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Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions

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Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*

MICHAEL H. GRAHAM**

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* This article is an updated and slightly enhanced version of a paper delivered in March, 1985, at the National Policy Conference on Legal Reforms in Child Sexual Abuse Cases sponsored by the National Legal Resource Center For Child Advocacy and Protection, a program of the Young Lawyers Division of the American Bar Association. As originally presented, the paper had no footnotes; lists of cases cited and other relevant authorities were annexed as Appendices. In keeping with the tenor of this symposium, only essential and descriptive footnotes have been added.

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I. INTRODUCTION

The last three years have brought the public to a state of awareness, often bordering on hysteria, concerning child sexual abuse. As the media uncovers new scandals throughout the country,¹ increasing numbers of concerned citizens look to prosecutors and legislatures to take action. Prosecutors have replied by filing more charges, and legislatures have in turn considered, and in many cases adopted, new statutory definitions of child sexual abuse. Critical for our purposes, legislatures² have also considered,

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1. See *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985). In *Myatt*, the court said: [T]he incidence of sexual abuse of young children has increased dramatically in recent years. . . . Statistics show that there has been a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 reported cases annually. A substantial number of cases are never reported; estimates of the actual incidence vary from 100,000 to 500,000 per year.

Id. at ___, 697 P.2d at 841.

2. Other groups have been active as well. For example, the Attorney General's Task Force on Family Violence issued its final report in September of 1984. Further, in July of 1985, the American Bar Association (ABA) approved the report of the Prosecution Function Committee of the Criminal Justice Section entitled *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*. The ABA recommends the following procedural reforms:

In criminal cases and juvenile delinquency and child protection proceedings where child abuse is alleged, court procedures and protocol should be modified as necessary to accommodate the needs of child witnesses including:

- a) If the competency of a child is in question, the court should evaluate competency on an individual basis without resort to mandatory or arbitrary age limitations.
- b) Leading questions may be utilized on direct and cross-examination of a child witness subject to the court's discretion and control.
- c) To avoid intimidation or confusion of a child witness, examination and cross-examination should be carefully monitored by the presiding judge.
- d) When necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses who testify in the particular courtroom.
- e) A person supportive of the child witness should be permitted to be present and accessible to the child at all times during his or her testimony, but without influencing the child's testimony.
- f) The child should be permitted to use anatomically correct dolls and drawings

and in many cases adopted, new evidentiary rules designed to facilitate prosecution of child sexual abuse cases and to reduce the trauma or emotional distress experienced by victims of child sexual abuse as a result of the litigation process itself.

State legislatures have dealt with reform of the rules of evidence in two basic ways. First, legislatures have created a hearsay exception for child sexual abuse prosecutions that makes out of court statements of the victim admissible under certain prescribed circumstances. Second, legislatures have authorized the prosecution to permit the parties to play videotaped recordings of statements, depositions, or preliminary hearing testimony of the child victim at trial instead of eliciting viva voce testimony. They also have authorized the child witness to testify at trial over closed circuit television or in a specially designed children's courtroom. The purpose of such reforms is to allow the child to testify without having to come face to face with the accused in open court. Both types of reforms have many variations.

The purpose of this article is to explore the constitutionality of these reforms under the confrontation clause.³ In the process, the wisdom of the particular reform will be commented on and, where appropriate, suggested modifications set forth.

II. CHILDREN'S OUT OF COURT STATEMENTS

A. *Hypothetical Case*

A mother leaves her four year old daughter, Alice, in the custody of the mother's live-in boyfriend, Sam. Eight hours after being returned to her mother's care, the mother asks her little girl how she enjoyed her time with Sam. In her reply, Alice tells her

during his or her testimony or any other manner.

g) When necessary, the child should be permitted to testify via closed-circuit television or through a one-way mirror so long as the defendant's right to confrontation is not impaired.

h) Persons not necessary to the proceedings should be excluded from the courtroom at the request of a child witness or his or her representative during pretrial hearings in cases where the child is alleged to be the victim of physical, emotional, or sexual abuse.

i) At pretrial hearings and in child protection proceedings the court, in its discretion, if necessary to avoid the repeated appearance of a child witness, may allow the use of reliable hearsay.

j) When necessary, the court should permit the child's testimony at a pretrial or noncriminal hearing to be given by means of a videotaped deposition.

See Report of the Prosecution Function Committee of the Criminal Justice Section, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*.

3. U.S. CONST. amend. VI.

mother that the boyfriend touched her, pointing to her genital area. After calling the police, Alice's mother takes her to the emergency room for an examination. A police officer interviews the child later in the day at her home. Alice tells both the doctor and the police officer that "Sam rubbed his hand up and down on me right here," pointing to her genitals.

In order for Alice's out of court statements to be admissible in a criminal prosecution of Sam, the statements, being hearsay, must meet the requirements of a hearsay exception and must satisfy the requirements of the confrontation clause. The question of whether Alice's out of court statements are admissible may well be critical to successful prosecution of Sam.⁴

B. Hearsay Exceptions

1. COMMON LAW AND FEDERAL RULES OF EVIDENCE

At common law, and under rules of evidence modeled on the Federal Rules of Evidence, several traditional hearsay exceptions should be considered to determine whether they permit introduction of one or more of Alice's statements. Barriers to admissibility exist, however, with respect to each of the potential avenues of admissibility, that most likely cannot be overcome.

Federal Rule of Evidence 803(1) provides a hearsay exception for a present sense impression. The rule defines a present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."⁵ Obviously, this does not apply to Alice's statement made no earlier than eight hours after

4. See *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985):

Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and perpetrator are rare as people simply do not molest children in front of others. . . . Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child. . . . Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive. . . . The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore, these hearsay statements are usually necessary to the proceedings as the only probative evidence available.

Id. at ___, 697 P.2d at 841; see also Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuses*, 18 J. MAR. 1, 5-6 (1984); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); Note, *The Sexually Abused Infant Hearsay Exceptions: A Constitutional Analysis*, 8 J. JUV. L. 59 (1984).

5. FED. R. EVID. 803(1).

the event.

Federal Rule of Evidence 803(2) provides a hearsay exception for excited utterances. The rule defines an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."⁶ This rule offers a greater possibility for admissibility even though Alice made her initial statement several hours after the event. The requirements for admissibility under this exception are: (1) the occurrence of an event or condition sufficiently startling to produce a spontaneous and unreflecting statement; (2) a statement made while under the influence of the startling event or condition; and (3) a statement relating to the startling event or condition. Accordingly, lapse of time between the startling event and the out of court statement, although relevant, is not dispositive. Nor is it dispositive that Alice made her statement in response to her mother's inquiry. Rather, these are factors which the trial court must weigh in determining whether the offered testimony falls within the excited utterance exception. Other factors the court should consider include the age of the declarant, the physical, mental, and most importantly emotional condition of the declarant during the relevant time period, the characteristics of the event and the subject matter of the statement. In order to apply the excited utterance exception, the court must find that the statement was spontaneous and impulsive rather than the product of reflection and deliberation. Although courts have been liberal in child sexual abuse cases when deciding whether the requirements of this exception have been satisfied,⁷ it is doubtful that Alice's

6. *Id.* at 803(2).

7. See *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985). In *Myatt*, the court stated that:

In those cases where the child was unavailable or unable to qualify as a witness, the *res gestae* and necessity exceptions of K.S.A. 60-460(d) were available. Under 60-460(d), statements made at the same time, or close in time with the events perceived, but prior to the commencement of any legal action, were admissible whether or not the child testified at trial. . . . The underlying rationale of the *res gestae* exception is that any statement arising during this period is assumed to be free of conscious fabrication and is considered trustworthy for that reason. The exclusive use of this exception in child abuse cases is not adequate because it fails to take into account the childhood perspective on sexual experiences which may not include the immediate, emotional shock an adult would feel. "The major weakness of the exception in this context stems from its undue reliance on spontaneity as an indicator of trustworthiness, to the exclusion of other equally valid indicia of reliability." . . . Often, a significant delay precedes the child's statement, thereby violating the time requirement of 60-460(d). This delay may be caused by the victim's fear of not being believed,

statements would be admitted. Alice made the comment calmly in response to her mother's question eight hours after the event. It is difficult to characterize her statement as spontaneous and impulsive.

The statement Alice made to the doctor in the emergency room must be evaluated in light of the medical diagnosis or treatment exception of Federal Rule of Evidence 803(4). This rule provides for admissibility of "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."⁸ There are two barriers to admissibility in Alice's case. First, the identity of the person who allegedly rubbed Alice's genital area is not pertinent to medical diagnosis or treatment,⁹ unless treatment includes the possibility of removing Alice from the threat of future sexual abuse by Sam, or includes obtaining information in contemplation of future

feelings of confusion or guilt, efforts to forget, and threats against the child by the defendant. . . . Consequently, a child often keeps silent until he or she is somehow compelled to relate what has happened.

A very young child [sexually abused] by an adult standing in the position of parent, caretaker or friend cannot be expected to immediately come forward with a complete and exact report of the event. The courts have recognized that the child may be unable to speak about the incident until she considers herself safely in the presence of a compassionate adult whom she can trust. Because the child has no clear understanding of what has been done to her, her original complaint often consists of responses to the questioning of a patient, persistent adult who draws the child's story from her.

Some courts, recognizing the flaws in a mechanical application of the res gestae exception to child-victim hearsay statements, have attempted to apply the exception beyond its established limits by allowing into evidence statements made hours, or even days, after the event.

Courts have thus tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy. The problem with "stretching" the existing exceptions in this manner is the destruction of the certainty and integrity of the exceptions. For these reasons, the Kansas legislature enacted the new hearsay exception. Although many statements admissible under the new exception may fall within an older exception, 60-460(dd) is broader. The statute is intended to allow the courts to be sensitive to the critical need for a child victim's out-of-court statements, while allowing them to address the various reliability problems posed by the statements, thus protecting the defendant's confrontation rights.

Id. at ___, 697 P.2d at 842.

The term *res gestae* is not employed under the Federal Rules of Evidence.

8. FED. R. EVID. 803(4).

9. The identity of the alleged perpetrator may be relevant to medical diagnosis or treatment if an examination of the perpetrator will assist in the determination of the presence or absence of venereal disease.

psychological counseling of Alice.¹⁰ Second, the reliability of hearsay statements made for purposes of medical diagnosis or treatment rests on the assumption that the declarant is aware of the importance of telling the truth to a doctor in order to secure proper medical care. It is questionable whether Alice, at the age of four, was so aware.

Alice's statement to the police officer does not meet the requirements of any traditional hearsay exception whether as contained in his report or as testified to at trial. Federal Rule of Evidence 803(8), which provides a hearsay exception for "records, reports, statements, or data compilations, in any form, of public offices or agencies . . ." ¹¹ does not apply to the police officer's report for two reasons. First, it involves a matter observed by a police officer offered against a criminal defendant, which is expressly excluded under Rule 803(8)(B).¹² Second, there is no second level hearsay exception applicable to Alice's statement itself. The latter observation also precludes the police officer from testifying to Al-

10. See, e.g., *People v. Wilkins*, 134 Mich. App. 39, 349 N.W.2d 815 (1984). In *Wilkins* the court stated:

Dr. Scheurer testified that the role of her clinic is to assess difficult parent-child problems. In a sexual abuse case, the clinic diagnoses and treats the medical, physical, developmental and psychological components of a sexual abuse case. There is no way in which the clinic could adequately diagnose and treat the impact of sexual abuse on a child unless it was known that the source of abuse was a family member. Part of the treatment that was recommended for the victim was that she begin seeing a child psychologist and that she be removed, through the probate court, from her home. This treatment would have been impossible had the clinic not known the source of the sexual abuse was the victim's stepfather. Consequently, the statements elicited from her were reasonably necessary to her diagnosis and treatment. We therefore hold that the trial court correctly admitted the testimony of Dr. Scheurer under MRS 803(4).

Id. at 45, 349 N.W.2d at 817-18. See also *Goldade v. Wyoming*, 874 P.2d 721, 726 (Wyo. 1983) ("It is apparent from the testimony of the physician that he was involved in attempting to diagnose and, if diagnosed, to then treat child abuse, not simply bruises on the little girl's face. The identity of the person causing those injuries is a pertinent fact in these circumstances.").

It is suggested that concern over the successful prosecution of child sex abuse should not be permitted to distort the hearsay exception of statements for medical diagnosis or treatment. FED. R. EVID. 803(4). The possibility of distortion exists because almost anything is relevant to the diagnosis or treatment of psychological well being. Similarly, far too many untrustworthy statements are relevant to prevention of repetition. The application of Federal Rule of Evidence 803(4) should remain restricted to statements pertinent to "physical" medical diagnosis or treatment. Other statements argued to possess adequate indicia of trustworthiness should be judged against the hearsay exceptions of Federal Rules of Evidence 803(24) and 804(b)(5), and most importantly, specific hearsay exceptions applicable solely in prosecutions for child sexual abuse.

11. FED. R. EVID. 803(8).

12. *Id.* at 803(8)(B).

ice's statement at trial.

Alice's statement to the police officer, and to the same or greater extent, her two prior out of court statements, possess the indicia of reliability of being (1) a statement describing an embarrassing fact which a child would not normally convey unless true, and (2) a cry for help.¹³ There is, however, no traditional common law hearsay exception applicable to statements constituting a cry for help that discloses an embarrassing event. The closest analogy in the common law is the notion of a prompt complaint in a rape or sexual abuse case where the statements are admissible to corroborate the in court testimony of the complainant. Traditionally, prompt complaint evidence is limited to the fact of the complaint, thereby excluding any reference to either the name of the offender or the details of the offense.

Alice's statements possess additional indicia of reliability because they describe an event that a four year old is not likely to realize could occur between an adult male and a young girl. In addition, she used language that one would expect a four year old girl to use. While not as reliable as, "He put his wee wee in my mouth. It got real big and exploded," where the physical possibility of the act is unlikely to be known unless experienced, Alice's statement describing Sam rubbing her genitals is not something a young girl is likely to know a grown man may enjoy doing. There is, of course, no traditional hearsay exception for statements of a young child that describe an event that the child is not likely to know is possible or sexually gratifying to some men.

In the hypothetical case of Alice, it is thus extremely likely that none of Alice's three out of court statements, made between eight and twenty-four hours after the alleged sexual abuse, will fall within a traditional hearsay exception. In the federal courts and a number of state courts, however, the traditional hearsay exceptions do not exclusively control admissibility; an out of court statement may be admissible under the "other" hearsay exceptions of Federal Rule of Evidence 803(24) or 804(b)(5). These two rules, which are identical with the exception that Rule 804(b)(5) requires that the

13. For a discussion about the possibility that a parent or other adult has suggested the existence of the act to the child and the child either now believes the event occurred or is merely repeating the conveyed story to please the adult, see *infra* notes 79, 86 and accompanying text.

Alleged incidents of false accusations of child sexual abuse has led to the formation of a group called Victims of Child Abuse Laws (VOCAL). This group claims to have members in 48 states. For a discussion of VOCAL, see Miami Herald, July 28, 1985 (Tropic Magazine), at 23.

declarant be unavailable at trial, provide as follows:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is not barred by the rule against hearsay], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.¹⁴

Rules 803(24) and 804(b)(5) each contain five express requirements which must be satisfied before the statement can be admitted.

1. **Equivalent Trustworthiness.** The most significant requirement is that the statement must possess "circumstantial guarantees of trustworthiness" equivalent to that of statements admitted under one of the traditional hearsay exceptions (the first twenty-three exceptions contained in Rule 803 and the first four exceptions contained in Rule 804(b)). In order to evaluate the trustworthiness of a prior statement, the courts look to several criteria: (1) certainty that the statement was made, which should include, where appropriate, an assessment of the credibility of the person testifying in court to the existence of the statement; (2) assurance of the declarant's personal knowledge of the underlying event or condition; (3) whether the statement was made under oath; (4) the practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event or condition [obviously inapplicable to Federal Rule of Evidence 804(b)(5)]; and finally, (5) an ad hoc ascertainment of trustworthiness based upon the totality of the surrounding circumstances. Relevant factors which bear upon such ascertainment of trustworthiness include: (1) the declarant's partiality (interest, bias, corruption, or coercion); (2) the presence or absence of time to fabricate; (3) suggestiveness brought on by the use of leading questions;

14. FED. R. EVID. 803(24), 804(b)(5).

and (4) whether the declarant has ever reaffirmed or recanted the statement.¹⁵ In child sexual abuse cases, the court should also consider whether the child's statement: (1) discloses an embarrassing event; (2) is a cry for help; (3) employs appropriate child-like language; or (4) describes an act of sexual contact that the child is not likely to realize is either possible or sexually gratifying to an adult unless actually experienced by the child. The age and maturity of the child, the nature and duration of the sexual contact, the physical and mental condition of the child when the statement was made, and the relationship of the child and the accused are also appropriately considered. On the other hand, the court should also consider whether the statement may have resulted from suggestiveness or command by an adult close to the child.¹⁶

2. Necessity. Introduction of the hearsay statement must be necessary; it must be more probative on the point for which it is offered than any other evidence which the proponent may reasonably procure. Whether the court can reasonably demand a particular effort to obtain alternative proof of a matter depends upon the fact at issue, considered in light of its posture in the total litigation. If the child testifies fully at trial about the relevant events, the "necessity" for the introduction of his or her out of court statement may be brought into question. If this occurs, circumstances surrounding the out of court statement, such as being made

15. See also MCCORMICK, MCCORMICK ON EVIDENCE § 324.1, at 908-09 (3d ed. 1984):

[A]s the volume of decided cases increases, certain recurring factors are acquiring recognition as significant in deciding whether to apply the residual exception. Among them are: whether the statement was under oath, the duration of the time lapse between event and statement, motivation to speak truthfully or otherwise, and whether declarant had firsthand knowledge. These are factors that bear upon the declarant at the time of making the statement, as is characteristic of the specific hearsay exceptions generally, and fairly fall within the description 'equivalent circumstantial guarantees of trustworthiness.' In addition, the courts have recognized further factors which did not bear upon declarant at the time he was speaking but which, viewed in retrospect, tend to support the truthfulness of his statement. These include: corroboration, whether the declarant has recanted or reaffirmed the statement, and whether the declarant is now subject to cross-examination. Strictly speaking, these may not be 'equivalent circumstantial guarantees of trustworthiness' in the language of the residual exception, but it would be unrealistic to ignore their bearing on the question of the truthfulness of the hearsay statement. Each situation still depends largely upon its own particular circumstances, and the force of precedent is developing rather slowly. The present status may well be a replay of the early stages of the evolution of the currently accepted specific exceptions.

