcoholic beverages because they had been placed in his control by his parent. But appellant was not on trial for possessing alcoholic beverages. The mere existence of a possible defense of this kind would not negate the probable cause for arrest as perceived by Trooper Anderson. We find no error.

[13] Appellant requested an instruction which would have told the jury that intoxicating liquor is defined by AS 04.20.010 as containing more than one per cent alcohol by volume, and that an instruction should have been given to the effect that a beverage cannot be determined to be alcoholic in content by sight alone. In response, the state argues that the instruction given was a proper statement of the law on the question of whether the officer had probable cause to believe that appellant was in the unlawful possession of an alcoholic beverage. We agree. The instructions contended for by appellant would only have confused the issue to be determined by the jury.

[14] The indictment charged that appellant attempted to stab Trooper Anderson. The statute under which the indictment was brought, AS 11.15.150, uses the term "stab at another" in defining the offense. The verdict found the appellant guilty of attempting to stab with the intent

6. AS 12.45.050 "In a criminal prosecution, no statement or report in the possession of the state which was made by a prosecution witness or prospective prosecution witness (other than the defendant) to an agent of the state may be the subject of subpoena, discovery, or inspection until the witness has testified on direct examination in the trial of the case."

AS 12.45.060 "After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the state to produce any statement of the witness in the possession of the state which relates to the subject matter as to which the witness has testified. If the entire contents of the statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

7. AS 12.45.080 "If the state elects not to comply with an order of the court to deliver to the defendant a statement or a portion of a statement as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion determines that the interests of justice require that a mistrial be declared."

8. We do not view our ruling as relaxing in any way the requirements of Mahle v. State, 371 P.2d 21 (Alaska 1962), that certain reports and materials must be made available to the defendant. Here we are dealing with notes that have to do with a case other than the one being tried. These were not notes as to which the prosecutor or the witness would have reasonably anticipated a requirement of production at trial, nor would there have been any reason for them to anticipate that they should search for these notes before trial so as to have them available for inspection.

to wound, but did not include the words "at another." The appellant claims that this is a material variance and the verdict should not have been accepted. No authority is cited in support of this contention. We do not think that extended discussion is in order. We are unable to find any error.

[15] Finally, we find that appellant's contention that in sentencing appellant the court improperly relied upon mere contacts with the police not resulting in convictions is not supported by the record. We find no error.

The judgment of conviction is affirmed.

NESBITT, C. J., not participating.

Jacklyn CUTLER, Appellant,
v.
CITY OF ANCHORAGE, Appellee.
No. 1093.
Supreme Court of Alaska.
Dec. 15, 1969.

Action against city for injuries received when pedestrian tripped while crossing catwalk built by city. The Superior Court, Third Judicial District, Eben H. Lewis, J., granted defendant's motion for directed verdict, and plaintiff appealed. The Supreme Court held that city was not liable for injuries pedestrian sustained in fall when she caught her foot on raised end of one-quarter-inch plywood board, which bowed when person preceding her stepped in the middle thereof and which had been placed at street end of catwalk built during repair of earthquake damaged sidewalk, curb, and gutter in absence of showing that city had notice that plywood had been removed from in front of window of nearby airline's office and placed at end of catwalk.

Affirmed.

Municipal Corporations ⚷817(1)

City was not liable for injuries pedestrian sustained in fall when she caught her foot on raised end of one-quarter-inch plywood board, which bowed when person preceding her stepped in the middle thereof, and which had been placed at street end of catwalk built by city during repair of earthquake damaged sidewalk, curb and gutter, in absence of showing that city had notice that plywood had been removed from in front of window of nearby airline's office and placed at end of catwalk.

James L. Johnston, John M. Savage, of Savage, Erwin, Curran & Johnston, Anchorage, for appellant.

Charles Hagans, Robert Opland, of Hagans & Opland, Anchorage, for appellee.

Before DIMOND, CONNOR, RABINOWITZ and BONEY, JJ., and MOODY, Superior Court Judge.

