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ALTERNATIVES TO IN-COURT TESTIMONY IN CHILD ABUSE CASES

A Thesis

Presented to

The Judge Advocate General's School,

United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by CPT Paula C. Juba, JA

United States Army

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ALTERNATIVES TO IN-COURT TESTIMONY IN CHILD ABUSE CASES

by CPT Paula C. Juba

ABSTRACT: Contrary to the trend in both federal and state courts, the military provides no procedural or judicial guidelines governing the use of televised or videotaped testimony by a child witness. This thesis recommends the adoption of a rule for courts-martial that would provide uniform procedural alternatives to in-court testimony in child abuse cases.

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I. INTRODUCTION

> *Drastic changes in appellate court functioning should come about by deliberate design and knowingly, not as accidental by-products of technological advances. The technological tail should not wag the procedural dog.* [1]
>
> --- *Professor Maurice Rosenberg*

Electronic technology has advanced to a level that was previously unimaginable. The increased sophistication and easy availability of video and audio equipment has created legal issues that were nonexistent when the Bill of Rights was drafted. Two new issues are the meaning of confrontation in an electronic age and the constitutionality of televised or videotaped testimony. The new technology provides tremendous opportunities to graphically recreate facts and events;[2] however, it also raises the dangers of factual distortion and undue influence.[3]

Nowhere is the use of electronic imagery more evident than in the prosecution of child sex abuse. Testimony via videotape or closed circuit television is being used with increasing frequency as a substitute for live, in-court testimony in the area of child sexual abuse. Forty-six states have statutes that specifically permit the use of a procedural substitute for a child's in-court testimony under certain limited conditions.[4] The United States Congress has followed suit with the passage of the Crime Control Act of 1990,[5] which authorizes federal courts to order the use of closed circuit television and videotaped testimony under specified circumstances in federal prosecutions for child abuse.

Contrary to the trend in both federal and state courts, the military provides no procedural or judicial guidelines governing the admissibility of televised or videotaped testimony by a child witness. Military judges are forced to improvise procedures on an ad hoc basis, relying upon case law and common sense.[6] This situation is untenable, first, because the law fluctuates as new issues arise,[7] and second, because the Supreme Court has refused to dictate any

"categorical evidentiary prerequisites for the use of the [alternative] procedure."[8]

In United States v. Thompson, Chief Judge Everett recommended that the Joint Service Committee on Military Justice adopt a rule concerning child witness testimony.[9] The purpose of this dissertation is to draft a proposed rule for courts-martial that would provide uniform procedures allowing alternatives to in-court testimony in child abuse cases. In support of this proposal, Part II discusses the need for a new rule in light of existing problems. Part III examines the societal considerations that led to the passage of child witness protection statutes. Parts IV and V outline the confrontational and due process issues raised by alternative procedures and discuss the constitutional boundaries for exceptions to in-court testimony. Part VI analyzes each aspect of the proposed rule in comparison with other statutory schemes. The Appendix sets forth a rule for courts-martial that is designed to protect a defendant's confrontation and due process rights while recognizing the special needs of child victims and witnesses in the judicial system.

II. THE RATIONALE FOR A RULE FOR COURTS-MARTIAL

A. IS A PROCEDURAL RULE NECESSARY?

Trial courts have inherent authority, subject to constitutional constraints, to receive evidence and maintain order in the courtroom.[10] Procedural rules assist the courts by providing guidelines for the fair and uniform administration of the law. In the absence of a procedural rule governing alternatives to in-court testimony, military judges have exercised their inherent authority to devise alternatives on a case by case basis.[11] The appellate courts have examined the alternatives and have found them to be constitutional.[12] In light of the broad judicial discretion to authorize special procedures, is there any need for a rule for courts-martial specifically dealing with testimony by a child witness?

The need for a rule still exists for the following reasons:

1. Procedural rules and practices must be consistent and uniform throughout a particular

jurisdiction. Military judges and counsel must be able to predict, with some degree of certainty, the procedures that will be used to ensure due process.

2. At present, there is no uniformity in this area. In the absence of any set standard, each court-martial has created a different procedure for handling child witness testimony based on the unique facts of each case. Any semblance of predictability has been destroyed.

3. Uniform procedural standards have not been provided by any other source of law, to include the Supreme Court, the military appellate courts, and the existing evidentiary and procedural rules.

4. Due to the case specific nature of appellate review and the proscription against issuing advisory opinions,[13] appellate courts base their decisions on the narrowest grounds possible. Appellate courts are ill suited to create comprehensive guidelines, particularly those involving broad policy

implications.