Id.

16. See *infra* note 79.

promptly when the declarant's recollection was fresh, being made without solicitation, being a cry for help, and being influenced by the preparation of litigation, etc., would foster admissibility.

3. **Material Fact.** The requirement that the statement be offered as evidence of a material fact probably means that not only must the fact the statement is offered to prove relevant,¹⁷ the fact must be of substantial importance in determining the outcome of the litigation.

4. **Satisfaction of Purposes of Rules.** The requirement that admission of the statement into evidence must serve the interest of justice and the general purposes of the rules of evidence has little practical importance in determining admissibility.

5. **Notice.** Courts generally enforce the requirement of notice in advance of trial, but it may be dispensed with if there is no apparent prejudice to the opponent, and the need for the hearsay statement arises on the eve of the trial or during the course of the trial. To avoid prejudice, the court may grant a continuance to the opponent so that he can prepare to meet or contest the introduction of the hearsay statement.

2. SPECIAL STATUTORY EXCEPTIONS

Several states have enacted hearsay exceptions applicable solely in prosecutions for child sexual abuse.¹⁸ These statutes are designed to permit admissibility of out of court statements of child victims when the equivalent circumstantial guarantees of trustworthiness demanded by Rules 803(24) and 804(b)(5) (sometimes referred to as indicia of reliability). Accordingly, under these statutory hearsay exceptions, courts do not base admissibility upon a categorical assessment of trustworthiness like that which accompanies each of the traditional hearsay exceptions enumerated in Federal Rules of Evidence 803(1)-(23) and 804(b)(1)-(4). Rather, these state statutes require a particularized showing that the child's statement describing prohibited sexual contact possesses equivalent circumstantial guarantees of trustworthiness to that possessed by hearsay statements admissible under Rules 803(1)-(23) and 804(b)(1)-(4). For example, in accordance with a recommendation of the National Legal Resource Center for Child Advocacy and

17. FED. R. EVID. 401.

18. See, e.g., FLA. STAT. § 90.803(23) (Supp. 1985); KAN. STAT. ANN. § 60.460(dd) (1983); WASH. REV. CODE § 9A.44.120 (1974).

Protection, Washington enacted the following statute:¹⁹

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: *Provided*, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Kansas enacted a hearsay exception applicable only to unavailable child declarants based upon a particularized finding of indicia of trustworthiness.²⁰ The statute applies not only in criminal proceedings but elsewhere as well. It provides:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay and inadmissible except:

(dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:

- (1) the child is alleged to be a victim of the crime, a deprived child or a child in need of care; and
- (2) the trial court finds after a hearing on the matter that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made,

19. WASH. REV. CODE § 9A.44:120 (1974).

20. KAN. STAT. ANN. § 60.460 (dd)(1983).

any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

Kansas also enacted a hearsay exception, applicable in civil and criminal proceedings, that permits a party to introduce, subject to satisfaction of specified requirements indicative of trustworthiness, statements of an unavailable declarant that relate to a recently perceived event or condition. Section 60-460(d)(3) of the Kansas statutes permits admission of the following statements:

A statement (1) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (2) which the judge finds was made while the declarant was under the stress of nervous excitement caused by such perception, or (3) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by the declarant and while his or her recollection was clear, and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

In 1985, the Florida legislature joined the parade. Section 90.803(23) of the Florida statutes provides as follows:

SECTION 90.803 HEARSAY EXCEPTIONS; AVAILABILITY OF
DECLARANT IMMATERIAL

The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(23) Statement of Child Victim of Sexual Abuse or Sexual
Offense Against A Child.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the

abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm in addition to findings pursuant to § 90.804(1).²¹

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this section will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.²²

21. FLA. STAT. § 90.804(1) (1983) provides as follows:

Definition of Unavailability. "Unavailability as a witness means that the declarant:

(a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;

(b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

(c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;

(d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his statement in preventing the witness from attending or testifying.

Id.

For a discussion of the competency of a child as a witness, see *infra* text accompanying notes 130-33, and for a discussion of unavailability, see *infra* Section III B(1). With respect to a Florida statute that imposes a less stringent standard of unavailability in connection with the use of closed circuit television or a videotaped deposition of a child witness, see *infra* note 137.

22. FLA. STAT. § 90.803(23) (Supp. 1985).

C. Confrontation Clause

Even if Alice's out of court statements satisfy a hearsay exception, they can not be admitted into evidence in a criminal prosecution against Sam unless they satisfy the confrontation clause as well. The confrontation clause of the sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²³ The defendant's right to confront witnesses is not absolute. If it were absolute, it would preclude admission of all out of court statements made by an unavailable witness, even if the statements met the requirements of one of the hearsay exceptions (with the possible exception of former testimony). In order to analyze the relationship between the rules against hearsay and its exceptions and the confrontation clause, it is necessary to distinguish out of court statements of witnesses who give *viva voce* testimony in court from out of court statements of witnesses who do not testify at the trial of the accused. We may, for the sake of convenience, call the former group of witnesses "testifying witnesses" and the latter group "available but not appearing" and "unavailable" witnesses.

1. TESTIFYING WITNESSES

In our hypothetical, assume the court finds Alice competent to testify at trial. When Alice takes the witness stand at trial, she can testify either inconsistently or consistently with her prior out of court statements, claim not to recall the event or condition in question, assert a privilege, or be unable or unwilling to give testimony. If she claims not to recall, asserts a privilege, or is unable or unwilling to testify, she is in fact unavailable as a witness.²⁴

(a). **Prior Inconsistent Statement.** If Alice testifies inconsistently with her prior out of court statements, the prosecution may seek to introduce her prior statements both as substantive evidence and to impeach. If the prosecution offers the out of court statements for their truth, each statement must meet a hearsay exception. If the particular statement does not meet either a traditional hearsay exception²⁵ or an available hearsay exception for other reliable hearsay,²⁶ the statement may still be admissible if it

23. U.S. CONST. amend. VI.

24. See FED. R. EVID. 804(a).

25. *Id.* at 803(1)-(23), 804(b)(1)-(4).

26. *Id.* at 803(24), 804(b)(5).

meets the hearsay exemption²⁷ or exception now provided in some jurisdictions for prior inconsistent statements. Alice's statements, however, would not meet the hearsay exemption for prior inconsistent statements contained in Rule 801(d)(1)(A) of the Federal Rules of Evidence. The rule states that a statement is defined as "not hearsay," and thus not barred by the rule against hearsay, when the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."²⁸ Since Alice did not make the out of court statements under the prescribed circumstances, Rule 801(d)(1)(A) does not provide an avenue for her prior inconsistent statements' substantive introduction at trial. California, on the other hand, in section 1235 of the Evidence Code, provides for the substantive admissibility of all prior inconsistent statements of testifying declarants provided the witness has an opportunity at trial to admit, deny, or explain the statements.²⁹

In *California v. Green*,³⁰ decided in 1970, the Supreme Court of the United States considered the application of the confrontation clause to the admissibility of prior inconsistent statements proffered as substantive evidence under Section 1235 of the California Evidence Code. In this case, John Green was convicted of supplying marijuana to Melvin Porter, a minor. At a preliminary hearing and in an oral, unsworn statement to a police officer, Porter identified Green as his supplier. At trial, however, Porter was evasive and uncooperative. He claimed that he could not recall who supplied the marijuana to him because he was under the influence of LSD at the time of the transaction. The trial court admitted both prior statements under Section 1235 of the California Evidence Code. The California Supreme Court reversed the defendant's conviction on the ground that admission of the prior statement as substantive evidence violated his right of confrontation. The United States Supreme Court reversed, upholding the constitutional validity of Section 1235.

In its analysis, the United States Supreme Court identified three purposes of confrontation: (1) to ensure that the witness

27. The reasons for creating an exemption rather than an exception are discussed in FED. R. EVID. 801(d) advisory committee note.

28. FED. R. EVID. 801(d)(1)(A).

29. CAL. EVID. CODE § 1235 (West 1965).

30. 399 U.S. 149 (1970).

gives his or her statement under oath; (2) to provide an opportunity for cross-examination; and (3) to allow the jury to assess the demeanor of the witness making the statement. Conceding that a prior out of court statement might be made under circumstances having none of these protections, the Supreme Court nevertheless found that each of the purposes of confrontation would be satisfied when the declarant testified at trial:

[A]s far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.

. . . .
The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement.³¹

Accordingly, the Supreme Court concluded that prior inconsistent statements which satisfy the requirements of Section 1235 do not run afoul of the confrontation clause. For a prior inconsistent statement to be admitted under this rule, the declarant must testify before the jury, under oath, and be subject to cross-examination and redirect examination before the jury regarding the statement; the jury can evaluate such responses.³²

In *Green*, the Supreme Court specifically declined to decide the question of the admissibility of the prior statement to the police officer, because, at trial, Porter did not affirm, deny, or qualify the truth of the prior statement, but instead testified to a lack of recollection of the underlying event. This raised the issue of whether the defendant was "assured of full and effective cross-examination at the time of trial." The Supreme Court explained:

Whether Porter's apparent lapse of memory so affected Green's right to cross-examine [at trial] as to make a critical difference

31. *Id.* at 158-60.

32. In *Green*, 399 U.S. at 149, the witness admitted making the prior inconsistent statement. In *Nelson v. O'Neil*, the Supreme Court held that the confrontation clause is satisfied with respect to a prior inconsistent statement if the witness has recollection, and is subject to cross-examination. 402 U.S. 622 (1971). This is true even if the witness denies making the prior statement.

in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue.³³

(b). **Prior Consistent Statement.** According to *Green*, if Alice's testimony at trial is consistent with her prior out of court statements, and she is available for cross-examination, the court may admit her prior consistent statements without violating the confrontation clause. Even though Alice's prior consistent statements do not violate the confrontation clause they may not be admissible for evidentiary reasons. At common law, and under the Federal Rules of Evidence, prior consistent statements are admissible only when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.³⁴ The express or implied charge will usually arise during cross-examination. It can also surface initially during the presentation of the opponent's case in chief. In either event, this limited window of admissibility makes introduction of Alice's prior consistent statements at trial somewhat problematic.

The common law doctrine of prompt complaint³⁵ affords Alice's prior consistent statements a possible avenue of admissibility that is not available under the Federal Rules of Evidence. The prompt complaint doctrine provides that when a witness testifies at trial accusing someone of a sexual offense, the fact that the witness promptly complained of the occurrence, absent details describing the incident, including the name of the offender, is admissible when testified to by the declarant or someone who heard the statement. The statement of prompt complaint is admitted to corroborate the in court testimony of the complainant. It is admissible under the theory that the evidence of prompt complaint re-

33. 399 U.S. at 168-70. For a discussion of the question that was reserved in *Green*, see M. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 143-49 (1985).

34. FED. R. EVID. 801(d)(1)(B). Assessment of the probative value of prior consistent statements, made in light of various trial concerns, such as misleading the jury and waste of time, is the reason for the limited avenue of admissibility.

At common law prior consistent statements are admissible solely to corroborate; under the Federal Rules of Evidence prior inconsistent statements are admissible as substantive evidence.

35. See generally Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLIAMETTE L.J. 489 (1983).

but the natural inference of fabrication that a jury would draw from a failure to promptly complain; a jury would expect a prompt complaint if the sexual abuse really happened.³⁶

2. NOT APPEARING AND UNAVAILABLE WITNESSES.

In exploring the application of the confrontation clause, it is helpful to consider the not appearing and unavailable witnesses³⁷ categories simultaneously.

In *California v. Green*,³⁸ as introduced above, the United States Supreme Court was called upon to decide the admissibility of preliminary hearing testimony of an unavailable witness, the court treating Porter's alleged lapse of memory as constituting unavailability for the purpose of addressing the question. Noting that Porter was under oath at the preliminary hearing and that Green had the right to cross-examine Porter at that time, the Supreme Court held that substantive admissibility of Porter's preliminary hearing testimony did not violate the defendant's right of confrontation:

We also think that Porter's preliminary hearing testimony was admissible as far as the constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

. . . In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confronta-

36. *Id.* at 492-93.

37. For a description of the circumstances that make a witness unavailable, see *infra* Section III B(1).

38. 399 U.S. 149 (1970).

tion requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.

. . . As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green.³⁹

As the foregoing quotation indicates, under *Green* defendants must have an opportunity to effectively cross-examine the witness; opportunity to cross-examine at the preliminary hearing is not per se adequate. Ordinarily, however, unless the defense was limited by "unusual circumstances," the cross-examination opportunity provided in the typical preliminary hearing will be sufficient. Obviously the question of an adequate opportunity to conduct cross-examination would arise if a child witness capable of direct examination falls apart and answers incoherently, inconsistently, claims lack of recollection, or answers not at all when asked questions on cross-examination, even calmly presented simple questions in child understandable language.

Decisions interpreting *Green* have generally agreed that the issue turns on whether the defense had the opportunity to cross-examine effectively, not whether defense counsel actually engaged in an extensive cross-examination. Nevertheless, the issue has not been totally resolved. In *Ohio v. Roberts*,⁴⁰ decided in 1980, the Supreme Court held that, under *Green*, a court could admit preliminary hearing testimony, offered by the prosecution, of an unavailable witness who had been called by the defense at the preliminary hearing and examined as a hostile witness. Although, in *Roberts*, defense counsel never formally asked the court to declare the witness hostile or to allow him to cross-examine, that is, lead and impeach, his questions were the functional equivalent of cross-examination. The Supreme Court noted that in his "direct examination," counsel challenged the witness' perception of events and her veracity and had not been limited "in any way" in this line of questioning. The result was, as in *Green*, a "substantial compliance

39. *Id.* at 165-69.

40. 448 U.S. 56 (1980).

with the purposes behind the confrontation requirement."⁴¹ The Supreme Court added, however, that in light of the facts before it, there was no need to determine whether *Green* would have applied if defense counsel had not actually engaged in extensive questioning of the witness.⁴²

Six months after *Green*, in *Dutton v. Evans*,⁴³ the Supreme Court held that a defendant's right of confrontation was not violated when the trial court admitted, under a Georgia coconspirator hearsay exception, an out of court declaration of a nonappearing but available witness. Three men, Truett, Williams, and Evans, were charged with the murder of three police officers. Truett was granted immunity in return for his testimony. Williams and Evans were indicted for the murders and tried separately. At Evans' trial, there were 20 prosecution witnesses, but Truett's testimony was the most damaging. He testified that he, Williams, and Evans were stealing a car when three police officers confronted them; they seized a gun from one of the officers and used it to murder all three. One of Williams' fellow prisoners, a man named Shaw, also testified. Shaw said that when Williams returned to the cell after arraignment, he asked Williams how he made out in court. According to Shaw, Williams responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."⁴⁴ Although Williams was available to either side, he was not called to testify at Evans' trial. Defense counsel objected to Shaw's testimony on the grounds that it was hearsay and that it violated Evans' right of confrontation.

The trial court admitted the testimony pursuant to the Georgia statutory coconspirator hearsay exception⁴⁵ and overruled the confrontation clause objection. Defense counsel then cross-examined Shaw at length. Evans was convicted; the Georgia courts upheld the conviction on direct appeal. A federal district court denied Evans' writ of habeas corpus, but the Fifth Circuit reversed, holding that admission of Shaw's testimony under the Georgia coconspirator hearsay exception violated Evans' right of confrontation.⁴⁶

In a five-to-four decision, the Supreme Court reversed. Justice

41. *Id.* at 71.

42. *Id.* at 70.