OPINION

PER CURIAM.

The single issue presented in this appeal is whether the trial court erred in granting the appellee's, City of Anchorage, motion for a directed verdict at the close of appellant's case for failure to establish a prima facie case of negligence on the part of the appellee.

Appellant instituted suit against the appellee for injuries suffered by her when she tripped while crossing a catwalk built by appellee to provide access to the Anchorage Westward Hotel's Third Avenue entrance during repair of earthquake damaged side walk, curb, and gutter. Another person preceded the appellant on the catwalk by three or four steps. Appellant was about to step from the catwalk onto a ¼ inch plywood board that served as a ramp when the person preceding her stepped in the the

HB
578

Alaska Network on Domestic Violence and Sexual Assault
P.O. Box 3356, ANCHORAGE, ALASKA 99510

POSITION PAPER: House Bill 578

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

Network programs have extensive experience dealing with the issue of sexual assault. Often victims contact our crisis centers immediately after the assault, involving our program advocates in the entire reporting and judicial process.

Based on experience with the offense of sexual assault and concern for the safety of our clients and the entire community the Network offers the following remarks regarding House Bill 578.

The Alaska Network on Domestic Violence and Sexual Assault fully supports HB 578.

The problem of sexual assault and other violent crimes is rapidly approaching epidemic proportions. Legislators have the power that no single concerned citizen or organization has to say to an entire class of criminal offenders that violent crimes will result in certain punishment.

Article I Section II of the Alaska Constitution does not afford the right to post conviction bail. While the right to bail is mentioned in the constitutions of all fifty states, each state's conception of bail is not the same. The Alaska Supreme Court in State v. Wassillie, 606 P.2d 797 (1980) decided that, following conviction, the right to bail pending appeal is not constitutionally mandated under the Alaska Constitution.

Article I Section II of the Alaska Constitution affords the right to bail to those accused of a criminal offense. The Alaska Statutes (AS 12.30.020) codify this right to bail pending trial.

In determining whether to release the defendant pending trial, a judicial officer must consider whether release will reasonably assure the appearance of the defendant or if the defendant will pose a danger to others and the community (AS 12.30.020 (a)). The judicial officer uses the same criteria regarding release of the convicted defendant unless he/she feels none of the guidelines will assure appearance or prevent the person from posing a danger to the community (AS 12.30.040 (a)). Presently a person may not be released on bail if convicted of murder in the first degree, robbery in the first degree, kidnapping or sexual assault in the first degree (AS 12.30.040 (b)).

HB 578 does not interfere with the traditional right to bail before conviction. HB 578 merely extends the present statute to further deny post-conviction bail to those convicted of other violent crimes. Punishment and denial of bail after conviction is compatible with our legal system and does not deny due process.

Those convicted of violent crimes pose a significant threat to society and should not be released on bail pending sentencing of appeal. Members of the community, as well as convicted criminals have a constitutional right to life and liberty and should not have to sacrifice their lives or safety as a price of granting bail to an individual convicted of a violent crime. Society deserves more.

A Felonies & Unclassified Crimes

Introduced: 5/15/81
Referred: Judiciary

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

IN THE HOUSE

HOUSE BILL NO. 578

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to release after conviction of a criminal offense."

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

* Section 1. AS 12.30.040(b) is repealed and reenacted to read:

(b) Notwithstanding the provisions of (a) of this section, a person convicted of any of the following offenses may not be released on bail either before sentencing or pending appeal:

(1) murder in the first degree (AS 11.41.100);

(2) murder in the second degree (AS 11.41.110);

(3) manslaughter (AS 11.41.120);

(4) criminally negligent homicide (AS 11.41.130);

(5) assault in the first degree (AS 11.41.200);

(6) assault in the second degree (AS 11.41.210);

(7) assault in the third degree (AS 11.41.220);

(8) kidnapping (AS 11.41.300);

(9) sexual assault in the first degree (AS 11.41.410);

(10) sexual assault in the second degree (AS 11.41.420);

(11) robbery in the first degree (AS 11.41.500);

(12) robbery in the second degree (AS 11.41.510);

(13) burglary in the first degree (AS 11.46.300);

(14) arson in the first degree (AS 11.46.400);

(15) escape in the first degree (AS 11.56.300);

(16) riot (AS 11.61.100).