5. The Supreme Court, in Maryland v. Craig,[14] refused to establish a minimum level of trauma or to list the evidentiary requirements that would justify the use of alternative procedures. The Court found that such issues were better determined by the states as a matter of public policy.

6. The rules of evidence fail to provide adequate guidelines because they do not address the confrontation and due process issues that are raised by alternative forms of testimony.[15]

7. The interest of justice is best served by a rule that sets minimum thresholds for the use of alternative forms of testimony and that specifically authorizes certain procedures. A uniform rule would protect abused children from being further traumatized by the judicial system and would protect the rights of defendants by requiring courts to use the least restrictive alternative.[16]$

B. THE GAPS IN CASE LAW

In Maryland v. Craig, the Supreme Court stated that a societal interest in protecting abused children might outweigh a defendant's right to face-to-face confrontation in some limited instances.[17] The Craig decision merely required a finding that the child would be traumatized, not by the courtroom in general, but by the defendant's presence, and that the trauma be more than de minimus. Since the Maryland statute in issue required a more stringent showing --- that, if forced to testify in the presence of the accused, the child would be so traumatized that he could not reasonably communicate --- there was no need to determine the minimum level of trauma that would justify restricting confrontation.[18] The Court left the minimum standard and the evidentiary bases for a finding of trauma to be defined by state statute.

The standard and bases for a finding of trauma are still open questions in military courts. In four separate cases, military judges have authorized some infringement of the right to face-to-face confrontation

to allow a child witness to testify.[19] In all the cases, the children were traumatized and would have had difficulty testifying under normal conditions; however, there was wide variation in the degree of impairment, the factors that were considered by the military judge, and the alternative procedure that was authorized. The military appellate courts found no constitutional violations, based upon the specific facts of each case, but provided no clear guidelines for the future.[20] A review of these cases illustrates the inherent limitations of setting standards on a piecemeal basis.

In United States v. Thompson and United States v. Williams,[21],[22] the trial courts allowed children to testify with their backs towards the accused. This procedure negates the presumption of evidence by making it clear that the child is afraid of the accused, rather than of the courtroom in general. The appellate courts found this procedure to be acceptable in the context of a trial by judge alone; however, Judge Cox, writing for the Court in Thompson,

warned that the result might be different if the accused were tried before a panel.[23]

In United States v. Romey,[24] an eight year old girl testified from her mother's lap by whispering the response to her mother. Although Private Romey was tried before a panel, the procedure was not held to be unduly prejudicial because the accused was not singled out as the cause of the child's fear.[25] The Court of Military Appeals added that reliability was not a problem under the particular facts of this case; therefore, the Romey procedure has limited applicability.

The trial court in United States v. Batten took a third approach that required a child's image to be

broadcast from behind a protective screen.[26] The result proved so unsatisfactory that the military judge ultimately rejected any reliance on the child's testimony, thereby foreclosing any possibility of error.

The practices of individual courts-martial are equally diverse with respect to determining a standard for trauma. In Thompson,[27] the military judge specifically found that the children's ability to think and speak would be impaired if they were forced to face the accused. The findings were based on the following factors:

1) The expert witness was a psychologist who had counselled the boys twice a month for eight months;[28] therefore, she had intimate knowledge of their

particular fears and abilities.

2) One of the boys had a severe stuttering problem that was likely to increase if he were anxious or frightened.[29]

3) Both boys had been physically beaten during the sexual acts and expressed fear that they might be attacked by their stepfather in the courtroom.[30]

4) The accused was in a position to exercise power and control over the boys because of his parental relationship.[31]

5) In response to a specific question, the expert stated that she would prefer to shield all child victims from confrontation, but that her testimony in this case was based on specific facts.[32]

The Thompson case is exceptional, first, because the government presented extensive evidence of trauma, and second, because the trial judge issued specific findings and stated a clear standard for trauma. In contrast, the judge in Romey made "an implied finding of necessity" based, in part, on his personal observation that the child refused to speak in the defendant's presence.[33] Either expert testimony or personal observation is an acceptable basis under Craig;[34] however, a consistent format is generally provided by state statute.[35] Moreover, the child in Romey made some independent responses during the course of the trial.[36] This does not negate a finding of necessity based on an impaired ability to communicate; however, it would not satisfy a total inability standard.

The various standards and procedures fall within the broad constitutional parameters announced in the Craig opinion, which acknowledged that numerous states had enacted plans to protect child witnesses.[37] State legislation lends consistency and predictability to the judicial process in state proceedings. A rule for courts-martial governing child testimony would lend consistency to military justice.

