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SUPREME COURT OF KENTUCKY

FILE NO. 85-SC-218-TG

COMMONWEALTH OF KENTUCKY

APPELLANT

VS.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. GEORGE BARKER, JUDGE
NO. 84-CR-346

LESLIE WILLIS

APPELLEE

## BRIEF FOR APPELLANT


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## CERTIFICATE OF SERVICE

This is to certify that a copy of the within Brief has been mailed, postage prepaid, to Honorable George Barker, Judge, Fayette Circuit Court, Courthouse, Lexington, Ky. 40507; and Honorable John P. Schrader, Geralds, Moloney & Jones, 259 West Short Street, 2nd Floor, Lexington, Ky. 40507-1237, Counsel for Appellee, on this the 2nd day of July, 1985. I further certify that the record has been returned to the Office of the Clerk of the Fayette Circuit Court.

Penny R. Warren
Assistant Attorney General

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MAY IT PLEASE THE COURT:

## INTRODUCTION

The Commonwealth appeals from the order denying its request to take the testimony of a 5-year-old sexual abuse victim pursuant to KRS 421.350(3), (4), (5) and holding those portions of the statute unconstitutionally deny a defendant's right to confrontation and violate the separation of powers doctrine. At a competency hearing the complaining child witness was so intimidated by the defendant that she was unable to testify in any meaningful manner.

## STATEMENT OF POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

The June 1984 term of the Fayette County Grand Jury indicted Leslie Willis for two counts of first-degree Sexual Abuse (Transcript of Record, hereafter "TR," 2). The indictment alleges that the offenses occurred during January of 1984 and on May 1, 1984 (Id.). According to statements made by the victim, Rosalind Carson, the incidents took place at the home of the appellee who was married to Rosalind's babysitter. Rosalind was five years old at the time of the indictment (Transcript of Hearing, hereafter "TH," 7-8).

On June 22, 1984, the defendant waived arraignment and entered a plea of not guilty (TR 7). A trial date was set for July 23, 1984 (Id.). On July 9, 1984 the appellee filed a motion to exclude the testimony of Rosalind Carson for the reason that she was incompetent as a witness because of her youth (TR 12-13). On July 20, 1984 a hearing was held in the chambers of Fayette Circuit Judge George Barker for the purpose of determining the competency of the witness (TH 1-26). Present at the hearing were Judge Barker, the court reporter, counsel for the defendant, the defendant, the Assistant Commonwealth's Attorney, Beverly Carson and her daughter, Rosalind Carson (Id.).

The record of the July 20th hearing reflects that Rosalind was generally unresponsive during the hearing (Id.). When asked to explain why she would not respond to certain inquiries the child stated:

A. I don't want him - - hurt me.

* * *

Q. Somebody here you don't want to see?

A. (Witness nods affirmatively.)

Q. Who's that?

A. Uncle Leslie." (TH 9.)

* * *

Q. Are you going to talk for us?

A. I don't want him here." (TH 10.)

* * *

A. Yes. I don't want Uncle Leslie, Mommy." (TH 19.)

As a result of her inability to testify in the presence of the defendant the court was unable to find Rosalind competent to testify (TH 23-24). The Commonwealth then submitted a motion to proceed under sections (3) or (4) of KRS 421.350, each of which permits the use of television cameras to present the testimony of a child victim in sexual abuse cases so that the child need not be aware of the defendant's presence (TR 27). The Commonwealth's proposal urged that if a videotape of the testimony could be made under KRS 421.350(4), the court would be able to judge from a review of the tape prior to trial whether the witness was competent (TH 25). Ruling was deferred pending submission of briefs on the constitutionality of the statute (TH 25-26).

On February 20, 1985, Judge Barker held that sections (3), (4) and (5) of KRS 421.350 are unconstitutional (TR 50-55). Specifically, Judge Barker held that KRS 421.350(3), (4), and (5) violate a defendant's right of confrontation under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution (TR 52-54) and violate the separation of powers doctrine contained in Sections 28 and 109 of the Kentucky Constitution (TR 51-52).

Judge Barker's ruling effectively eliminated the testimony of Rosalind Carson, who is the only eyewitness to the crimes charged. Because this prevents the Commonwealth from prosecuting this case, this appeal was filed under the provisions of KRS 22A.020 (TR 56). In order that this important and timely question be answered without delay, the Commonwealth successfully sought transfer of this appeal to this Court from the Court of Appeals. This is a case of first impression in the Commonwealth.

## ARGUMENT

### I.

THE TRIAL COURT ERRED IN HOLDING KRS 421.350 VIOLATES A DEFENDANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 11 OF THE KENTUCKY CONSTITUTION.

This issue was preserved by the Commonwealth's motion to take the 5-year-old sexual abuse victim's testimony under

KRS 421.350(3)(4), the trial court's denial of the motion on grounds the statute denies the defendant's right of confrontation and the Commonwealth's timely notice of appeal from that order. (TR 27, 52-54, 56.)

The trial court in the present case held that subsections (3), (4) and (5) of KRS 421.350 do not adequately protect a defendant's right of confrontation under the United States and Kentucky Constitutions. The Commonwealth respectfully submits that the discretion provided the trial court under KRS 421.350 to utilize modern procedures and technology not only comports with constitutional principles of confrontation but may also provide potential benefits. For the reasons discussed below, the opinion of the Fayette Circuit Court should be reversed.

## A. Statutory Provisions

A review of the specific statutory language is necessary to appreciate the trial court's concerns and misapprehensions. KRS 421.350 provides in part:

* * *

> (3) The court may, on the motion of the attorney for 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 attorneys 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.

(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 subsection (3) of this section 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 subsection (3) of this section. 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:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(5) If the court orders the testimony of a child to be taken under subsections (3) or (4) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken."

KRS 421.350 permits a very limited class of witnesses to testify with special protections provided for them. It is applicable only to children twelve years old or younger who are victims of sexual offenses. Only the statements of the alleged victim are covered by the statute.

Subsections (3) and (4) of KRS 421.350, which were held unconstitutional in this case, are similar to each other except that (3) provides for the live use of closed-circuit cameras during the trial. The child witness would be in a room outside the courtroom and would be examined by both attorneys. The subsection requires that the defendant be present in person so that he may see and hear the witness but that he shall not be seen by the child. Subsection (4) establishes the same basic procedure but permits the testimony to be taken prior to trial and preserved by videotape. As in subsection (3), the child would not be able to see or hear the defendant but the defendant would be present in person and able to observe and hear the witness.

The availability of procedures to permit the defendant to fully participate in cross-examination and to adequately see and hear the witness were unquestioned below. It is also assumed that the reproduced testimony would be of adequate

quality for the jurors to assess the demeanor of the witness. In the trial judge's words, "The question is whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face to face confrontation." (TR 53.)

(B) Obligation To Construe Statutes To Uphold Constitutionality

A fundamental tenet of constitutional law is that statutes carry a strong presumption of constitutionality. American Trucking Association v. Commonwealth, Transportation Cabinet, Ky., 676 S.W.2d 785, 789-790 (1984); Jefferson County Police Merit Board v. Bilyeu, Ky., 634 S.W.2d 414, 416 (1982).

> "It is the duty of this court to 'draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act and expound it.' Folks v. Barren County, 313 Ky. 515, 519-20, 232 S.W.2d 1010, 1013 (1950)." Budget Marketing, Inc. v. Commonwealth, ex rel. Stephens, Ky., 587 S.W.2d 245, 247 (1979).

Doubt should be "resolved in favor of the voice of the people as expressed through their legislative department of government." Walters v. Bindner, Ky., 435 S.W.2d 464, 467 (1968). The Commonwealth respectfully submits the trial court did not accord KRS 421.350 the strong presumption of constitutionality to which it is entitled and erred by failing to construe the statute so as to sustain its validity.

(C) The Trial Court's Construction of KRS 421.350

Initially, the Commonwealth notes that the trial judge construed KRS 421.350 as requiring the defendant to be placed in a separate room (TR 51, 53). While this is a plausible construction of one portion of the statutory language, it appears to conflict with the requirement that the defendant shall be permitted ". . . to observe and hear the testimony of the child in person . . ." (Emphasis added.) The focus of the statute is plainly an assurance that ". . . the child cannot hear or see the defendant." If the location of the defendant is important, the statute should be construed to permit the defendant to observe and hear the child's testimony in person in the same room but in a position so that he cannot be seen or heard by the child.

The trial court also construed KRS 421.350 as violative of RCr 7.12. This issue is discussed more fully in the confrontation argument which follows and Argument II below. The Commonwealth respectfully submits the trial judge's construction of rules regarding depositions was narrower than intended or authorized by this Court.

The only plausible remaining requirement of confrontation, under the trial court's interpretation of that right, is that the defendant be able to require the witness to look at him. The Commonwealth is not aware of any authority, even under normal courtroom procedures, which specifically

requires the witness to look at a defendant. Surely the defendant cannot argue that the testimony of a blind victim would be invalid nor the testimony of a witness who refuses to look upon the accused. By parity of reasoning, a defendant would not be denied the right of confrontation when a young victim is so intimidated by his presence that she cannot testify unless she is unable to see or hear him. Further assessment of this issue requires a review of case law construing the right of confrontation.

D. The Right of Confrontation Under the Constitutions Of The United States and Kentucky.

The defendant argued below, and the trial court appeared to agree, that the Kentucky Constitution defines confrontation more stringently than the Sixth Amendment by use of the words "face to face." (TR 40.) Yet, construction of the Sixth Amendment by federal courts has consistently included the identical language:

> "Thus, the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts [citation omitted] and in the state courts is assured very often by the constitutions of the states." Snyder v. Massachusetts, 201 U.S. 102, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 674 (1933). (Emphasis added.)

> "The court has emphasized that the confrontation clause reflects a preference for face-to-face confrontation at trial." Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). (Emphasis added.)

The defendant has produced no authority, and the Commonwealth has found none, to support his position that the right of confrontation in the Kentucky Constitution should be construed as more stringent than the same right in the United States Constitution. The debates on the Kentucky Constitution of 1891 include references to the "face to face" language, but these discussions neither support nor refute the defendant's position. In Harris v. Commonwealth, Ky., 315 S.W.2d 630, 632 (1958), the Court held:

> "The main purpose of confrontation is to insure the right of cross examination and protect the accused from conviction by means of ex parte testimony or affidavits given in his absence."

This same language was cited with approval in Flatt v. Commonwealth, Ky., 468 S.W.2d 793 (1971), where the Court also stated, "An obvious purpose of these [United States and Kentucky] constitutional provisions is to secure to the accused a right of cross-examination." Id. at 794.