43. 400 U.S. 74 (1970).

44. *Id.* at 77.

45. GA. CODE ANN. § 38.306 (1954).

46. *Dutton v. Evans*, 400 F.2d 826 (5th Cir. 1968).

Stewart began the plurality opinion with a careful reminder that the confrontation clause was not a codification of the common law rule of hearsay and its exceptions, nor did the confrontation clause render all hearsay inadmissible. He rejected the defendant's argument that the Georgia coconspirator hearsay exception was constitutionally invalid because it did not conform to the federal exception.⁴⁷ Justice Stewart indicated that the issue before the Court was whether the "mission" of the confrontation clause was satisfied:

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."⁴⁸

In *Green*, the Supreme Court remanded for a determination of whether the declarant's lack of recollection at trial "so affected" the defendant's opportunity to cross-examine that the defendant was deprived of his right of confrontation. In *Evans*, the defendant had no opportunity to even attempt to cross-examine the declarant because he was physically absent from trial, not just practically unavailable, as in *Green*. According to Justice Stewart, however, the issue in *Evans* was no longer the existence of an opportunity for full and effective cross-examination, but whether the "trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement." Although Justice Stewart's opinion is abstruse, he appears to have looked to the criteria of certainty of making, indicia of reliability, and probative impact, to determine whether the jury had a satisfactory basis for evaluating the truth of the out of court statement.⁴⁹

Justice Stewart initially found that the jury had a satisfactory basis for evaluating whether Williams actually made the statement to Shaw. Shaw was present in court and defense counsel effectively cross-examined him on the question of whether he actually heard Williams make the statement. According to Justice Stewart, the opportunity to cross-examine the reporting witness, while the witness was under oath and in the presence of the ultimate trier of fact, was a sufficient guarantee of certainty of making.⁵⁰

47. *Dutton v. Evans*, 400 U.S. 74 (1970).

48. *Id.* at 89 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

49. 400 U.S. at 89.

50. *Id.* at 88.

Stewart next found that Williams' statement possessed those indicia of reliability "widely viewed as determinative" of whether a statement should be placed before the jury without confrontation of the declarant. The statement contained no express assertion of past fact and consequently carried on its face a warning to the jury against giving the statement more than the little probative value it deserved. Williams' personal knowledge of the facts surrounding the murder was well established. There was little likelihood that Williams had faulty recollection of the crime. The circumstances under which Williams made the statement negated any motive to misrepresent. Although in *Green*, the court had quoted Wigmore to characterize cross-examination as "the greatest legal engine ever invented for the discovery of truth,"⁵¹ in *Evans*, Justice Stewart summarily dismissed as "wholly unreal"⁵² the possibility that cross-examination of Williams would have aided the jury in determining whether his statement might have been untrustworthy.

Justice Stewart's plurality opinion in *Evans* is exceptionally unclear concerning the standard a court should apply to determine the constitutional admissibility of an out of court statement of an available but not appearing declarant. Justice Stewart was concerned with providing the trier of fact with a satisfactory basis for evaluating the truth of the prior statement. He looked to the indicia of reliability possessed by the statement, the factors establishing certainty that the statement was made and the importance of the statement in the litigation, but he failed to advise lower courts of the proper weight to accord each of these factors. For example, it is not apparent whether Justice Stewart intended an evaluation of incremental probative value to be an independent criterion in the confrontation analysis, or whether he was merely stating that any error in admitting Williams's statement was harmless. Moreover, even if incremental probative value is a relevant criterion, Stewart's opinion is still unclear as to whether all crucial hearsay statements must be excluded, or whether necessary hearsay may nevertheless be admitted if indicia of reliability are adequately established.⁵³

In *Ohio v. Roberts*,⁵⁴ the court answered the questions left

51. 399 U.S. at 158.

52. 400 U.S. at 89.

53. With respect to questions that relate to the admissibility of confessions of co-defendants discussed under the rubric of the confrontation clause, see *Parker v. Randolph*, 442 U.S. 62 (1979); *Bruton v. United States*, 391 U.S. 123 (1968).

54. 448 U.S. 56 (1980).

open in *Evans*. In *Roberts*, the defendant was charged with forgery of a check in the name of Bernard Isaacs and with possession of stolen credit cards belonging to Isaacs and his wife. At a preliminary hearing, defense counsel called Isaac's daughter, Anita, to establish that she had permitted the defendant to use her apartment and to attempt to get her to admit that she had given the defendant the checks and the credit cards without informing him that she did not have permission to use them. Anita denied giving the defendant the items. The government issued five subpoenas to Anita for four different dates. She was not at her residence and did not appear at the trial.

After the preliminary hearing, the defense counsel resigned to accept an appointment as municipal county judge. New counsel appeared at trial. The defendant testified that Anita had given him her parents' checkbook and credit cards. On rebuttal, relying on an Ohio rule of evidence which permits a party to use the preliminary examination testimony of a witness "who cannot for any reason be produced at trial," the state offered the preliminary hearing transcript of Anita's testimony.⁵⁵ At a *voir dire* hearing, the trial court determined that Anita was unavailable because no one knew of her whereabouts. The preliminary hearing testimony was received into evidence.⁵⁶

The Ohio Court of Appeals reversed the defendant's conviction, holding that the state made insufficient efforts to find Anita. The Ohio Supreme Court affirmed the reversal on a different ground, after declaring that the trial court could reasonably infer from testimony at *voir dire* that due diligence to procure Anita's attendance had been shown. The supreme court determined that the transcript was inadmissible because the mere opportunity to cross-examine at a preliminary hearing did not afford the defendant his constitutional right of confrontation for purposes of trial.⁵⁷ At the preliminary hearing, since defense counsel did not ask the court to declare Anita hostile, and thus subject to cross-examination, the lack of actual cross-examination violated defendant's confrontation right.

On appeal, the United States Supreme Court reversed the decision of the Ohio Supreme Court and found the preliminary hearing testimony admissible. The Supreme Court reasoned that with

55. OHIO REV. CODE ANN. §2945.49 (1975).

56. *Ohio v. Roberts*, 448 U.S. 56 (1980).

57. *State v. Roberts*, 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978).

respect to former testimony, the confrontation clause establishes a preference for a face to face confrontation. Thus the prosecution must produce the declarant or establish his or her unavailability. Moreover, every hearsay statement of either an available or unavailable witness, whether or not crucial to a case, must possess "indicia of reliability" to be admitted.⁵⁸ Pursuant to *Green*, prior consistent and inconsistent statements of a witness testifying at trial possess the necessary "indicia of reliability," because the declarant is under oath, is testifying before the trier of fact, and is subject to cross-examination. As to the not appearing or unavailable declarant, the Supreme Court said:

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . . This reflects the "truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values," . . . "and stem from the same roots," . . . It also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁵⁹

The Supreme Court found that defense counsel's method of direct examination gave Anita's testimony the necessary "indicia of reliability" to satisfy the confrontation clause. Although defense counsel did not have Anita declared a hostile witness, counsel did explore her perception of events and her veracity in detail. The Supreme Court found that the change of attorneys was irrelevant.⁶⁰

The Supreme Court delineated several important doctrines in *Roberts*. Although it declined to map out a theory of the confrontation clause that would determine the validity of all hearsay exceptions, the Supreme Court stated, without qualification, that a

58. 448 U.S. at 65-67.

59. *Id.* at 64-65.

60. *Id.* at 72.

trial court may admit into evidence a hearsay statement of a witness not called at trial only if the statement bears adequate "indicia of reliability." Adequate "indicia of reliability,"⁶¹ however, can be "inferred without more" when evidence falls squarely within a "firmly rooted" hearsay exception.⁶² Among the "firmly rooted" hearsay exceptions are the following: (1) the common law hearsay exception for former testimony codified in Rule 804(b)(1) of the Federal Rules of Evidence; (2) each of the hearsay exceptions specifically denominated in Rule 803, where unavailability is not required; (3) the remaining specifically denominated Rule 804 exceptions which require unavailability (with the possible exception of statements against penal interest, Rule 801(b)(3));⁶³ and (4) the Rule 801(d)(2) designation of an admission by a party opponent as "not hearsay" (with the possible exception of statements of coconspirator, Rule 801(d)(2)(E)).⁶⁴

Although, generally, statements not falling within a traditional

61. Adequate "indicia of reliability" must be established with regard to whether or not the not appearing witness must also be shown to be unavailable.

62. *Id.* at 66.

63. The cases are conflicting as to whether a statement against penal interest, offered to inculpate or exculpate under Rule 804(b)(3), falls within the firmly rooted hearsay exceptions of *Ohio v. Roberts*, 448 U.S. 56 (1980), or must be shown to possess particularized guarantees of trustworthiness. Compare *United States v. Katsougrakis*, 715 F.2d 769 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 704 (1984) (firmly rooted) with *Olson v. Green*, 668 F.2d 421 (8th Cir. 1982), *cert. denied*, 456 U.S. 1009 (1982) (particularized guarantees). For other decisions requiring a showing of particularized guarantees, see *Maugeri v. State*, 460 So. 2d 975 (Fla. 3d DCA 1984); *State v. Parris*, 98 Wash. 2d 140, 654 P.2d 77 (1982). The question may lack practical significance if the requirement of Rule 804(b)(3), that corroborating circumstances clearly indicate the trustworthiness of exculpatory statements, applied to inculpatory statements as well by the courts equates with a showing of particularized guarantees of trustworthiness.

64. Admissions of a party-opponent that are exempt from the operation of the rule against hearsay by Rule 801(d)(2) form a possible exception because admissibility is based upon the adversary system rather than an assessment of trustworthiness. At the current time, it is problematic whether statements admitted pursuant to Rule 801(d)(2), and in particular, Rule 801(d)(2)(E), fall within the "firmly rooted" hearsay exception category of *Roberts*. See *United States v. Caputo*, 758 F.2d 944, 951-52 (3rd Cir. 1985). In this case, the court commented, "[i]n holding the *Roberts* 'unavailability' and 'reliability' requirements fully applicable to the admissions of coconspirators who do not testify in court, we are joined by other Courts of Appeals that have decided this question." Judge Sloviter wrote a strong dissent in which he argued that *Roberts* only applies to those hearsay exceptions that require unavailability at common law. For a full view, see *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985). In *Williams* the court held that "challenges to co-conspirators' statements should be based on the requirements of Rule 801(d)(2)(E), not on the Sixth Amendment." 737 F.2d at 610. See also *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984) ("The Circuits are split as to whether compliance with Rule 801(d)(2)(E) automatically satisfies the Sixth Amendment requirements."). See also *infra* note 73.

"firmly rooted" hearsay exception must be excluded, the Supreme Court provided for the admission of such statements if they possess "particularized guarantees of trustworthiness" that are equal to the circumstantial guarantees of statements admitted pursuant to the "firmly rooted" traditional hearsay exceptions. Notably, the Kansas, Washington and Florida statutes follow the Court's language, which parallels the requirements of Rules 803(24) and 804(b)(5).⁶⁵ Under each of these statutes, as required by *Roberts*, evidence can be admitted only if it possesses "particularized guarantees of trustworthiness" equivalent to those possessed by the traditional "firmly rooted" hearsay exceptions. Thus, evidence properly admitted pursuant to any of these or similar hearsay exceptions also meets the requirements of the confrontation clause.

According to the above quotation from *Roberts*, statements falling within a Federal Rule of Evidence 803 hearsay exception, as well as those statements defined as "not hearsay" in Rule 801(d)(2), may be admitted against a criminal defendant "normally" only if the government produces the declarant for direct and cross-examination at trial, or makes a sufficient showing that the declarant is not available to testify. Taken literally, almost every hearsay statement that meets an exception in Rule 803, and every statement defined as "not hearsay" in Rule 801(d)(2), would seem to require either production of the declarant, or a showing of unavailability before the statement can be received in evidence against the accused.⁶⁶

Several factors, however, indicate that the Supreme Court did not contemplate such radical change in practice. First, the Court discussed its interpretation of the confrontation clause in the context of a discussion of Rule 804(b)(1), the former testimony hearsay exception. This exception requires unavailability. The casual nature of the comment with respect to unavailability, in the context of a hearsay exception requiring unavailability, belies any intention to make a radical change in the law. More importantly, in *Roberts* the Court clearly states that while the confrontation clause "normally requires" a showing of unavailability, "competing interests . . . may warrant dispensing with confrontation at trial."⁶⁷ The Court specifically recognized that the requirement of face to face confrontation must sometimes give way to "considerations of

65. See *supra* note 18 and accompanying text.

66. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

67. *Id.* at 64.

public policy and the necessities of the case."⁶⁸ The opinion also indicates that parties need not demonstrate unavailability or produce the declarant when the utility of confrontation is remote.⁶⁹ It is interesting to note that, generally speaking, neither the state courts, the United States Courts of Appeal, nor the leading commentators on the Federal Rules of Evidence have construed *Roberts* as ushering in a radical change. For example, *United States v. Yakobov*⁷⁰ holds that evidence of the absence of a public record may be introduced against the criminal defendant under Rule 803(10) without production of the available records custodian or any other available witness.⁷¹ Finally, it would be completely out of character with the other Supreme Court decisions including *Evans*, to read the "normally requires" language of *Roberts* as a requirement of either unavailability or production with respect to almost every hearsay statement offered against a criminal defendant pursuant to Rule 803.

In summary, it is very clear that an available declarant need not always be called by the prosecution at trial to testify before a prior hearsay statement, which meets either a traditional "firmly

68. *Id.* at 64 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

69. *Id.* at 65.

70. 712 F.2d 20 (2d Cir. 1983). See also *United States v. Hans*, 684 F.2d 343, 346 (6th Cir. 1982) ("The district court acknowledged that the checks were exceptions to the hearsay rule under Rule 803(6) and Rule 803(8), both of which could be utilized 'even though the declarant is available as a witness.' Clearly *Roberts* does not support exclusion of the instant checks.").

71. *Cf. United States v. Massa*, 740 F.2d 629 (8th Cir. 1984):

The record also raises serious questions about Brimberry's availability. The government recognized on the record that Brimberry had offered to testify. In *Roberts*, the Supreme Court stated 'if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.' Thus, the government may have been obligated to make Brimberry available for cross-examination in order to use his out-of-court statements in conformity with the confrontation clause. . . .

. . . .

This raises the additional question, not pressed by the government in its brief, of whether the confrontation clause prevents the use of hearsay statements when the declarant is available to both sides. Two Ninth Circuit pre-*Roberts* cases imply that it does not. . . . We read *Roberts*, however, to place the burden on the government to make available for cross-examination a witness whose out-of-court statements it is using against the defendant. The Court stated: '[A] witness is not unavailable for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial * * *.' Thus, it is the government's burden to obtain the available hearsay declarant's presence at trial, although it need not call the witness to testify.

Id. at 640 & n.6 (citations omitted).

rooted" hearsay exception or possesses equivalent particularized guarantees of trustworthiness, may be admitted against the accused in evidence in satisfaction of the confrontation clause. It is abundantly clear that the "normally requires" language of *Roberts* does apply to prior statements of alleged victims of sexual abuse accusing the defendant of the charged offense. If the confrontation clause means anything, it must mean the right of the defendant to confront complaining "witnesses against him" who are available to testify.⁷² Thus, none of the exceptions alluded to by the Supreme Court in *Roberts* to justify nonproduction of an available declarant would or should apply to Alice's statements that Sam rubbed his hand on her genitals.

3. SYNOPSIS

The interpretation of the confrontation clause developed in *Green*, *Evans*, and *Roberts* allows introduction, as substantive evidence, of all prior out of court hearsay statements of a witness who is called at trial by the prosecution and testifies subject to cross-examination, whether the hearsay statement is consistent or inconsistent with the witness' in-court testimony.⁷³ If the witness is

72. Instead of trying to determine whether "competing interests," "public policy," "necessity," or "remoteness" should dispense with the requirement of production of an available declarant, it has been suggested that the better approach is to judge imposition of the requirement of showing unavailability by the circumstances under which the statement was made. See Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 Tex. L. Rev. 151 (1978):

Under this approach, when the Government offers an out-of-court statement pursuant to a hearsay exception, the confrontation clause requires the Government to produce the declarant only if he is available and then only if the circumstances surrounding the making of the statement indicate that it was accusatory in nature when made. If the out-of-court statement was accusatory when made, the declarant is a witness 'against' defendant. Conversely, if the out-of-court statement was not accusatory, the declarant is not a witness 'against' defendant, and the confrontation clause has no application.

....

... A statement is accusatory in nature under this analysis if it is made under circumstances that evidence, first, an intent of the declarant to accuse or charge someone with conduct that is criminal, or second, an awareness by the declarant of a reasonable possibility that the statement may be of assistance to the Government in the apprehension or prosecution of any person who may be charged with having committed any crime.

Id. at 192.

