# Criminal Procedure: Closed-Circuit Testimony of Child Victims

Whether child abuse is on the rise is unknown and perhaps unknowable.[1] However, reported child abuse is increasing.[2] In Oklahoma in 1985, about 5,400 incidents of child sexual abuse were reported to the Oklahoma State Health Department.[3] This number does not include the additional cases of nonsexual physical abuse. One cause of the increased reporting is an Oklahoma statute mandating the reporting of physical abuse of children.[4] Along with the increasing number of reports of such abuse comes the practical challenge of prosecuting the perpetrators.[5]

Child abuse prosecutions are plagued with problems. The child victim, usually the only eyewitness to the crime, may be afraid, uncooperative, or embarrassed to testify in open court.[6] The child's support person may be unwilling to put the child through the ordeal of a trial and, therefore, refuse to file the complaint against the abuser.[7] Even if the child does testify, her testimony often may be viewed as inaccurate or inadequate. Consequently, many prosecutions are abandoned or result in generous plea bargain agreements.[8]

Courts and legislatures have struggled to minimize the trauma for the child witness.[9] One approach has been to allow the testimony of the child to be

1. Cares, *Videotaped Testimony of Child Victims*, 65 MICH. B.J. 46 (1986); Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437, 437 n.3, 441 (1985).

2. Cares, *supra* note 1, at 46; Comment, *supra* note 1, at 437 n.1, 439-41; Blinka, *A Child in Court*, 59 WIS. B. BULL. 13 (1986).

3. *Molestation Prevention Eyed*, Daily Oklahoman/Oklahoma City Times, Oct. 13, 1986, at S5, col. 3.

4. 21 OKLA. STAT. §§ 846, 846.1 (1981 & Supp. 1986).

5. *Id.* §§ 843, 843.1.

6. Comment, *supra* note 1, at 451. *See also* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1334 (1984). This is particularly true in child sexual abuse cases, as compared with other physical abuse. Ordway, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131, 132 (1981).

A child who commits a crime is given consideration because of age in delinquency proceedings. Juvenile offenders have the benefit of less formal court proceedings. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969). The special procedures afforded juvenile offenders may indicate that a victimized child should also be given consideration because of age and should not be treated the same as an adult witness.

7. Stiles & Armstrong, *Facing the Abusers in Court: How Therapists Can Help Lawyers Help Children*, 14 STUDENT LAW. 16, 18 (1986). *But see* Libai, *supra* note 6, at 978: "Parents who might wish to prevent their child from being repeatedly interrogated will find it difficult to withdraw their complaint against a child molester . . . because the state regards its interest in punishing the offender as overriding the parents' interest in protecting the child."

8. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1333 (1984).

9. Some novel solutions to the problems include the following:

taken in a room other than the courtroom. The testimony is simultaneously televised into the courtroom by closed-circuit equipment.[10] Where a court

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(a) Arranging the courtroom so the witness and defendant could not view each other. Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981) (holding that the arrangement violated defendant's right of confrontation). *See also* Annotation, *Conditions Interfering with Accused's View of Witness as Violation of Right of Confrontation*, 19 A.L.R.4th 1286 (1983).

(b) Permitting leading questions to children of tender years. People v. Dermartzex, 29 Mich. App. 213, 185 N.W.2d 33 (1970) (leading questions permitted), *aff'd*, 213 N.W.2d 97; Jolly v. State, 681 S.W.2d 689, 696 (Tex. Ct. App. 1984) (citing Flannery v. State, 135 Tex. Crim. 235, 117 S.W.2d 1111, 1113 (1938)) ("the rigor of the rule forbidding the asking of [leading] questions bears some flexibility when dealing with a witness of tender years"); State v. Gilbert, 109 Wis. 2d 501, 325 N.W.2d 744, 751 (1982) (allowing the use of leading questions during direct examination of a child in order to develop the testimony); CAL. EVID. CODE § 767(b) (West 1987) ("The court may in the interests of justice permit a leading question to be asked of a child under 10 years of age in a case involving a prosecution of [child abuse or child molestation].").

(c) Permitting the child to whisper answers to intimate questions to a magistrate conducting the hearing to be repeated on the record. Parisi v. Superior Court, 144 Cal. App. 3d 211, 192 Cal. Rptr. 486 (1983) (holding that defendant's rights of confrontation and cross-examination were not impermissibly infringed by this procedure at preliminary hearing).

(d) Taking the child's testimony in chambers. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 n.22 (1982), lists the following provisions that allow a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, but intimates no view regarding the constitutionality of them: ALA. CODE § 12-21-202 (1975); ARIZ. R. CRIM. P. 9.3; GA. CODE ANN. § 81-1006 (Supp. 1986); LA. REV. STAT. ANN. § 15:469.1 (West 1981); MISS. CONST. art. 3, § 26; N.H. REV. STAT. ANN. § 632-A:8 (1981); N.Y. JUD. LAW § 4 (McKinney 1968); N.C. GEN. STAT. § 15-166 (1981); N.D. CENT. CODE § 27-01-02 (1974); UTAH CODE ANN. § 78-7-4 (1953); VT. STAT. ANN. tit. 12, § 1901 (1973); WIS. STAT. § 970.03(4) (Supp. 1986).

(e) Creating a new specific hearsay exception, which allows for admission of statements made by a child under a given age which describe acts of sexual contact. In Oklahoma, sufficient indicia of reliability, plus opportunity to cross-examine the child or (if unavailable) corroborative evidence is required. 12 OKLA. STAT. § 2803.1 (Supp. 1987) (held not to offend constitutional due process requirements by restricting right of confrontation in *In re* W.D., 709 P.2d 1037 (Okla. 1985)). *See infra* note 53 for other state statutes.

(f) Videotaping the child's testimony prior to the trial for showing in the courtroom: Child faces accused, CAL. PENAL CODE § 1346 (West 1984); FLA. STAT. ANN. § 92.53 (West Supp. 1987); MONT. CODE ANN. § 46-15-402 (1981); Confrontation not required, ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1986); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1986); 22 OKLA. STAT. § 753 (Supp. 1986); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986); WIS. STAT. ANN. § 957.04(7) (Supp. 1986).

In State v. Tafoya, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), the court of appeals upheld the constitutionality of the videotaped deposition procedure. Petition for certiorari to the United States Supreme Court was filed Feb. 12, 1987. 55 U.S.L.W. 3665 (Mar. 31, 1987).

10. ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1986); CAL. PENAL CODE § 1347 (West Supp. 1987); FLA. STAT. ANN. § 92.54 (West Supp. 1987); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1986); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1986); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1985); N.J. STAT. ANN. § 2A:84A-32.4 (Supp. 1986); 22 OKLA. STAT. § 753 (Supp. 1986); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986).

Some courts have allowed this procedure without legislation: State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986) (while reversing a conviction because the particular procedure used did not protect the defendant's rights (see *infra* note 129), the Nebraska Supreme Court agreed that

uses this procedure, the jury and the defendant are out of the child's view. Avoiding an in-court appearance may improve the accuracy of a child's testimony.[11] Thus, the child can be spared the traumatic experience of the traditional trial while providing invaluable eyewitness testimony.

Oklahoma has adopted the televised testimony approach to protect the child victim from further trauma at trial.[12] The statute provides, among other things, for the testimony of the child to be taken outside the courtroom, to be televised by closed-circuit equipment, and to be viewed simultaneously by the court. This statute raises constitutional questions involving (1) the right of the accused to be confronted with the witnesses against him, (2) the right of compulsory process for obtaining witnesses in his behalf, and (3) the right of the defendant to represent pro se.[13]

This comment analyzes the Oklahoma statute, comparing it with other state statutes, and assesses its constitutionality. The purpose is twofold: first, to demonstrate the need for the innovative television procedure in the criminal child abuse proceeding,[14] and second, to suggest ways in which this method of taking testimony may be implemented without depriving the accused of constitutional rights.

### *Justification for the Closed-Circuit Television Procedure*

Children are this country's most precious resource. Mistreated children carry emotional scars throughout their lives, and as adults, may ultimately express their anger in the form of deliberate crimes.[15] All too often they treat their own children in the same abusive way that they were treated.[16] Society

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new procedures can and must be implemented by courts); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984) (even so, the legislature later enacted N.J. STAT. ANN. § 2A:84A-32.4 (Supp. 1986)).

A California court did not allow this procedure without legislation: Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). The legislature subsequently enacted CAL. PENAL CODE § 1347 (West Supp. 1987). For analysis of this California statute, see Note, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919 (1986).

The Pennsylvania Superior Court in Commonwealth v. Ludwig, 40 Crim. L. Rep. (BNA) 2166 (Pa. Super. Ct. Nov. 26, 1986), held that one convicted of sexual abuse of a child was denied his right of confrontation by the use of closed-circuit television to present his daughter's testimony. Direct eye-to-eye contact was found to provide a unique safeguard for truth-telling. The court explained that a statute (42 PA. CONS. STAT. § 5985(a) (Supp. 1987)) enacted after the case arose and expressly approving the procedure would be found unconstitutional if it were involved in the present case. 40 Crim. L. Rep. (BNA) 2166, 2167 (Pa. Super. Ct. Nov. 26, 1986).

11. *See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984).

12. 22 OKLA. STAT. § 753 (Supp. 1986). See *infra* note 73.

13. U.S. CONST. amend. VI; OKLA. CONST. art. II, § 20.

14. Child abuse here is a generic term that includes physical as well as sexual abuse.

15. Fifty-two percent of the prostitutes in one penal institution had been incest victims; 75 percent of one group of teen-age prostitutes had been incestually abused. Ordway, *supra* note 6, at 133 n.10.

16. "Child abuse is conditioned behavior learned from parents and passed along from one generation to the next." EDUCATION COMM'N OF THE STATES, CHILD ABUSE AND NEGLECT PRO-

has a strong interest in stopping this vicious cycle. Failing to protect the legal interests of children will result in "a mortgage of violence payable by citizens in future years."[17] The dilemmas of the child victim, the prosecutor, the defense counsel, and the jury illustrate the need for the innovative child testimony procedure.