In the present case, the proposal to take the victim's testimony pursuant to KRS 421.350 does not in any way limit the accused's right of cross-examination, nor is he precluded from bringing forth any evidence of hostility, bias, other motive for testifying, or from otherwise attacking the witness' credibility. Cf. Barrett v. Commonwealth, Ky., 608 S.W.2d 374, 376 (1980). The right of confrontation is fully protected as required by the Constitutions and RCr 7.12.

The Kentucky statute is identical to a statute adopted in Texas in 1983. Tex. Crim. Proc. Code Ann. § 38.071 (Vernon 1983). Subsection 2 of the Texas statute has withstood attack on confrontation grounds but the comparable subsection 2 of KRS 421.350 is not in issue here. Jolly v. Texas, 681 S.W.2d 689 (Tex.App. 1984). Numerous other jurisdictions have similar statutes or rules, but the specific issue here has not been reported by their appellate courts.

In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), the Court refused to uphold the use of a video-taped deposition of an adult witness who was reluctant to testify because of her fear of the defendant. The Court stated:

> "Most believe that in some undefined but real way recollection, veracity and communication are influenced by face to face challenge." Id. at 821.

Yet that court recognized the distinctions between that case, involving an adult victim and the crime of misprison of felony, and other cases involving heinous crimes and competency hearings for child abuse victims. Benfield at 821 and n. 10.

The Benfield Court's unsupported assertions regarding recollection and veracity were refuted by the evidence and rejected by the court in State v. Sheppard, 197 N.J.Super. 411, 484 A.2d 1330 (1984), the only case the Commonwealth is able to locate which is very closely on point. In Sheppard the trial court permitted, without an authorizing statute, the use of closed circuit televised testimony taken under circumstances



see Stivers
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similar to those described in KRS 421.350. The Court took evidence on the question from a forensic psychiatrist who had examined the child, and witnesses from the prosecutor's office who had experience in child abuse cases. The Court learned that probable long-range emotional consequences would result from the in-court testimony even though the child was well oriented, with a sound memory and no evidence of psychotic thoughts, delusions or hallucinations. Id. at 1332. Long-term effects could include nightmares, depression, eating, sleeping and school problems, behavioral difficulties, including "acting out" and sexual promiscuity. Id. The state's forensic psychiatrist testified that in his opinion the child was less likely to testify accurately in court and that the video presentation would "enhance, not diminish, the prospect of obtaining the truth." Id. at 1344. While the adult witness may be impressed by the solemnity of the courtroom atmosphere and so forth, the child on the other hand, because of fear, anxiety and guilt (many children feel guilty about abuse perpetrated on them), may be less likely to be truthful. Id. at 1332. The attorneys told the court that in many cases children were able to testify with difficulty before a grand jury but "froze" in front of the defendant. Children who had previously testified before a grand jury, for example, frequently "forgot" details, changed stories, or presented

inconsistent facts. Eventually many broke down, cried, ignored questions and eventually refused to answer. Id. at 1333.

The testimony of these witnesses is borne out by the behavior of Rosalind Carson. After talking to police, the prosecutor and the grand jury, she forgot details, cried, ignored questions and refused to answer questions about the charge when she finally was forced to look at the defendant.

After carefully analyzing authorities on the right of confrontation and its many exceptions and authorities on child abuse, the Sheppard court held that the videotape procedure would not deny the defendant's rights of confrontation and due process. The Court alternatively held that the minimal incursion, if any, into the confrontation clause was outweighed by the harm to victims of child abuse and the inability to prosecute child abusers because evidence against them cannot be presented. The Commonwealth submits the Sheppard court reached a well-conceived, prudent and constitutionally sound decision and urges careful consideration by this Court. (See Appendix.)

Alternatively, should this Court decide that KRS 421.350 does in some manner infringe upon the rights of confrontation or due process, the Commonwealth submits that, upon proper weighing of the competing interests, the Court should declare the statute constitutional.

The problem of child sexual abuse is increasing both in occurrence and public awareness. In each case where a child

becomes the victim of a crime there are considerations that are not present in a criminal case with an adult victim. Children as victims cannot be expected to defend themselves and their rights. The General Assembly recognized the magnitude of this problem with the passage of KRS 199.335 which requires teachers, doctors and other persons to report cases of child abuse. Children as victims may be traumatized by the courtroom procedure itself as well as the crime. See Libai, "The Protection Of The Child Victim Of A Sexual Offense In The Criminal Justice System," 15 Wayne L. Rev. 977 (1969). It is impossible to gauge exactly what prospective damage might occur to a young child but it cannot be doubted that the mental health and possibility of serious psychological harm must be of paramount importance to Kentucky citizens.

The right and need of the people of the Commonwealth to apprehend and remove from society those who commit child abuse is obvious. Because the victim has no "rights" in the absolute sense, the Commonwealth will generally require the witness to testify because in the Commonwealth's view the state's need outweighs that of the individual child. In reality, then, the victim is urged, persuaded and eventually compelled to try to testify even when the risk of harm to him or her is present.

The solution to this dilemma is to find a better way to present the testimony of children in a sexual abuse case.

See Note, "Proving Parent-Child Incest," 15 U. of Mich. Journal of Law Reform 131 (1981). While the rights of a defendant cannot be ignored, they must be balanced with legitimate concern for the victims of crime. Kentucky has long recognized, on a far broader scale, special treatment for child witnesses by authorizing leading questions on direct examination. Meredith v. Commonwealth, 265 Ky. 380, 96 S.W.2d 1049, 1051 (1936); Peters v. Commonwealth, Ky., 477 S.W.2d 154, 158 (1972).

Similarly, Kentucky recognizes numerous exceptions to the right of confrontation. Business records, dying declarations, res gestae statements and excited utterances are admissible despite the defendant's inability to cross-examine the declarer. See: Lawson, Kentucky Evidence Law Handbook (1976), pp. 119-185. Where a witness is unavailable and there are circumstantial guarantees of trustworthiness, the testimony is admissible despite possible violations of the right of confrontation. Federal Rule of Evidence 804, adopted in Maynard v. Commonwealth, Ky.App., 558 S.W.2d 628, 633 (1977). Written depositions may be introduced at trial. RCr 7.12; Noe v. Commonwealth, Ky., 396 S.W.2d 808 (1965). A defendant may be excluded from the courtroom, and thereby denied the right of confrontation, because of his misconduct. RCr 8.28; Scott v. Commonwealth, Ky., 616 S.W.2d 39, 43 (1981). Recently, the Court of Appeals affirmed a conviction based almost exclusively on the out-of-court statements of a five-year-old witness who

told her mother and two other persons about an abuse occurring hours earlier. McClure v. Commonwealth, Ky.App., 686 S.W.2d 469 (1985). Other jurisdictions are expanding hearsay exceptions to accommodate the special problems encountered in child sex abuse cases. See "A Comprehensive Approach To Child Hearsay Statements In Sex Abuse Cases," 83 Columbia Law Review 1745-1766 (1983).

In contrast to these exceptions to the right of confrontation, KRS 421.350 applies to only a limited class of witnesses (children twelve years old or younger who are victims of sexual offenses), permits the factfinder to observe the demeanor of the witness, imposes no restrictions upon cross-examination, and requires the defendant to be present in person to see and hear the testimony. The Commonwealth respectfully submits that this limited statutory exception should be made available at the discretion of the trial judge in the interest of justice. Appropriate balancing of the competing interests compels a conclusion in favor of the constitutionality of the statute.

II.

LEGISLATIVE ADOPTION OF A DISCRETIONARY METHOD FOR ADMISSION OF EVIDENCE IS NOT VIOLATIVE OF SEPARATION OF POWERS.

This issue was preserved through the Commonwealth's motion to take the child's testimony under KRS 421.350 (TR 27),

the trial court's denial of the motion holding the statute violates the separation of powers doctrine (TR 51-52), and the Commonwealth's notice of appeal from that order (TR 56).

In his Opinion and Order, the trial judge held:

> "Clearly, this Statute involves a matter of procedure rather than substance. It purports to authorize the Court to establish a method for obtaining the testimony of a witness which has not heretofore been authorized. To this extent the Legislature has invaded the province of the judiciary in controvention (sic) of Sections 28 and 109 of the Kentucky Constitution." (TR 51-52.)

The trial court also held that the defendant's right of confrontation will not be fully protected, as required by RCr 7.12, under the provisions of KRS 421.350(3), (4), (5). (TR 52.) The Commonwealth respectfully disagrees.

First, KRS 421.350 places total discretion in the trial court as to whether its provisions are to be utilized. Subsections (3) and (4) each begin with, "The court may . . . order . . . ." (Emphasis added.) When the trial judge has unbridled discretion, there is no invasion of judicial powers.

Second, the Court has not adopted formal rules of evidence and has long upheld statutes relating to the admissibility of certain testimony, the competency of testimony and witnesses, etc. See, e.g., KRS 421.210 (dead man's statute, self-serving declarations, privileged communications); KRS 421.200 (competency of witnesses); KRS 421.240, KRS 421.250 (procedures for attendance of witnesses); KRS 422.010 through

422.087 (judicial notice, proof and admissibility of laws and documents); KRS 422.120 (evidence of genuineness of handwriting); and KRS 510.145 (rape shield law, held constitutional in Smith v. Commonwealth, Ky.App., 566 S.W.2d 181, 183 (1978). In Ex parte Farley, Ky., 570 S.W.2d 617, 624-625 (1978), this Court noted:

> "Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters, just as we accept KRS 532.075, even though it has been argued with much force that there is no constitutional basis for a statute enlarging the scope of appellate review beyond the matters of record in the proceeding under consideration."

In O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 158 (1982), this Court's response to claims under KRS 452.220, which sets out procedure for change of venue, was:

> "Until this statute is superseded by this Court, under the Court's paramount rule-making authority, it stands as enacted by the General Assembly under the principles of comity elucidated in Ex Parte Auditor of Public Accounts, Ky., 609 S.W.2d 682 (1980)."

Most recently, in Commonwealth v. Littrell, Ky., 677 S.W.2d 881, 885 (1984), the Court reviewed KRS 22A.020(4) relating to procedures for appeals by the Commonwealth and added:

> "The fact that this Court has not attempted to preempt this statute by the adoption of pertinent Criminal Rules to parallel the old Criminal Code provisions is in itself tacit

approval of the propriety and efficacy of the statute."

In the present case, the statute does not threaten to interfere with the orderly administration of justice and it has not been superseded by a rule of procedure. KRS 421.350 stands as enacted under the principles of comity.