73. Thus with respect to an out of court statement offered under Rule 801(d)(2)(E), if the declarant testifies at trial, under *Green*, the court clearly need not make an ad hoc search for circumstantial guarantees of trustworthiness; oath, demeanor, and cross-examination before the trier of fact suffice to meet the confrontation clause's requirement of indicia of reliability.

available but does not appear, certain hearsay statements which meet a traditional "firmly rooted" hearsay exception or which are shown on a particularized basis to be sufficiently trustworthy may nevertheless be admitted where the utility of confrontation is remote or the competing interests of public policy and the necessities of the case warrant admission. Hearsay statements in the "normal" case, however, which certainly includes out of court statements of alleged victims which accuse the defendant of committing the crime for which he is on trial, are admissible under the confrontation clause only if the available declarant is produced at trial. Such hearsay statements are, of course, admissible only if they meet the requirements of a traditional "firmly rooted" hearsay exception or are shown to possess particularized guarantees of trustworthiness possessed by statements admitted pursuant to the traditional "firmly rooted" exceptions.

D. *Proposed Hearsay Exception*

The following proposed hearsay exception for children's out of court statements that describe sexual contact draws upon various common law and emerging statutory hearsay exceptions:

A statement made by a child, when under the age of ____, describing an act of sexual contact performed with or on the child by another is admissible in evidence in criminal proceedings, civil proceedings, and dependency and delinquency proceedings in juvenile court if:

(1) The child testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement

(a) is consistent with the child's testimony and is one of initial complaint, or

(b) (i) is inconsistent with his testimony, and

(ii) was made by a child possessing personal knowledge of the sexual conduct described, and

(iii)(1) is proved to have been made under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or

(2) the statement is proved to have been written or signed by the child, or

(3) the making of the statement is acknowledged to have been made either (a) by the child in his testimony in the present proceeding or (b) by the child under oath subject to the penalty of perjury at a prior trial, hearing, or other proceeding or in a deposition, or

(4) the statement is proved to have been accurately recorded by a tape recorder, videotape recorder, or any other similar electronic means of sound recording, provided further

(iv) there is adequate corroborative evidence introduced at trial of the act of sexual contact described in the statement, or

(2) The testimony of the child is unavailable at the trial or hearing and the statement

(a) was made by a child possessing personal knowledge of the sexual conduct described, and

(b) the statement possesses circumstantial guarantees of trustworthiness equivalent to that possessed by statements admitted pursuant to a firmly rooted hearsay exception, and

(c) the proponent of the statement notifies the adverse party of his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, provided further,

(d) there is adequate corroborative evidence introduced at trial of the act of sexual contact described in the statement.

1. TRUSTWORTHINESS

Proposed Rule 1(a) constitutes a modification of the common law doctrine of prompt complaint. Under the proposed rule, the child victim of prohibited sexual contact must testify at trial in a manner consistent with the content of the initial complaint, and must be subject to cross-examination. If the child fails to so testify at trial, for example, if the child is physically unavailable, fails to recall the event, or testifies to a version that differs from the alleged initial complaint, the initial complaint would fail to meet the requirements of proposed Rule 1(a). The presence of the witness in court under oath, subject to cross-examination, coupled with consistency between the witness' in court testimony and the witness' statement of initial complaint, clearly justifies substantive admissibility.

Under proposed Rule 1(a), the court may admit the initial complaint of the child victim as substantive evidence on direct examination. Moreover, in contradistinction to the common law, the initial complaint need not be "prompt"; delay in making the complaint does not affect admissibility. Instead, delay is a factor to be weighed in assessing the credibility of the witness. Proposed Rule

1(a) also resolves a continuing problem concerning the scope of admissibility of victim complaint evidence: whether admissibility should be limited to the fact of the complaint or should instead encompass details including the name of the alleged assailant. Rule 1(a) would simply allow the trial court to admit as substantive evidence all details actually contained in the initial complaint. The common law has already moved significantly in this direction. Increasingly, courts allow more background details; some courts even admit the identity of the assailant. Permitting admissibility of all details actually contained in the initial complaint gives the jury a more complete picture of what actually transpired. When only the mere fact of the complaint is admitted, the jury receives very little useful information to guide them in determining the weight to give the complaint. By permitting admissibility of all details actually stated at the time of initial complaint, the proposed rule would give the factfinder the maximum amount of information with which to assess the credibility of the initial complaint evidence and the overall credibility of the child witness.

While proposed Rule 1(a) would admit the fact of the complaint and its details, it would limit admission to the initial outcry, which is the earliest prior statement, and thus, the most useful in assessing the credibility of the child victim. Any subsequent complaint would be considered inadmissible hearsay unless it met the requirements of one of the remaining subsections of the proposed rule, the excited utterance hearsay exception, the requirements for a prior consistent statement, or another hearsay exception or definition of "not hearsay" contained in the Federal Rules of Evidence.

Proposed Rule 1(b) constitutes a modification of Rule 801(d)(1)(A) of the Federal Rules of Evidence. Rule 801(d)(1)(A) provides for the substantive admissibility of prior inconsistent statements given under oath, subject to the penalty of perjury at a trial, hearing, or other proceeding, or at a deposition. Proposed Rule 1(b) expands significantly, but with limitation, the substantive admissibility of prior inconsistent statements made by child witnesses that describes an act of sexual conduct performed with or on the child by another. Proposed Rule 1(b) would permit introduction of prior inconsistent statements clearly shown to have been made, where an opportunity exists at trial to examine the witness in order to expose and counteract any impropriety that may have occurred during the taking of the statement, such as coercion, deception, or subtle influences. Proposed Rule 1(b) imposes

a requirement that the child declarant possess personal knowledge of the sexual conduct described.⁷⁴ Considered as a whole, proposed Rule 1(b) adequately ensures that the witness made the prior inconsistent statement, and that the trustworthiness of the prior inconsistent statement can be explored at trial. At the same time, proposed Rule 1(b) excludes the most untrustworthy declaration, the unacknowledged oral statement. In addition, proposed Rule 1(b) permits the prior inconsistent statement to be admitted only if there is adequate corroborative evidence or the sexual contact described in the statement. The significance of the corroboration requirement will be discussed later, in connection with proposed Rule 2, which deals with the prior statement of an unavailable child.

Certain other provisions of proposed Rule 1(b) deserve specific mention. Rule 801(d)(1)(A) of the Federal Rules of Evidence does not permit substantive admissibility of a witness' statement when, at trial, the witness acknowledges making, but denies the truth of, an inconsistent statement. In contrast, proposed subsection 1(b)(iii)(3)(a) would allow substantive admissibility of this inconsistent statement. In addition, proposed subsection 1(b)(iii)(3)(b) provides for substantive admission of a prior oral statement, the making of which the witness acknowledged while testifying at a prior trial, hearing, other proceeding, or deposition, even if the witness had denied its truth at that time. Thus, subject to the requirement of personal knowledge, if a child witness at a current trial appeared at a prior formal proceeding and acknowledged that he or she made a particular oral inconsistent statement, under the proposal, the statement would be admissible substantively in the present trial even if the child now testifies that he or she never made the prior oral statement and that it is untrue.

Whenever a child has not and will not acknowledge making a prior oral statement, proposed Rules (1)(b)(iii)(1), (2), and (4) re-

74. The requirement that the witness have had personal knowledge of the event or condition the prior inconsistent statement narrates, describes, or explains, proposed Rule (1)(b)(ii), has two very important consequences. First, only a child witness with personal knowledge of the subject matter of a prior inconsistent statement can be examined about whether the statement is truthful. Second, the requirement excludes from evidence all prior statements of a child witness that merely narrate a third person's declaration unless the child also has personal knowledge of the facts underlying the third person's statement. Thus a child's prior statement that he heard a criminal defendant make an incriminating admission would be inadmissible as substantive evidence unless the child had personal knowledge of the incriminating conduct itself. The personal knowledge requirement excludes from evidence those statements most open to fabrication by the child while concurrently assuring the opportunity for effective cross-examination.

quire proof that the statement was made at a formal proceeding, was written or signed by the child, or was accurately electronically recorded. Introduction of evidence sufficient to support a jury finding that the child made the prior inconsistent out of court statement. Rather, the litigant must initially satisfy the court that it is more probably true than not true that the statement was in fact made. An in court declarant who denies making a prior inconsistent statement will necessarily be testifying under oath, therefore, the proposal justifiably imposes a greater requirement of certainty that the child made the statement. Such direct testamentary contradiction is not often present with respect to authentication of writings or recordings that are admitted pursuant to the doctrine of conditional relevance. Given the nature of the prior inconsistent statements that fall within the proposed rule, it is probable that even a child, especially after reviewing his or her statement, will seldom deny making the statement, although the possibility of forged signatures or alteration of the prior written or recorded statement creates a potential for dispute. Ultimately, the decision about whether the statement was made rests with the jury.

Although proposed Rule 1(b) requires that the proponent bear the burden of proof that it is more probably true than not true that the statement was the exact statement the child wrote, signed, or recorded, the proponent should not be required to bear this burden of proof regarding other contested matters relating to the statement. The jury, under the concept of conditional relevancy, must resolve any special problems such as distortion of the signed statement by subtle word variations, complete omissions, or fabricated additions by the person preparing the statement for the child to sign, uncritical signing, and subtle influences such as the child's desire to please another person. After the jury has heard the allegations presented by the child and others in court, and has listened to cross-examination of the person who obtained the prior statement, the jury has the task of judging the credibility of each witness and of deciding what, in fact, occurred when the prior statement was allegedly made. If the child asserts that a prior statement was made involuntarily, however, under the proposed rule, the proponent of the statement would be required to convince the court that it is more probably true than not true that the statement was not coerced.

In summary, proposed Rule 1(b), to the extent justified by concerns for certainty of making and circumstantial guarantees of trustworthiness, increases the breadth of prior inconsistent state-

ments that describe an act of sexual contact admitted as substantive evidence when the child is available for cross-examination. The proposed rule also makes it easy for police officers, social workers, specially trained interviewers, and prosecuting attorneys to promptly preserve an out of court statement of a child witness for admission at trial against the possibility of changed testimony by video or tape recording the child's oral statement, or by having the child, if old enough, either prepare a handwritten statement or execute a written statement prepared by another.

Proposed Rule 2 provides for the substantive admissibility of prior statements of a child that describe an act of sexual contact performed with or on the child by another where the child's testimony is unavailable at trial and (a) the child is shown to possess personal knowledge of the sexual conduct described,⁷⁵ (b) the statement is shown to possess circumstantial guarantees of trustworthiness equivalent to that possessed by statements admitted pursuant to a traditional "firmly rooted" hearsay exception, (c) advance notice of intent to offer the statement is given, and (d) adequate corroborative evidence of the sexual conduct described in the statement is introduced at trial. Proposed Rule 2 generally conforms with the proposal of the National Legal Resource Center for Child Advocacy and Protection as incorporated by Washington Revised Code Section 9A.44.120. The proposed rule adds the requirement that the child possess personal knowledge and it borrows a notice provision from Rule 804(b)(5) of the Federal Rules of Evidence. Proposed Rule 2 also rewords the requirement of trustworthiness to parallel Rule 804(b)(5) and *Roberts*. It retains the requirement of corroboration of the act of sexual contact.

Whether a child's hearsay statement is accompanied by sufficient particularized guarantees of trustworthiness turns on the facts of the case. As previously mentioned, in conducting a similar inquiry under Federal Rules of Evidence 803(24) and 804(b)(5), courts have looked to several criteria: (1) certainty that the statement was made, which should include an assessment of the credibility of the person testifying in court to the statement;⁷⁶ (2) assur-

75. The personal knowledge requirement excludes from evidence all prior statements of a child that merely narrate a third person's declaration unless the child also has personal knowledge of the facts underlying the third person's statement. Thus a child witness' statement that he heard a criminal defendant make an incriminating admission would be inadmissible as substantive evidence unless the child had personal knowledge of the incriminating conduct itself.

76. It is questionable whether expert witness testimony should be admissible on the issue of trustworthiness. The availability of expert witness opinions going in both directions

ance of the declarant's personal knowledge of the underlying event; (3) whether the statement was made under oath; (4) the practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event [obviously not applicable to Rule 804(b)(5)]; and (5) an ad hoc ascertainment of trustworthiness. This ad hoc assessment is to be based upon the totality of the surrounding circumstances, including corroborating facts such as physical evidence, inconsistent facts, and the assessed credibility of the declarant, all considered in the light of the traditional "firmly rooted" exceptions to the hearsay rule. The following factors are relevant and bear upon the determination of trustworthiness of a child's statement that describes an act of sexual contact: (1) the child's partiality, that is, interest, bias, corruption, or coercion; (2) the presence or absence of time to fabricate;⁷⁷ (3) the physical and mental condition of the child when the statement was made;⁷⁸ (4) suggestiveness, brought on by the use of leading questions coupled with an evaluation of the child's relationship to the questioner, considered in light of surrounding circumstances;⁷⁹ (5) the age of

should make the court reluctant to open the flood gates to such testimony. See *infra* note 90 and text accompanying notes 92-95. Moreover, it is questionable whether such testimony is helpful because it only addresses the issue of trustworthiness, it does not address the psychological manifestations indicative of child sexual abuse syndrome. *Contra* *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985):

In this case there were sufficient guarantees of trustworthiness to support admission of the hearsay statements. The State's expert witness—an M.D. specializing in child psychiatry—concluded that the child's statements were reliable. He spent four 50-minute sessions with the child and spoke with her foster parents and teacher. At the doctor's request, the child demonstrated what had happened with anatomically correct dolls. The doctor could discern no motive for falsification and concluded that she knew the difference between right and wrong and her statements were reliable.

Id. at ____, 697 P.2d at 844.

77. A court is more likely to admit statements made soon after the event than statements made after a substantial lapse of time. Similarly, initial statements are more easily admitted than subsequent statements. Nevertheless, although time and sequence are important, they are not preclusive because delay in reporting and vacillation are commonly associated with complaints of child sexual abuse.

78. It is appropriate to consider the child's chronological age, mental age, and maturity in order to determine the child's physical and mental condition at the time he or she made the statement.

79. Compare *State v. Myatt*, 237 Kan. 17, 697 P.2d 836, (1985) ("[I]t is highly unlikely that a child will persist in lying to his or her parents, or other figures of authority about sexual abuse.") with *State v. Ryan*, 103 Wash. 2d 140, 691 P.2d 197 (1984).

[A]s regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

the child; (6) the nature and duration of the sexual contact; (7) the relationship of the child and the accused; and (8) whether the child has reaffirmed or recanted the statement. Matters of particular importance in determining the trustworthiness of a young child's hearsay statement include: (1) whether the child is likely, apart from the incident, to have sufficient knowledge of sexual matters to realize that sexual contact is both possible and sexually gratifying to some individuals;⁸⁰ (2) whether the child's statement describes an embarrassing event that a child would normally not relate unless true;⁸¹ (3) whether the language is appropriate for the child's age; and (4) whether the child's statement is a cry for help.⁸²

Id. at ___, 691 P.2d at 205.

The problem of command suggestiveness by a person in authority, particularly a mother involved in a custody dispute, should not be underestimated. It is possible that a child's statement alleging sexual abuse resulted from a desire to please, from fear, or from uncritical acceptance of what the child perceives the authority figure believes happened. With very young children it is possible that over time, the child may accept the suggested event as true and recall it as if it had really occurred. See *Miami Herald*, July 28, 1985 (*Tropic Magazine*), at 11-13 (describing questionable accusations as "epidemic" and quoting Dianne Schetky, a child psychiatrist in Connecticut, as stating about false accusations: "A child can be very impressionable. They want to believe their parents. And if Mommy says Daddy abused you . . . the child is not per se lying. He is brainwashed. . . . Children are very suggestible. I have seen interviews where the interrogators put words in the child's mouth."). See also *infra* text accompanying note 86.

80. *State v. Myatt*, 237 Kan. 17, ___, 697 P.2d 836, 841 (1985) ("[C]hildren do not have enough knowledge about sexual matters to lie about them."). But see *supra* note 79.

81. See Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983).

To ensure that the statement is not admitted without the requisite guarantees of trustworthiness, the hearing requirement of the new hearsay exception should be construed broadly. The exception requires that the court hold a hearing on the issue of reliability prior to admission of the statement. At the very least, the court should thoroughly question the person who will testify concerning the child's out-of-court statement, any other persons who heard the statement, any persons who have knowledge of the circumstances surrounding the alleged sexual assault, and if possible, the child. During the questioning, the court should attempt to determine: (1) the time lapse between the alleged sexual act and the child's recital of the statement; (2) whether the statement was made in response to a leading question; (3) whether either the child or the hearsay witness has any bias against the defendant or any motive for fabricating the statement or implicating the accused; (4) whether the statement was made while the child was still upset or in pain because of the incident; (5) whether the terminology of the statement was likely to have been used by a child the age of the alleged victim; and (6) whether any event that occurred between the time of the alleged act and the time the statement was made could have accounted for the contents of the statement.

Id. at 827.