*The Child's Dilemma*

Understanding the child's dilemma may help the state to protect tomorrow's adults.[18] Children are often warned about "the stranger with candy down the block." Yet one survey suggests that only 8 percent of 583 child sexual abuse cases involved a stranger to the child.[19] When the abuser is a stranger, the child is more readily able to identify and accuse the perpetrator.[20] But one expert estimates that nearly 80 percent of child sexual abuse victims know their adult abuser.[21]

When the abuser is also a caretaker (parent, step-parent, babysitter, day-care worker, teacher),[22] the child faces extreme internal conflict. The child victim needs to be physically safe and will fervently desire the abuse to stop. At the same time, the victim is dependent upon the adult and needs to preserve the relationship. The prospect of daddy going to jail and the family splitting up and losing its breadwinner is likely to inhibit many abused children from speaking out.[23]

Fear of retaliation is a factor where the abuser threatens the child. Other typical reactions of victims of sexual and other abuse include intense anxiety, depression, anger, guilt, shame, sadness, embarrassment, self-hate, betrayal, and confusion. Many times the abuser blames the child for the situation. When told that he is responsible for the activity, the victim often feels at fault.[24] The vulnerable child who has been sexually abused feels more like an accomplice than a victim. Often the nonoffending spouse aligns herself with the offender, which confuses and frightens the victim further.[25]

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JECT, CHILD ABUSE AND NEGLECT: MODEL LEGISLATION FOR THE STATES, Rep. No. 71, at 2 (1976). "Once violence begins in the home, it spreads like a cancer throughout society. Children who see violence become batterers themselves." Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 TRIAL 68, 70 (1983).

17. Miller & Miller, *supra* note 16, at 70 (quoting Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561, 562 (1980)).

18. One study estimates that 19.2 percent of the women and 8.6 percent of the men in this country have been sexually abused as children. Comment, *supra* note 1, at 439-40 (citing D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 53 (1979)). *See also* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1334 (1984).

19. State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 579 (1986).

20. Stiles & Armstrong, *supra* note 7, at 16-17.

21. *See* Comment, *supra* note 1, at 449 (citing *Child Molestation: Hearing before the California Joint Committee for Revision of the Penal Code* (Dec. 16, 1980)).

22. "About three-fourths of the offenders are known by the abused child." *Molestation Prevention Eyed*, *supra* note 3.

23. Comment, *supra* note 1, at 443 n.31, 446 n.45.

24. Stiles & Armstrong, *supra* note 7, at 17.

25. Cares, *supra* note 1, at 46-47.

Though abuse by family members has a uniquely devastating effect on children, abuse by others is by no means easy on the victim. The same features of the trial atmosphere are present. The ordeal of trial aggravates the psychological and emotional damage already suffered by the abused child.[26] The anticipation of testifying in court can be agonizing. The pretrial and trial process usually requires repeated interrogations and cross-examinations.[27] Interviewers are often insensitive to the child's unique needs and do not adapt questions to the child's level of understanding.[28] The prosecutor is often more concerned with the child's ability to convince the trier of fact than with the child's emotional well-being.[29]

The courtroom setting is likely to intimidate the child. The judge in a long, black robe is an unfamiliar sight. Likewise, the jurors are total strangers, their unsmiling faces often perceived by the child as evidence of hostility. The child sits on the witness stand in a large chair, isolated from others, most significantly separated from a support person, usually a nonoffending parent.[30] Perhaps the most frightening aspect of the trial for the child victim is being in the same room with, and looking at, the defendant who allegedly inflicted the harm and often has threatened more harm.

Requiring the child to testify in the abuser's presence may inflict psychological damage that outweighs the probative value of any testimony the child may give.[31] Yet, no precedent supports completely excusing a witness from the obligation to testify because of the witness's claim of emotional harm.[32] Even recognizing the very real needs of child victim witnesses, a court may not excuse them completely from giving testimony.[33]

Once a child is called to testify against her abuser, every effort should be made to eliminate or lessen the burden on the victim. By altering courtroom

26. *Id. See also* Comment, *supra* note 1, at 442-43.

27. Stiles & Armstrong, *supra* note 7, at 19.

28. Comment, *supra* note 1, at 443.

29. Ordway, *supra* note 6, at 134.

30. Cares, *supra* note 1, at 47.

31. State v. Gilbert, 109 Wis. 2d 501, 326 N.W.2d 744, 745 (1982).

32. *Id.* at 749-51. One situation was found in which a court exempted a witness from the obligation to testify because of possible emotional damage to the witness. Child custody proceedings focus on the best interest of the child, and the court thought it should not do injury to the child by forcing the child to testify. *Gilbert* distinguished the policies underlying civil child custody determinations as different from those underlying criminal proceedings. *Id.*

33. That no one proposes completely excusing children from making their testimony available in criminal proceedings is perhaps the accommodation of two competing concerns for the child's welfare. The first concern is to protect the child (and other children) from further injury by bringing to trial the alleged perpetrator of the crime. The second is to protect the child from being injured by the search for justice in the legal system. These two concerns conflict when the child who seeks to be protected as a witness is the only person who can testify against the defendant. The child is usually the only witness to the abuse, and the child's testimony is usually crucial to the state's case against the abuser.

*Id.* at 751.

procedures, a court can protect the emotional well-being of child witnesses while making their testimony available in the criminal proceeding.[34] The Oklahoma legislature has provided for the taking of the child's testimony in a separate room while transmitting it over closed-circuit television equipment into the courtroom. This alternative procedure is a justified method of making the testimony available while minimizing the trauma of the child victim.

*The Prosecutor's Dilemma*

The question whether to prosecute a suspected child abuser is not always an easy one. The caring and informed prosecutor will ask: (1) Does sufficient evidence exist for a conviction? and (2) What is best for the child victim? Sufficiency of the evidence often depends on the availability of the complaining child witness to testify. Where a complaint is filed and there appears to be sufficient evidence, the prosecutor "faces the dilemma of letting the defendant go free or doing harm to the emotional well-being of the child-victim by compelling her testimony."[35]

In determining the child's welfare, the prosecutor will look at several factors. If the criminal proceedings lead to a family member's incarceration, the resulting split in the family has the potential of causing the innocent child to feel intense guilt and blame for the occurrence.[36] Further, if the suspect is acquitted, the child may lose all hope of escaping the abusive situation.[37] A psychiatric treatment program, if available, may be the preferred alternative to reform the abuser;[38] the child then would be spared having to testify against a loved one. Counselors advise against prosecution where they believe that rehabilitation is possible and that family unity and security can be preserved.[39] Because a protracted criminal action may prove counterproductive to the welfare of the child, the prosecutor should consider all available alternatives.[40]

When the prosecutor decides to call a child to testify, two difficult tasks remain: (1) convincing the judge that the child is competent to testify,[41] and (2) convincing the jury that the child is credible.[42] Competency of a child witness is determined in the same manner as competency of an adult. A child must be

34. *Id.* at 751-52.

35. *Id.* at 747.

36. Comment, *supra* note 1, at 446 n.45.

37. *Id.*

38. A clinical psychologist and coordinator of the new Sexual Health Center at Presbyterian Hospital in Oklahoma City, who is also an attorney, treats child molesters. Admitting that about half of her clients drop out, she states that her program is about 80 percent effective with those who complete treatment. See *supra* note 3.

39. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1334 (1984).

40. Comment, *supra* note 1, at 450. *See* Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1985-86).

41. 12 OKLA. STAT. § 2601 (1981) (General Rule of Competency); 12 OKLA. STAT. § 2602 (1981) (Lack of Personal Knowledge).

42. Comment, *supra* note 1, at 451 n.72, 454-61.

shown to have personal knowledge of the event,[43] to understand the importance of truth-telling and to affirm that he will testify truthfully.[44] A competency hearing prior to trial may be conducted to establish these factors.[45]

Credibility decides many close cases where corroborating evidence is lacking. Even if the child is called to testify, there is no guarantee that he will be able to do so. Some children freeze when on the stand; they refuse to testify, forget details, change stories, present inconsistent facts, break down and cry, ignore questions, and may eventually refuse to answer questions.[46] The child's inability to testify at all, or the inability to testify adequately, often results in the abandonment or compromise of prosecutions.[47]

A prosecutor who does not abandon the case but instead insists that the child victim testify in court may be viewed as being cruel and insensitive. Yet in doing so, the prosecutor represents the child's and the public's mutual interests in prosecuting the alleged abuser. By not calling the child as a witness, the prosecutor may inflict greater harm on the child by allowing the alleged abuser to go free.[48] By calling the child to testify before a closed-circuit television, as provided by the statute, the prosecutor may prevent future child abuse. The television testimony allows the prosecutor to present the best available evidence while protecting the child witness from the rigors of the courtroom.

*The Defense Counsel's Dilemma*

Defense counsel in a child abuse case must overcome several obstacles before obtaining an acquittal. First, the public is quick to judge a person guilty who has been accused of child abuse.[49] After all, why would anyone lie about such a thing? Legally, the accused must be presumed innocent until

43. 12 OKLA. STAT. § 2602 (1981) (Lack of Personal Knowledge).

44. *Id.* §§ 2602, 2603. In Davis v. State, 647 P.2d 450 (Okla. Crim. App. 1982), seven-year-old prosecuting witness was permitted to testify against the defendant accused of sexual offense. The former test for testimonial capacity (incapable of forming just impressions) had been abandoned by the Code; it affected the credibility of the child's testimony rather than its admissibility. Personal knowledge, understanding the importance of truth-telling, and taking the oath were sufficient to qualify her as a witness.

45. Whether the defendant has an absolute right to be present at competency hearings of alleged child victims was answered in the affirmative in Stincer v. Commonwealth, 712 S.W.2d 939 (Ky. 1986).

Other courts have held that a defendant's right of confrontation was not violated by his exclusion from the child's competency hearing. State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971); People v. Breitweiser, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (1976); Moll v. State, 351 N.W.2d 639 (Minn. Ct. App. 1984); State v. Taylor, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985).

46. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1333 (1984); Cares, *supra* note 1, at 47 (stating that "[h]esitation, or indeed total silence, has nothing to do with a lack of candor").

47. *See Sheppard*, 197 Super. 411, 484 A.2d at 1333.

48. *See* State v. Gilbert, 109 Wis. 2d 501, 326 N.W.2d 744, 746-47 (1982).