Third, the Commonwealth submits KRS 421.350 does not conflict with nor violate the requirements of RCr 7.12. As discussed above, the defendant's right of confrontation is fully protected. The defendant must be permitted to see and hear the child "in person" and will be permitted to participate in cross-examination through his attorney. The witness in this case is unable to testify under normal trial conditions because of the frailties and infirmities associated with her tender years and the nature of the crime against her; thus, her deposition should be admissible. See RCr 7.20(1). In Wells v. Commonwealth, Ky., 562 S.W.2d 622, 624 (1978), this Court held that RCr 7.20 regarding the use of depositions should not be so narrowly construed to preclude other circumstances when a witness is unavailable, as was the case in Wells when the witness was available and present but her testimony was privileged at the time of trial. "Its [RCr 7.20] clear purpose is to preserve the evidence against the event of the witness's becoming unavailable to testify." Id.

The public's strong interest in ascertaining the truth and providing adequate protection for child abuse victims, along with the underlying policies of KRS 421.350, which further justice without undue interference with the rights of a defendant or the discretion of the court, provide additional support for the Commonwealth's position that the statute should be declared constitutional.

## CONCLUSION

No right assured the criminal defendant by the Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution is infringed by the provisions of KRS 421.350(3), (4), (5). If the Commonwealth is permitted to proceed with the testimony of Rosalind Carson by video, then the accused will still be accorded the full right of cross-examination, and may hear and observe the witness testify. The jury as well will have the opportunity to view the video and evaluate the demeanor and credibility of the witness.

The only possible objection to this procedure is to the inability to intimidate the child/witness into silence by forcing her to look upon the accused. No case has been found where a witness was disqualified by the mere refusal or inability to look upon the defendant. Available evidence suggests that the child witness in a sexual abuse case is less

likely to testify accurately when burdened with the inherent stress of ordinary courtroom procedures.

The Federal and State Constitutions are not such inflexible documents that they are resistant to pragmatic interpretations of their intent to allow this Court to find the challenged statute constitutional. KRS 421.350 is a well-conceived statutory plan designed to protect the interests of both society and the accused and to further justice.

Additionally, KRS 421.350 does not interfere with or threaten to interfere with the orderly administration of justice, nor has it been preempted by the Court's rule-making authority. Total discretion remains with the judiciary. The limited provisions of KRS 421.350 should stand as enacted under the principles of comity.

For all the foregoing reasons, the Commonwealth submits the decision of the Fayette Circuit Court should be reversed, the statute declared constitutional, and the case remanded for trial.

Respectfully submitted,

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# APPENDIX

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SIXTH DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. OPINION AND ORDER NO. 84 CR 346

LESLIE WILLIS DEFENDANT

**********

This is an indictment for two counts of sexual abuse first degree, it being alleged by the Grand Jury that on two occasions the Defendant had sexual contact with Rosalind Carson, a child four (4) years of age.

Defendant moved the Court to exclude the testimony of Rosalind Carson by reason of incompetency as a witness and in response thereto this Court conducted a competency hearing on July 20, 1984. Prior to the hearing the Commonwealth moved the Court to permit the child, Rosalind Carson, to testify by video tape pursuant to KRS 421.350. This Statute was passed by the 1984 Legislature and became effective July 13, 1984.

The competency hearing was conducted in the chambers of the Court with the Defendant and his attorney present. The child would not testify as to any details of the alleged offense and appeared to be reluctant to testify in the presence of the Defendant. The Court made no findings upon the issue of the competence of the child to

testify and continued the hearing pending legal arguments upons the Defendant's objection to the Motion to permit the child to testify pursuant to KRS 421.350.

Counsel for the Commowwealth and the Defendant promptly submitted legal briefs upon the issue but unfortunately this case was buried in the workload of the Court and has just now come to the Court's attention.

In brief KRS 421.350(3)(4) provide that in cases involving a child allegedly a victim of illegal sexual activity the Court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment to the courtroom or be recorded for showing in the courtroom. Although the attorney for the Defendant may be present in the room with the child, the Defendant may not be present but should be permitted to observe and hear the testimony of the child but without the child being able to hear or see the Defendant. Although the Defendant is excluded from the room, the Statute provides that any person whose presence would contribute to the welfare and wellbeing of the child may be present in the room with the child during his testimony. KRS 421.350(5) provides that if the Court orders the testimony of a child to be taken as above provided, the child may not be required to testify in Court.

Clearly, this Statute involves a matter of

procedure rather than substance. It purports to authorize the Court to establish a method for obtaining the testimony of a witness which has not heretofore been authorized. To this extent the Legislature has invaded the province of the judiciary in controvention of Sections 28 and 109 of the Kentucky Constitution.

That which is contemplated under the Statute is nothing more than a video tape deposition of a witness. For many years in Kentucky a witness in a criminal trial had to testify in court in person, with few exceptions. This rule was due to the right of confrontation gauranteed an accused under the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution, which provides that "in all criminal prosecutions the accused has the right to meet the witnesses face to face,...". Subsequently, this rule was relaxed to permit the taking of a deposition of a witness, but only upon certain specified conditions, the most important of which are that the witness may be unable to attend the trial and that the Defendant and his attorney be present at the taking of the deposition. RCr 7.12 specifically provides that the Order authorizing the taking of the deposition shall contain such specifications as will fully protect the rights of personal confrontation and cross examination of the witness by the Defendant.

The most fundamental issue in this case is whether

this Court could comply with the mandate of RCr 7.12 by excluding the Defendant from the room in which the deposition of the child witness was being taken. The question is whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitionally acceptable substitute for face to face confrontation. It is the opinion of this Court that it is not.

This Court is aware of the strong public interest in the prosecution of child abuse cases, particularly sexual abuse. This Court is also aware of the sometimes unsurmountable difficulties in getting a small child to tell in a courtroom in the presence of the Defendant the events of sexual abuse. Children, even of tender years, can be and frequently are competent witnesses to their own sexual abuse. Certainly, there is no truth in the idea that children never tell the truth.

On the other hand, closely following the wave of public concern regarding child abuse may be seen the wave of public concern regarding false accusations of child abuse and the irreparable damage which can occur. The fact is that it is a very difficult and sometimes impossible decision to be made as to whether a child is telling the truth under certain circumstances. At best, it is a difficult determination even for well trained and

experienced investigators.

Neverthless, the difficulty of the task alone should not be justification for abbrogating well established constitutional rights. Our traditional methods of criminal law enforcement simply do not lend themselves well to protect against child abuse. Methods that are more effective and less dangerous to the welfare both of the child and the accused must be developed.

Evidently, it was the thought of the Legislature that the rights of children, traditionally wards of the state, should outweigh the rights of the individual. However, the individual rights and liberties provided our citizens under our constitutions have served us well and should not be abandoned except in the very last resort. Under our constitution a criminal accused has the right to meet witnesses against him face to face and it is the opinion of this Court that "face to face" does not include a one-way mirror or a T.V. monitor nor do such procedures adequately protect the Defendant's rights of personal confrontation and cross examination.

Wherefore, it is the opinion of this Court that KRS 421.350(3)(4)(5) are unconstitutional and therefore it is hereby,

ORDERED that Defendant's Motion to exclude the testimony of Rosalind Carson be and it is hereby sustained

197 N.J.Super. 411

**STATE of New Jersey, Plaintiff,**

**v.**

**George R. SHEPPARD, Defendant.**

Superior Court of New Jersey,
Law Division (Criminal),
Burlington County.

Decided Aug. 29, 1984.

In prosecution of defendant for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse, State moved for permission to present testimony of ten-year-old victim through use of video equipment, and defendant objected, claiming his right of confrontation would be violated by the procedure. The Superior Court, Law Division, Burlington County, Haines, A.J.S.C., held that: (1) use of videotape testimony of child victim would be permitted, and (2) defendant waived his right of confrontation by making threats to victim.

Motion to present testimony of child victim of sexual assault through use of video equipment granted.

**1. Criminal Law ⇐662.1**

Confrontation clause declares a fundamental right to which the states are subject by reason of the Fourteenth Amendment. U.S.C.A. Const.Amends. 6, 14.

**2. Criminal Law ⇐662.1**

Constitutional right of confrontation is not absolute. U.S.C.A. Const.Amend. 6.

**3. Criminal Law ⇐438(8)**

Videotape records fall within definition of "writing" in the rules of evidence, for purposes of determining whether videotapes are admissible in evidence. Rules of Evid., N.J.S.A. 2A:84A, Rule 1(13).

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

**4. Criminal Law ⇐662.3, 667(1)**

In determining whether to allow testimony of ten-year-old sexual assault victim to be presented through use of video equipment, court must weigh great harm to victims of child abuse, inability to prosecute child abusers because evidence against them cannot be presented, and damage to children by traumatic role in testifying in court against defendant's right of confrontation. U.S.C.A. Const.Amend. 6.

**5. Criminal Law ⇐662.3, 667(1)**

Child victim would be allowed to testify through use of video equipment in prosecution for sexual assault, engaging in sexual conduct which would impair or debauch the morals of a child and child abuse, despite resulting lack of eye contact between witness and defendant and defendant's claim of a confrontation clause violation, where defendant, judge, jury and spectators would see and hear the child clearly, where adequate opportunity for cross-examination would be provided, and in view of court's finding of harm to child if she was required to testify in court; disagreeing with *U.S. v. Benfield*, 593 F.2d 815. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

**6. Criminal Law ⇐662.7**

Confrontation clause's central purpose is provision of the opportunity for cross-examination. U.S.C.A. Const.Amend. 6; N.J. S.A. Const. Art. 1, par. 10.

**7. Witnesses ⇐268(1)**

Like the right of confrontation, the right of cross-examination is not without limitations. U.S.C.A. Const.Amend. 6; N.J. S.A. Const. Art. 1, par. 10.

**8. Criminal Law ⇐662.80**

A defendant may waive his Sixth Amendment right of confrontation. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

**9. Criminal Law ⇐777**

Evidence rule, providing that if a judge admits a statement, he shall not inform the jury that he has made a finding that the statement is admissible, and he shall instruct the jury that they are to disregard the statement if they find it is not credible, but if the judge subsequently determines that the statement is not admissible, he shall take appropriate action, is applicable only when statement concerned is a statement which is intended to be introduced at trial. Rules of Evid., N.J.S.A. 2A:84A, Rule 8(1, 3).

**10. Criminal Law ⇐632(5)**

Rule of evidence, providing that if a judge admits a statement he shall not inform jury that he has made a finding that the statement is admissible, and shall instruct jury that they are to disregard statement if they find it not credible, but if judge subsequently determines from all evidence that statement is not admissible he shall take appropriate action, did not apply to admissibility of psychiatrist's testimony at pretrial hearing regarding threats sexual assault defendant allegedly made to child victim, for purposes of determining whether victim's videotape testimony would be admissible without consideration of defendant's right to confrontation. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10; Rules of Evid., N.J.S.A. 2A:84A, Rule 8(1, 3).