Foster Family Assn

HSS

SB 651 → Paymt of Foster Care

Stipend ($10 day → $14 day)

→ [illegible]

→

Assn

Cit Review Bd

→ Foster Parents

POSITION PAPER/Department of Health and Social Services

REVISED

POSITION PAPER

HOUSE BILL NO. 578

"An Act relating to release after conviction of a criminal offense."

House Bill No. 578, by decreasing categories of those who may be released on bond after conviction, will have some impact on the Division of Adult Corrections in terms of numbers of prisoners being held. There is not, however, data available to tell how many of those in the affected categories are presently being released. Experience does indicate that few were so released, and that in the cases where such release did occur, it was for less than the entire period of eligibility. Therefore, it would seem that the impact will not be substantial.

Recommended by: Walter B. Jones, Jr.
Walter B. Jones, Jr.
Acting Director
Division of Adult Corrections

Date: 1-25-82

Approved by: [signature]
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. 578
Title An Act relating to release after conviction of a criminal offense.
Requested by Senator Bennett Date Date 5, 1981

II. FISCAL DETAIL
Agency Affected Division of Adult Corrections, Department of Health & Social Services
Program Category Affected Offender Confinement, Reformation and Supv.
BRU, Program, Or Subprogram(s) Affected Adult Confinement
(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		8.9	9.7	10.6	11.6	12.6
400 COMMODITIES		13.9	14.9	16.2	17.6	19.2
500 EQUIPMENT						
600 LAND & STRUCTURES		683.3				
700 GRANTS,CLAIMS,ETC.						
TOTAL		705.8	24.6	26.8	29.2	31.8

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		705.8	24.6	26.8	29.2	31.8
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

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

* Security personnel will be required. See B. 2. a. below.

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

A. Assumptions

1. Very few persons convicted of unclassified, Class A or Class B felonies are now granted bail or make bail when granted.

2. There is only a relatively short period of time between conviction and sentencing.

3. Historical data has not been gathered regarding the number of persons released on bail after conviction for offenses specified, or how long such persons were out on bail before sentencing or pending appeal.

IV. DATE January 26, 1982 PREPARED BY Roger C. Lange
AGENCY Division of Adult Corrections
Original: Legislative Finance PHONE 465-3376
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

4. It is assumed that approximately five additional person years per year of incarceration will result if this statute amendment is adopted.

5. Since the Alaskan correctional centers are currently operating at emergency capacity levels, five additional beds would be necessary in the Alaska correctional system.

B. Cost Estimate

1. Capital Expenditures

Core facility bed prices are used here rather than bed additions to existing or planned facilities because if HB 180 and HB 293 or SB 327 pass, in effect we have another institution and a core facility is needed to support the total number of beds. A core facility includes heating and electrical plants, kitchen, administration, recreation and program areas. The estimated cost per bed in the FY 1983 Capital Budget Request for a core facility is $136,667. That figure is used here to compute construction costs. It is:

Capital Expenditures = 5 x $136,667
= $683,335

2. Operating Costs

a. Personal Services
No personal services are requested. It is assumed the five beds would be added to the design of a new facility after all legislation requiring new beds was analyzed. Personnel requested for larger bed increases would probably cover the staff requirements for these beds.

b. Inmate related costs (FY 1982 level)

1.) Contractual (utilities, medical services, etc.)	8,200
2.) Commodities (food, clothing, etc.)	12,500

3. A 9% inflation rate is assumed for subsequent fiscal years.

Presented by N. Davis PA

JUDGE JAY HODGES
604 BARNETTE
FAIRBANKS, ALASKA 99701

WE, THE BELOW SIGNED, ARE CONCERNED AT THE ALARMING RATE--- FOR EVEN ONE WOULD BE UNJUST TO THE COMMUNITY-- THAT PRISONERS OF THE STATE ARE ALLOWED TO ROAM FREE IN BARROW WHILE AWAITING THEIR SENTENCING AFTER BEING FOUND GUILTY, BY JURY, OF A VIOLENT CRIME: i.e., SEXUAL ASSAULTS, FOUR CASES +.