82. See *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985). The *Myatt* court said:

The determination of reliability and trustworthiness must be made on a case-by-case basis. Such factors as the age of the child; his or her physical and

The Washington statute, Section 9A.44.120, in its search for particularized guarantees of trustworthiness, requires consideration of the time, content, and circumstances of the statement. The Kansas statute, Section 60-460(d)(3), demands consideration of whether the statement was made by the declarant at a time when the matter had been recently perceived, whether the statement was made in good faith prior to the commencement of the action, and whether the statement was made with no incentive to falsify or distort. Another Kansas statute, Section 40.460(d)(a), requires that the court consider whether the child was induced by threats or promises to falsely make the statement. A Florida Statute, Section 90.803(23), mandates consideration of the mental and physical age and maturity of the child.

The Supreme Court of Washington, in *State v. Ryan*,⁸³ listed the following factors, originally set forth in *State v. Parris*,⁸⁴ as relevant in the search for particularized guarantees of trustworthiness: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statement; (4) whether the statement was made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness.⁸⁵ In *Ryan*, two children, when questioned about the source of candy in their possession, first told a story, then later recanted the story and stated that the defendant had given it to them for permitting sexual contact. In applying the factors, the court considered it important the fact that both children's statements were made initially to only one person. The court held that the children's hearsay statements were inadmissible. The court was strongly influenced by the fact that both mothers solicited the initial statements after they learned of the possibility that sexual contact had occurred. Implicit in the court's reasoning is the belief that children are susceptible to suggestion from persons they love or who have authority over them. The *Ryan* court said:

Applying the *Parris* factors to the circumstances of the pre-

mental condition; the circumstances of the alleged event; the language used by the child; the presence of corroborative evidence; the relationship of the accused to the child; the child's family, school, and peer relationships; any motive to falsify or distort the event; and the reliability of the testifying witness can be examined.

Id. at ___, 697 P.2d at 843. See also *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984).

83. 103 Wash. 2d 165, 691 P.2d 197 (1984).

84. 98 Wash. 2d 140, 654 P.2d 77 (1984).

85. 103 Wash. 2d at ___, 691 P.2d at 205.

sent case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have. Second, all the record reveals about the character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.⁸⁶

Applying the relevant factors, proponents will often succeed in introducing the child's initial statement that describes the act of sexual contact performed with or on the child by another, as well as additional statements made immediately after the initial statement. It is, however, extremely doubtful that a child's statement to a police officer, social worker, or someone specially trained to interview children will be found to possess equivalent circumstantial guarantees of trustworthiness, whether or not the statement was videotaped or otherwise recorded. The normal timing of such an interview, its investigative function, the frequent use of suggestive questions by a person in authority, and the fact that the child will usually have made several earlier statements relating to the alleged sexual contact all militate against admissibility. Such investigatory statements are somewhat analagous to grand jury testimony which has received a checkered response when offered under Federal Rule of Evidence Rule 804(b)(5).⁸⁷ A proponent can often, when desirable, preserve the child's testimony against the possibility of unavailability at trial by having the child testify, subject to cross-examination, at a preliminary hearing or by means of a deposition.

86. *Id.*

87. See, e.g., *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. denied*, 439 U.S. 936 (1978) (finding grand jury testimony admissible). But see *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) (finding grand jury testimony inadmissible).

2. CORROBORATION

An important feature of proposed Rule 2 is that to be admitted in evidence, an unavailable child's hearsay statement must not only be sufficiently trustworthy, it must also be corroborated by evidence introduced at trial. The requirement of adequate corroboration applies only to evidence of the sexual conduct described in the statement itself; proposed Rule 2 does not require corroborative evidence that the sexual conduct was committed by the accused.⁸⁸ Recall that proposed Rule 1(b) also requires corroboration with respect to prior inconsistent statements.

Neither considerations underlying the hearsay rule and its exceptions, nor considerations underlying the confrontation clause as set forth in *Roberts*,⁸⁹ require corroboration of the sexual contact itself as a separate requirement to admissibility of a child's hearsay statement. The corroboration requirement stems from a due process concern that the trier of fact may be too willing to convict an accused sexual offender, that is, find that the state has satisfied its burden of proof beyond a reasonable doubt, on the basis of evidence of alleged out of court statements of children that describe socially repugnant sexual contact. The requirement of corroboration also implicitly recognizes that judges may be too willing to send such cases to the jury.

Let's take a worst case scenario. Assume that Alice is unavailable at trial because she is unable to recall the events in question. Assume further that no corroboration exists, that is, the medical examination reveals no abnormalities, the investigators find no physical evidence at the scene, no other eyewitnesses are located, and Sam does not confess. Neither evidence of lustful disposition, where admissible, nor expert witness testimony relating to the credibility, character, or psychological state of being⁹⁰ of either the

88. But see Comment, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 821 (1985).

89. Section 2(b) of the proposed rule requires trustworthiness, "indicia of reliability," as mandated by *Roberts*. See *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984).

90. *Contra* Comment, *supra* note 88, at 821:

[T]he state must produce corroborative evidence of the abusive act itself and not merely of the circumstances surrounding the act as described by the child. To corroborate the abusive act the state may offer eyewitness testimony (including that of another child), physical evidence, a confession, or any clear evidence that the child has been the victim of sexual abuse, including psychiatric testimony that the child displays behavioral symptoms of having been sexually abused.

Id.

It is simply too easy to find a psychologist or psychiatrist who is willing to testify that

child or the defendant should be considered as the type of corroborative evidence of the existence of the act of sexual contact described in the hearsay statement required by the rule. Alice's mother claims that Alice, relatively near the time of the event, volunteered the statement describing the sexual contact. Alice's mother's testimony at trial, if believed, supports a finding of equivalent circumstantial guarantees of trustworthiness. Alice's statement described sexual contact which a girl of four probably would not realize could be enjoyable to an adult male. In addition, her statement may have disclosed events embarrassing to her. It is difficult to say under the circumstances, however, that Alice's statement was a cry for help. Assume no apparent motive to fabricate on the part of Alice or her mother is disclosed during cross-examination. The question thus posed is whether a criminal defendant can be convicted of the serious crime of child sexual abuse solely on the basis of an out of court declaration of an unavailable child? Due process demands a "No" answer.

One may assert that the concern with convicting an accused solely on the basis of an out of court statement is a question of sufficiency of evidence and not one of admissibility. While true in theory, in light of the current hysteria over the recent revelation of the extent of child sexual abuse, courts and juries may very well be too ready to convict, if given the opportunity. The requirement of adequate corroborative evidence thus serves an appropriate screening function.⁹¹ The undue tendency to convict is likely to be exacerbated by the emerging practice of permitting expert witnesses to

the child displays behavioral symptoms consistent with sexual abuse. The "venality" of expert witnesses is well documented. See Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35 (1977).

91. See Comment, *supra* note 88, at 820:

Creating a general exception to the hearsay rule for the statements of children in sex abuse cases would render a separate requirement of corroboration superfluous. But such a step would place the defendant in the untenable position of having to refute, without the benefit of cross examination, statements charged with powerful emotional appeal yet supported only by questionable common sense suppositions. Moreover, the presumption that children's reports of sex abuse are inherently reliable will become increasingly less valid as children are more commonly instructed on the nature of sex abuse, advised to "tell" if it happens, and assured that if they tell they will be believed. The public's heightened awareness of child sex abuse may also lead worried parents to question children about their relationships with adults and to misconstrue innocuous replies. Because the state's case will typically rest largely on the child's hearsay statement, a general requirement of corroboration is a necessary safeguard against wrongful conviction.

Id.

testify for the prosecution in support of the child's testimony. In addition, the corroboration requirement assists prosecutors to dismiss cases that should never have been brought, by providing a way to explain the dismissal to interested individuals.

To highlight the concern over testimony of expert witnesses, assume that Alice is examined by a psychologist six days after the incident. She gives the psychologist the same account of the story that she previously gave to her mother, the doctor, and the police officer. At trial, however, Alice testifies that Sam never touched her genital area. She further testifies that she was confused by everyone's questions and just wanted to tell them what they seemed to want to hear. She also says that she did not know it would get Sam into so much trouble. The prosecution now seeks to buttress its case through expert testimony. The prosecution calls a consulting psychologist, who never examined Alice, to testify that the delay in reporting the incident was normal and common for children that have been sexually abused by a person who lives in the same household as the child. Another psychologist, who did examine her, then testifies that, in his opinion, Alice exhibited the classic indicators of child sexual abuse syndrome and that the children who exhibit such a syndrome make truthful out of court statements describing the sexual contact. Moreover, the expert testifies that on the basis of his examination of Alice, he is of the opinion that Alice was sexually abused⁹² and that her out of court statements are truthful. Finally, the expert testifies that young children generally do not lie about graphic portrayals of sexual activity. Next, a third psychologist, who also never examined Alice, testifies that recantation is extremely common in sexual abuse cases involving persons that live together. This expert offers his opinion that children often have guilt feelings concerning the family disruption caused by his or her complaint. He also testifies that on other occasions, children have simply been pressured to recant. The expert thus becomes a third voice telling the jury that it should believe the

92. One may question the helpfulness of the testimony of an expert witness who testifies at trial. In *State v. Lairby*, a pediatrician testified:

I'm saying my experience, my experience after seeing children who have been sexually abused is that children whose behavior, and that includes vocabulary and way of expressing things in terms of their genital area, when the behavior is beyond that which would be acceptable as normal, if you will, in a sexual sense in a given age group, then that has—yes, that has to influence a concern. It is one of the indicators of sexual abuse.

699 P.2d 1187, 1201 (Utah 1984).

child's earlier accusation.⁹³ Although court authorization of such expert testimony is not yet widespread and three separate experts would rarely be permitted to testify for the prosecution in the same case,⁹⁴ the testimony of just one expert could constitute an overwhelming appeal to the jury to follow their own inclinations and convict.⁹⁵ The potential for misuse of expert witnesses in the foregoing manner supports the imposition of a requirement of adequate corroborative evidence with respect to hearsay statements of an unavailable child declarant as well as to prior inconsistent statements of a testifying child complainant.

93. For a full discussion of the use of expert witnesses in child sex abuse cases, see Roe, *infra* p. 97 (*Expert Testimony In Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)). See also *State v. Kim*, 64 Hawaii 598, 654 P.2d 1330 (1982); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983). See generally Wells, *Child Sexual Abuse Syndrome: Expert Testimony—To Admit or Not to Admit*, 57 FLA. B.J. 672, 675 (1983).

94. For a discussion of the limits of social science research, see *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985):

To some extent a broad issue before this Court concerns the role that social science is to have in judicial decisionmaking. Social science is a broadbased field consisting of many specialized discipline areas, such as psychology, anthropology, economics, political science, history and sociology. . . . Research consisting of parametric and nonparametric measures is conducted under both laboratory controlled situations and uncontrolled conditions, such as real life observational situations, throughout the disciplines. The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society's and the individual's circumstances. Social science as a *nonexact* science is always mindful that its research is dealing with highly complex behavioral patterns and institutions that exist in a highly technical society. At best, this research "models" and "reflects" society and provides society with trends and information for broad-based generalizations. The researcher's intent is to use the conclusions from research to predict, plan, describe, explain, understand or modify. To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research. Even when this research is at a high level of exactness, in design and results, social scientists readily admit their steadfast hesitations to conclude such results can explain specific behavioral actions in a certain situation.

The judiciary is aware of the potential limitations inherent in such research: (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently, and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking.

Id. at 887.

95. If the prosecution offers the testimony of expert witnesses, the accused may seek an order requiring the child to submit to a psychological or psychiatric examination by an expert that he or she selects. See *State v. Lairby*, 699 P.2d 1187 (Utah 1984).

III. CLOSED CIRCUIT TELEVISION, VIDEOTAPED STATEMENTS, VIDEOTAPED DEPOSITIONS, AND CHILDREN'S COURTROOMS

Videotaping may be employed to preserve any statement made or testimony given by a child. If the statement of the child is admissible pursuant to any hearsay exception, including a special hearsay exception for statements that describe an act of sexual contact, the videotape, once authenticated, serves as an alternative means of introduction of the child's statement into evidence. Thus, instead of the jury observing the child or another witness testify to what the child said or having a transcript read, the videotape of the child speaking can be shown to the jury. The videotape may be, for example, of a statement made to the child's doctor admitted under Rule 803(4) of the Federal Rules of Evidence, or of a videotape of prior testimony at a preliminary hearing admitted upon a finding of the child's unavailability at trial under Rule 804(b)(1) of the Federal Rules of Evidence.

Videotaping to preserve and introduce admissible hearsay statements or testimony of child declarants is not controversial.⁹⁶ Two widely advanced suggestions that involve the use of closed circuit television, a children's courtroom, videotaped statements, or videotaped testimony are, however, extremely controversial. The first suggestion involves altering procedures now associated with the admission of former testimony under Federal Rule of Evidence 804(b)(1), in litigation involving sexual abuse. The second suggestion involves changing the configuration of trial testimony when the child actually testifies. Both suggestions represent attempts to respond to the perceived need to permit children to present their version of the events without face to face confrontation with the defendant. The underlying premise is that the child will suffer severe trauma or emotional distress if he or she is called to testify in the presence of the accused in the traditional trial setting. Advocates argue that it is both advisable and constitutional to avoid live face to face confrontation between the accused and the child by means of closed circuit television, a children's courtroom, a videotaped statement, or videotaped testimony. In addition, advocates of videotaping in advance of trial argue that the procedure reduces the number of times the child must repeat the story, thus further reducing the adverse impact on the child.

The constitutionality and propriety of eliminating the traditional face to face confrontation between accuser and accused var-

96. See McCORMICK, *supra* note 15, § 214 at 675.

ies depending upon the particular procedure suggested. The use of closed circuit television and videotaping in child sexual abuse cases may also raise constitutional questions related to freedom of the press⁹⁷ and public trial concerns.⁹⁸ These matters are not linked to the confrontation clause, and will not be addressed in this article.

A. Available Child

As discussed earlier, in *Ohio v. Roberts*, the Supreme Court interpreted the confrontation clause to require the production at trial of the complaining witness, when available, in order to admit the witness' out of court statement.⁹⁹ The right of the defendant to confront available complaining witnesses stems from the trial of Sir Walter Raleigh.¹⁰⁰ Sir Walter Raleigh was convicted of treason after a trial by affidavit, without ever being able to confront his accusers. Not only did the government fail to produce live witnesses, Sir Walter Raleigh was not permitted to summon witnesses on his own behalf. To remedy this situation, our founding fathers gave us the confrontation clause and the compulsory process clause of the sixth amendment: "the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor"¹⁰¹

1. EX PARTE VIDEOTAPED STATEMENTS

In an attempt to relieve the trauma or emotional distress that a child witness faces when he or she testifies face to face with the accused in open court, Texas enacted a statute, Article 38.071(2), that provides for ex parte videotaping of the child victim's statement and for admissibility of such videotaped statements in open

97. See *Miami Herald Publishing Co. v. Morphonios*, 467 So. 2d 1026 (Fla. 3d DCA 1985).

98. Another area of importance not explored in this article involves enhanced control by the trial judge over the examination of the child to decrease the stress of testifying. Suggestions have been made that include: providing a support person for the child, removal of the judge's robes, and asking the child to testify from a table in the well of the court, rather than from the witness stand. It is crucially important to avoid unnecessary delays in the commencement of the trial and unnecessary delays during the testimony of the child so that the child will be on the witness stand no longer than absolutely necessary. In monitoring cross-examination by defense counsel, the court must keep in mind that children are less capable than adults when testifying to time and place sequences or small details.

99. *Ohio v. Roberts*, 448 U.S. 56 (1980).

100. See Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another*, 8 CRIM. L. BULL. 99 (1972).

101. U.S. CONST. amend. VI.

court provided that "the child is available to testify":

Sec. 2 (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.¹⁰²

Notice that the prosecution need not call the child at any time during its case in chief in order for the ex parte statement of the child to be admissible. All that is required is that the child be made available for the accused to call and examine, and presumably cross-examine, although subsection (b) seems to indicate otherwise, if he chooses to do so. The Texas statute is apparently based upon the notion that as long as the declarant of a hearsay statement is available to be called by the accused and examined at trial, the right of confrontation is satisfied.

The Texas statute raises many concerns, the most important of which is its probable unconstitutionality under the confrontation clause.¹⁰³ The only reason we lack a United States Supreme Court decision squarely on point declaring the procedures provided in the statute a violation of the confrontation clause is the simple fact that no one has previously been bold enough to pursue the

102. TEX. CRIM. PROC. CODE ANN. art. 38.071(2) (Vernon 1985).

103. In *Long v. State*, the court held that TEX. CRIM. PROC. CODE ANN. art. 38.071(2) (Vernon 1985) was unconstitutional. 694 S.W.2d 185 (Tex. Ct. App. 1985). *Contra Tolbert v. State*, 697 S.W.2d 795 (Tex. Ct. App. 1985).

statute's approach in the face of the history of the clause, its language, and the Supreme Court decisions touching on the subject.