**11. Criminal Law ⇐667(1)**

Psychiatrist's testimony regarding defendant's threat to kill child victim was admissible at pretrial hearing in prosecution for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse for purposes of determining whether defendant waived his right to confrontation by reason of such threats, and thus, whether victim would be able to testify through use of video equipment. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

**12. Criminal Law ⇐662.80**

Standard for determining whether a defendant waived his right to confrontation by threatening a victim is preponderance of the evidence. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

**13. Criminal Law ⇐662.80**

In prosecution for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse, the state supported with sufficient evidence its claim that defendant waived his right to confrontation by threatening to kill the child victim, despite fact that evidence of defendant's threat to kill victim was hearsay consisting of victim's statement to a psychiatrist and repeated by him at a pretrial hearing, where child's statement to the psychiatrist was made in a setting of confidence, and was not made because child knew that her statement could effect a waiver of the confrontation clause; under the circumstances, defendant waived his right to confrontation with the child victim, and victim's testifying through use of videotape equipment was permissible. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

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Lily Oeffler, Mount Holly, for plaintiff (Stephen G. Raymond, Burlington County Pros. Atty.).

Robert Sloan, Mount Holly, for defendant (James Logan, Jr., Mount Holly, attorney).

HAINES, A.J.S.C.

Defendant, George R. Sheppard, has been indicted for sexual assault, engaging in sexual conduct which would impair or debauch the morals of a child and child abuse. The State now moves for permission to present the testimony of the ten-year-old victim, defendant's stepdaughter, through the use of video equipment. De-

fendant objects, claiming his right of confrontation, guaranteed by the Sixth Amendment of the *United States Constitution* and Art. 1, par. 10 of the *New Jersey Constitution* (1947), will be violated by the procedure. The question has not been addressed in the published opinion of any court in this State.[1]

The State proposes to place the child, the prosecuting attorney, defense counsel, and a cameraman in a room near the courtroom at the time of trial. The room will be equipped with video and audio systems. The judge, jury, and defendant will be in the courtroom. The child will testify as though sitting in the courtroom, responding to questions from the prosecutor and the defense attorney. Defendant, the judge, the jury, and the public will see and hear her testimony through monitors placed appropriately in the courtroom. Private communication between defendant and his attorney will be available through an audio connection.

A hearing was held, in response to the State's application, at which witnesses for the State testified and were cross-examined. Defendant, who was present, represented by counsel and provided with notice and an opportunity to be heard, did not introduce any evidence.

Robert L. Sadoff, a forensic psychiatrist with substantial credentials relating to trial proceedings as well as medical matters, was the first witness. He interviewed the child victim for the purpose of testifying at the hearing. She revealed frequent incidents of sexual abuse by her stepfather beginning when she was only three or four-years old. She told him she would be able to testify in open court facing the defendant. Her willingness, however, was based upon a misconception. She was afraid of her stepfather, who had threatened to kill her if she revealed his activities, and therefore wanted to send him to jail for her protection. She believed that he could not be sentenced to jail if she testified through the use of videotape equipment. When advised otherwise, she expressed a preference for a video arrangement.

Doctor Sadoff said the victim had the capacity to testify truthfully. It was his opinion, however, that avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony. He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.

In his opinion, the child was well-oriented, with a sound memory and no evidence of psychotic-thought disorder, hallucinations or delusions. She currently receives group and individual counseling. Probable long-range emotional consequences resulting from her in-court testimony would be the continued presence of fear, guilt, and anxiety. The testimonial experience is itself traumatic and likely to be long remembered. Possible long-term effects of her testimony in court would be nightmares,

1. It has been addressed by Judge Edwin H. Stern in a New Jersey murder case. He permitted the use of video equipment in that case, stating his reasons from the bench. The transcript of his opinion has been supplied to counsel and the court.

depression, eating, sleeping, and school problems, behavioral difficulties, including "acting out," and sexual promiscuity. The psychiatric goal in these cases is to provide appropriate treatment of the offender and strong support for the child to the end that the family can be reunited. The prospect of reaching this goal will be much inhibited by face-to-face testimony.

Two attorneys with substantial experience in the prosecution of child abuse cases testified to the difficulties attending the presentation of children's testimony. In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents her from testifying or makes the testimony obviously inaccurate or inadequate. One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, she could not testify in court face-to-face with the accused and other relatives. The victim either refused to testify or "froze" when she got to court. Children who did testify, *e.g.*, before a grand jury, frequently "forgot" details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer. Most of the victims involved in these cases were being treated by counsellors who frequently advanced the opinion that their child patients could not survive the trauma attending a courtroom appearance.

The second attorney, a member of a "charge" committee in the prosecutor's office, had reviewed 75 to 80 cases of child abuse. His committee was responsible for double-checking cases which the prosecutor believed would have to be dismissed for various reasons. Nearly 90% of the child abuse cases were dismissed as a result of problems attending the testimony of children, who could not deal with the prospect of facing fathers, stepfathers, relatives, and strangers in a courtroom setting. He described three child abuse cases which illustrated the problems.

(1) A child was the victim of a stranger's sexual molestation at age 12. The facts did not become known to the prosecutor (often the case) until she was 17. The case was dismissed on the basis of psychiatric advice that the child could not testify without having a total emotional breakdown. The child's approach to emotional survival, typically, had been to forget, forget, forget. Reinforcing her memory of this traumatic event would have been devasting.

(2) A seven-year-old boy was abused by a friend. He was precocious and articulate when speaking to the prosecuting attorney. When presented to the grand jury, the presence of many people made him hesitant, forgetful, and inconsistent. Shortly afterward, for unknown reasons, he and his family moved to Italy and the matter was resolved by a plea agreement.

(3) A father was charged with sexually abusing his daughter. The child found it very difficult to articulate the facts, and refused to discuss them with anyone except the prosecuting attorney. The complaint was therefore dismissed; the necessary facts could not be presented to a grand jury.

The final witness was a video expert. He testified that the video equipment to be used at the trial of this matter would provide instant transmission of images and voices from a remote room to the courtroom, providing more than acceptable clarity. Both video and audio would be taped to preserve the record of the child's testimony. Images could be presented in black and white or color. In the present case, color will be used. Special lighting is not

necessary. Although bright lights improve color presentation, they will not be required in this case. Monitors (picture screens with sound capacities) will be connected to the camera and placed in the courtroom. A zoom lens will be available for close-ups of the witness. The witness and both attorneys can be photographed simultaneously without difficulty.

An in-court demonstration was provided by the expert using the video equipment to be employed at trial in a conference room adjoining the courtroom. Two attorneys acted as witness and prosecutor. A monitor with a 25" screen faced the judge. The use of the zoom lens was illustrated. A well-defined picture appeared on the monitor; when the zoom lens was used, facial details were provided with great clarity. The testimony was distinct and easily understood. The color was satisfactory although no special lighting was used. The video expert testified that audio communication between the defendant and his attorney would be provided through wireless devices or a hard wire connection. Two-way communication from the judge to the conference room could also be provided.

It is the court's conclusion that the planned video arrangement for presenting the testimony of the child victim satisfies constitutional requirements. It will be allowed. That conclusion is supported by the following extended analysis.

A. The Dimensions of the Problem; Trial Effects; Social Responsibility.

According to an extensive article appearing in *Newsweek* (May 14, 1984), "somewhere between 100,000 and 500,000 American children will be [sexually] molested this year." The same article refers to a study "showing that 19% of all American women and 9% of all men were sexually victimized as children." According to the State's witnesses in this matter, the Burlington County Prosecutor's Office interviews seven to eight children a month in connection with sexual-abuse cases. The *Newsweek* article discusses the difficulties involved when these cases reach court, pointing to many of the problems mentioned by the State's witnesses. Children and relatives are ashamed and afraid. There is anxiety about the future of the child and the family. In many cases the abuser contributes all or most of their financial support. Counselors who believe that rehabilitation and the consequent preservation of family unity and security are possible, advise against prosecution.

For obvious reasons, only one witness with personal knowledge is available to prove the State's case in almost every child abuse prosecution: the child victim. These victims, as shown by the State's proofs, have been traumatized by their subjection to the abuse. They become so further traumatized by the prospect of testifying in front of their abusers that they cannot speak about the central happenings or can do so only with great difficulty and doubtful accuracy. The in-court experience may cause further lasting emotional harm. Writers in the field bear this out. Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 *Wayne L.Rev.* 977 (1969), has this to say:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere in court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative. [at 984]
>
> . . . .
>
> The fact is that psychiatrists all over the world repeatedly warn that 'legal proceedings are not geared to protect the

> victim's emotions and may be exceptionally traumatic.' The studies do not as yet demonstrate a clear causal link between the legal proceedings and the child victim's mental disturbances, but no psychiatric study has attempted to prove, or is likely to attempt to prove in the future, such a causal link. Psychiatrists agree that they cannot isolate the effects of the 'crime trauma' from the '*prior personality damage*' or either of the foregoing from the '*environment reaction trauma*' or the '*legal process trauma.*' But psychiatrists do agree that when some victims encounter the law enforcement system, for one reason or another, the child requires special care and treatment. [at 1015]

Libai points to a study comparing a "court sample" of child victims involved in criminal proceedings with a random sample of such victims, which "found that 73% of the court sample had behavior problems and over-disturbances compared with only 57% of the random sample." At 982.

Another article entitled, "Proving Parent-Child Incest," 15 *U. of Mich. Journal of Law Reform* 131 (Fall 1981), by Ordway, addresses the need to find a better way to present children's testimony in sexual abuse cases because of the human and social costs involved:

> Our system of justice manifests a concern with human costs at many levels. The eighth amendment prohibits cruel and unusual punishment, and prisons, despite their problems, attempt to provide for more than mere physical survival. Bankruptcy procedures protect enough of the assets to cover necessaries. Tort law struggles to develop a fair system for compensating victims' loss of companionship and mental distress. Most pertinent here are the informal procedures and the 'best interest' standards of the juvenile/family courts.
>
> Furthermore, it is as sensible to establish an exception to protect the incest victim from trauma as it is to protect the taxpayer from expenditure and the accused from delay. The only difference between the first and the latter two harms is the value at risk. In light of the fact that money and time have recognizable value only in relation to human needs and values, the cost in harm to a person must be valued at least as highly as money and time. [at 148, n. 78]

New Jersey is sensitive to the needs of juveniles and to their problems. Its system of juvenile courts, culminating in the recent creation of the Family Division of the Superior Court, has always been devoted to the "best interest" of the juvenile. Judicial responsibility in juvenile matters is described in *Sorentino v. Family & Children's Soc. of Elizabeth*, 72 *N.J.* 127, 367 *A.*2d 1168 (1976), a custody case. The Supreme Court said:

> The court cannot evade its responsibility, as *parens patriae* of all minor children, to preserve them from harm. The possibility of serious psychological harm to the child in this case transcends all other issues. [at 132, 367 *A.*2d 1168; citations omitted]

Unfortunately, this all-encompassing concern for the welfare of children has not been directed toward their protection in our courts when they are obliged to testify as victims of abuse.