49. *See* Schuman, *False Accusations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY L. 5 (1986).

proven guilty,[50] but often this is more of a theoretical goal than an emotional reality in these cases.[51]

Second, frequently where the complaining witness is a child, the prosecutor will offer the child's statement without calling the child to the stand. In some jurisdictions, the excited utterance exception to the hearsay rule is interpreted liberally to enable out-of-court statements of the victim to be offered through the adult to whom the child spoke.[52] Other jurisdictions, including Oklahoma, have created a new hearsay exception that allows admission of a child's statement describing any act of sexual contact.[53] Lack of opportunity to cross-examine the child declarant may be viewed as a significant handicap.[54] Thus, the closed-circuit procedure is preferable to the hearsay exception because it provides for cross-examination.

When cross-examination of the complaining child witness is possible, a third hurdle exists. The defense attorney must be careful not to alienate the jury by embarrassing or frightening the child. For a child to break into tears on the witness stand is, to say the least, detrimental to the defendant's case.[55] The child may cry because intimidated by the courtroom, not by the defendant. By taking the child's testimony in a separate room, the chances of provoking her to tears are significantly reduced. The defendant may desire the procedure because it eliminates many of the threatening aspects of the trial for the child witness.

Finally, impeaching the child's testimony may be impossible even when the charge of abuse is invalid. Three possibilities exist where the accused is in fact innocent: (1) the child is lying (knowingly stating untruths with the intent to deceive); (2) the child is pretending (fabricating a story "for fun"); or (3) the child is mistaken (genuinely believes what he is saying, but the statements

50. Criminal justice demands that a person be presumed innocent until every element of the crime is proved beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358 (1970).

51. *See* Schuman, *supra* note 49, at 5. "In some quarters there is such degree of sensitivity or outrage about possible child abuse that a presumption exists that such abuse has occurred whenever it is alleged." *Id.* (citing Shipp, *The Jeopardy of Children on the Stand*, N.Y. Times, Sept. 23, 1984, at E8).

52. Bertrang v. State, 50 Wis. 2d 702, 184 N.W.2d 867, 869-70 (1971).

53. COLO. REV. STAT. § 13-25-129 (Supp. 1986); FLA. STAT. ANN. § 90.803(23) (Supp. 1986); IND. CODE ANN. § 35-37-4-6 (West Supp. 1986); KAN. STAT. ANN. § 60-460(dd) (Supp. 1985); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986); MINN. STAT. § 595.02(3) (Supp. 1986); 12 OKLA. STAT. § 2803.1 (Supp. 1986); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1986); UTAH CODE ANN. § 76-5-411 (Supp. 1986); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986).

54. The truthfulness of the witness may be attacked through cross-examination by challenging (1) the honesty and integrity of the witness, (2) her ability to observe accurately at the time the incident occurred, and (3) her accuracy of recollection of the past events. *See* Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141, 1150 (1937).

55. "It is at least arguable that the emotional impact on the trier-of-fact of a cutely dressed and crying child victim could be more prejudicial to the accused than any disadvantages of the proposed procedure." Maye & Meiring, *The Child Witness In Abuse Prosecutions*, 56 OKLA. B.J. 2946, 2954 (Dec. 28, 1985).

are inaccurate). In early childhood, determining the difference among the three possibilities is extremely difficult.[56]

One psychiatrist suggests that child sexual abuse can be overperceived and overalleged.[57] Children's reactions to stresses of marital breakdown can contribute to invalid reports of sexual abuse. He cites seven cases in which children claiming to have been abused were consistently perceived by everyone as sincere, yet all of the claims of abuse were ultimately shown to be untrue.[58] Further accounts of invalid sexual assault charges have gained national attention.[59] For example, in Jordan, Minnesota, many children were removed from their homes based on allegations by children who later admitted they lied.[60] Almost all of the more than four hundred counts of sexual abuse were determined to be unfounded. Given the fact that false accusations can and have been made, the presumption of innocence must be upheld even against emotionally charged allegations of child abuse. The accusation immediately attaches a stigma of immense proportions. The defendant is entitled to every constitutional protection.[61] Within this framework, the closed-circuit television procedure can be advantageous to the defense.[62]

*The Jury's Dilemma*

The jury has the job of determining the credibility of the child witness. Some research studies conclude that the word of children can be believed,[63]

56. Schuman, *supra* note 49, at 18.

57. *Id.* at 5.

58. The psychiatrist discussed seven cases from his practice in which physical and/or sexual child abuse was reported. "All of the claims of abuse were ultimately shown to be invalid by a *two-pronged test*: affirmative psychodynamic formulation and subsequent independent justice-system determination." Schuman, *supra* note 49, at 6 (emphasis in original).

59. For a brief discussion of recent controversial child sexual assault cases, see Moss, *Are the Children Lying?*, 73 A.B.A. J. 58 (1987); Selkin, Herscovici & Gaudia, *The Child Sex Abuse Case in the Courtroom*, 15 COLO. LAW. 807 (1986).

60. Blodgett, *"Sex Ring" Fallout*, 71 A.B.A. J. 17 (1985).

61. "The seriousness of the offense charged [child sexual abuse] should make us more, not less, inclined to secure the full constitutional protections to the defendant." Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 95 (1985).

62. A jury instruction may be in order to the effect that the use of the television method is not to be construed as evidence of the defendant's guilt or innocence. Defense counsel should be given the option whether to request such an instruction. Counsel will want to weigh the advantages of such an instruction with the disadvantages of calling attention to the fact that an unusual method is being employed.

CAL. PENAL CODE § 1347(d)(2) (West Supp. 1987) mandates an instruction to the jury that "they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor."

63. Young children rarely have the capacity to lie; they are not jaded. They are honest by nature and are candid and innocent in responses. Silas, *Would a Kid Lie?*, 71 A.B.A. J. 17 (1985). A Boston study of child abuse cases found that roughly 95 percent of the children's accusations were accurate. The study was conducted by the director of psychiatry at the Carney Hospital in Boston. Other studies confirm this finding. *Id.*

although they may not remember as many details as adults.[64] Children can become confused by repeated questioning, and inconsistencies may give the impression to the jury that the testimony is not truthful.[65] The jury must be aware of the following: young childen are vulnerable to adult influence;[66] a child may have a motive for fabricating, such as to manipulate a desired result in a custody battle;[67] young children rarely have the capacity to lie,[68] but the capacity to lie does develop in later childhood;[69] hesitation in giving testimony in no way reflects upon the honesty of a child;[70] a child's spontaneous account of an incident soon after it occurs is more accurate than belated statements.[71] Utilizing the closed-circuit television procedure will likely increase the reliability of the child's testimony.[72] The child is less inhibited in the separate room than in the courtroom. Reducing the child's anxiety ultimately provides the jury more accurate testimonial evidence for its deliberations.

### *Analysis of Oklahoma's Closed-Circuit Television Statute*

#### *Scope*

Oklahoma's closed-circuit television statute is limited to criminal proceedings "in the prosecution of an offense,"[73] which presumably include preliminary

64. *Id.* (Studies at Kempe National Center in Denver, Colo.).

65. *Id.*

66. Comment, *supra* note 1, at 455.

67. Schuman, *supra* note 49, at 12.

68. Silas, *supra* note 63, at 17.

69. Schuman, *supra* note 49, at 18.

70. Silas, *supra* note 63, at 17.

71. Selkin, Herscovici & Gaudia, *supra* note 59, at 808. Even for adults, "the greatest memory loss occurs within hours after an event. After that, the dropoff continues much more slowly." Manson v. Brathwaite, 432 U.S. 98, 131 (1976) (Marshall, J., dissenting) (citing Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1100-01 (1973)).

72. *See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984).

73. 22 OKLA. STAT. § 753 (Supp. 1986) (effective Apr. 9, 1984):

> Taking testimony of child age 12 or under in room other than courtroom—Recording.
>
> A. This section shall apply only to a proceeding in the prosecution of an offense alleged to have been committed against a child twelve (12) years of age or younger, and shall apply only to the testimony of that child.

(KY. REV. STAT. ANN. § 421.350(1) (Baldwin Supp. 1986) and TEX. CRIM. PROC. CODE ANN. art. 38.071 § 1 (Vernon Supp. 1986) are essentially the same, but add specific references to some offenses included).

> B. 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, the state and the child, 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 ques-

hearings and trials. Similar provisions apply to proceedings affecting family relationships in which a child twelve years of age or younger is alleged to have been abused.[74]

The act is not limited to sexual abuse[75] or physical abuse, but rather any "offense[76] alleged to have been committed against a child."[77] The age of the child is set at "twelve (12) years of age or younger."[78] The act does limit the scope to testimony of the child victim, disallowing the use of television and videotape for children who have witnessed crimes committed against another.[79]

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tion 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.

(KY. REV. STAT. ANN. § 421.350(3) (Baldwin Supp. 1986) and TEX. CRIM. PROC. CODE. ANN. art. 38.071 § 3 (Vernon Supp. 1986) are exactly the same with one exception: they omit the reference to the attorney for the child.)

Section C will not be discussed. It provides for visual and aural recording of the child's testimony for showing in the courtroom.

D. If the court orders the testimony of a child to be taken under subsections B or C of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

(KY. REV. STAT. ANN. § 421.350(5) (Baldwin Supp. 1986) and TEX. CRIM. PROC. CODE ANN. art. 38.071 § 5 (Vernon Supp. 1986) are the same, except they replace "shall not" with "may not.")

74. 10 OKLA. STAT. § 1147 (Supp. 1986) (prerecorded statements of child in domestic proceeding); *Id.* § 1148 (closed-circuit television in domestic proceeding).

75. CAL. PENAL CODE § 1347(b)(1) (West Supp. 1987) and FLA. STAT. ANN. § 92.54(1) (Supp. 1986) limit the procedure to an alleged sexual offense.

76. The following apply to any offense, whether sexual or physical child abuse: KY. REV. STAT. ANN. § 421.350(1) (Baldwin Supp. 1986); LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (Supp. 1985); N.J. STAT. ANN. § 2A:84A-32.4(a) (Supp. 1986); TEX. CRIM. PROC. CODE. ANN. art. 38.071 § 1 (Vernon Supp. 1986).

77. *See* 21 OKLA. STAT. §§ 843-848 (1981 & Supp. 1986) for abuse of children statutes.

78. Compare "child under the age of eighteen (18) years" in child abuse statutes: 21 OKLA. STAT. §§ 843, 843(b)(2), 846 (1981 & Supp. 1987). Recently the Oklahoma legislature changed the age of a child for hearsay purposes from "under ten (10) years of age," 12 OKLA. STAT. § 2803.1 (Supp. 1986), to "twelve (12) years of age or younger." *Id.*, (Supp. 1987).