After the trial of Sir Walter Raleigh, the public reacted against the exact abuse that the Texas statute seeks to reimpose—trial by *ex parte* affidavit. The confrontation clause requires that an available complaining witness be called and examined by the prosecution in open court, and that he be subjected to cross-examination by the accused. The compulsory process clause gives the accused the right to present evidence in his favor; its purpose is not to permit the accused to present and examine witnesses against him, which is the apparent intent of the Texas statute. The language of the sixth amendment makes this perfectly clear: Confrontation Clause: "The accused shall enjoy the right . . . to be confronted with the witness against him."¹⁰⁴ The clause is "to be confronted with," which requires presentation of evidence by the prosecution. The clause does not merely say "to confront" which could more easily be interpreted to mean cross-examination only. Compulsory Process Clause: "To have compulsory process for obtaining witnesses in his favor."¹⁰⁵ The clause is "witnesses in his favor" which means witnesses tending to establish his innocence. The clause does not state "witnesses against him" as apparently contemplated by the Texas statute.

The Supreme Court decisions which bear upon this point are in full accord. In *Mattox v. United States*,¹⁰⁶ decided in 1895, the court said:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil case, [from] being used against the prisoner *in lieu of a personal examination and cross-examination* of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.¹⁰⁷

In 1899, the Court again considered the right of confrontation. In *Kirby v. United States*,¹⁰⁸ the Court said:

104. U.S. CONST. amend. VI.

105. *Id.*

106. 156 U.S. 237 (1895).

107. *Id.* at 242-43.

108. 174 U.S. 47 (1890).

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 offense, 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.*¹⁰⁹

Over the years, the Supreme Court has decided many cases involving questions of unavailability of the declarant and admissibility of hearsay statements of unavailable declarants. *Roberts* represents the latest of this long line of decisions. In every decision, the Supreme Court has implicitly premised its discussion upon the firm principle that the confrontation clause requires available complaining witnesses to be called at trial before the trier of fact for examination by the prosecution in the presence of the accused, and to be presented to the defendant for cross-examination. In this long line of decisions, there is not even the slightest hint that the sixth amendment permits the prosecution to introduce an ex parte affidavit merely because the complaining witness is available to be called and examined by the accused at trial.

In light of the foregoing discussion of the Texas statute and the assessment of the unconstitutionality of the admissibility of ex parte videotape statements at trial, other concerns arising from the statute will be addressed only in passing.¹¹⁰ First, it is difficult to see how the Texas statute serves to reduce trauma or emotional distress from face to face confrontation if the accused exercises his

109. *Id.* at 55. *Accord* Dowdell v. United States, 221 U.S. 325 (1911).

110. Videotaped statements of child victims serve useful functions even if they are not admitted at trial. Some of these functions are: (1) encouraging confessions and admissions when shown to the accused; (2) encouraging pleas and agreements to undergo treatment; (3) reducing the number of interviews with the child; (4) acting as a prior consistent statement; (5) curtailing recanting; (6) admissibility at preliminary hearing, if hearsay is allowed, or at the grand jury; (7) preserving the witness' statement and demeanor early in time when memory is fresh and the threat of outside influence is less than at trial; and (8) employment by an expert witness under Federal Rule of Evidence 703.

A videotape of the child's statement can also help the court to determine whether the requisite indicia of reliability are present by permitting it to observe the demeanor of the child and the degree of suggestiveness of the interviewer. On the other hand, videotape statements may prove to be inconsistent with subsequent statements or testimony of the child, thus providing ammunition to the defense.

right to call the child to the witness stand at trial. Second, the videotaped statement can be made after the child has been prepared by the prosecution with respect to his or her version of the critical events—the statute provides only that the prosecuting attorney cannot be present at the videotaping session.¹¹¹ Finally, even if defense counsel decides to run the risk of incurring the wrath of the jury simply by calling the child to testify, and thereby exposing the child to the possibility of suffering trauma or emotional distress, it will be extremely difficult for defense counsel to cross-examine the child with respect to a videotape statement prepared under such circumstances. Not knowing for sure whether the child at trial, if given the opportunity, would testify in conformity with the prepared statement creates a serious dilemma for defense counsel. If defense counsel takes the child through the events once again, and the child says the same thing, the position of the accused may be hurt significantly. Is it not surprising that defense attorneys in Texas rarely call the child to the witness stand. If the child testifies inconsistently, or claims not to recall, more fundamental problems arise. Is the child's videotaped statement still substantively admissible or is the theory of admissibility limited solely to prior consistent statements? Under the *Roberts* confrontation clause analysis, the videotaped statement of an unavailable witness must be ruled inadmissible unless it is shown to possess sufficient indicia of trustworthiness,¹¹² an unlikely event considering the surrounding circumstances, including the fact that the statement was prepared in anticipation of litigation.

2. ABSENCE OF FACE TO FACE CONFRONTATION

Various alternatives have been suggested that would permit the prosecution to elicit the testimony of a child witness under circumstances that shield the child from live face to face confrontation with the accused while simultaneously assuring cross-examination by the attorney for the accused. No showing is required that the testimony of the child is or would be unavailable at trial.

(a). The Alternatives.

(i). **THE CHILDREN'S COURTROOM.** A special courtroom could be built that permits the jury and judge to see the child witness and the defendant, but would not permit the child witness to see

111. The videotape can thus be equivalent to seeing the final commercial after several aborted earlier filming attempts.

112. See *supra* text accompanying notes 61-65.

the defendant. The use of one way glass or television monitors would permit the accused to see the child witness testify. The special courtroom may also have other modifications designed to help children testify, such as elimination of the imposing judicial bench and the isolated witness stand.

(ii). **CLOSED CIRCUIT TESTIMONY.** Another portion of the Texas statute provides that the testimony of a child may be projected into the courtroom by means of closed circuit television.¹¹³ The attorneys for the parties, appropriate technicians, and any person that the child needs to contribute to his or her welfare during testimony can accompany the child while he or she testifies. The judge, jury, and, most importantly, the accused remain in the courtroom. The child cannot see any of them. Presumably, the defendant would be able to communicate with his attorney during the examination. A finding by the court of unavailability of the child to testify in the presence of the accused by reason of trauma or emotional distress to the child resulting from a face to face confrontation is not required. The Texas statute states:

Sec. 3. The court may, on the motion of the attorney of any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorney for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant.¹¹⁴

The physical layout can be altered as suggested in *Hochheiser v. Superior Court*,¹¹⁵ to place the image of the defendant before the child:

According to the parties, the physical layout will include the

113. TEX. CRIM. PROC. CODE ANN. § 38.071(3) (Vernon Supp. 1985).

114. *Id.* Section 90.90 of the Florida Statutes employs the same procedures. See *infra* note 135.

115. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

following: Each of the two minors to be called as a prosecution witness will testify separately in a small anteroom (probably the jury room) with the only other persons present in that room being a parent, as a supporting adult, and the court bailiff. The judge, jury, defendant, both counsel, the court clerk, court reporter and the public (including the press) will be in a separate courtroom. Both the courtroom and anteroom will have television cameras and three television monitors for viewing. The three television screens and the courtroom will face the judge, the well in front of counsel table, and the jury box. The three screens in the anteroom will show the defendant, the trial judge and the attorney who is examining the witness. Apparently a single image of the testifying minor and supporting parent will be televised. The voices of those in the anteroom will simultaneously be transmitted as the examination is conducted.¹¹⁶

The Texas statute provides for the attorneys to be in the room with the child, but in *Hochheiser*, the attorneys were in the courtroom asking questions over the closed circuit television. The California legislature has adopted the suggestions made in *Hochheiser*.¹¹⁷

116. *Id.* at 788, 208 Cal. Rptr. at 279-80.

117. CAL. PENAL CODE § 1347 (West Supp. 1985) provides as follows:

(a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other provision of law, the court in any criminal proceeding, upon written notice of the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the court of the proceeding on the court's own motion may order that the testimony of a minor 10 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom by means of two-way closed-circuit television, if the court makes all of the following findings.

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of

(iii). **VIDEOTAPED DEPOSITIONS.** An alternative procedure is to

removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

(3) The equipment available for use of two-way closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c) (1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other provision of law, the court, in determining the merits of the motion, on the ground that the minor has not testified.

(3) In determining whether the impact of an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(d) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of two-way closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue or in any way influence or attempt to influence the

videotape the testimony of the child witness in advance of trial. This allows the child to testify, subject to cross-examination, outside the presence of the accused. The accused, of course, would be in contact with his attorney at all times. The videotape of the deposition, possibly including pictures of the defendant, would be shown at trial. The child would not be required to testify at trial. The Texas statute provides as follows:

testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination be made and preserved on video tape in addition to being stenographically recorded. The video tape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and his or her attorney during ordinary business hours. The videotape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape which is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(e) When the court orders the testimony of a minor to be taken in another place outside the courtroom only the minor, a support person designated pursuant to Section 868.5 of the Penal Code, a nonuniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or any of the facts of the case with the minor during this meeting.

(g) When the court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section shall prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose including identification of the defendant or defendants as the court deems necessary.

(h) The examination shall be under oath, and the defendant's image shall be transmitted live to the witness via two-way contemporaneous closed-circuit television.

(i) Nothing in this section shall affect the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(j) Judicial Council shall submit a report to the Legislature on or before January 1, 1988, summarizing the experience of courts which have used contemporaneous closed-circuit television pursuant to this section

Sec. 4. The court may on the motion of the attorney for any party order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

- (1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
- (3) each voice on the recording is identified; and
- (4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken.¹¹⁸

(b). Evaluation. If the parties use a children's courtroom, there will be no face to face confrontation between the accuser and the accused. The use of closed circuit television or videotaping of the child's deposition raises additional questions of distortion, exclusion of evidence, and status conferral variations in credibility. All three procedures raise further concern about the possibility that the jury will be swayed by the circumstances that required such a drastic change in procedure, thereby affecting the presumption of innocence.

(i). FACE TO FACE CONFRONTATION. In *United States v. Benfield*,¹¹⁹ the Eighth Circuit addressed the issue of whether a live face to face meeting is part of the right of confrontation guaranteed by the sixth amendment. *Benfield* involved the admissibility of a videotaped deposition. The accused was not only excluded from the deposition room itself, the witness apparently was not ad-

118. TEX. CRIM. PROC. CODE ANN. § 38.071(4) (Vernon Supp. 1985). With respect to the constitutionality of the statute, see *infra* note 127.

119. 593 F.2d 815 (8th Cir. 1979).

vised that the accused was in the building and in communication with his attorney. Relying on *Mattox v. United States*,¹²⁰ *Kirby v. United States*,¹²¹ *Dowdell v. United States*,¹²² and *Snyder v. Massachusetts*,¹²³ the Eighth Circuit concluded that the accused's right was abridged:

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*, . . . 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. . . . 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. 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. 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.¹²⁴

Hochheiser v. Superior Court is in accord:

It would appear from a careful reading of the cases that physical confrontation is an element of Sixth Amendment guarantees. For example, the *Mattox* court stated: [T]he primary object of the [Confrontation Clause] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection of sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon

120. 156 U.S. 237 (1895).

121. 174 U.S. 47 (1890).

122. 221 U.S. 325 (1911).

123. 291 U.S. 97 (1934).

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

the stand and the manner in which he gives his testimony whether he is worthy of belief.¹²⁵

As *Benfield* and *Hochheiser* indicate, our adversary system, as reflected in the confrontation clause, rests upon the assumption that a face to face challenge influences recollection, veracity, and communication, and that observing this confrontation will assist the trier of fact in determining credibility.¹²⁶ Our day to day experience in life indicates that these assumptions are valid. People are more careful and sincere when they accuse someone face to face than they are when spreading a rumor. In short, it is unconstitutional to deny a criminal defendant face to face confrontation with a child witness who is not "unavailable" to testify in the accused's presence at trial.¹²⁷

(ii). EFFECT OF CLOSED CIRCUIT TELEVISION AND VIDEOTAPED DEPOSITIONS. *Hochheiser* addressed the problems associated with the use of closed circuit television or videotaped depositions to present testimony of child witnesses:

Moreover, there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen. . . . [T]here may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence. . . . For example, "the lens or camera angle chosen can make a witness look small and

125. 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278. *Hochheiser* was decided before passage of Section 1374 of the California Penal Code, which provides for the use of closed circuit television upon a finding of unavailability. See *supra* note 117 (text of CAL. PENAL CODE § 1374).

126. See *Benfield*, 593 F.2d at 821; *Hochheiser*, 161 Cal. App. 3d at 777, 208 Cal. Rptr. at 273.

127. The Supreme Court's most recent opinion relating to an accused's right to physically confront witnesses against him is *United States v. Gagnon*, 105 S. Ct. 1482 (1985). In *Gagnon*, the Court said:

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts* . . . the Court explained that a defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. . . . The Court also cautioned in *Snyder* that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record.

Id. at 1484.

weak or large and strong. Lighting can alter demeanor in a number of ways, . . .” Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor [A]nd off-camera evidence is necessarily excluded while the focus is on another part of the body Thus, such use of closed circuit television may affect the jurors’ impressions of the witness’ demeanor and credibility Also it is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status. . . . Such considerations are of particular importance when, as here, the demeanor and credibility of the witness are crucial to the state’s case.¹²⁸

While it can be argued with some force that testimony presented via closed circuit television or videotape is less persuasive than live testimony, in the average case, the possibility of enhancement of credibility nevertheless certainly exists.

(iii). PRESUMPTION OF INNOCENCE. Whenever litigants use an alternative to face to face confrontation, there is a risk that the jury will give weight to the alternative procedure itself in deciding guilt or innocence. What will a jury think about the child testifying outside of the physical presence of the accused? Why is the defendant shielded in open court from the child? Why is the defendant in the courtroom and the child testifying live on closed circuit television? Even with respect to the videotaped deposition, where the absence of face to face confrontation between the child and defendant is less likely to be perceived by the jury, isn’t the jury likely to draw certain inferences from the variation from normal courtroom procedure? Is it possible to draft a jury instruction that in practice actually will discourage the jury from drawing this inference? Is a simple instruction to draw no inference from the fact the child is not testifying in the normal manner likely to be effective? Should we instead tell the jury that the unfamiliar public setting makes it impossible for the child to appear before them, even though the primary reason is that the child does not want to face the accused? If the jury does conclude that the reason the child is not testifying live before them is to avoid looking at the accused while testifying, isn’t the jury from that fact alone likely to infer guilt? The *Hochheiser* court stated: “[T]he presentation of a witness’ testimony via closed-circuit television may affect the pre-

128. 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278-79.

sumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence."¹²⁹

(c). Summary. With respect to use of a child's courtroom, closed circuit television, or videotaped deposition to elicit the testimony of an alleged child victim of sexual abuse, the absence of live face to face confrontation between the defendant and a child witness who has not been shown to be unavailable to testify in the accused's presence violates the defendant's sixth amendment right to confront witnesses against him.

B. *Unavailable Child*

Having determined that the confrontation clause demands live face to face confrontation in open court between the accused and a child witness who is available to give viva voce testimony at trial, it is time to address two very difficult questions. First, what circumstances, including potential trauma or emotional distress to a particular child that might arise from face to face confrontation with the accused in open court, render the child's testimony unavailable? Second, if the child's testimony is unavailable for any reason, does presentation in court of the child's testimony, elicited outside the accused's physical presence, but subject to cross-examination by counsel for the accused, satisfy the accused's sixth amendment right to confront witnesses against him?

1. UNAVAILABILITY OF TESTIMONY

A witness' testimony may be unavailable at trial for many reasons.

(a). Competency. Every witness, including a child witness, must be competent before he or she will be permitted to testify. Rule 601 of the Federal Rules of Evidence eliminates all grounds of witness incompetency with respect to a charge, claim, or defense as to which federal law provides the rule of decision, except those specifically recognized in the Federal Rules of Evidence. The following characteristics are not grounds of incompetency: age, religious belief, mental incapacity, color of skin, moral incapacity, conviction of a crime, marital relationship, and connection with the litigation as a party, attorney, or interested person.¹³⁰ Such mat-

129. *Id.* at 788, 208 Cal. Rptr. at 279.

130. See FED. R. EVID. 601 advisory committee note.

ters, long ago regarded as grounds of incompetency, survive today, in most instances, as avenues of impeachment of the witness. Overall, Rule 601 closely reflects the common law.

The only general competency requirements specified in the Federal Rules of Evidence are contained in Rule 603, which requires that every witness declare that he will testify truthfully by oath or affirmation, and Rule 602, which requires that the witness possess personal knowledge. Together these rules require that: (1) the witness have the capacity to accurately perceive, record and recollect impressions of facts (physical and mental capacity); (2) the witness in fact did perceive, record and can recollect impressions having any tendency to establish a fact of consequence in the litigation (personal knowledge); (3) the witness declare that he or she will tell the truth and be capable of understanding the duty to tell the truth (oath or affirmation), which requires that the witness be capable of distinguishing between the truth and a lie or fantasy;¹³¹ and (4) the witness possess the capacity to comprehend questions and express himself understandably, where necessary with aid of an interpreter under Rule 604 (narration).¹³² Accordingly, Rule 602 requires that before the court permits a witness to testify, the proffering attorney must introduce evidence sufficient to support a finding of personal knowledge. Personal knowledge

131. Recommendations have been made to permit a child to testify without taking an oath or giving an affirmation that he or she will testify truthfully. See FED. R. EVID. 603. The apparent purpose of the recommendation is to avoid a judicial determination of whether the child knows the difference between the truth and a lie or fantasy. Query: Should a witness who does not understand the difference between the truth and a lie or fantasy or the obligation to tell the truth be permitted to testify? A "No" answer is suggested.