Testimonial problems are being addressed in other states in various ways. In California, for example, preliminary hearings may be videotaped and the taped testimony presented at a later trial. *Cal.Penal Code* § 1346 (West 1984). The arrangement, however, does not resolve the problems of fear, anxiety, and trauma affecting the child witness. She is still subjected to a face-to-face confrontation at the preliminary hearing.

Some states permit hearsay testimony, *e.g.*, by a counsellor, to avoid the presentation of a child witness. Videotaping arrangements are authorized in some juris-

dictions. Libai, *op. cit., supra*, recommends the use of a two-way glass enclosure in the courtroom which would permit a child witness to be observed by everyone in the courtroom while she remained unconscious of their presence. Statutory provisions in addition to California which illustrates the varied approaches are as follows:

(1) *Arizona*

Permits videotaped testimony of a minor witness in the presence of the court, the defendant, defendant's counsel, the prosecuting attorney or plaintiff and plaintiff's counsel for presentation to the jury at a later time as evidence. *Ariz. Rev.Stat.Ann.* § 12-2312 (1982)

(2) *Florida*

Upon application to the court on notice to the defendant and proof of a substantial likelihood that a child abuse victim will suffer severe emotional or mental strain if required to testify in open court, her out-of-court testimony may be videotaped for use as evidence. A trial judge must preside at the videotape session and shall rule on all questions as if at trial. (No mention is made of confrontation.) *Fla.Stat.Ann.* § 918.17 (West 1984)

(3) *Montana*

Videotaped testimony of a child victim is permissible as evidence even though the victim is not in the courtroom when the videotape is admitted into evidence. The judge, prosecuting attorney, victim, defendant, defendant's attorney, and such other persons as the court deems necessary shall be allowed to attend the videotaped proceedings. *Mont.Code Ann.* § 46-15-401 (1983)

(4) *New Hampshire*

In cases where the victim is under 16 years of age, the victim's testimony shall be heard in-camera unless good cause is shown by the defendant. The record of the victim's testimony is not to be sealed and all other testimony and evidence produced during the proceeding shall be public. *N.H.Rev.Stat.Ann.* § 632-A:8 (1983).

(5) *New Mexico*

Upon a showing that a child victim may be unable to testify without suffering unreasonable and unnecessary emotional or mental harm, out-of-court videotaping of her testimony is permitted. (No mention of confrontation.) *N.M. Stat.Ann.* § 30-9-17 (1982).

(6) *Colorado*

An out-of-court statement made by a child describing any act of sexual contact performed with that child which is otherwise inadmissible as evidence, is admissible in criminal proceedings in which the child is the victim of an unlawful sexual offense. The court must find that the statement is reliable and the child must either testify at the proceeding or be unavailable. *Colo.Rev.Stat.* § 13-25-129 (1983).

(7) *Washington*

Same as Colorado's statute except that, when the child is unavailable, there must be other corroborative evidence of the act.

(8) *Texas*

The "visual and aural" recording of the pretrial statement of a child is admissible at trial if no attorney for either party is present when the statement was made and the child is available to testify. Other conditions are listed. If the statement is admitted into evidence, either party may call the child to testify and the opposing party may cross-examine. Statute also permits testimony of a child by closed-circuit television from a room outside the courtroom. "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." In addition, statute permits a like arrangement for recording the child's testimony before trial and its later showing in court. *Tex.Crim.Proc. Code Ann.* § 38.071 (Vernon 1983).

Texas appears to be the only state with a complete statutory solution to the confron-

tation problem. Colorado and Washington offer partial solutions since the admission of a "statement" is obviously much less satisfactory than the presentation of all of a child's testimony by videotape.

B. The Right of Confrontation: Physical Presence.

[1] The defendant claims that the proposed video presentation of testimony violates his constitutional right of confrontation. It is his reading of our constitutions that they entitle him to confront every witness against him in person in court. The Sixth Amendment to the *Constitution of the United States* provides in part: "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." Art. 1, par. 10, of the *New Jersey Constitution* (1947) provides: "in all criminal prosecutions the accused shall have the right ... to be confronted with the witnesses against him...." The confrontation clause is held to be a fundamental right to which the states are subject by reason of the Fourteenth Amendment. *Pointer v. Texas*, 380 *U.S.* 400, 403–405, 85 *S.Ct.* 1065, 1067–1069, 13 *L.Ed.*2d 923 (1965); *State v. Williams*, 182 *N.J.Super.* 427, 434, 442 *A.*2d 620 (App.Div.1982).

*U.S. v. Benfield*, 593 *F.*2d 815 (8 Cir. 1979), provides some support for the defendant's position. In that case, after a videotaped deposition of the victim was admitted into evidence, the defendant was convicted of misprison of felony for failing to report an abduction by others. The victim testified by deposition because she feared psychological harm, if forced to confront the defendant in court. During the deposition the defendant could observe the victim through a one-way glass. He could reach his attorney, who was present while the witness was deposed, through an audio device. He appealed his conviction, arguing that his confrontation was only partial and did not satisfy the Sixth Amendment. The appellate court agreed, stating:

> Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place.... 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. [at 821]

*Benfield*, however, is distinguishable. It concerned a deposition. The jury was not present to see and hear the actual testimony. The victim was an adult, not a child, as here. The charge did not involve sexual abuse. Furthermore, *Benfield* recognized the possibility of exceptions to the right of confrontation, saying: "what curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct ... Any exception should be narrow in scope and based on necessity or waiver." *Ibid.* Indeed, the court acknowledged:

> It is possible that face-to-face confrontation through two-way closed circuit television might be adequate. By a four to three vote, the Missouri Supreme Court has approved the use of such testi-

mony by an expert witness in a case involving violation of a municipal ordinance, despite a defense based on the sixth amendment. *Kansas City v. McCoy*, 525 *S.W.*2d 336 (Mo.1975). Among the more disturbing aspects of the decision is that there was no showing of extraordinary circumstances necessitating reliance on the procedure. [*Id.* at 822]

Defendant may obtain some comfort from *Herbert v. Superior Court of the State of California*, 172 *Cal.Rptr.* 850, 117 *Cal.App.*3d 661 (Dist.Ct.App.1981). Defendant in that case was charged with sexual offenses involving a five-year-old girl. At a preliminary examination, she was reluctant or unable to testify and was therefore so positioned in the courtroom that she and the defendant could not see each other. The defendant could hear her testimony. She could be seen by the judge and the attorneys. The court held that the arrangement violated the defendant's right of confrontation, citing *Benfield*. It said:

> The historical concept of the right of confrontation has included the right to see one's accused face-to-face, thereby giving the fact finder the opportunity of weighing the demeanor of the accused when forced to make his or her accusation before the one person who knows if the witness is truthful. [172 *Cal.Rptr.* at 855, 117 *Cal.App.*3d at 671]

*Herbert* is closer to the point than *Benfield*. Nevertheless, it is also distinguishable. Here, the defendant will be able to see the witness; there he could not. The *Herbert* court recognized the fact that "[t]he confrontation right is not absolute," 172 *Cal.Rptr.* at 853, 117 *Cal.App.*3d at 667, but found no room for an exception on the facts of that case. Its final conclusion was motivated in part by the fact that there was no record showing that the child's conduct required the arrangement, no record of any intimidating action by defendant, no oath taken by the victim and no request from defendant or the prosecutor to make a special arrangement. 172 *Cal.Rptr.* at 855, 117 *Cal.App.*3d at 670. Here we have a record of the child's concerns, supported by the opinion of a psychiatrist who believed that emotional damage could be caused by in-court testimony. There has been a request by the prosecutor for the video arrangement. The witness will be sworn before she testifies. *Herbert* considered neither a video technique nor the special problems of child witnesses.

Additionally, doubt may be cast upon the *Herbert* conclusion by *Parisi v. Superior Court of the State of California for the County of Los Angeles*, 192 *Cal.Rptr.* 486, 144 *Cal.App.*3d 211 (Dist.Ct.App.1983). Defendant in that case was charged with sexual abuse of his eight-year-old daughter. The child appeared as a witness at the preliminary examination but became embarrassed and could not answer questions out loud. She was therefore permitted to whisper her answers to the magistrate conducting the hearing who repeated them on the record. Defendant argued that his rights of confrontation and cross-examination were impermissibly infringed by this procedure. The court, disagreeing, said:

> It is the responsibility of every court to conduct its proceedings in such a manner that the truth will be established and it is its duty to render assistance whenever such aid is needed.
>
> In the case at bar, because of her fear and discomfort, a young victim of sexual crimes committed by her father was too embarrassed to articulate aloud answers to two most intimate questions. Under such circumstances, it was not improper for the magistrate to intervene in order to help elicit her testimony. In essence, the court did but act as a "loud speaker" for a child temporarily rendered mute. [at 192 *Cal.Rptr.* 490; citations omitted]

The Court distinguished *Herbert* noting that the *Parisi* defendant was able to see the witness.

[2] As *Benfield, Herbert,* and *Parisi* all acknowledged, the right of confrontation is not absolute. *Benfield* and *Herbert* do not control the issue in the present case. Other cases and other reasons compel the conclusion here that the proposed video presentation will not offend any constitutional demands.

As early as 1895, the United States Supreme Court held that the right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. U.S.*, 156 *U.S.* 237, 243, 15 *S.Ct.* 337, 340, 39 *L.Ed.* 409 (1895). In *Mattox*, witnesses died and were consequently unavailable[2] at the time of trial. Their prior testimony was admitted into evidence. The Supreme Court held this to be permissible, saying:

> A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. [156 *U.S.* at 243, 15 *S.Ct.* at 340]

In 1980, in *Ohio v. Roberts*, 448 *U.S.* 56, 100 *S.Ct.* 2531, 65 *L.Ed.*2d 597 (1980), the Court said:

> [T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial and that "a primary interest secured by [the provision] is the right to cross-examination." *Douglas v. Alabama*, 380 *U.S.* 415, 418 [85 *S.Ct.* 1074, 1076, 13 *L.Ed.*2d 934] (1965)
>
> The Court, however, has recognized that competing interests, if closely examined, may warrant dispensing with confrontation at trial. [448 *U.S.* at 63–64, 100 *S.Ct.* at 2537–2538]

In *California v. Green*, 399 *U.S.* 149, 90 *S.Ct.* 1930, 26 *L.Ed.*2d 489 (1970), Harlan, J. concurring, said: The belief that the rights of confrontation and cross-examination are co-extensive is "an understandable misconception." *Id.* at 172–173, 90 *S.Ct.* at 1942–1943.