Similar statutes in other states differ as to age. CAL. PENAL CODE § 1347(b) (West Supp. 1987) ("a minor 10 years of age or younger at the time of the motion"); FLA. STAT. ANN. § 92.54(1) (Supp. 1986) ("a child under the age of 16"); LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) (child under 14 years of age); N.J. STAT. ANN. § 2A:84A-32.4(b) (Supp. 1986) (16 years of age or younger).

79. Compare 10 OKLA. STAT. §§ 1147, 1148 (Supp. 1986) (use of videotape and closed-circuit equipment in domestic proceedings) where other child witness is included. The difference may be explained by the fact that one is a criminal and one a noncriminal proceeding. LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) and MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (Supp. 1985) limit the procedure to testimony of the child victim only. FLA. STAT. ANN. § 92.54(1) (Supp. 1986) ("victim of or witness to") and N.J. STAT. ANN. § 2A:84A-32.4(b) (Supp. 1986) do not limit the procedure to testimony of the child victim.

*Criteria for Granting the Motion*

The court has discretion to order that a child's testimony be televised from another room.[80] However, the statute has no guidelines for the court to follow in deciding whether to grant the motion.[81] The defendant's constitutional right to be confronted with the witnesses against him[82] gives preference to live testimony, under oath and subject to cross-examination. To replace live courtroom testimony with televised testimony requires a showing of necessity or waiver.[83] The statute might be viewed as a legislative finding of necessity in all child abuse cases.[84] However, many courts have decided that a case-by-case determination of necessity is essential.[85]

*Necessity.* Necessity may be shown where the child is otherwise unavailable. Some statements are not excluded by the hearsay rule if the

80. One possible basis to deny the motion is where the defendant legitimately requests to represent herself. See *infra* text accompanying notes 193-207.

81. CAL. PENAL CODE § 1347(a) (West Supp. 1987) spells out the intent of the legislature; subsection (b) requires the court to make all of three findings; and subsection (c) spells out details of the hearing on motions. FLA. STAT. ANN. § 92.54(1) (Supp. 1986) requires a hearing *in camera* and a "finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court or that such victim or witness is unavailable as defined in § 90.804(1)." LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) provides "when justice so requires." MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1985) provides that the judge must first determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." N.J. STAT. ANN. § 2A:84A-32.4(a) (Supp. 1986) provides "after conducting a hearing in camera" and subsection (b) provides upon findings of a "substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court."

82. U.S. CONST. amend. VI; OKLA. CONST. art. II, § 20.

83. United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). Regarding a Kentucky statute identical to Oklahoma's, the Kentucky court said, "If the prosecution is unable to show any necessity for use of the statute, it could be an abuse of discretion to grant a motion over defense objection." Commonwealth v. Willis, 716 S.W.2d 224, 229-30 (Ky. 1986).

84. "It is proposed that a child victim of physical or sexual abuse should be statutorily defined as unavailable. The child's in-court testimony should never be required." Maye & Meiring, *supra* note 55, at 2955.

85. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), held that the legislature could not mandate excluding the press and the public from certain child sexual testimony. The court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. *Id.* at 608. To justify the exclusion of the press and public from criminal trials, the state must show that closure is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. *Id. See also* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273, 282-84 (1984); Commonwealth v. Willis, 716 S.W.2d 224, 229-30 (Ky. 1986); State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 581 (1986); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1342 (1984). Libai states:

> Psychiatric opinions and studies emphasize that each child victim reacts to an offense and its aftermath in his own individual way. A case of incest is different from indecent exposure, a stranger-aggressor different from an offender whom the child knows, use of force different from willing participation, *etc.* Thus, there can be no more justification for excusing all child victims from testifying than for imposing the duty on all of them. Each case merits its own individual decision.

Libai, *supra* note 6, at 1009.

declarant is unavailable as a witness.[86] It might be useful to adopt the same definition of "unavailability of a witness" in the context of the television testimony.[87] The definition of unavailability is met if the witness: (1) "Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;"[88] or (2) "Is unable to be present or to testify at the hearing because of . . . then existing . . . mental illness or infirmity."[89]

The first definition may be in reality a duplication of the waiver idea discussed below. A child may persist in refusing to testify out of fear of retaliation by the defendant.[90] If determined to be unavailable to testify in the defendant's presence for this reason, the witness may yet be available to testify out of the presence of the accused. Hence, the court may have good reason to grant the motion. The first definition may also apply to a young child who freezes on the stand. The courtroom atmosphere might be the cause of a child's involuntary refusal to speak. Where a child is called to the stand and subsequently is unable to respond to questions, use of the unique procedure may be deemed "reasonably necessary"[91] and the court may grant the motion. On the other hand, the court may choose to require more than a demonstration of inability to respond to questions.[92]

The second definition would require expert testimony.[93] A generalized belief that the child would be psychologically harmed may be insufficient to show the need for altering normal trial procedures.[94] Each child victim reacts differently to the crime, and it would be improper to resort to the closed-circuit procedure where the mental health of the child does not in fact require it.[95] Showing a compelling need to protect the child from further injury is a substantial basis for granting the motion.[96]

86. 12 OKLA. STAT. § 2804 (1981).

87. *Id.* § 2803.1 (Supp. 1986) (hearsay exception for child in sexual abuse case) adopts the title 12 definition of "unavailable."

88. 12 OKLA. STAT. § 2804(A)(2) (1981).

89. *Id.* § 2804(A)(4).

90. One court held that a bare showing that a child is "too afraid to testify" does not satisfy the burden of demonstrating unavailability. State v. Gollon, 115 Wis. 2d 592, 340 N.W.2d 912 (Ct. App. 1983). However, where the defendant is guilty of misconduct causing the child's fear, there is more than a "bare showing"; there is waiver.

91. *See* Commonwealth v. Willis, 716 S.W.2d 224, 227, 231 (Ky. 1986).

92. *See* State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 581 (1986). See *infra* note 96.

93. *See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984). A forensic psychiatrist with substantial credentials favored avoidance of an in-court appearance through the use of video equipment. The procedure would improve the accuracy of the child's testimony and would avoid some long-range harmful emotional effects, such as continued fear, guilt, anxiety, nightmares, depression, eating, sleeping, and school problems, behavioral difficulties, and sexual promiscuity. *Id.* at 1332-33. *See also* State v. Tafoya, 105 N.M. 117, 729 P.2d 1371, 1374-75 (Ct. App. 1986).

94. Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273, 284 (1984).

95. *Id.*, 208 Cal. Rptr. at 283.

96. In State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986), a child victim of sexual assault was called to the stand and answered some preliminary questions, but became uncoopera-

*Waiver.* The right of confrontation is not absolute.[97] A defendant may forfeit or waive the right to confront witnesses by his actions. He can lose the right to be present at trial where he insists on being disorderly, disruptive, and disrespectful of the court.[98] The trial can continue in his absence until such time as the defendant agrees to act properly. Where an alleged child abuser misbehaves in court to the extent of being excluded from the trial, much of the justification for taking the child's testimony outside the courtroom is eliminated. If put on the witness stand in the courtroom, the child would be testifying without seeing or hearing the defendant. Yet, if the accused has lost his right to be present, and hence his right to confront witnesses against him, no further harm would be done by utilizing the television method of taking the child's testimony. Avoiding the other traumatic aspects of the trial for the child,[99] coupled with the waiver, may be sufficient reason to order the closed-circuit procedure.

A defendant may also waive the right of confrontation if he intimidates a prospective witness prior to trial.[100] This type of waiver might frequently be found in child abuse cases. Often the abuser has threatened the child with future harm if the child refuses to submit to the abuse or if the child reports the abuse.[101] By intimidating the prospective witness prior to trial, the defendant has waived the right to confront that witness.[102] A hearing in chambers to hear evidence whether threats have been made should precede the judge's decision in the matter.[103] Where the court determines that the child has been frightened by the threats of the defendant and is intimidated by the presence of the defendant during examination, grounds exist to order the television

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tive and refused to answer further questions. The court and counsel for the parties joined the child and her therapist in chambers for direct examination of the child. The jury and the defendant viewed the proceedings on video equipment set up in the courtroom. The court found no compelling need to protect the child witness from further injury. The child's failure to cooperate frustrated the examination, but there was no indication that the child would be further traumatized. Absent a particularized showing that the child was intimidated by testifying in the courtroom in front of the defendant, the procedure did not withstand constitutional scrutiny. *Id.* at 581. See *supra* note 81 for ways in which legislatures have incorporated this idea of "compelling need" into their laws.

97. Mattox v. United States, 156 U.S. 237, 242-43 (1895).

98. Illinois v. Allen, 397 U.S. 337, 343 (1970).

99. See *supra* text accompanying notes 26-30.

100. Prior testimony of the witness may be admitted as substantive evidence of the defendant's guilt. United States v. Carlson, 547 F.2d 1346, 1358-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

101. In State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984), a ten-year-old girl revealed frequent incidents of sexual abuse by her stepfather beginning when she was only three or four years old. She was afraid of her stepfather, who had threatened to kill her if she revealed his activities. *Id.* at 1332. The court recognized that the defendant may waive his sixth amendmet right of confrontation by threatening, intimidating, or coercing a witness. *Id.* at 1345. Under the circumstances of the case, the claim of waiver was supported. Therefore, the confrontation clause was held not to be available to the defendant. *Id.* at 1348.

102. See *supra* note 100. *See also Sheppard*, 484 A.2d at 1348.

103. See *supra* note 81 for other states' in-chambers provisions.

procedure. Also, by stipulating to the admission of certain evidence,[104] or by voluntarily and knowingly pleading guilty,[105] a defendant waives the right of confrontation. In some instances, it may be strategically advantageous to stipulate to the closed-circuit evidence. Doing so may give the impression of having nothing to hide. Where a defendant is in fact innocent, he will want the truth to come out, and he may believe that having the child in a relaxed setting will facilitate the truth-seeking process.