NAME	ADDRESS/PHONE
Sonya Leavitt	Box 289 Barrow Ak 852-5416
Hjördis Lomborg-Parkinson	Bx 188 Barrow. Ak 99723
Marvel Bramwell	PO Box 69 - Barrow - 7146
George Leavitt	Box 289 - BRW - 99723
Rhonda McSwain	General Delivery Barrow, AK 99723
Valerie Strait	Box 409 Barrow, AK 99723 (7152)
Stephen Krajcir	P.O. Box 687 Barrow, AK 99723
Dave Parkinson	Bx 188 Barrow AK 99723
Robert Fry	Box 930 Barrow ak. 99723
Dennis D'Cap	General delivery Nuiqsut 99723
D.A. Thurman	P.O. Box 894 Barrow, AK
Alice R. Ireakok	P.O. Box 27 Barrow, Alaska
Albert K. Overbay	P.O. Box 794 Barrow, Alaska
Gloria L. Overbay	P.O. Box 794 Barrow, Alaska
Jane Patkotak	Box 132, Barrow, alaska
Elise S Patkotak	PO Box 531 Barrow AK

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT MEMBER ORGANIZATIONS

Judge JAY Hodges
Petition

NAME	ADDRESS/TELEPHONE
Lucetta M Wilhelm	Box 287 - BARROW, Alaska
Oranoot Gueco	BOX 724 Brrw, AK
Ruth K. Murphy	Box 21 Barrow, ak. 99723 852-5131
Diane Christopherson	Box 595 Barrow AK 99723
Annie E. Pattkotak	Box 688 Barrow, AK 99723
Marie K. Simmonds	Box 67 Barrow, ak 99723
B. Ahtuangaruak	Box 848 Barrow, Ak 99723
Kieko Bragan	BOX 470 BARROW AK 99723
Trish Maher	Box 56 BARROW AK 99723
Linda Christman	Box 675 Barrow, AK. 99723
Jack Fanaman	Box 968 BARROW AK. 99723
[illegible]	PO 735 BARROW AK 99723.
Herbert Leavitt	Box 202 Barrow AK 99723
Marion Ellis	Box 736 Barrow, AK
Bill L. Jones	Box 795 BARROW, AK

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604 BARNETTE
FAIRBANKS, ALASKA 99701

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NAME	ADDRESS/PHONE
Gaye T. Harvey	PHS Hospital, Barrow, Ak. 852-4611 x264
Priscilla Sage	Box 349 Barrow, Alaska 852-4611 x 215
Cheryl A. Brower	Box 402 Barrow, AK. 852-7107 Home
Deborah Wallace	Box 646 BARROW AK NONE
Evelyn Donovan	Box 674 Brw
[illegible]	Box 214 Barrow, AK 852-2010 Home
Charlotte A. Rogers	Box 13 P.H.S. Barrow AK 852 4611 -
Larry Hall	PHS HOSPITAL BARROW AK. 99723 (852-4611)
Johanna Sage	PHS Hospital - Barrow AK - 99723 852-4611
Vera Oleman	Box 593 Barrow, ak. 852-6350
[illegible]	Box 775 Barrow AK 852-7710
CLAYTON SANDERS	BOX H A. BARROW AK. 852-5600 - 852-3997
Christa Farmer	PHS Hospital, Barrow, Ak 99723 852-2093
Lena Baker	Box 721 Barrow, Alaska 99723 852-2269
Margaret [illegible]	Box 391 Barrow, ak 99723 852-3829
[illegible]	Box 118 Barrow, Alaska 99723 852-3499
[illegible]	Box 275 Barrow ak 99723 852 3350