III. SOCIETAL CONSIDERATIONS

An inherent tension exists between the constitutional right of an accused to "test the recollection and sift the conscience" of his accuser by adversarial confrontation,[38] and the concern that our confrontation procedures unnecessarily traumatize children and discourage victims from testifying against their assailants.[39]

The importance of face-to-face confrontation in probing the truthfulness of a witness is not in dispute. The Supreme Court has held that the right of confrontation is not absolute; however, it is so essential to our system of justice that it may be abrogated "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[40] The issue is whether society's interest in protecting abused children from the additional trauma of facing their assailants in court is so compelling that it outweighs a defendant's right to prove his innocence.

The societal concern is well founded, as reflected by the few reported cases of child abuse that culminate in a criminal trial.[41] In State v. Sheppard,[42] a New Jersey court expressed its frustration that "[k]nown abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more traumatized by their role in the court proceedings than they were by their abuse."[43]

The desire to protect child witnesses from emotional trauma is not the only rationale for the use of alternative procedures. Some studies suggest that the formality of a courtroom setting, the presence of a jury, and cross-examination techniques designed to "shake" a witness's story --- all of which serve to impress upon an adult the need to tell the truth --- merely tend to confuse and distress a child, thereby detracting from the accuracy of his testimony.[44] When the psychological injury to a child witness, if forced to confront the accused in person, is overwhelming enough to prevent effective communication, the truth-finding function of the trial is undermined.[45]

The Sheppard opinion reflects the view that the need to protect the truth-finding function outweighs a defendant's right of confrontation.[46] In Sheppard, the court authorized special arrangements allowing a ten year old girl to testify via closed circuit television based, in part, on evidence that the arrangements would enhance the accuracy of her testimony. Specifically, the girl stated in a psychiatric interview that she would be able to testify in open court, but was afraid of the defendant (her step-father) because he had threatened to kill her on several occasions. Because of her feelings of fear, guilt, and anxiety, the psychiatrist's opinion was that in-court testimony would tend to diminish the probability that the girl could testify truthfully.[47]

Critics respond that modification of courtroom procedures to accomodate a child witness ignores the plain meaning of the words "face to face" and subverts a defendant's constitutional right to personally confront and question his accusers.[48] Face-to-face confrontation has long been considered the best means of discovering the truth. As expressed by Supreme Court Justice Scalia, the state cannot deny "the profound emotional impact upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential 'trauma' that allegedly justified the extraordinary procedure."[49]

In addition, some experts question the reliability of children's out-of-court statements for two reasons. First, their desire to please adults makes them vulnerable to suggestions --- whether real or perceived --- by investigators, social workers, or parents.[50] Second, much of a child's time is spent playing games of "make believe" which, to children, may seem more real than actual events.[51] Justice Scalia expressed this fear in the Craig dissent, stating that:

The "special" reasons that exist for

> suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.[52]

The state's interest in protecting minor victims of sex crimes was found to be less than compelling in the First Amendment freedom of information context.[53] In Globe Newspaper Co. v. Superior Court,[54] the Supreme Court reviewed the constitutionality of a Massachusetts law that required judges to close the courtroom during testimony by a child victim. The Court asserted that, while the public's "right of access to criminal trials was not absolute," any infringement upon that right must be "necessitated by a compelling government interest, and [be] narrowly tailored to serve that interest."[55] Far from condemning all efforts to protect a child victim, the Court suggested that the issue be determined on a case-by-case basis and that the trial judge state the

relevant factors in the record as particularized findings of fact.[56]

When the trial court has engaged in a case-by-case analysis and when the state has made a proper showing of a compelling interest, the Supreme Court has permitted restrictions on constitutional rights. In the due process area, for example, the Court has permitted a defendant to be shackled and gagged when it was shown to be a last resort.[57] In a less dramatic example, when the state was able to show a compelling interest in maintaining safety and order, the Court has permitted the use of armed guards in a courtroom.[58]

In balancing the interest of the State against the individual rights of a defendant, the underlying question always has been which of the two competing interests is more essential to a fair trial.[59] This is consistent with the underlying rationale of the confrontation clause --- to "ensure the integrity of the fact-finding process" --- and with the purpose of a criminal trial. Under this standard, the denial of face-to-face confrontation is justified only if a child is so traumatized that he cannot reasonably communicate

in the presence of the accused;[60] that is, if the truth-seeking function of a trial is impaired. The Maryland statute that was upheld in Craig adhered to this precise standard.[61] The focus of inquiry by courts-martial under the proposed rule complies with this standard.