Earlier, in *Douglas v. Alabama*, 380 *U.S.* 415, 85 *S.Ct.* 1074, 13 *L.Ed.*2d 934 (1965), the Court held:

> Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. [380 *U.S.* at 418, 85 *S.Ct.* at 1076]

In *United States v. Tortora*, 464 *F.*2d 1202 (2 Cir.1972), *cert. den.* 409 *U.S.* 1063, 93 *S.Ct.* 554, 34 *L.Ed.*2d 516 (1972), the voluntary failure of a defendant to appear in court was held to waive his right of confrontation. In *United States v. Toliver*, 541 *F.*2d 958 (2 Cir.1976), an asthmatic defendant was absent during several days of trial while prosecution witnesses testified. The court nevertheless held that such testimony, while violating the confrontation clause, was not sufficiently probative of the defendant's guilt to constitute reversible error. In *Dutton v. Evans*, 400 *U.S.* 74, 91 *S.Ct.* 210, 27 *L.Ed.*2d 213 (1970), the Court permitted introduction of an out-of-court statement, holding that there was no violation of the confrontation clause because the testimony had other "indicia of reliability," was of "peripheral significance" and was not "crucial" to the prosecution or "devasting" to the defendant. *Id.* at 87, 91 *S.Ct.* at 219.

5 *Wigmore, Evidence* (Chadbourne Rev. 1974) § 1365, discusses the distinction between confrontation and cross-examination:

> Now confrontation is, in its main aspect, *merely another term for the test of cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-ex-

2. *Evid.R.* 63(3) permits prior testimony of an unavailable witness. It does not fit the circumstances of this case.

amination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i.e.*, it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable. [at 28]

Wigmore then explains the meaning of confrontation:

> There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness'* deportment while testifying, and a certain subjective moral effect is produced upon the witness.
>
> ....
>
> This secondary advantage, however, does not arise from the confrontation of the *opponent* and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the *tribunal* that secures this secondary advantage—which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. [§ 1395 at 153–154]

This opinion is underlined in the following note:

> The following are instances of amusing legal pedantry: *Bennett v. State*, 62 *Ark.* 516, 36 *S.W.* 947 (1896) (holding erroneous the action of the trial court in proceeding with the examination of witnesses during the accused's absence in the water closet); *State v. Mannion*, 19 *Utah* 505, 57 *Pac.* 542 (1899) (a witness for the state claiming to be afraid of the defendant, the court placed him back in the room, out of sight and hearing of the witness; held improper, on the absurd ground that the dictionaries define "confront" as meaning 'to bring face to face' .... [§ 1399 at 199]

The numerous exceptions to our hearsay rules, *Evid.R.* 63(1), *et seq.*, present daily instances of testimonial admissions without any confrontation with the witness. In *Ohio v. Roberts, supra*, the court said that to give the confrontation clause an unqualified scope "would abrogate virtually every hearsay exception...." 448 *U.S.* at 63, 100 *S.Ct.* at 2537.

Numerous cases reflect the use of electronic devices for the presentation of evidence and implicate the confrontation clause. *Benfield* has been cited above. In our own State, a defendant in a custody case excluded from a judge's private interview with a child, was permitted to hear the interview in the courtroom through an audio arrangement. The judge solicited questions from counsel in the courtroom and repeated them to the child in his chambers. The technique was approved on appeal. *N.J. Youth and Family Services v. S.S.*, 185 *N.J.Super.* 3, 447 *A.*2d 183 (1982). The court held that the confrontation clause had not been violated. It said:

> We are satisfied that under the circumstances the procedure utilized was in the best interests of the child. It is evident from the record that the child was emotionally disturbed. The trial judge described him as 'rigid.' We conclude that the judge reasonably found that a certain degree of privacy would be more likely to elicit a genuine and reliable response from the child. We are satisfied that the trial judge acted reasonably in balancing the needs of the child for protection as against defendant's need to see her child

when that child answered the judge's questions or answered questions submitted by the attorneys for cross-examination....

The use of the tape recorder and voice transmission under these circumstances is an acceptable method of balancing the interests of the child and the rights of the parties while at the same time affording the trier of fact maximum opportunity to ascertain the truth by questioning the child and observing his demeanor. [at 7, 447 *A.*2d 183]

*N.J. Youth and Family Services* cited *Kansas City v. McCoy*, 525 *S.W.*2d 336 (Mo.Sup.Ct.1975), with approval. In that case an expert witness testified against defendant via closed circuit television. On appeal defendant argued that his right of confrontation had been violated. The court, quoting *Douglas v. Alabama, supra*, said that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 338. It held that the television arrangement provided the cross-examination opportunity required by the *Douglas* court; television did not significantly affect the ability to question and observe the witness. *Id.* at 339. Jury impact was found to be little different, whether the witness appeared in court, in person or by television. *Ibid.*

The conclusion is supported by *People v. Moran*, 114 *Cal.Rptr.* 413, 420, 39 *Cal. App.*3d 398, 410 (Dist.Ct.App.1974). In *Moran*, defendant argued that the jury could not weigh the credibility of a witness whose testimony at a preliminary hearing was presented at trial by videotape. The court held, however, that the jury could adequately weigh credibility and that "the process does not significantly affect the flow of information to the jury." It satisfied the "broad purposes" of the confrontation clause. 114 *Cal.Rptr.* at 420, 39 *Cal. App.*3d at 410–411.

*Moran* also considered the use of videotape as a reliable medium for the presentation of evidence. It said:

We turn next to defendant's due process contentions concerning the technical distortions of the medium and its failure to accurately transmit the demeanor of the witness and the dramatic components of the testimony. In general, the advantages and disadvantages of the "filtering" effect of the medium fall equally on both sides. Therefore, its use is "fair" and there is no inherent unfairness. Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury. Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function. Fair new procedures that facilitate proper factfinding are allowable, although not traditional. In any event, we do not comprehend defendant's contention that the tape is less valid or less reliable than the reading of the written transcript of the preliminary hearing....

the videotape is a modern technique that better protects the rights of all concerned. We can also take judicial notice of the fact of the ubiquity of television sets, as revealed by the 1970 census [96% of all households had at least one black and white television set], and recent availability of low-cost television cameras. With such a widespread availability of television comes a familiarity with its technical characteristics and distortions. Indeed the television camera is a stranger only in the slower moving apparatus of justice. [at 114 *Cal.Rptr.* 420; citations omitted]

The federal courts have approved the use of a videotaped confession as evidence. In *Hendricks v. Swenson*, 456 *F.*2d 503 (8 Cir.1972), cited in *Moran*, the court said:

If a proper foundation is laid for the admission of a videotape by showing that it truly and correctly depicted the events and persons shown and that it accurately reproduced the defendants' confession,

we feel that it is an advancement in the field of criminal procedure and a protection of defendants' rights. We suggest that to the extent possible, all statements of defendants should be so preserved.

[3] In discussing videotapes as evidence, *Moran* held that the *California Evidence Code* § 250 included them in its definition of "writing," saying that its Legislature "recognized the widespread use of videotape in our society and its relevance to legal proceedings." 114 *Cal.Rptr.* 418, 39 *Cal.App.*3d at 409. The rules in New Jersey can be read no differently. *Evid.R.* 1(13) is nearly identical to the California rule. It provides:

> "Writing" means handwriting, typewriting, printing, photostating, photography, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, combinations thereof, provided that such recording is (a) reasonably permanent and (b) readable by sight.

Videotape records obviously fall within the language of the definition; they provide a means for recording words and pictures. Motion pictures have long been admissible in evidence in our courts. *Balian v. General Motors*, 121 *N.J.Super.* 118, 125, 296 *A.*2d 317 (App.Div.1972). There is little difference between a motion picture presentation or a videotaped presentation except that the latter can provide the simultaneous photographing and transmission of information while the former cannot.

Our rules recognize the adequacy of videotaped evidence. *R.* 4:14–9, adopted in 1980, permits the taking and use of videotaped depositions in civil proceedings. *R.* 3:13–2 permits the taking and use of the deposition of a material witness who "may be unable to attend ... as provided in civil actions...." Thus, the videotaped deposition of a material witness may be introduced in evidence in our criminal courts. In addition to this formal authorization, it is apparent to this court from the demonstration of the equipment to be used in this matter and the expert testimony that the use of a videotaped presentation has the capacity to present clear, accurate, and evidentially appropriate transmissions of images and sounds to defendant, the judge, the jury, and the public.

[4] Great harm befalls the victims of child abuse. It destroys lives and damages our society. Known abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse. These considerations must be weighed and balanced against the right of confrontation in child abuse cases.

Any zeal for the prosecution of these cases, however, cannot be permitted to override the constitutional rights of the defendants involved. They are at great disadvantage in these cases. The testimony of a small child can be very winsome. (More winsome, perhaps, if she testifies in person than by videotape.) The difficulty of cross-examining a young child may prevent the exposure of inaccuracies. The charge of child abuse carries its own significant stigma. Defendants in these cases may find themselves ostracized, whether they are guilty or not. Like children, they too have ambivalent feelings and may decide, even though they believe they will be acquitted, that it is better for the child, the family and themselves to accept a plea agreement than to subject everyone involved to a trial. These problems must also be weighed in deciding the dimensions of the constitutional right of confrontation.

[5] The Confrontation Clause is not implacable in its demands. Nearly every authority agrees that it is subject to exceptions. In reaching the conclusion, as this court has, that the use of videotaped testimony in this case of child abuse is permissi-

ble, it is accepted as a fact that only a modest erosion of the clause, if any, will take place. The child, through the use of video, will not be obliged to see the defendant or to be exposed to the usual courtroom atmosphere. Nevertheless, the defendant as well as the judge, the jury, and the spectators, will see and hear her clearly. Adequate opportunity for cross-examination will be provided. This is enough to satisfy the demands of the confrontation clause. If it is not, it represents a deserved exception. It is more than Wigmore would require. Everything but "eyeball-to-eyeball" confrontation will be provided. No case has held eye contact to be a requirement. It is not demanded when a witness "confronts" a defendant in the courtroom. No court rule requires eye contact and courtroom distances sometimes make such contact impossible. *Benfield* required face-to-face confrontation but did not define that requirement as including eye contact. To the extent that *Benfield* would deny the opportunity to use video equipment as proposed in the present case, I am in disagreement with its conclusions.