*Who May Make the Motion*

"The attorney for any party" may make a motion for the court to require closed-circuit testimony.[106] Ordinarily, the parties to a criminal action are the state[107] and the defendant.[108] In child abuse cases, the trial judge must appoint an attorney or special advocate to represent the allegedly abused child.[109] The attorney is entitled to investigate beyond given reports, to interview witnesses, to examine and cross-examine witnesses, and to make recommendations to the court.[110] While the child is not expressly made a "party" to the action, the television testimony statute should be construed to allow the attorney for the child to make a motion for the television procedure. The statute mandating a court-appointed attorney for the child provides that the attorney shall "participate further in the proceedings to the degree appropriate for adequately representing the child."[111] The attorney for the child has the express job of protecting his client's best interests.[112] If the attorney believes that the child will suffer harm by directly facing the judge, jury, spectators, and especially the defendant, he should move for the court to order that the testimony be taken in another room before a camera. The purposes of the act are furthered by including the attorney for the child among those who may make the motion. This may be achieved either by broadly interpreting the word "party,"[113] or by amending the statute.

The prosecution might so move in order to introduce crucial testimony at

104. Williams v. Oklahoma, 358 U.S. 576, 584 (1959).

105. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

106. CAL. PENAL CODE § 1347(b) (West Supp. 1987) excludes defense counsel by stating "upon written notice of the prosecutor . . . or on the court's own motion." FLA. STAT. ANN. § 92.54(2) (Supp. 1986) and N.J. STAT. ANN. § 2A:84A-32.4(c) (Supp. 1986) allow the following persons to file the motion: the victim or witness; the attorney, parent, or legal guardian of the victim or witness; the prosecutor; the defendant or the defendant's counsel; or the trial judge. (Florida's provision adds guardian ad litem of the victim or witness.) LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) also allows the court to make its own motion.

107. 22 OKLA. STAT. § 11 (1981) (state of Oklahoma as a party).

108. *Id.* § 12 (party prosecuted as defendant); 21 OKLA. STAT. §§ 171-175 (1981) (parties to crime); 22 OKLA. STAT. §§ 431-434 (1981) (parties prosecuted).

109. 21 OKLA. STAT. § 846(B) (1981 & Supp. 1987).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* 25 OKLA. STAT. § 1 (1981) (enacted 1910), providing for an understanding other than the ordinary meaning of a word.

trial.[114] The government's key witness, the child victim, might not be able to testify any other way. The parent or guardian might not file a valid complaint if the child would have to be subjected to the rigors of the courtroom.[115] But if the child had an opportunity to testify under these conditions, the parent or guardian would be less hindered by fear of further trauma to the child. An added benefit of the procedure is that the testimony is likely to be more accurate in an environment less threatening than the courtroom.[115]

Defense counsel might so move to avoid or minimize the possibility of the child breaking into tears on the witness stand, thereby winning the jury's sympathy.[117] Where the defendant is in fact innocent, the defense will likewise benefit from increased accuracy of the testimony. In those instances where the child would otherwise be excused from taking the stand,[118] defense counsel might prefer the television procedure as an opportunity to cross-examine the child.

*Implementation of the Procedure*

Once the motion is granted, some guidelines are given for use of the procedure. The place where the testimony of the child will be taken is described as "a room other than the courtroom."[119] Most likely that room will be in the same building as the courtroom. However, this phrase could arguably extend as far as the child's bedroom.[120] The prejudicial effect of such a setting would have to be determined.

114. Strategy may include the notion that television is a common source of news. Using it here might enhance the weight of the evidence in the jury's mind. "[T]he juror might attach excessive importance to the fact of televising and give the testimony greater weight than would otherwise be the case." Vartabedian & Vartabedian, *Striking a Delicate Balance*, 24 JUDGES' J. 16, 48 (1985). See also *infra* note 117.

115. *See* State v. Gilbert, 109 Wis. 2d 501, 326 N.W.2d 744 (1982), which held that the child victim was required to attend and testify in a criminal proceeding despite evidence from a social worker, the foster mother, and a psychologist showing the child would be greatly damaged by having to testify

116. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984).

117. Strategy may include the notion that television is a common source of entertainment. Using it here might impersonalize the child's testimony and thus reduce jury sympathy. "[T]he juror may feel detached from and have less concern for the absent victim." *Id.* See also *supra* note 114. As the author points out, arguments regarding the effect of live televising cut both ways. See *infra* note 177.

118. For example, hearsay exception for a child under a given age in a sex abuse case. See *supra* note 53 for list of state statutes.

119. CAL. PENAL CODE § 1347(b) (West Supp. 1987) ("in another place and out of the presence of the judge, jury, defendant, and attorneys"); FLA. STAT. ANN. § 92.54(1) (Supp. 1986) and MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (Supp. 1985) (outside of the courtroom); LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) ("a room other than the courtroom"); N.J. STAT. ANN. § 2A:84A-32.4(a) (Supp. 1986) ("out of the view of the jury, defendant, or spectators").

120. *See* Annotation, *Propriety of Allowing Absent Witness to be Examined Over Closed-Circuit Television*, 80 A.L.R.3d 1212 (1977) (discussing Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975), where expert testifying from his office over closed-circuit television held sufficient for confrontation clause).

The statute provides for the placement of specific persons. In the courtroom are the judge and jury. In the "testimony room" are the child, the attorney for the defendant, the attorney for the state, the attorney for the child,[121] persons necessary to operate the equipment,[122] and any person whose presence would contribute to the welfare and well-being of the child.[123] In "an adjacent room or behind a screen or mirror" (that permits persons to see and hear the child during his testimony but does not permit the child to see or hear them) are persons operating the equipment.[124]

The statute is ambiguous with regard to the defendant's exact position during the proceedings. The defendant must be in a place that permits him "to observe and hear the testimony of the child," but out of sight and sound of the child.[125] A problem arises as to the meaning of the phrase "in person." Because it is not defined in the statute, resort to the ordinary meaning of the word is appropriate, unless the ordinary meaning conflicts with the intention of the act.[126] *Webster's Third New International Dictionary* defines "in person" as "bodily presence."

If by "in person" the statute means actual bodily presence, the whole purpose of the legislation would be abrogated. It would be difficult, if not impossible, for the defendant to be in the same room with the child and not be seen or heard by the child. The statute lists those who may be present in the

121. CAL. PENAL CODE § 1347(b) (West Supp. 1987) does not permit attorneys to be present during examination and cross-examination. Subsection (e) states: "Only the minor, a support person . . . , a nonuniformed bailiff, and . . . a representative appointed by the court, shall be physically present for the testimony."

122. 22 OKLA. STAT. 753(B) (Supp. 1986). A discrepancy appears regarding placement of the technicians. On the one hand, they are allowed to "be present in the room with the child *during his testimony.*" *Id.* (Emphasis added.) On the other hand, they "shall be confined to an adjacent room or behind a screen or mirror." *Id.* One interpretation would be that the technicians may set up the equipment in the room as necessary prior to the actual event, then exit to the adjacent room to operate the equipment during the testimony. However, the exact wording of the statute makes this interpretation problematic.

This issue is easily solved in that it is merely a matter of practicality. The statute should ensure that the technicians do their job with minimal interference with the attorneys and witness. The solution lies in (1) choosing one or the other positions currently at odds in the statute (preferably in an adjacent room or behind a screen or mirror during the child's testimony), (2) making clear that the child is not to hear or see the technicians (*see* LA. REV. STAT. ANN. § 15:283(B) (West Supp. 1987)), or (3) stating simply, "the operators of the closed circuit television shall make every effort to be unobtrusive" (*see* MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(3) (Supp. 1985)). The third alternative seems to uphold the purpose of the provision while allowing for necessary flexibility.

123. Soap v. State, 562 P.2d 889 (Okla. Crim. App. 1977), held it was not error to permit the mother of a seven-year-old sodomy victim to stand by and hold the victim's hand while she gave testimony. *See* FLA. STAT. ANN. § 92.54(3) (Supp. 1986) (Supp. 1985) (includes an interpreter, and the support person must be one who will not be a witness in the case); LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) ("any person, other than a relative of the child"); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b)(1)(iv) (Supp. 1985) (includes "unless the defendant objects").

124. See *supra* note 122.

125. This arrangement implicates the defendant's sixth amendment right to pro se representation. See *infra* text at notes 193-207.

126. 25 OKLA. STAT. § 1 (1981) (enacted 1910) provides in part: "Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."

"testimony room" and specifically says "only" those persons may be there. Because the defendant is not listed in the group, presumably he is not permitted in the room.[127]

The defendant could be in the same room with the witness behind a screen or mirror with the technicians and not be seen or heard by the child. Such a placement is ill-advised because the court would not be able to monitor the actions of the defendant. Although placing the accused in the same room with the victim would satisfy a loose interpretation of "in person," nothing would be gained by doing so.

The best placement of the defendant is in the courtroom while the child testifies in another room.[128] "The court shall permit the defendant to observe and hear the testimony of the child in person" can be read to mean that the defendant is physically present in the courtroom while observing the simultaneously broadcast testimony on a closed-circuit television monitor. This interpretation is practical and supports the spirit of the legislation.

Technical details describing the proper implementation of the closed-circuit procedure are not included in the act. How many monitors are needed in the "testimony room," if any? How many monitors are needed in the courtroom? How much discretion do the camera operators have? Is it proper for them to use a zoom lens, or special lighting, or to focus on one person at a time? What about communication between the defendant and defense counsel? How will the judge be able to rule on objections from the courtroom? These are among the questions that must be answered in order to ensure the least deviation from the traditional trial procedure. Because the defendant has a constitutional and statutory right of confrontation, it is essential to arrange the closed-circuit television setting in such a way that the right is not abridged.[129] Several proposals have been made in this regard.[130]

127. FLA. STAT. ANN. § 92.54(3) (Supp. 1986) and LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) specifically include the defendant among the persons who may be present in the room with the child. The purpose here must be to allow the child to avoid viewing the jury and spectators rather than the defendant. FLA. STAT. ANN. § 92.54(4) adds: "During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom."

128. FLA. STAT. ANN. § 92.54(4) (Supp. 1986) allows the court to require the defendant to view the testimony from the courtroom. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b)(2) (Supp. 1985) specifically provides: "During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom."