See FLA. STAT. § 90.605(2) (Supp. 1985). Section 90.605(2) of the Florida Statutes says: "In the court's discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth, or the child understands the duty not to lie." If the child understands the duty to tell the truth, the child can most certainly take an oath or give an affirmation. Moreover, the court has to decide whether the child knows the difference between the truth and a lie as part of the process of determining whether the child understands the duty to tell the truth or not to lie. The wisdom of the Florida statute is subject to challenge.

132. See FED. R. EVID. 604. See also FLA. STAT. § 90.606(1) (Supp. 1985):

When a judge determines that a witness cannot hear or understand the English language, or cannot express himself in English sufficiently to be understood, an interpreter who is duly qualified to interpret for the witness shall be sworn to do so. This section is not limited to persons who speak a language other than English, but applies also to the language and descriptions of any person who cannot be reasonably understood, or understand questioning, without the aid of an interpreter, such as children or persons who are mentally or developmentally disabled.

Id.

means that the witness had the capacity to and actually did observe, receive, and record, and can recollect and narrate impressions obtained through any of his senses that have a tendency to establish a fact of consequence. The witness must also declare, by oath or affirmation, in accordance with Rule 603, that he or she will testify truthfully. No other personal qualifications of a witness are required.

No mental qualification is specified. The Advisory Committee's Note reasons that standards of mental capacity have proved elusive. Few witnesses were actually disqualified. Moreover, it is difficult to imagine a witness wholly without mental capacity. Although mental incapacity is not a specified ground of incompetency, if a witness' mental capacity has been seriously questioned, his testimony may still be excluded under Rule 602 on the grounds that no reasonable juror could believe that the witness possesses personal knowledge or, under Rule 603 on the grounds that because no reasonable juror could believe that the witness understands the difference between the truth and a lie or fantasy and understands the duty to tell the truth.

Competency of a witness to testify requires a minimum ability to observe, record, recollect, and recount as well as an understanding of the difference between the truth and a lie or fantasy, and an understanding of the duty to tell the truth. Where the capacity of a witness is questioned, the ultimate determination is whether a reasonable juror must believe that the witness is so bereft of his powers of observation, recordation, recollection, and narration so as not to believe the witness possesses personal knowledge of the event related and told the truth. Such a test of competency has been characterized as requiring minimum credibility.¹³³ Courts

133. 3 J. WEINSTEIN, *WEINSTEIN'S EVIDENCE* § 601[01] (1981):

In such cases, since there are no longer artificial grounds for disqualifying a witness as incompetent, the traditional preliminary examination into competency is no longer required. But a trial judge still has broad discretion to control the course of a trial (Rule 611) and rule on relevancy (Rules 401 and 403). If competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness's testimony, then a witness must be competent as to the matters he is expected to testify about; it is the court's obligation to insure that he meets that minimum standard. In making this determination the court will still be deciding competency. It would, however, in view of the way the rule is cast, probably be more accurate to say that the court will decide not competency but minimum credibility. This requirement of minimum credibility is just one aspect of the requirement of minimum probative force - i.e., relevancy. Regardless of terminology, the trial judge may exclude all or a part of the witness's testimony on the ground that no one could reasona-

tend to resolve doubts about minimum credibility of a witness, including a child witness, in favor of permitting the jury to hear the testimony and judge the credibility of the witness for itself.

(b). Federal Rule of Evidence 804(a). The testimony of a competent witness may be unavailable for several reasons including any of the reasons set forth in Rule 804(a):

Definition of Unavailability. Unavailability as a witness includes situations in which the declarant:

(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]

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; 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.¹³⁴

The definition of unavailability contained in Rule 804(a) includes, but is not limited to, five alternatives, each one sufficient to satisfy the requirement. The thrust of the alternative definitions of unavailability is upon the unavailability of the testimony of the witness which includes, but is not limited to, situations in which the witness is not physically present in court.

Rule 804(a)(1) provides that a witness is unavailable if he or

bly believe the witness could have observed, remembered, communicated or told the truth with respect to the event in question. He may use the *voir dire* to make this determination. . . . Thus, the practice can—and probably will—even in non-state law cases remain much as it has been in determining that the witness meets minimum credibility standards.

While not embodied directly in the rules, implied through Rules 401 to 403 is Rule 19 of the Uniform Rules of Evidence (1953) [t]hat the Judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter.

134. Fed. R. Evid. 804(a).

she is exempt from testifying about the subject matter of the statement on the grounds of privilege. The witness must make an actual claim of privilege that is allowed by the court before the witness will be considered unavailable. Rule 804(a)(2) provides that a witness is unavailable if he persists in refusing to testify concerning the subject matter of the statement despite a court order. Silence resulting from misplaced reliance upon a privilege without making a claim, or in spite of a court denial of an asserted claim of privilege, constitutes unavailability under this subsection. Rule 804(a)(3) provides that a witness is unavailable if he testifies to a lack of memory of the subject matter of his statement. A witness either may truly lack recollection or may feign lack of recollection for a variety of reasons, including an unwillingness or inability to confront the defendant face to face. In either event, the witness is unavailable to the extent that he asserts lack of recollection of the subject matter of a prior statement.

Rule 804(a)(4) provides that a witness is unavailable if unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity. Death is the most obvious basis; mental illness and physical disability of a serious nature are equally compelling. In criminal matters, if the government's witness is only temporarily unavailable, the confrontation clause may require resort to a continuance. In both civil and criminal cases, where the testimony of a temporarily unavailable witness is critical, the trial court should consider carefully the option of granting a continuance.

Rule 804(a)(5) provides that in both civil and criminal cases, a declarant is unavailable if his presence cannot be secured by process or other reasonable means. In criminal cases, the confrontation clause requires that the government make a good faith effort to obtain the presence of the witness at trial, going beyond a mere showing of an inability to compel appearance by subpoena, before prior testimony may be introduced as a substitute for testimony. The court must determine on a case to case basis whether the government has shown good faith in attempting to locate and procure the witness' attendance.

(c). *Severe Psychological Injury.* Efforts to shield child witnesses from potential injury derived from live face to face confrontation at trial requires the establishment of a standard to be applied to determine when such a child is "unavailable" within the meaning of the confrontation clause.

Two Florida Statutes, 90.90(1)¹³⁵ and 92.54(1),¹³⁶ each provide

135. Florida deals with the videotaping of child victims' depositions as follows:

Sexual abuse or child abuse case; videotaping of testimony of victim or witness under age 16. —

(1) On motion and hearing in camera and finding that there is a substantial likelihood that a victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court, or that such victim or witness is otherwise unavailable as defined in § 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

(2) The motion may be filed by:

(a) The victim or witness, or the victim's or witness' attorney, parent, legal guardian, or guardian ad litem;

(b) A trial judge on his own motion;

(c) Any party in a civil proceeding; or

(d) The prosecuting attorney or the defendant, or the defendant's counsel.

(3) The judge shall preside, or shall appoint a special master or preside, at the videotaping unless the following conditions are met:

(a) The child is represented by a guardian ad litem or counsel;

(b) The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and

(c) The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

(4) The defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

(5) Any party, or the court on its own motion, may request the aid of an interpreter, as provided in § 90.606, to aid the parties in formulating methods of questioning the child and in interpreting the answers of the child throughout proceedings conducted under this section.

(6) The motion referred to in subsection (1) may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony may be made any time after the court grants the motion. The videotaped testimony shall be admissible as evidence in the trial of the cause; however, such testimony shall not be admissible in any trial or proceeding in which such witness testifies by use of closed circuit television pursuant to § 92.54.

(7) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

FLA. STAT. § 90.90 (Supp. 1985).

136. Florida deals with the closed circuit testimony of a child victim of or witness to sex abuse as follows:

Use of closed circuit television in proceedings involving sexual offenses against victims under the age of 16. —

(1) Upon motion and hearing in camera, the trial court may order that the testimony of a child under the age of 16 who is a victim of or witness to an unlawful sexual act, contact, intrusion, penetration or other sexual offense be

that a child witness is unavailable upon "a finding [by the court] that there is a substantial likelihood" that a child victim or witness of sexual abuse "would suffer at least moderate emotional or mental distress if required to testify in open court."¹³⁷ A Maine statute, Title 15, Section 1205, provides that the child witness is unavailable if the trial court finds "that the emotional or psychological well being of the person would be substantially impaired if the person were to testify at trial."¹³⁸ The New Mexico Rules of Procedure for the Children's Court, Rule 34.1, provides for unavailability "upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm."¹³⁹ Finally, the California Evidence Code, Section 240, declares that a witness is unavailable on the ground of physical or mental illness or infirmity when expert testimony "establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the

taken outside of the courtroom and shown by means of closed circuit television, upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court, or that such victim or witness is unavailable as defined in § 90.804(1).

(2) The motion may be filed by the victim or witness, his attorney, parent, legal guardian, or guardian ad litem, the prosecutor, the defendant, or the defendant's counsel; or the trial judge on his own motion.

(3) Only the judge, the prosecutor, the defendant, the attorney for the defendant, the operators of the videotape equipment, an interpreter, and some other person who, in the opinion of the court, contributes to the well-being of the child and who will not be a witness in the case may be in the room during the recording of the testimony.

(4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.

(5) The court shall make specific findings of fact on the record, as to the basis for its ruling under this section.

FLA. STAT. § 92.54 (Supp. 1985).

137. Notice that Fla. Stat. § 90.803(23) (Supp. 1985), creating a hearsay exception for statements of child victims of sexual abuse provides for unavailability upon a showing of substantial likelihood of "severe emotional or mental harm." Requiring only "moderate emotional or mental distress" in connection with closed circuit television or videotaped deposition in comparison to "severe emotional or mental harm" in connection with a child victim hearsay exception is probably based upon the mistaken and inappropriate notion that the confrontation clause requirement of unavailability can be varied depending upon the trustworthiness of the testimony being admitted, i.e., the more trustworthy the testimony, the less strenuous the showing needed to establish unavailability.

138. ME. REV. STAT. ANN. tit. 15, § 1205(1) (Supp. 1984-1985).

139. N.M. STAT. ANN. § 4-34.1 (Supp. 1982).

witness is physically unable to testify or is unable to testify without suffering substantial trauma." An expert witness is defined for this purpose to include physicians, surgeons, and psychiatrists.¹⁴⁰

Whether a finding that the child witness would suffer moderate emotional or mental distress, substantial emotional or psychological impairment, unreasonable and unnecessary mental or emotional harm, or substantial trauma, if required to testify face to face in open court in the presence of the accused, is sufficient to constitute unavailability under the confrontation clause is uncertain, but doubtful. A showing of greater likelihood of severe psychological injury is probably required.

Witnesses who testify in open court often suffer some emotional distress. Many, if not most, rape victims suffer severe emotional distress or trauma while testifying, especially when face to face with the accused. Presumably, so do many other groups of victims. "Unavailability" requires more than merely showing the possibility of emotional distress or trauma, even more than showing a likelihood that such emotional distress or trauma will be substantial or severe.¹⁴¹ In *People v. Stritzinger*,¹⁴² the court held that in order to find that a witness is unavailable due to emotional distress or trauma, the potential psychological injury must render the witness' testimony "relatively impossible."

For a child witness to be found to be unavailable, the court must decide that the emotional distress or trauma now present or likely to be suffered by the child witness as a result of live face to face confrontation in open court with the accused when testifying as to acts of prohibited sexual contact is significantly more severe than the emotional distress or trauma often suffered by other witnesses. In determining whether it is "relatively impossible" for the child witness to testify on the basis of the likelihood of severe psychological injury, *Warren v. United States*,¹⁴³ suggests looking at the following factors:

140. CAL. EVID. CODE § 240 (West Supp. 1985).

141. Attorneys and psychologists that were present at a conference on child sexual abuse unanimously reported that a great majority of children are capable of testifying at trial without much difficulty. See *supra* note *. Children who initially volunteered the report of the incident were usually able to repeat their complaint in front of the accused at trial. Children who had to be questioned about the sexual abuse before disclosing it, and who fluctuated in their accounts of what transpired, were more likely to suffer trauma and emotional distress from face to face confrontation in open court. Such children were also more likely to recant before or at trial.

142. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

143. 436 A.2d 821 (D.C. App. 1981).

[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 [child sexual abuse] 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.¹⁴⁴

144. *Id.* at 830. See also Comment, *supra* note 88, at 819, 824.

Some trauma is inevitable whenever a child takes the stand, and although the trauma of testifying should be minimized to the extent possible, it cannot justify depriving the defendant of a fundamental aspect of his right to a fair trial.

. . . Specifically, the state holds an interest in protecting young children, allegedly the victims of sexual abuse, from the trauma of repeated appearances and extended testimony in open court in the presence of the alleged assailant. The trial judge should therefore allow the child to testify on videotape if testifying in open court would cause the child substantial emotional trauma.

Id.

Compare this view with the view in *State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982):

The well-accepted legal principle, a fundamental tenet of our modern legal system, is that the public has a right to every person's evidence except for those persons protected by a constitutional, common-law, or statutory privilege. This principle applies to all of us—even to the President of the United States.

The principle and its corollary—that each person has a duty to testify—are basic to the adversary system. The integrity of the legal system depends on the court's ability to compel full disclosure of all relevant facts under the rules of evidence. The theory of the adversary system is that examination of all persons who have relevant information will develop all relevant facts and will lead to justice.

Nonetheless, our sense of compassion tells us that we should do what we can to protect a ten-year-old who allegedly has been abused by her mother from further victimization in a legal system which is committed to protecting human rights. No sensitive person can read about child abuse without feeling anguish for the abused child or without understanding a child's needs and wishes to avoid confronting and accusing the alleged abuser in criminal proceedings, especially if the abuser is a close relative of the child. We commend Attorney Daniel, BP's guardian ad litem, for impressing upon us the importance of the issue we decide today and for his continuing concern for BP's well-being and his good counsel. While we are concerned with the victim-witness child, we must also consider that although the district attorney's insistence on BP's testifying is portrayed as being cruel and insensitive, the district attorney is also concerned with BP's welfare. In demanding the testimony the district attorney represents BP's interests and the public's interest in prosecuting an alleged child abuser and murderer. The district attorney contends that BP's testimony may be crucial to bringing the mother to trial. The district attorney faces the dilemma of letting the defendant go free or doing harm to the emotional well-being of the child-victim by

Applying the foregoing standard, it is extremely unlikely that either the Maine, New Mexico, or California statutes previously discussed, as currently written, will often come into play. The Maine statute provides that, upon a finding of unavailability, prior recorded testimony of the child witness subject to cross-examination by the accused becomes admissible. The California statute provides similarly, but only as to preliminary hearing testimony. New Mexico sanctions the taking and admissibility of videotaped depositions. Notice, however, that all three statutory schemes provide that the defendant must be present face to face with the child, when the testimony of the child is taken.¹⁴⁵ Only under very unusual circumstances will the taking of the child's testimony face to face with the accused in open court be "relatively impossible" while it is "relatively possible" for the same child to testify face to face with the defendant at a prior hearing, former trial, preliminary hearing perpetuation deposition.¹⁴⁶

Unlike the above three statutes, Section 90.90(4) of the Florida Statutes provides for taking the child's videotaped deposition

compelling her testimony. Were the district attorney to decide not to call the child as a witness, the district attorney may protect the child's emotional interest in not being forced to face the alleged abuser and accuse the abuser of criminal acts, but may inflict greater harm on the child by allowing the alleged abuser to go free and by demonstrating to the child that the state of Wisconsin does not place a high enough value on the child's suffering to bring to justice the person alleged to have caused the suffering.

Id. at ___, 326 N.W.2d at 746-47. The court further stated:

We can find no precedent, and none has been cited, that a court may completely excuse a witness from his or her obligation to testify because of the witness's claim of emotional harm. In cases in which adult witnesses have asked to be excused from their duty to testify on the grounds of personal fear of reprisal, or fear for the witness's family's safety, courts have generally been reluctant to excuse the witness, concluding that the public policy in favor of compelling testimony outweighs the possible harm that testifying would cause. This court has strictly construed the public policy in favor of having a witness testify when the witness claims emotional damage. The court refused to allow the use of a deposition in lieu of live testimony in a criminal case when the argument was made which would cause him psychiatric illness.

Id. at ___, 326 N.W.2d at 749-50.

145. The Maine statute provides that upon a finding of unavailability, prior recorded testimony of the child subject to cross-examination by the accused becomes admissible. ME. REV. STAT. ANN. tit. 15, § 1205(1) (Supp. 1984-1985). The California statute has a similar provision that only deals with preliminary hearing testimony. CAL. EVID. CODE § 240 (Supp. 1985). New Mexico sanctions taking and admitting videotaped depositions. N.M. STAT. ANN. § 4-34.1 (Supp. 1982).