The child in the present case said that she *could* testify. The probable and possible consequences of that testimony, however, could not have been known to her. Indeed, her willingness to testify was grounded upon fear and misconception. She believed her stepfather would kill her for revealing his abuse and felt that she would be safe only if he went to jail. She thought, erroneously, that he would be sent to jail only if she testified in court. The risk her face-to-face testimony imposes is too great to be permitted. The concern which the court must have for her, and for all children, dictates a different course, when that course will not significantly impair the rights of the defendant.

In *Ohio v. Roberts, supra*, the Court "recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." 448 *U.S.* at 64, 100 *S.Ct.* at 2538. *N.J. Youth and Family Services, supra*, 185 *N.J.Super.* at 7, 447 *A.*2d 183, is to the same effect. *See also Chambers v. Mississippi*, 410 *U.S.* 284, 295, 93 *S.Ct.* 1038, 1045, 35 *L.Ed.*2d 297 (1973). Child abuse cases present such interests. The growing awareness of the social consequences of child abuse has resulted in the enactment of significant criminal statutes and has been underlined by our Supreme Court in *State v. Hodge*, 95 *N.J.* 369, 471 *A.*2d 389 (1984):

> Crime within the family is one of the most deeply troubling aspects of contemporary life. Governor Kean recently established a task force to study the problem of child abuse. The United States Attorney General has instituted a Task Force on Family Violence to study the national dimensions of this problem. The Legislature has therefore graded sexual crimes that occur within the family differently from those occurring in other contexts. When criminal sexual conduct involves a victim who is 'at least 13 but less than 16 years old,' and the 'actor is a foster parent, a guardian, or stands in loco parentis within the household,' *N.J.S.A.* 2C:14-2(a)(2)(c), even though there may have been no force, the silent abuse inflicted deeply threatens the fabric of society. Accordingly, the Legislature graded this crime as one of the first degree. *N.J.S.A.* 2C:14-2(a). [at 377, 471 *A.*2d 389]

Truth is the ultimate quest. This is the proper interest of the prosecution, the defense, the jury, the judge and all of our society in all judicial proceedings. Philosophically, it may be argued that truth is not an absolute. If so, that conclusion does not diminish the premise. Truth, though unattainable in all of its labyrinthic extremities, must always be the judicial goal. It is the purpose undergirding our rules of evidence. *Evid.R.* 5 most appropriately in the present setting, provides:

> The adoption of these rules shall not bar the growth and development of the

law of evidence in accordance with fundamental principals to the end that the truth may be fairly ascertained.

In the present case, it is the opinion of the State's forensic psychiatrist that the video presentation of the child victim's testimony will enhance, not diminish, the prospect of obtaining the truth. His reasons for reaching that conclusion are convincing. The ambivalent position in which the child must find herself, her fear, guilt, and anxiety, become doubly oppressive when she is subjected to the courtroom atmosphere. Those factors become less burdensome through the use of video.

"Proving Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim," 15 *U. of Mich. Journal of Law Reform* 131 (1981), corroborates this conclusion:

> Making the child incest victim testify in court has another distinct failing: it produces unreliable evidence. The trier of fact in an incest case faces a dilemma. Its determination of whether abuse occurred rests primarily upon the testimony of the child victim, but child witnesses are widely acknowledged to be unhelpful. They have a subjective sense of time, an inaccurate memory—especially with regard to experience such as incest which are repeated over time, and limited ability to communicate what they do not understand and recall. These natural disabilities tend to intensify when the child is afraid or under emotional stress as a child may regress to a less mature state or withdraw entirely. Incest victims are especially likely to suffer from these disabilities because they are young and find current pretrial and courtroom procedures especially traumatic. [at 137]
>
> ....
>
> The incest victim, unlike the witness to intrafamilial violence or the victim of physical abuse, is not only the child of the defendant nor merely his adversary witness, but also his accomplice. Her confusion and sense of guilt at her involvement is thus potentially far greater than other victim's experience. It seems the trauma to the parent-child incest victim is greater, her usefulness as a witness is less; the victim is likely to have positive ties to the perpetrator; and other family members are likely to be involved. No other case, however similar in some respects, shares all of these complicating factors. [at 142–151]

Thus, the use of video which enhances the quality of a child victim's testimony, serves the essential demand for truth while satisfying the constitutional mandate.

C. The Court's Control of Cross-Examination.

[6, 7] Confrontation's central purpose is provision of the opportunity for cross-examination. *Douglas v. Alabama, supra.* Like the right of confrontation, however, the right of cross-examination is not without limitations. "The trial court has broad discretion in determining the proper limitations of cross-examination of a witness whose credibility is in issue." *State v. Cranmer*, 134 *N.J.Super.* 117, 122, 338 *A.*2d 830 (App.Div.1975); *State v. Pontery*, 19 *N.J.* 457, 472–473, 117 *A.*2d 473 (1955); *State v. Zwillman*, 112 *N.J.Super.* 6, 17–18, 270 *A.*2d 284 (App.Div.1970), certif. den. 57 *N.J.* 603, 274 *A.*2d 56 (1971).

In the present case, there is, in fact, no curtailment of cross-examination, only a restriction upon the means of transmitting questions and answers. That restrictive action is less significant than the action taken in *State v. Cranmer.* In that case, a defendant charged with impairing the morals of an eight-year-old boy, who became so emotionally distressed during cross-examination that he could not continue, was denied any opportunity for further cross-examination. The Appellate Division held that the circumstances permitted the limita-

tion upon cross-examination and did not improperly abridge the right of confrontation. In *United States v. Toliver, supra,* the court permitted the State's testimony to continue in the absence of an ill defendant. The action was affirmed on the ground that the evidence was not consequential. The use of video equipment is less consequential. It's use may be permitted as the discretionary action of the trial court in this case.

D. Waiver of the Right of Confrontation.

The State argues that defendant has waived his right of confrontation by threatening to kill the child victim if she revealed his activities. In addressing this issue, it is assumed, *arguendo,* that a videotaped presentation will not satisfy the requirements of the confrontation clause. The court also adopts the conclusion that the child cannot testify in court without risking serious emotional damage. Finally, the court takes the position that a waiver may occur even though the child is an available witness who can testify but should not because of the risk involved. That risk, in short, is one to which a child victim in a sexual abuse case should not be subjected and, consequently, one which cannot be imposed as a means of defeating a waiver claim.

[8] A defendant may waive his Sixth Amendment right of confrontation. *United States v. Carlson,* 547 *F.*2d 1346, 1358 (8 Cir.1976), *cert.* den. 431 *U.S.* 914, 97 *S.Ct.* 2174, 53 *L.Ed.*2d 224 (1977). In *Carlson,* a witness testified before a grand jury but refused to testify at trial. F.B.I. agents then testified, based upon conversations with the witness, that his refusal was the result of threats made by defendant. For this reason the grand jury testimony of the witness was admitted into evidence. The Court of Appeals affirmed the trial court's ruling that defendant had waived his right of confrontation, saying "the sixth amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." 547 *F.*2d at 1359. It concluded that public policy was served by a rule permitting the admission of an out-of-court statement by a witness who has been intimidated by a defendant.

In *United States v. Balano,* 618 *F.*2d 624 (10 Cir.1979), *cert.* den. 449 *U.S.* 840, 101 *S.Ct.* 118, 66 *L.Ed.*2d 47 (1980), the court said: "under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation." It added:

> We recognize that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents. Consequently, a reasonable doubt standard for admission might well preclude a finding of waiver, no matter how reprehensible the defendant's conduct. On the other hand, we do not wish to emasculate the Confrontation Clause merely to facilitate government prosecutions. Thus, a prima facie showing of coercion is not enough. We hold, therefore, that before permitting the admission of grand jury testimony of witnesses who will not appear at trial because of a defendant's alleged coercion, the judge must hold an evidentiary hearing in the absence of the jury and find by a preponderence of the evidence that the defendant's coercion made the witness unavailable. [at 629]

The Court of Appeals found that the waiver determination was supported by "sufficient evidence." The trial court heard the testimony of the witness himself who, while refusing to discuss his reasons for not testifying, reiterated the truthfulness of his grand jury testimony. An FBI agent then testified to his conversations with the witness, indicating the circumstances surrounding various threats made against him by or on behalf of the defendant, if he testified, and his resulting fear. This was held to be sufficient evidence to support the claim of waiver.

In *Black v. Woods*, 651 *F.*2d 528 (8 Cir. 1981), *cert.* den. 454 *U.S.* 847, 102 *S.Ct.* 164, 70 *L.Ed.*2d 134 (1981), a witness refused to testify in a murder trial because she was afraid of being killed by defendant. Defendant had arranged a prior killing of another witness to prevent her from testifying against him in a robbery case. The murder witness was put on the stand by the prosecution but refused to testify and was held in contempt. The circuit court opinion does not set forth the evidence received at the trial level on the waiver question, but states:

> We agree with the state court that Black forfeited his confrontation right by a pattern of conduct that resulted in Link's fear which we find to be reasonable under the circumstances. The record is replete with Black's threats and attempts to intimidate against Link and others. Black had physically abused Link and threatened to kill her if she did not do what she was told. [651 *F.*2d at 531]

The court rejected the argument that there was no evidence of an express threat addressed to Link by Black, or anyone acting on his behalf, saying that the argument "ignores the facts of the case and the demonstrated tendencies of Black." It approved a comment of the Minnesota Supreme Court that Black's motive for killing the witness in the robbery case, namely, to assure himself of her silence, "provided Link with the most graphic and explicit threat possible if she testified against him." *Id.* at 532.

In the case at bar, the evidence of the defendant's threat to kill the child victim is hearsay. It consists of the victim's statement to Doctor Sadoff as repeated by him at the pretrial hearing. It is not admissible if the *Rules of Evidence* apply.

**[9, 10]** The question presented at the pretrial hearing was whether videotaped testimony of the victim would be admissible in evidence. The objection to its admission was based upon the claim that it would violate the Confrontation Clause. One answer to this claim is that the right of confrontation was waived by the defendant by reason of his threat. If there was a waiver, the videotaped testimony would be admissible without consideration of that right.

*Evid.R.* 8(1) states in part:

> When the ... admissibility of evidence ... is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In his determination the rules of evidence shall not apply except for *R.* 4 or a valid claim of privilege.