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT MEMBER ORGANIZATIONS

JUDGE JAY HODGES
604 BARNETTE
FAIRBANKS, ALASKA 99701

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NAME	ADDRESS/PHONE
Nancy E. Ahsogeak	P.O. Bx 791, BRW 852-6654
Emma Aishanna	P.O Bx 722 Brw 852-unlisted
F. Fay Conn	P.O. Box 256, Brw
Sharon Mae Brown	P.O. Box 163 Barrow 852-6644
Mary Ann Pitt	PO Box 203, Barrow 852-7790
Martha Nolan	P.O. Bx 845 Brw 852-4051
[illegible]	P.O. Box 612 Barrow 852-7387
Mabel F. Smith	Bx 901 Brw - no phone
Karla Kolash	Box 117 Brw - no phone
Harold J. [illegible]	Box 117 Brw
Barbara Kaurayurak	Box 283 Brw
Flora Solomon	Box 364, Barrow, AK
[illegible]	Bx 674, Barrow
Sheldon Adams	Box 176 Brw, Ak 99723
Larry Ahmaogak Jr	Box 411 Brw, Ak 99723
Edna Ipalook	Box 333 Brw, AK 99723

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE & SEXUAL ASSAULT MEMBER ORGANIZATIONS

Judge Jay Hodges
Petition

NAME	ADDRESS/TELEPHONE
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M. Barbosa	Box 335 Brw
Virginia Crosby	BOX 101 Brw, AK
[illegible]	Box 87 Brw AK
S Okchak	Box 728 Brw AK
D Ahmaogak	Box 331 Brw. AK.
G. Dungard	Box 296 Barrow, AK
B. Kaleak	Box 378 Barrow AK
Johnny Adams	BOX 347 Barrow, AK 99723 (unlisted)
Earl Finkler	Box 834 Barrow
Kent Grinage	Box 142 Barrow, AK.
[illegible] Murphy	P.H.S. HOSPITAL BARROW AK.
Jerry Coydil	BOX 567 Barrow, AK.
Jerry Wilhelm	BOX 287 BRW. AK.
Jasper Mack	BOX 642 BRW. AK.
Jim Richards	Box 924 - Brw, AK - 99723 -0924 -852-6162
Lawrence F. Osborn	Box 936, Brw AK. 99723-0936
Cora M. Attungowruk	Box 101, Brw, AK. 99723
Gordon Kellbear	Box 610 Barrow, Alaska
Maude Rochon	P.O. Box 1107, Brw. AK. 99723
Emily Ilmoungenya	P.O. Box 42, Barrow, AK 99723
Ann Roberts	P.O. Box 662 Barrow, AK. 99723
Laurie Rice	P.O. Bx#652 BARROW, AK
Jillen Carlson	Box 573, Barrow AK
Kay Graham	BOX 755 Barrow, AK.
Rosabell Rexford	Box 286 Barrow, AK

JUDGE JAY HODGES
604 BARNETTE
FAIRBANKS, ALASKA 99701

WE, THE BELOW SIGNED, ARE CONCERNED AT THE ALARMING RATE--- FOR EVEN ONE WOULD BE UNJUST TO THE COMMUNITY --- THAT PRISONERS OF THE STATE ARE ALLOWED TO ROAM FREE IN BARROW WHILE AWAITING THEIR SENTENCING AFTER BEING FOUND GUILTY, BY JURY, OF A VIOLENT CRIME: i.e., SEXUAL ASSULTS, FOUR CASES +.