129. The court in State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986), held that a closed-circuit television procedure denied the defendant his rights under the confrontation and due process clauses. Several aspects of the procedure were constitutionally objectionable. The defendant did not have any means of communication with his attorney. The judge could not monitor what was happening in the courtroom. The therapist was allowed to conduct the examination of the victim. At one point the child continued her testimony in chambers with only the therapist present, with all other parties in the courtroom watching the monitors. The judge had no means by which he could exercise control over the examination of the witness or interrupt the questioning to rule on objections made by the defendant. The court admitted that new procedures can and must be implemented to ease the emotional burden of the child witness. *Id.* at 580. At the same time it said, "Courts which allow such evidentiary innovations must tailor these techniques carefully to prevent overbroad application." *Id.* at 581.

130. *See* Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Ac-*

The camera operators should be directed to situate the camera so as to permit simultaneous viewing of all persons other than the camera operators in the room in which the examination is being conducted.[131] While observing the demeanor of the child is of utmost importance, other considerations are also relevant. By focusing exclusively on the child's face, the camera would not convey actions of others in the room. The questioner might coach the child to respond a certain way, for example, by nodding, yet would not be seen by the court. To permit filming one person at a time, such as the speaker, would exclude off-camera evidence that would otherwise be seen.[132] Therefore, exclusive use of a zoom lens to narrow the field of vision should be prohibited. It should be allowed only where a second camera transmits to a second monitor a picture of everyone in the testimony room except the camera operators. Lighting should be unobtrusive, and lens and camera angle should conform to providing the most accurate reproduction of the scene as possible.[133]

The defendant must have a means of communicating with his counsel during the examination and cross-examination.[134] This can be accomplished by constant electronic means of communication or periodic interruptions of the testimony for person-to-person consultation between defendant and attorney.[135] Equally as important to the process is the ability of the judge to rule on objections and otherwise control the proceedings. An audio system connecting the judge with the testimonial room must be provided.[136]

*Who May Question the Child Witness*

"Only the attorneys may question the child."[137] Some authorities have suggested that a social worker or other court designee should conduct the

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*complished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 124-25 (1985).

131. *Warford*, 223 Neb. 368, 389 N.W.2d at 582; State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1349 (1984).

132. "[T]he camera becomes the juror's eyes, selecting and commenting upon what is seen." Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273, 278 (1984).

133. Maye & Meiring, *supra* note 55, at 2953-54.

134. *Cf.* FLA. STAT. ANN. § 92.54(4) (Supp. 1986) ("The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method."); LA. REV. STAT. ANN. § 15:283(B) (West Supp. 1987) ("The court shall also ensure that the defendant is afforded the ability to consult with his attorney during the testimony of the child."); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b)(3) (Supp. 1985) ("The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method."); N.J. STAT. ANN. § 2A:84A-32.4(d) (Supp. 1986) ("the defendant . . . and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.").

135. Commonwealth v. Willis, 716 S.W.2d 224, 227, 231 (Ky. 1986); State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 581 (1986); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1349 (1984).

136. *See* cases cited *supra* note 135.

137. Those specifically excluded from questioning the child include persons necessary to

questioning.[138] Both sides would submit questions to be posed to the child. While sensitive to reducing trauma to the child witness, having a third person question the child is not advisable for two reasons: (1) The procedure would be cumbersome, ineffective to expose flaws in the testimony, and would seriously impair cross-examination;[139] and (2) arguably, the court designee would be practicing law without a license.[140] This provision limiting who may question the child witness is unambiguous and avoids both problems. The attorneys who examine and cross-examine the witness should be sensitive to the child's unique needs and adapt questions to the child's level of understanding.

### *Constitutionality of Closed-Circuit Testimony of Children*

Abused children need to be protected from further emotional damage, which the legal system tends to inflict. Oklahoma has addressed this need by enabling trial courts to take the child's testimony in a separate room, away from the judge, jury, spectators, and defendant. The procedure provides simultaneous viewing and hearing of the testimony by the court. Arguably, the Oklahoma statute may be unconstitutional on its face. At the very least, care must be taken to see that it is not applied unconstitutionally.[141] Three constitutional rights are implicated by the act: confrontation, compulsory process, and pro se representation.

#### *Confrontation*

The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has held that the sixth amendment right of confrontation is applicable to the states through the fourteenth amendment.[142] Oklahoma reaffirms the accused's right of confrontation in its constitution and through legislation.[143]

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operate the equipment, any person whose presence could contribute to the welfare and well-being of the child, and the judge. LA. REV. STAT. ANN. § 15:283(A) (West Supp. 1987) specifically includes "the presiding judge as authorized by law." MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(2) (Supp. 1985) also specifically includes the judge.

138. Cares, *supra* note 1, at 49; Maye & Meiring, *supra* note 55, at 2953. CAL. PENAL CODE § 1347(b) & (e) (West Supp. 1987) do not include attorneys in the testimony room, and subsection (c)(3) prohibits attorneys from examining the minor at the session in chambers.

139. Cares, *supra* note 1, at 48.

140. *See* 5 OKLA. STAT. § 12 (1981) (Unauthorized Practice of Law); 5 OKLA. STAT. ch. 1, app. 3, DR 3-101 (1981). *See also* State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 582 (1986).

141. *See* Commonwealth v. Willis, 716 S.W.2d 224, 232 (Ky. 1986) (Leibson, Gant, and Vance, JJ., concurring) (finding the Kentucky statute constitutional, which is essentially the same as Oklahoma's television statute).

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

143. "In all criminal prosecutions the accused shall have the right to . . . be confronted with the witnesses against him. . . ." OKLA. CONST. art. II, § 20. "In a criminal action the defendant is entitled: . . . To be confronted with the witnesses against him in the presence of the court." 22 OKLA. STAT. § 13 (1981).

Taken literally, the sixth amendment makes no provision for an exception to the confrontation right. Yet, as early as 1895, the Supreme Court rejected a technical adherence to the letter of the constitutional provision in favor of recognizing exceptions to it that do not interfere with its spirit.[144] It was held that the right of confrontation is not absolute. General rules of law compelling the witness to be personally present before the jury "must occasionally give way to considerations of public policy and the necessities of the case."[145] As recently as 1980 the Supreme Court maintained that "competing interests, if 'closely examined,' . . . may warrant dispensing with confrontation at trial."[146]

The state has a powerful interest in punishing child abusers and in stopping the abuse. The state has a concurrent interest in preventing further psychological and emotional harm to abused children caused by the legal process. Where the government's key witness is the victim of the abuse, it is difficult and sometimes impossible to prosecute the alleged abuser successfully. Where the state must call the child to the witness stand, it often sacrifices the victim's immediate welfare for the sake of the public welfare. These "considerations of public policy" and "necessities of the case" prompted development of the closed-circuit method of taking testimony.

This new procedure implicates the right of confrontation by separating the accused and the accuser. Before the availability of television and videotapes, physical face-to-face meeting with one's adversaries was viewed as an element of the sixth amendment guarantees.[147] The technology of closed-circuit television has raised the issue whether contemporaneously viewing the witness's face on a monitor, without the witness viewing the defendant, is confrontation in the constitutional sense.[148]

144. Mattox v. United States, 156 U.S. 237, 243 (1895). Two of the government's witnesses had died after being fully examined and cross-examined in a former trial but before a subsequent trial. Their prior testimony was admitted to be read in evidence in the subsequent criminal trial, despite the confrontation provision of the Constitution. "A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Id.* at 243.

145. *Id.*

146. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

147. *See, e.g.*, United States v. Benfield, 593 F.2d 815, 819 (8th Cir. 1979). *But see* Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986). Although the Kentucky constitution specifically requires that in all criminal prosecutions the accused has the right "to meet the witnesses face to face," the requirement was held to be basically the same as the sixth amendment to the federal Constitution. The court merely recognized a preference for face-to-face confrontation at trial. *Id.* at 227. *See also* State v. Tafoya, 105 N.M. 117, 729 P.2d 1371, 1373-75 (Ct. App. 1986), regarding videotaped depositions and the confrontation clause. Petition for certiorari filed Feb. 12, 1987. 55 U.S.L.W. 3665 (Mar. 31, 1987).

148. KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1986) is almost identical to Oklahoma's statute, with a few minor word changes. Recently the Kentucky statute was challenged by a circuit court, but the Kentucky Supreme Court held that it provides an acceptable substitute for fa e-to-face confrontation. *Willis*, 716 S.W.2d at 228.

> The videotaped or televised testimony . . . is the functional equivalent of testimony in court. The testimony is taken with the court, counsel and the defen-

The "spirit" of the confrontation clause embraces the following objectives: (1) assurance that the witness will tell the truth under oath for fear of a penalty for perjury; (2) submission of the witness to cross-examination, thus promoting reliability; and (3) aiding the jury in assessing credibility by permitting them to observe the demeanor of the witness.[149] A child witness probably will be motivated to tell the truth for reasons other than fear of a penalty for perjury. It is unlikely that children comprehend those penalties imposed by the court, yet they know that lying is wrong and they can be punished by their parent or guardian for not telling the truth.

There is some danger that not having to face the defendant in the courtroom will make it easier for the child to lie.[150] The Oklahoma statute allows for the entire trial to proceed without the child witness "facing" the accused even once. The statute provides that the child need not hear or see the defendant and shall not be required to testify in court.[151] Given that it is much easier to lie *about* someone than to lie *to* someone, provisions are needed to reduce the chances of fabrication. Such a danger can be minimized by informing the witness that the defendant is viewing the testimony. Other provisions to promote reliability of testimony and identification of the perpetrator might include the following: bring the child into the courtroom, however briefly,[152] or provide two-way television, with a monitor in the testimony room showing the defendant.[153]

Cross-examination of the witness is presumed to promote reliability of the

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dant present in person. Full cross-examination is authorized. The defendant and the jury can see and hear the witness and assess credibility by observation of the demeanor of the witness.

*Id.* "We realize that the statute in question does limit the manner of confrontation, but it does not infringe on the right of confrontation, and a proper balancing of the competing interests of society in general and the accused require that the statute be upheld." *Id.* at 229.

149. Lee v. Illinois, 106 S.Ct. 2056, 2062 (1986) (citing California v. Green, 399 U.S. 149, 158 (1970)); State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 580 (1986).

150. *But see* Cares, *supra* note 1, at 47: "An untruthful child, however, would most likely not be inhibited by the courtroom atmosphere since it takes a certain amount of boldness to manufacture a sexual abuse allegation. Consequently, a lying child is likely to fare better in the courtroom than a truthful, but intimidated, child."