146. A deposition may be less stressful because it is not public. On the other hand, if counsel is taking the child's deposition in a small room, and the defendant is there, the child will have trouble looking away. The process may thus be more traumatic than testimony in open court.

testimony outside the physical presence of the accused:

The defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.¹⁴⁷

The Florida statute that provides for the use of closed circuit television at trial, Section 92.54(4), is in accord:

During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.¹⁴⁸

(d). Unwillingness or Inability. A child witness may be unavailable because the child is unwilling or unable to testify in open court, whether or not in the accused's presence, even though requested by the court to do so. On other occasions, a child placed in the unfamiliar court surroundings simply falls apart and forgets what happened. In each instance, the child's testimony is unavailable.¹⁴⁹

2. PROCEDURAL CONSIDERATIONS

Let's return to the hypothetical child sexual abuse victim, Alice. Assume that Alice confronted Sam with her accusation. This may have occurred at the time of her initial statements of complaint or during the investigation of the criminal complaint. As-

147. FLA. STAT. § 90.90(4) (Supp. 1985).

148. *Id.* at § 92.54(4).

149. See *State v. Myatt*, 237 Kan. 17, ___, 647 P.2d 836, 841 (1985) ("The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant."); *supra* note 88, at 819 ("If, having been called to testify, the child proves too frightened or inarticulate to allow any meaningful examination, then a finding of unavailability would be justified . . ."). Such a witness' testimony is unavailable under Federal Rule of Evidence 804(a).

sume further that Alice told the state's attorney or the child psychologist working with her that she will not say that Sam rubbed her on her genitals if Sam is present. The child psychologist is prepared to say that forcing Alice to testify face to face with Sam in open court may cause some short term distress, but it is unlikely, given her age, to be severe or long term. The child psychologist believes that while the entire incident may have long term repercussions for Alice, it is unlikely that face to face confrontation will add significantly to these long term effects. Of course, if Alice had never confronted Sam with her accusation, the likelihood of the psychologist opining that it is "relatively impossible" for Alice to testify would increase. Given the lack of clinical hard evidence about the long range effects of face to face confrontation with the accused, even if the psychologist were to testify, the court should declare the child unavailable because of the potential for severe psychological injury only when the court, upon consideration of all the evidence, finds by clear and convincing evidence that the criteria set forth constituting "relative impossibility" to testify has been satisfied.

If the prosecution wants the court to declare Alice unavailable for face to face confrontation on the basis of potential severe psychological injury that makes her testimony "relatively impossible," the court should hold an evidentiary hearing in advance of trial, at which time the prosecution may, and most likely would offer expert testimony as to Alice's condition. Alice may or may not be required to testify. A presumption in favor of requiring Alice to testify at the hearing outside Sam's presence seems warranted. If the court finds Alice unavailable, a statute or court rule should give the prosecution the opportunity to take a videotaped perpetuation deposition employing previously discussed procedures, so that Alice will not have to come face to face with Sam. The alternatives of closed circuit television and employing a children's courtroom at trial should also be considered.

The court should also require an evidentiary hearing if the prosecution believes that Alice is or may become unavailable on the basis of unwillingness or inability to testify in open court with Sam present. There are several ways in which the court could conduct such a hearing. The court could put Alice in the same room as Sam in advance of trial at a deposition or otherwise, or outside the jury's presence at trial, in order to see if Alice will actually refuse to testify at such a dress rehearsal. The court could also rely on Alice's statement that she will not testify if Sam is present, or on

the testimony of appropriate experts to that effect.¹⁵⁰ A dress re-

150. See *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (1983). In this case, the court used the videotaped testimony of the child victim at trial, because the victim was scared to testify in front of the jury. A clinical psychologist testified that the child would become uncommunicative if she were called to testify before a jury. If all courts employ the same procedure that this court used, unavailability will become too conjectural. *But see* CAL. PENAL CODE § 1347(b)-(c) (1985). Under the California statute, it is not easy for the prosecution to have the court declare the child victim unavailable:

(b) Notwithstanding any other provision of law, the court in any criminal proceeding, upon written notice of the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 10 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom by means of a two-way closed circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, or incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

(3) The equipment available for use of two-way closed-circuit television would accurately communicate the demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c)(1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other provision of law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substan-

hearsal to test Alice's actual unwillingness or inability to testify in Sam's presence will most often be appropriate.

If the court determines that Alice is unavailable on the basis of unwillingness or inability to testify, shouldn't Sam nevertheless be entitled to have the prosecutor present Alice in open court where she can be observed by the jury? In the absence of a pretrial finding of unavailability based upon "relative impossibility", even if Alice says nothing when questioned by the prosecution, shouldn't Sam have the right to confront Alice in open court? Conversely, if a pretrial hearing determines that Alice will not testify meaningfully in open court in Sam's presence, shouldn't Sam have the right to have the court declare her incompetent to testify and thus barred from taking the witness stand at all? In short, if Sam and his attorney believe that the jury will infer that the events that she described in her videotaped testimony must have occurred for Alice to be so scared, Sam should have the right to bar Alice's testimony at trial if a pretrial rehearsal shows her to be unavailable. On the other hand, if Sam and his attorney do not fear jury speculation but prefer to let the jury see Alice on the stand, close up and in person, Sam's right to confront witnesses against him mandates that the court grant Sam that privilege.

If the prosecution believes that Alice may not be both willing to testify in court in Sam's presence and able to do so without suffering severe psychological injury, a complimentary procedure should be considered. The trial court, on motion of the prosecution, could order a perpetuation deposition. The prosecution could offer the perpetuation deposition testimony at trial if the parties later stipulated that Alice was unavailable, if the court later found that she was unavailable, or if for any reason she proved to be unavailable when called to testify at trial in Sam's presence. Presumably, the prosecution would not request a conditional perpetuation

tial that the minor is unavailable as a witness unless closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

Id.

Notice that the possibility of severe emotional distress or trauma to the child from face to face confrontation with the accused is not included in (A)-(D) above.

deposition order unless it believed that face to face presence in open court or other circumstances were likely to cause a deterioration in the child or the child's testimony. The deposition would obviously create an opportunity for the defendant's lawyer to test his cross-examination. Moreover, the deposition testimony would serve to impeach the child if he or she testified inconsistently at trial. Since the prosecution would naturally desire to avoid both possibilities, the prosecution would likely request a conditional perpetuation deposition only when the chances are great that Alice would deteriorate at trial. Accordingly, the perpetuation deposition should be available on motion, as a matter of right, without requiring the prosecution to make a specific showing of cause. The motion procedure is preferable to mere notice because it keeps the court advised of the circumstances surrounding Alice's testimony and provides the court an opportunity to participate in the structuring of the procedures to be followed at the videotaped perpetuation deposition.

3. ADMISSIBILITY

(a). Confrontation. Where a court declares a witness unavailable at trial for reasons such as lack of recollection, unwillingness or inability to testify, or likelihood of severe psychological injury, may a court admit a perpetuation deposition, or other testimony given subject to cross-examination, without violating the confrontation clause, if the defendant was denied live face to face confrontation when the testimony was taken? Similarly, may the court order the child to testify on closed circuit television or in a children's courtroom once it has been determined that the child's viva voce testimony in court face to face with the accused, is unavailable?

Answer: Almost always, if not always, "Yes."

If Alice is truly unavailable under the standards previously discussed, then the introduction into evidence of her testimony, without live face to face confrontation with the defendant at the perpetuation deposition or other formal hearing in the same proceeding, is almost always, if not always, permissible under the confrontation clause. Under *Roberts* and the definition of hearsay contained in Rule 801(a)-(c) of the Federal Rules of Evidence, one should analyze Alice's testimony as a hearsay statement of an unavailable declarant.¹⁵¹ This is true even if Alice is testifying via closed circuit television or live in a child's courtroom—the absence

151. FED. R. EVID. 801(a)-(c).

of live face to face confrontation with the accused mandates this result. As a hearsay statement of an unavailable declarant, confrontation is satisfied only if Alice's testimony bears adequate indicia of reliability. Pursuant to *Roberts*, reliability can be inferred when the hearsay evidence falls within a traditional "firmly rooted" hearsay exception. If Alice's testimony is admissible pursuant to the proposed special statutory hearsay exception for testimony of a child witness relating an act of sexual contact, it will possess almost all of the aspects of former testimony admitted under Rule 804(b)(1) of the Federal Rules of Evidence.¹⁵² The absence of live face to face confrontation, however, prevents testimony admitted under a special hearsay exception for testimony from being considered former testimony. Accordingly, under *Roberts*, Alice's testimony must be shown to possess particularized circumstantial guarantees of trustworthiness equivalent to that possessed by hearsay statements that are admissible under the traditional "firmly rooted" hearsay exceptions.

Applying such criteria, a court should find that Alice's testimony satisfies the confrontation clause. Alice is testifying under oath, subject to full cross-examination. The jury may observe Alice's demeanor either live, by closed circuit television or on videotape. The defendant's demeanor could and should be visible to the trier of fact. Oath, cross-examination and demeanor are strong indicia of reliability. In addition, if Alice will still testify, a television picture of Sam could be projected for her to view while she testifies. Although it does not constitute physical face to face confrontation, this procedure would add another circumstantial guarantee of trustworthiness to the testimony, making the procedure almost indistinguishable in operation from former testimony hearsay statements admitted under Rule 804(b)(1). Moreover, various other factors, such as absence of motive to fabricate, non suggestive inquiry, embarrassing event and cry for help, are present with respect to Alice's testimony. These factors provide additional circumstantial guarantees of trustworthiness.

Although it is debatable whether oath, demeanor of the victim and cross-examination are *alone* enough to establish equivalent circumstantial guarantees of trustworthiness, a "Yes" answer is suggested. If such indicia are combined with display to the trier of fact of the demeanor of the accused and projection of the accused's image before the child victim during the child's testimony, a "Yes"

152. *Id.* at 804(b)(1).

answer is strongly indicated and advisable. Treating these procedures as adequate alone would avoid practical problems associated with evaluating other indicia of reliability, especially when the child testifies live over closed circuit television or in a children's courtroom. If additional indicia of reliability are ultimately required by the courts, it may be beneficial to hold a pretrial hearing to determine admissibility. At least some indicia of reliability exist with respect to the great majority of victim statements describing prohibited acts of sexual contact performed with or on the child by another. When combined with oath, demeanor, and cross-examination, a court will almost always find an adequate particularized showing of equivalent circumstantial guarantees of trustworthiness.

(b). Corroboration. If Alice is unavailable for confrontation clause purposes, should the court, in addition require adequate corroborative evidence of the act described in her testimony? The prosecution could call expert witnesses to explain why Alice is unwilling or unable to testify, or can't or won't recall, and to say that Alice told the truth during her testimony outside Sam's presence thus adding to the danger that Alice's testimony will be overvalued by the jury. Nevertheless, the circumstances of Alice's testimony so closely parallel viva voce testimony at trial that traditional notions for evaluating the sufficiency of the evidence to sustain a verdict of guilty should prevail. Courts should not impose the additional requirement of adequate corroborative evidence of the acts described in the testimony of the unavailable child witness.

4. SUMMARY AND SUGGESTIONS

With respect to establishing unavailability, legislatures and courts should amend current statutes and rules to provide specifically for unavailability based upon the presence of, or potential for, severe psychological injury to a child witness if forced to face the defendant in open court. Supporting commentary should make clear, however, that the appropriate standard for unavailability is "relative impossibility" and that the factors set forth in *Warren v. United States* should be taken into consideration.¹⁵³

The legislatures and courts should also amend their statutes

153. Sometimes the problem is not that the child cannot testify in open court without suffering severe psychological injury, but that the attorney does not want to try the case for some reason. It is possible that counsel does not want to present the child's testimony in public.

and rules to provide for the use of closed circuit television or a children's courtroom for eliciting testimony in child sexual abuse prosecutions where the child witness is unavailable for live face to face confrontation, but is available to give testimony in an alternative setting. The statutes or rules should provide for projection to the jury of the demeanor of both child witness and defendant. The rules and statutes should also provide for projection of the image of the defendant before the child witness where the witness is willing and able to testify under such circumstances, and where such projection will not cause severe psychological injury.

States should modify their statutes and rules relating to perpetuation depositions to provide for the taking and videotaping of perpetuation depositions of child witnesses in sexual abuse prosecutions employing previously outlined procedures suggested for the taking of testimony outside the physical presence of the defendant. The prosecution should be allowed to take a perpetuation deposition on motion without requiring a showing of cause. Since the deposition provides advantages to the accused even if the child turns out to be available at trial, imposition of a specific showing of likelihood of unavailability does not appear warranted. Of course, the court must be assured that the child witness is truly unavailable before it permits the deposition to be introduced.

It is generally preferable to use the videotaped perpetuation deposition, which incorporates closed circuit television to avoid live face to face confrontation, instead of either live closed circuit testimony at trial or the use of a children's courtroom. The videotaped deposition is less likely to be perceived by the jury as an unusual procedure. Moreover, when properly done, it may not be obvious to the jury that the child and the accused were separated. The videotaped deposition is thus less likely to be an intrusion on the presumption of innocence.

States should amend their statutes and rules to provide that testimony of an unavailable child witness taken outside the physical presence of the accused, subject to cross-examination describing an act of sexual contact performed with or on the child by another is admissible as an exception to the hearsay rule. The child's testimony may be presented to the jury by either closed circuit television, use of a children's courtroom, or a videotape of the child's testimony given at a prior trial, hearing, or other proceeding, or perpetuation deposition. Admissibility should be conditioned upon a showing that the child's testimony possesses particularized guarantees of trustworthiness equivalent to those possessed by state-

ments admitted pursuant to a traditional "firmly rooted" hearsay exception. Only in unusual cases will the court be unable to find equivalent particularized guarantees. It is, in fact, very likely that oath, demeanor, whether live, via closed circuit television, or videotaped, and cross-examination, if combined with projection of the defendant's image before the child witness, alone create adequate indicia of reliability to be admissible under *Green* and *Roberts*. States should consider providing for admissibility solely on this basis. If the drafters of the statute or rule deem a showing of additional indicia of reliability necessary, the foregoing indicia may be combined with the indicia of reliability presently associated with Rule 803(24) and 804(b)(5) of the Federal Rules of Evidence.

To the extent that the procedures at the perpetuation deposition or other methods of presentation of the child's testimony are modified to take into account differences asserted by some to be important in examining children, the less likely oath, demeanor and cross-examination alone will satisfy the equivalent particularized guarantees of the trustworthiness requirement of *Roberts*. To illustrate, if defense counsel in conducting cross-examination is not permitted in the room with the child, but must ask questions by giving them to a psychologist or other designated expert who first converts the question into "children's talk" and then presents it to the child, it is extremely likely that such equivalent particular circumstantial guarantees of trustworthiness will not be found to exist. Cross-examination envisions cross-examination by counsel selected by the accused confronting the witness. Alteration from this expectation bears the risk of an enhanced probability of a finding of inadmissibility. If such a modified procedure is deemed beneficial, the statute or rule creating the appropriate hearsay exception should definitely require a finding of equivalent guarantees of trustworthiness based upon those factors now considered relevant in deciding admissibility of a hearsay statement under Federal Rules of Evidence 803(24) and 804(b)(5) and recently enacted state hearsay exceptions for children's statements describing sexual contact.

IV. CONCLUSION

The outcry of the public to disclosure of widespread child sexual abuse can be addressed effectively within the established boundaries of the confrontation clause. State legislatures can and should enact new hearsay exceptions designed specifically to cope with the question of the admissibility of out of court statements of

child sexual abuse victims. New procedures for securing the testimony of the child witness both at and prior to trial may and should be created to respond to problems arising from the inability to procure viva voce testimony from some child victims when placed face to face with the accused in open court.

New hearsay exceptions and new procedures taking advantage of video technology can and must comply with the confrontation clause, as interpreted by the Supreme Court in *Mattox*, *Green*, *Evans* and *Roberts*. Radical alterations, such as permitting introduction of ex parte videotaped statements of a child witness provided the child is available to be called by the defendant, are neither necessary nor constitutional. Evidentiary problems, thought by some to be unique to child sexual abuse prosecutions, must not be employed to weaken the constitutional protections granted the accused. Face to face physical confrontation between witness and accused is required if the mandate of the confrontation clause is to be satisfied through the production of an available witness. If face to face confrontation is truly not possible, such as when the potential of severe psychological injury makes the witness' viva voce testimony relatively impossible, and the witness is thus properly considered unavailable, the confrontation clause provides for the admissibility of the declarant's hearsay statements and testimony if shown to possess adequate indicia of trustworthiness.

Strict construction of unavailability must be maintained. We must not disregard the strong preference under the confrontation clause for production of the complaining witness before the jury under oath, subject to cross-examination, live face to face with the defendant, testifying in a public courtroom, even in child sexual abuse cases. The seriousness of the offense charged should make us more, not less, inclined to secure the full constitutional protections to the defendant.