Under this rule hearsay evidence is admissible for the purpose of making the *R.* 8(1) decision. *State v. Moore*, 158 *N.J.Super.* 68, 385 *A.*2d 867 (App.Div.1978); *Hill v. Cochran*, 175 *N.J.Super.* 542, 420 *A.*2d 1038 (App.Div.1980). The hearsay evidence of Doctor Sadoff is therefore admissible, provided *Evid.R.* 8(3) does not apply. That rule provides in part:

> Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the *Rules of Evidence* shall apply and the burden of proof as to admissibility of the statement is on the prosecution.

Without more, this provision would require the *Rules of Evidence* to be applied and Doctor Sadoff's testimony would be excluded. It is apparent, however, from a reading of *Evid.R.* 8(3) in its entirety, that it does not apply. The balance of that rule reads as follows:

> If the judge admits the statement, he shall not inform the jury that he has made a finding that the statement is

admissible, and he shall instruct the jury that they are to disregard the statement if they find it is not credible. If the judge subsequently determines from all of the evidence that the statement is not admissible, he shall take appropriate action.

It therefore appears that *Evid.R.* 8(3) is applicable only when the "admissibility of a statement by the defendant" is a statement which is intended to be introduced *at the trial.* That was not the purpose of the hearing in the present case. The evidence of the threat to kill was introduced only for the purpose of supporting the claim of waiver, not for trial purposes. Consequently, *Evid.R.* 8(3) does not apply. Neither do the *Rules of Evidence,* except *Evid.R.* 4 and rules relating to privilege.

This conclusion is supported by *U.S. v. Mastrangelo,* 693 *F.*2d 269 (2 Cir.1982). In that case grand jury testimony of a witness was accepted into evidence after the witness had been killed while on his way to testify. The court, citing *Carlson* and *Balano* as well as numerous other cases, held that the misconduct of a defendant could constitute a waiver of the Confrontation Clause. It said:

> Since *Mastrangelo's* possible waiver of his sixth amendment right is a preliminary question going to the admissibility of evidence, the hearing will be governed by *Fed.R.Evid.* 104(a), which states that the exclusionary rules, excepting privileges, do not apply to such proceedings. Thus, hearsay evidence, including Bennett's grand jury testimony, will be admissible, as will all other relevant evidence. [at 273]

*United States v. Thevis,* 665 *F.*2d 616 (5 Cir.1982), *cert.* den. 459 *U.S.* 825, 103 *S.Ct.* 57, 74 *L.Ed.*2d 61 (1982) is to the same effect. The evidence rule was not mentioned in *Carlson* or *Balano* or *Black,* all of which decided the waiver issue, however, on the basis of hearsay testimony. It is apparent that they relied upon the same approach.

It might be asserted that what is sought is not to determine the "admissibility of evidence," but rather to decide the manner of production of that evidence. It could be said that what is to be resolved is not whether the statement of the child victim is to be admitted, but rather to decide whether that statement is to be established by in-court testimony or by videotaped proofs. The difference is vital: If the concern is the manner of production of evidence as opposed to its basic admissibility *Evid.R.* 8(1) does not apply. That rule pertains only to issues concerning "the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege." If *Evid.R.* 8(1) is not applicable, the hearsay evidence of the defendants' threat to kill is not admissible. The threat could then be proved only if the child victim appeared in court and testified against the defendant. This would be self-defeating. It would vitalize the unacceptable: permitting the defendant to gain advantage by his reprehensible conduct. This interpretation of *Evid.R.* 8(1) would thwart the truth. The *Rules of Evidence* as stressed by *Evid.R.* 5, are designed for the opposite purpose.

[11] Doctor Sadoff's testimony is therefore admissible. One problem remains: What is the burden of proof in the waiver hearing? *Balano* held that waiver might be shown by a "preponderance of the evidence." 618 *F.*2d at 629. *Thevis* required "clear and convincing" evidence. 665 *F.*2d at 631. *Mastrangelo* adopted the preponderance of evidence test but remanded the case for a further hearing on the waiver question, instructing the trial judge to make findings under the clear and convincing standard as well. The court discussed the proof issue in the following language:

> [T]he Supreme Court precedents are mixed. While the Court has held the preponderance of evidence test applicable to suppression hearings involving possible misconduct by the government, *Lego*

*v. Twomey*, 404 *U.S.* 477, 489, 92 *S.Ct.* 619, 626, 627, 30 *L.Ed.2d* 618 (1972) (voluntariness of confession); *United States v. Matlock*, 415 *U.S.* 164, 177–78, 94 *S.Ct.* 988, 996, 997, 39 *L.Ed.2d* 242 (1974) (consent to search), it has applied the clear and convincing standard to questions of admissibility involving constitutional requirements going to the reliability of evidence, *United States v. Wade*, 388 *U.S.* 218, 240, 87 *S.Ct.* 1926, 1939, 18 *L.Ed.*2d 1149 (1967) (circumstances surrounding identification at a showup).

These decisions are thus not dispositive. Since the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it. However, waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rules concerning burden of proof. We see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. Compare *McCormick, McCormick's Handbook on the Law of Evidence* § 340 (2d ed. 1972). To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself. [693 *F.*2d at 273]

[12] In deciding whether the rule is to be "preponderance" or "clear and convincing" in present circumstances, we must weigh once again the confrontation right of the defendant against the "right" of a child victim to testimonial protection. It has been decided above that there is no absolute right of confrontation, that the videotaped testimony of the child victim in a sexual abuse case is admissible, either because it does not violate the Confrontation Clause or because it represents a very modest exception to that right. The purpose of the *R.* 8 hearing therefore does not deal with an absolute constitutional mandate. Further, since the hearing may be said to involve, indirectly, the reliability of the videotaped evidence, reliability is enhanced by the minimal incursion, if any, into the confrontation clause. It was the opinion of Doctor Sadoff, corroborated by other authorities, that the video presentation would be more likely than in-court testimony to produce the truth. As in *Mastrangelo*, this court sees "no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where a waiver by misconduct is concerned."

[13] Applying that test here, I conclude that the State has supported the claim of waiver by sufficient evidence. The statement of the child to the psychiatrist was made in a setting of confidence. It was not made because the child knew that her statement could effect a waiver of the Confrontation Clause. On the contrary, it was the basis for her mistaken willingness to testify in court. It was the opinion of Doctor Sadoff that the child's fear, occasioned by the threat, was real. He also found that she was capable of telling the truth. No contradictory testimony was presented by the defendant. Under the circumstances, the proofs support the claim of waiver. The Confrontation Clause is not available to the defendant.

E. Conclusion.

The use of videotaped testimony of the child victim in this case will be permitted because:

(a) It will not unduly inhibit the defendant's right of confrontation and

therefore does not violate our constitutional provisions.

(b) The testimony of a child victim in a child sexual abuse case may be presented by videotape as an exception to the confrontation requirement.

(c) The use of the video technique is a permissible restriction of cross-examination.

(d) The defendant in this case has waived his right of confrontation.

The videotaped presentation shall be subject to the conditions set forth in the schedule annexed to this opinion.

## APPENDIX

### Conditions Imposed on the Use of the Videotaped Presentation

1. The testimony of the child victim shall be taken in a room near the courtroom from which video images and audio information can be projected to courtroom monitors with clarity.
2. The persons present in the room from which the child victim will testify (testimonial room) shall consist, in addition to the child, only of the prosecuting and defense attorneys together with the cameraman.
3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape recording equipment as may be appropriate to carry out the conditions herein set forth.
4. The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, so that the jury, the defendant, the judge, and the public shall be able to see and hear the witness clearly while she testifies. The following monitors are deemed to be satisfactory insofar as screen size is concerned: Jury—25"; public—18"; defendant—10"; judge—7".
5. It shall not be necessary to conceal the video camera. A videotape shall be made containing all images and all sounds projected to the courtroom which tape shall be introduced in evidence as a state exhibit.
6. No bright lights shall be employed in the testimonial room.
7. Color images shall be projected to the courtroom by the video camera.
8. The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.
9. The video camera, the witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, absent an agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counselor.
10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication between them during the testimony of the child witness.
11. An audio system shall be provided connecting the judge with the testimonial room to the end that he can rule on objections and otherwise control the proceedings from the bench.
12. In the event testimony is being recorded by use of a mechanical system, the video monitors or one of them shall be so connected to that equipment as to record all of the child witness's testimony.
13. In the event the proceedings are being recorded by a court stenographer, that stenographer shall remain in the courtroom and shall rely upon the vid-

APPENDIX—Continued

eo monitors for the purpose of recording the testimony of the child victim.

14. All video equipment, the videotape and the cameraman, shall be provided by and at the expense of the State.
15. The oath of the child witness may be administered by the judge using the audio equipment, or by the court clerk who may enter the testimonial room for that purpose only, or otherwise as the judge may direct.
16. The testimony of the child victim shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.
17. The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the videotape presentation.
18. These conditions have been adopted by the court after counsel has been provided with the opportunity to make objections to them.


197 N.J.Super. 443

**Barbara J. VAN ALLEN, Plaintiff,**

v.

**The BOARD OF COMMISSIONERS OF the TOWNSHIP OF BASS RIVER and the Township of Bass River, Defendants.**

Superior Court of New Jersey,
Law Division, Burlington County.

Decided Aug. 31, 1984.

Tax collector filed suit seeking to invalidate a township resolution requiring her to establish office hours five days a week for each month next preceding the month containing the day upon which taxes are due which by law do not become delinquent until the tenth day of the second month of a quarter. The Superior Court, Law Division, Burlington County, Haines, A.J.S.C., held that: (1) while statute delegating authority to township over a tax collector authorized governing body to require collector's attendance at her office on certain days, it did not authorize township resolution controlling hours of attendance; (2) township resolution requiring tax collector to perform all official business in the municipal building and maintain all books and records in her office was overbroad; and (3) while the township could fix certain days during which tax collector would be obliged to attend her office in the municipal building, they would have to be designated in the months of January, April, July, and October, which are the months next preceding the month in which taxes become delinquent, and resolution requiring tax collector's attendance from the tenth of one month to the tenth of the next was invalid.

Resolution held invalid.

**1. Municipal Corporations ⇐978(1)**

A tax collector is an officer, not an employee of the municipality, in view of fact that tax collector occupies a place of government created by statute and is charged with the continuous performance of permanent and certain public duties, namely, the collection of taxes. N.J.S.A. 54:4–73, 54:4–122.2.

**2. Municipal Corporations ⇐978(1)**

As an occupant of an office established by statute, a tax collector has an obligation to discharge responsibly the duties imposed upon her by statute to comply with all authorized regulations of the governing body of the municipality she serves. N.J.S.A. 54:4–73, 54:4–122.2.