151. See *supra* note 73.

152. *See* CAL. PENAL CODE § 1347(g) (West Supp. 1987) ("[N]othing in this section shall prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose including the identification of the defendant or defendants as the court deems necessary."); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(d) (Supp. 1987) ("This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.").

153. CAL. PENAL CODE § 1347(h) (West Supp. 1985) ("[T]he defendant's image shall be transmitted live to the witness via two-way contemporaneous closed-circuit television."). *See also* Graham, *supra* note 61, at 91.

In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), an adult was deposed by use of videotape. Such procedure was held to violate the defendant's constitutional rights. The fact that the witness was apparently unaware that her testimony was being monitored by the defendant was a significant factor in the court's decision. *Id.* at 822. The court commented that face-to-face confrontation through two-way closed-circuit television might be adequate. *Id.* at 822 n.11.

testimony. The closed-circuit procedure supplies the same opportunity for cross-examination of the child witness as does the traditional trial. The confrontation clause reflects a preference for face-to-face confrontation at trial, yet "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."[154] In fact, some statements are admissible into evidence even absent an opportunity for cross-examination.

Hearsay exceptions appear as a common means of eroding the constitutional right to confrontation.[155] The hearsay rule of evidence excludes the use at trial of out-of-court statements to prove the truth of the matter asserted, thereby protecting the defendant's right to confront the witness against him.[156] Yet, there are no less than twenty-nine legislatively sanctioned exceptions to the hearsay rule.[157] The Supreme Court has recognized that to apply the confrontation clause literally "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."[158]

It has been suggested that the confrontation clause is a "preferential rule,"[159] obligating the prosecution to present its evidence in its best available form.[160] Live testimony under oath and subject to cross-examination is the preferred form because it is the best. Where the state can show that a particular witness is not available to testify at trial, and that the state is not responsible for the absence,[161] hearsay may be the best form in which the evidence still exists. As long as the statements are sufficiently reliable to satisfy due process requirements,[162] the prosecution may use the hearsay

154. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

155. For a brief discussion of whether the confrontation clause requires exclusion of all hearsay in criminal trials, see Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1200 n.65 (1979).

156. FED. R. EVID. 801, 802; 12 OKLA. STAT. §§ 2801, 2802 (1981) (Definitions and Hearsay Rule).

157. FED. R. EVID. 803; 12 OKLA. STAT. § 2803 (1981) (Hearsay Exceptions; Availability of Declarant Immaterial); FED. R. EVID. 804; 12 OKLA. STAT. § 2804 (1981) (Hearsay Exceptions; Declarant Unavailable).

158. Ohio v. Roberts, 448 U.S. 56, 63 (1980) (holding that introduction into evidence of prior testimony was constitutionally permissible (1) where the witness' testimony at the preliminary hearing had been tested by questioning that was the equivalent of cross-examination, and (2) where the circumstances established that the witness was unavailable, in the constitutional sense, to appear at trial).

159. Westen, *supra* note 155, at 1189.

160. *Id.* at 1193 nn.34-35, 1195-96 n.47.

161. Justice Harlan suggested that the sixth amendment uses "witnesses against" a defendant to mean persons who are *available* to give incriminating evidence in the form of live testimony in open court, under oath, and subject to cross-examination. In contrast, if the declarant is *not* available to testify live through no fault of the state, she is *not* a "witness against" the accused within the meaning of the clause. *Id.* at 1188-89 (citing California v. Green, 399 U.S. 149, 179-83 (1970) (Harlan, J., concurring)).

162. Once a declarant has been shown to be unavailable, the inquiry no longer proceeds under the sixth amendment, but rather under a due process standard (whether hearsay possesses sufficient indicia of reliability to justify placing it before the jury). *Id.* at 1199 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)).

statements of unavailable witnesses without violating the confrontation clause.[163]

A child victim may be unavailable to testify at trial as defined in the hearsay statutes,[164] yet be available to testify before a camera in a room other than the courtroom. Given that hearsay exceptions are allowed sometimes with no cross-examination at all, it would seem that the television testimony with cross-examination would be the more reliable alternative. It would be the best form in which the evidence exists.

The right to confrontation is basically a trial right,[165] "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[166] Absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process.[167] It is possible to implement the closed-circuit television procedure to simulate "in person" confrontation. Continuous audio contact between the defendant and defense counsel must be maintained.[168] Great care must be taken to deviate as little as possible from the ordinary trial methods so that the defendant's right to confrontation is assured in a meaningful sense.[169]

If the witness can be produced at the final trial, it is the right of the defendant to have her present.[170] For hearsay to be admitted it must be substantially proven (1) that the witness is in fact unavailable to testify at trial,[171] and (2) that the statement must be admitted in the declarant's absence as a matter of necessity to prevent a miscarriage of justice.[172] Even then, the statement is admissible only upon a showing of guarantees of trustworthiness.[173] The same criteria should be applied before a court grants a motion to use the closed-circuit method of taking testimony.[174]

Finally, the confrontation clause is meant to aid the jury in assessing credibility of witnesses. Observing the demeanor of a witness allows a jury to

163. The scope of the confrontation clause is largely defined by its relationship to its sixth amendment companion, the compulsory process clause. The compulsory process clause does not require a state to subpoena unavailable witnesses. The state is not a guarantor of their presence at trial. *Id.* at 1197 (citing United States v. Hart, 546 F.2d 798, 799 (9th Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977)). By analogy, the state has no obligation under the confrontation clause to produce witnesses who are no longer available to testify live under oath. *Id.*

164. See *supra* text accompanying notes 86-89.

165. Barber v. Page, 390 U.S. 719, 725 (1968).

166. Pointer v. Texas, 380 U.S. 400, 405 (1965). *See also* Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986); Barber v. Page, 390 U.S. 719, 721 (1968).

167. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 64 (1980); Berger v. California, 393 U.S. 314, 315 (1969).

168. *See* Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986). The Kentucky statute, like the Oklahoma statute, does not provide at all for a means of communication between the defendant in the courtroom and the defense counsel in the testimony room. Yet the court assumed that the defendant not only can view and hear the child, but also that she must be able to "maintain continuous audio contact with defense counsel." *Id.* at 227, 231.

169. See *supra* text accompanying notes 131-136.

170. Golden v. State, 23 Okla. Crim. 243, 214 P. 946 (1923).

171. *In re* Bishop, 443 P.2d 768 (Okla. Crim. App. 1968).

172. Alexander v. State, 51 Okla. Crim. 1, 299 P. 237 (1931).

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

174. See *supra* text accompanying notes 80-105.

judge whether he is worthy of belief. In a case regarding the use of a videotape deposition of an adult witness, the Eighth Circuit viewed the right of cross-examination as reinforcing the importance of physical confrontation.[175] The court held that any exception to the face-to-face aspect of the confrontation clause should be narrow in scope and based on necessity or waiver.[176] There must be a showing of extraordinary circumstances compelling reliance on any new procedure that implicates confrontation.

Once necessity or waiver has been established to justify the use of the television procedure, it may be used without hindering a jury's ability to assess credibility. The demeanor of the witness can be observed through the use of television nearly as well as where testimony is live.[177] The differences between live and televised testimony can and should be minimized. Technical details of the camera operation should be spelled out for this purpose.[178] Unlike hearsay exceptions, which effectively eliminate observation of the declarant's demeanor, television testimony projects the face and voice of the declarant at the time he speaks. Therefore, reliance on hearsay exceptions is unnecessary where the television testimony mechanism is an acceptable form of evidence.

*Compulsory Process*

Where the court issues an order under the Oklahoma statute, "the child *shall not* be required to testify in court at the proceeding for which the testimony was taken."[179] This mandatory provision accomplishes the goal of protecting the child from repeated interrogations. It also preserves the principal purpose of the statute: in some circumstances, the child victim should not have to testify in open court. To excuse the child from the courtroom by permitting questioning in a separate room, and shortly thereafter to force the child to testify in court would be counterproductive. The advantages of using closed-circuit television would be nullified.

Nevertheless, the mandatory provision compromises the defendant's state[180] and federal[181] constitutional and statutory rights to have compulsory

175. "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979).

176. *Id.* at 821. See *supra* text accompanying notes 80-105.

177. 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.

State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1341 (1984) (quoting People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413, 420 (Dist. Ct. App. 1974)).

178. See *supra* text accompanying notes 131-133.

179. 22 OKLA. STAT. § 753(D) (Supp. 1986) (emphasis added). See *supra* note 73.

180. "In all criminal prosecutions the accused shall . . . have compulsory process for obtaining witnesses in his behalf." OKLA. CONST. art. II, § 20. "In a criminal action the defendant is entitled: . . . To produce witnesses on his behalf." 22 OKLA. STAT. § 13 (1981).

181. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. This right to have com-

process for obtaining witnesses in his behalf. The defendant who wants to call the child to the stand after the televised testimony has been taken is denied an opportunity to do so.

The Kentucky statute has a provision substantially similar to this subsection of the Oklahoma statute.[182] The difference is that when the Kentucky court orders the testimony of the child to be taken in a separate room, "the child *may not* be required to testify in court at the proceeding for which the testimony was taken."[183] Three state supreme court judges concurred in *Commonwealth v. Willis*, asserting that this subsection is constitutionally impermissible under any circumstances.[184]

> [T]his section conflicts with the accused's Sixth Amendment right to put on his case, he is entitled to call witnesses in his own defense, which must necessarily include the right to call adverse witnesses, including a child who has given evidence against him.
>
> Regardless of how the Commonwealth conducts its case, . . . when the time comes for the defendant to put on his case, he is entitled to call any witness he wishes. If the child will not answer questions when called by the defendant, the jury is entitled to know this and evaluate this aspect of the case.[185]

The issue raised is whether the child witness, when called by the defendant as an adverse witness, may testify before the camera in a separate room rather than testify on the stand in the courtroom without violating the compulsory process clause. The alleged abuser can claim the right to compulsory process only where she believes the child's testimony will be "on her behalf." The defendant must make a showing that the testimony would be material and favorable to the accused, and not merely cumulative to the testimony of available witnesses.[186] An alleged child abuser may seek to compel the adverse child witness to take the stand in order to cast doubt upon the credibility of the child's story.[187] The defendant does have a right to impeach the credibility of the child's testimony. Yet, an opportunity to impeach is already afforded by cross-examination of the child while the closed-circuit television procedure is utilized by the prosecution. Putting the child in the courtroom for an "instant replay" of the questions and answers might yield some benefit of seeing the child's reaction to the courtroom and defendant,

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pulsory process applies to the states through the fourteenth amendment. Washington v. Texas, 388 U.S. 14, 17-19 (1967). For extensive coverage of the topic, see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) and Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975).