IV. THE SIXTH AMENDMENT RIGHT OF CONFRONTATION

> *In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.* [62]

The confrontation clause has spawned three separate lines of cases: (1) those dealing with out-of-court statements, reflecting the drafters' original concern with trial by affidavit;[63] (2) those dealing with the scope of cross-examination when the witness is present;[64] and (3) those concerning the face-to-face aspect of confrontation, made pressing by the recent trend towards child witness protection statutes.[65]

A. RESTRICTIONS ON OUT-OF-COURT STATEMENTS

The line of cases beginning with Mattox v. United States[66] and culminating with Idaho v. Wright[67] and White v. Illinois,[68] concerns the limited issue of constitutional requirements imposed by the Confrontation Clause for the admissibility of hearsay statements. Although this is separate from the issue of constitutional alternatives to in-court testimony, a clear understanding of all three aspects of confrontation is a prerequisite to drafting a uniform procedural rule.

In the landmark case of Mattox v. United States,[69] the Supreme Court established the parameters of the confrontation clause and set the standard for all future analysis. The Court stated that the overriding purpose of confrontation is to ensure the trustworthiness of a witness's testimony. In furtherance of this goal, an accused has the right, not only to "test the recollection and sift the conscience of the witness," but also to compel the witness to "stand face to face with the jury in order that they may look at him and judge by his demeanor on

the stand and the manner in which he gives his testimony whether he is worthy of belief."[70]

These safeguards of confrontation and cross-examination were fully complied with in Mattox, in which the defendant was re-tried for murder. The "necessities of the case" justified admitting into evidence the former testimony of two government witnesses who had died prior to trial, when they had been fully cross-examined by the accused during the first trial.[71] As stated by the Court, "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."[72]

The case of California v. Green,[73] which was decided eighty-five years after Mattox, stands for the proposition that the Confrontation Clause is not a mere codification of the rule against hearsay. The Court noted that, while the Confrontation Clause and the hearsay rules are designed to protect similar values, they are not co-extensive. "We have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably

recognized hearsay exception."[74] Under the facts in Green, the rules and the confrontation right did overlap. The admission of a witness's prior inconsistent statement did not violate the Confrontation Clause, provided the declarant was available at trial and could be cross-examined about his prior statement.[75] In dicta, the Court opined that the statements, which were made during a preliminary hearing, would be admissible at trial regardless of the declarant's availability, because they were made under circumstances approximating the trial and were subject to similar safeguards; that is, the declarant was under oath, the accused was represented by counsel, opportunity for cross-examination existed, and the statements were made in the context of a judicial proceeding.[76]

That dicta was affirmed, in part, in Ohio v. Roberts,[77] in which a witness testified at the accused's preliminary hearing but could not be located for trial. Roberts established a two-pronged test to determine whether these statements are constitutionally admissible. First, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the

defendant."[78] Second, the prosecution must show that the out-of-court statement has adequate indicia of reliability.[79] Reliability may be inferred when the evidence falls within a firmly rooted hearsay exception, on the ground that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional procedure.'"[80]

The Roberts test appeared to sharply restrict the range of hearsay evidence that was permissible under the Confrontation Clause to those instances where it was necessary to prove the case and its reliability could be established. The Supreme Court subsequently clarified the Roberts interpretation of the confrontation clause and limited the Roberts two-pronged test to the facts presented.[81]

The retreat was completed in three stages. First, in United States v. Inadi, [82] the Court eliminated the unavailability prong when the reliability of the

statement was demonstrated by its context. The evidence in Inadi consisted of federally authorized tape recordings of telephone conversations between the defendant and his co-conspirators. The Court agreed that, as a general rule, out-of-court statements are weak substitutes for live testimony; however, the out-of-court statements of a co-conspirator are actually more reliable than the declarant's in-court testimony.[83] "Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court."[84]

In the second stage, the Court in Bourjaily v. United States[85] emphasized that the second prong of Roberts ---- the requirement to show independent indicia of reliability --- did not apply to certain firmly rooted hearsay exceptions.[86] In the context of a conspiracy, the Court held that the same statement could be used to prove both that the conspiracy existed and that it was on-going at the time the statement was made.[87] These statements were recognized as exceptions under common law because they were made under circumstances that provided substantial

guarantees of trustworthiness; therefore, an independent inquiry on the statement's reliability was superfluous.[88]

The final blow was struck in White v. Illinois,[89] when the Supreme Court, in dicta, limited the Roberts analysis to "challenged out-of-court statements . . . made in the course of a prior judicial proceeding."[90] The Court conceded using "language [in Roberts] that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence,"[91] but noted that this interpretation had been negated in Inadi.