NAME	ADDRESS/PHONE
Lorrie Bodfish	Bx 575, 852-4520
Hazel Oktollik	Bx 146
Bruce Marshall	Box 837/852-8364
Lenora Faithorly	Box 577 none
Susie Iviniak	Box 697 unlisted
Lena Baker	Box 721 852-2269
Ethel Aknaaitoak Nungasak	Box 382 852-none
Clifford E. Baker	Box 721 852-2269
Melinda Lord	Box 686 852-2399

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSULT MEMBER ORGANIZATIONS

JUDGE JAY HODGES
604 BARNETTE
FAIRBANKS, ALASKA 99701

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NAME	ADDRESS/PHONE
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Sarah Jacoby	Box 71 Barrow, ak 99723 - 852-3999
[illegible] M.D.	PHS HOSPITAL, BARROW 852-4611
Marthana Kelaygatcha	Box 914 Barrow Ak 852-7685
Kathleen B. Ulmich	Box 71 Barrow AK 99723 852-5081
Wilbur F. Livesay	c/o Barrow Health Ctr, Barrow, 852-6308
William Graybeal	BOX 94 BARROW, AK 852-3164
Jennifer Ullham	Box 937 Barrow, AK 852-2535
Lynn Smith	PHS Hosp. Barrow, AK 852-2535
Bonnie M. Livesay	c/o Barrow Health Center, Barrow, Ak. 852-6308
[illegible] Oleman	Box 593 Barrow, Alaska 99723 852-6350
Fannie K. Akpik	Box 668 Barrow, Alaska 852-5600 ext. 310
Jo-Ann Powell	P.O. Box 635 852-5600 x 330
Mabel Panigeo	PO Bx 263 Barrow 852-5600
Les Dalton	Box 925 Barrow 852-2383
Susanna Taegan	Box 8026 Barrow 852-3350

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT MEMBER ORGANIZATIONS

JUDGE JAY HODGES
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NAME	ADDRESS/PHONE
Carl M Hild	P.O. Box 245 Barrow 852-8364
Vicki A. Hild	P.O. Box 245 Barrow, AK. 99723 852-8364
Valerie Street	PO Box 409 Barrow ~~[illegible]~~

cc: ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT MEMBER ORGANIZATIONS

CITY OF KOTZEBUE

P.O. BOX 46
KOTZEBUE, ALASKA 99752

KOTZEBUE POLICE DEPARTMENT
907-442-3351

September 22, 1981

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

Dear Representative Barnes:

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

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

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

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

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

Donald E. Buehler
DONALD E. BUEHLER
Chief of Police

cc: AS Revisions file
Sgt Jones
Sgt Wallace

DEB/dew

"GATEWAY TO NORTHWEST ALASKA"

TO: The House Judiciary Committee

FROM: Suzanne Lombardi
Client Service Coordinator
Valley Womens Resource Center

next page →

RE: Testimony for House Bills on Sexual Assault and Violent Crime

The Valley Womens Resource Center has been serving victims of sexual assault and domestice violence in the Matanuska-Susitna Borough for the last year. I would like to thank the Judiciary Committee for this opportunity to express our opinions on the follwing bills:

HB 473 Regarding Sexual Assault

We are grateful to see that the Task Force has recognized the serious effects of these crimes and are pleased to see this legislation that will enforce stiffer penalties.

We would like to suggest that along with longer sentences that there be mandated treatment programs as well as funds appropriated for treatment not only within the prison system, but for ouside as well.

We have found that assailants convicted of sexual assault are usually sentenced to time without parole, and therefore, upon release there is not treatment and no hold upon them. As aresult the recidivism rate for this particular crime is extremely high.

HB 572 Domestice Violence/Emergency Injunctive Relief or TRO

We are pleased to see that the breakdown has been recognized between victims being informed of the TRO and the actual carrying through of this process.

At this time we are not sure that more legislation, or more paperwork will solve this gap. The problem in our area seems to be with the original bill. To our knowledge, some women have not been informed of either the Resource Center or the option of filing a TRO.

It is our opinion that more would be accomplished if the original HB 287 was more effectively enforced.

If the victims were made aware of the existence of the Center, and if possible, a call made at the scene of the incident to our advocates, the trained staff would be able to follow through with the action and accompany the person throughout the legal system. This would cut down on police time as well as put the victim in direct contact with the Resource Center for further support systems.

We would emphasize that our situation in the Valley may differ substantially from more inaccessable areas.

CONTINUED OVER →