182. KY. REV. STAT. ANN. § 421.350(5) (Baldwin Supp. 1986).

183. *Id.* (emphasis added). The Oklahoma language appears to be stronger than the Kentucky language. See *supra* text accompanying note 179.

184. 716 S.W.2d 224, 233 (Ky. 1986) (Leibson, Gant & Vance, J.J., concurring).

185. *Id.*

186. United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982).

187. Mlyniec & Dally, *supra* note 130, at 129-30.

but would mostly be cumulative. Provided the procedure conforms as closely as possible to traditional questioning, such duplication would be unnecessary.

The compulsory process clause and the confrontation clause are sixth amendment companions.[188] Unavailability for confrontation purposes will serve as unavailability for compulsory process purposes as well. The state has no obligation under the compulsory process clause to produce witnesses who are unavailable to testify in person.[189] Where the child is found to be unavailable to testify in open court and is afforded the extraordinary procedure of testifying in a room other than the courtroom, the defendant may no longer rely on the compulsory process clause to compel the child to testify in the courtroom under this theory.

The Oklahoma statute as written might offend the compulsory process clause. It does prevent the defendant from putting the child "on the stand" in the courtroom where the television procedure is ordered. Yet the provision is not arbitrary.[190] It narrowly excludes from the courtroom only those children who have been deemed to require the unique method of taking testimony. The statute would be strengthened by including criteria for granting the motion,[191] such as unavailability of the child victim to testify in the courtroom. By specifying a limited class of witnesses who may be excused from being physically present in the courtroom because of necessity or waiver, the statute would pass constitutional muster.

The televised testimony is the functional equivalent of testimony in court.[192] The child witness is before the court under oath in person and subject to cross-examination. The child has literally been "compelled" to come before the court to offer his evidence. A defendant may believe that calling the complaining child witness will benefit his defense in a case where the court has granted the motion to utilize closed-circuit equipment. Such a defendant will not be denied compulsory process by acquiescing to this manner of questioning. The procedure does not deny the court or the defendant

188. Westen, *supra* note 155, at 1197. See *supra* note 163.

189. For example, persons who are dead, undiscoverable, or beyond the territorial reach of the subpoena power. Westen, *supra* note 155, at 1197. See *supra* note 163.

190. The United States Supreme Court struck down two Texas statutes that prevented a participant accused of a crime from testifying for his co-participant. Washington v. Texas, 388 U.S. 14 (1967). The Constitution is violated by "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief." *Id.* at 22. Where a witness is physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense, the state may not arbitrarily deny the defendant the right to call that witness. *Id.* at 23. The closed-circuit television statute does not prohibit the defendant from calling the child witness when presenting her defense, but rather prohibits the child's presence in the courtroom where closed-circuit equipment is ordered. The compulsory process clause is satisfied, although an innovative method of taking the child's testimony is employed.

191. See *supra* text accompanying notes 80-105.

192. Commonwealth v. Willis, 716 S.W.2d 224, 228 (Ky. 1986) (finding the Kentucky statute constitutional, which is essentially the same as Oklahoma's statute).

access to the witness's direct "in-court" testimony. Therefore, compelling the child witness to testify before the camera is sufficient compulsory process in the constitutional sense.

*Pro Se Representation*

If the defendant elects to represent pro se and the prosecution moves to have the child's testimony taken out of the defendant's presence, the statute's constitutionality is again brought into question. Oklahoma's statute is silent on this issue. One state expressly denies application of the procedure where the defendant is an attorney pro se.[193]

*Faretta v. California* held that a criminal defendant has a constitutional right to knowingly and intelligently waive the right to counsel and proceed to defend himself.[194] The limitations on this right[195] include (1) requesting to defend pro se within a reasonable time prior to the commencement of the trial;[196] (2) requesting in a clear and unequivocal manner;[197] and (3) absence of conduct which would be construed as forfeiting the right to pro se representation.[198]

Forfeiture of the right to represent pro se may be found where the defendant intends to disrupt or frustrate the integrity of the court.[199] Where a defendant requests to defend pro se solely to frustrate the prosecutor's request for the television procedure, it may or may not be construed as conduct intended to frustrate the integrity of the court. Proving the motive would be difficult if not impossible, and the pro se request itself is unlikely to reach the level of disruption or frustration usually associated with the forfeiture of the right.[200]

Once granted the right to represent himself at trial, the defendant may exhibit disruptive behavior in the form of harassing or intimidating the child witness. If he goes beyond zealous cross-examination to the point of impugning the integrity of the court, his right to defend pro se might be forfeited.[201] Whether the defendant is motivated to defend pro se for the purpose of harassing or intimidating the child witness might be determined before allow-

193. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(c) (Supp. 1985) ("The provisions of this section do not apply if the defendant is an attorney pro se.").

194. 422 U.S. 806 (1975).

195. *See* Mlyniec & Dally, *supra* note 130, at 131-32.

196. *See* People v. Windham, 19 Cal. 3d 121, 560 P.2d 1187, 1191, 137 Cal. Rptr. 8, 12 (1977), *cert. denied*, 434 U.S. 848 (1977); Coleman v. State, 617 P.2d 243, 245 (Okla. Crim. App. 1980).

197. *See* Anderson v. State, 267 Ind. 289, 370 N.E.2d 318, 320 (1977), *cert. denied*, 434 U.S. 1079 (1978); Gilbreath v. State, 651 P.2d 699, 702 (Okla. Crim. App. 1982). Vacillation in requesting a lawyer or permitting a lawyer to do some of the in-court work can amount to waiver of the right to pro se representation. Mlyniec & Dally, *supra* note 130, at 131-32.

198. Illinois v. Allen, 397 U.S. 337 (1970) (defendant's repeated disruptive behavior warranted removing defendant from the courtroom), *reh. denied*, 398 U.S. 915 (1971).

199. *Id.* at 343; Coleman v. State, 617 P.2d 243, 245 (Okla. Crim. App. 1980).

200. Mlyniec & Dally, *supra* note 130, at 133.

201. *Id.* at 134.

ing him to do so. Where the alleged abuser has threatened the child during the act of abuse with further harm, he has waived the right to confrontation.[202] It could be argued that the right to pro se representation is similarly forfeited to the extent of examining or cross-examining the child victim. Yet, the right to defend pro se cannot be denied because of the anticipation of disruptive conduct.[203]

Three justices who concurred in the recent case of *Commonwealth v. Willis* agreed that

> [w]here the defendant has legitimately undertaken to defend himself *pro se*, his right to question all witnesses (including the child) cannot be impaired. However, he cannot elect to selectively question the child, or the child and one or two other witnesses, and utilize the services of an attorney for the remainder of his defense.[204]

The court may permit a lawyer to assist a defendant upon request,[205] but is unlikely to do so for the sole purpose of permitting the defendant to circumvent the closed-circuit testimony statute. The court may permit hybrid representation or appoint stand-by counsel over a defendant's objection,[206] but counsel's assistance ordinarily may not interfere with defendant's questioning of witnesses.[207]

The key word in the above quote is "legitimately." This presupposes that the defendant does not intend to frustrate the integrity of the court nor intimidate the child witness. It would seem that in such a case the defendant must be allowed to represent himself, and the technologically innovative method of taking the child's testimony would not be possible. Examination or cross-examination of the child witness by the defendant could not be achieved without the child seeing or hearing the defendant.

A blending of the right to represent pro se and the use of closed-circuit television might be possible if the statute were changed to allow the child to view the defendant on a monitor. The defendant in the courtroom could question the child in the testimony room. The child would have the advantage of being physically separated from the accused and avoiding the unpleasant elements of the courtroom. As written, the statute does not allow for this procedure.

## *Conclusion*

The need to protect children from adults who would abuse them is beyond dispute. Oklahoma has addressed this problem by enacting a mandatory

202. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1348 (1984).
203. Coleman v. State, 617 P.2d 243, 245 (Okla. Crim. App. 1980).
204. 716 S.W.2d 224, 233 (Ky. 1986) (Leibson, Gant & Vance, J.J., concurring).
205. *See* McKaskle v. Wiggins, 465 U.S. 168, 182 (1984).
206. *Id.* at 184.
207. *Id.* at 178.

reporting act. Minimizing further emotional damage to abused children is equally compelling. Oklahoma has addressed this need by enabling trial courts to take a child's testimony in a separate room, away from, but viewed by, the judge, jury, spectators, and defendant. At the same time, a defendant's right to a fair trial must not be lessened in a child abuse prosecution.[208] Thus, Oklahoma must carefully apply the closed-circuit television statute so that the defendant's constitutional rights are not abridged.[209]

"But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[210] Oklahoma is to be commended for recognizing its duty to protect its children both in and out of the courtroom. The closed-circuit television statute is a step toward protecting children who would be further injured by the legal system. It is certainly possible to apply the innovative procedure without unduly restricting the defendant's right to confront adverse witnesses. Some case law is developing that indicates minimum constitutional standards for taking testimony using closed-circuit television. As written, the Oklahoma statute requires that care be taken to apply it within constitutional limits.

*V. Kay Curtis*

208. "Convenience or ease of prosecution of any criminal offense is not, and should not be, a factor in interpreting the basic rights of an accused person." Commonwealth v. Willis, 716 S.W.2d 224, 234 (Ky. 1986) (Stephens, C.J., dissenting). "The need to adopt measures to ease the emotional burden placed on a child witness cannot, however, be an excuse for stripping the defendant of his constitutional rights." State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 580 (1986). "[W]e do not wish to emasculate the Confrontation Clause merely to facilitate government prosecutions." State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1345 (1984) (citing United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979)).

209. Perhaps the Oklahoma statute itself should be revised to give specific guidance to trial courts. Necessity or waiver should be found before the statutory television procedure is ordered. Everyone in the testimony room should be visible on at least one of the monitors at all times. Constant audio communication between the courtroom and the testimony room is essential. The defendant and her counsel must have a way to communicate during examination and cross-examination. The judge must have a way to rule on objections and otherwise control the proceedings. These requirements will serve to protect the integrity of the truth-finding process by providing as little deviation from the traditional trial procedure as possible.

210. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).