Notwithstanding the language of the Court in White, the Roberts test still may be applicable to hearsay exceptions that are not firmly rooted in the common law, to include residual hearsay. In Idaho v. Wright,[92] which preceded White by less than two years, the Court cited the Roberts test verbatim and applied it to facts involving residual hearsay.[93] The issue presented in Wright was whether statements made by a child to an examining physician, which were

admissible under the state's residual hearsay exception,[94] met the requirements of the Confrontation Clause. Justice O'Connor, writing for the Court, found that the statements did not fit within a "firmly rooted hearsay exception," consisting of statements "so inherently trustworthy that adversarial testing can be expected to add little to their reliability."[95] The Court then analyzed the hearsay statement in accordance with the necessary and reliable test of Roberts: was the declarant available to testify and, if not, did the out-of-court statement bear adequate indicia of reliability? In Wright, reliability was not supported by "particularized guarantees of trustworthiness drawn from the totality of circumstances surrounding [the making of the statement]."[96] Absent these guarantees of reliability, and absent any opportunity to test reliability via cross-examination, admission of the statement would violate the defendant's right of confrontation.

In comparison, the proffered evidence in White fell within two firmly rooted exceptions to the hearsay rule --- statements made for purposes of medical treatment and excited utterances --- which are

inherently trustworthy and for which in-court testimony is a poor substitute.[97] The out-of-court statements are more probative, using the Inadi rationale, because the spontaneity of an excited utterance precludes any opportunity to fabricate and because there is every incentive to be truthful and accurate when seeking medical treatment. Under these circumstances, there is no need to either produce or show the unavailability of the declarant,[98] consistent with the reasoning in Roberts that certain hearsay evidence "rests upon such solid foundations that virtually any evidence within them comports with the substance of [the Confrontation Clause]."[99]

White v. Illinois can be reconciled with Wright on the theory that the Roberts analysis still applies when the hearsay statement does not fall within a firmly rooted exception. When reliability is not clearly established by the statement's context, it must be proven by other means. The best and preferred means is to test the declarant's truthfulness and accuracy by cross-examination. Therefore, the proponent either must produce the declarant or must show that he is unavailable and, in the latter case, must show that the statement bears specific indicia of reliability

equivalent to that possessed by well established hearsay exceptions.

Reliability is not well established when, for example, the statement is ambiguous or subject to two interpretations; when the declarant was biased or had a motive to lie; or when the statement was made under suspect circumstances. Statements made by a child in response to questioning by police or by investigative social workers would certainly fall within the latter category. This type of interrogation, however well intentioned, may inadvertently suggest a desired response. Under these circumstances, the child would still have to be produced for questioning.[100] If the child, for any reason, is unavailable to explain the statements, the unreliable, untested statements are not admissible. On the other hand, if the child is physically present but is unavailable based on his inability to communicate in the presence of the accused, he could testify, by an alternative procedure, about the same events that were the subject of his out-of-court statement. His prior statement would only be admissible for the purpose of bolstering or impeaching his trial testimony, in accordance with Military Rule of Evidence 806.[101]

B. RESTRICTIONS ON THE SCOPE OF CROSS-EXAMINATION

> *The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness or of being gazed upon by him, but for the purpose of cross-examination, examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.*[102]
>
> ___ *J. Wigmore*

The statement by Dean Wigmore, which was quoted with approval in Davis v. Alaska, conveys in unmistakeable terms that the right of confrontation means more than the right of an accused to physically

confront his accusers. The case law has construed the right of cross-examination to be the paramount element of the Confrontation Clause.[103]

The leading cases in this area are Chambers v. Mississippi[104] and Davis v. Alaska.[105] In both cases, witnesses were present at trial; however, for reasons of state procedural rules[106] or public policy,[107] the defendants were prevented from questioning the witnesses about certain issues.

In Chambers, the defendant was convicted of murder, even though another man had confessed, on three separate occasions, to the same murder. Chambers called the individual to the stand as a defense witness, but was not allowed to question him about the prior confessions because of a state rule preventing a party from impeaching his own witness.[108] The Supreme Court held that Chambers was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.[109] The right of cross-examination is so essential to the discovery of the truth that any diminution or denial of that right calls into question "the integrity of the fact-finding process."[110] Although the right is not absolute, any competing state interest or policy is subject to strict scrutiny.[111]

Similarly, in Davis v. Alaska, the defendant was prevented from questioning a juvenile witness, who was present at trial, about his criminal record.[112] In balancing the competing interests, the Supreme Court held that the defendant's right to probe the witness's

testimony for prejudice or bias outweighed the state's interest in maintaining the confidentiality of juvenile records.[113]

Chambers and Davis stand for the proposition that the witness's mere presence does not automatically rebut a possible Sixth Amendment violation. The Sixth Amendment also guarantees to the accused the opportunity to cross-examine a witness about any matter --- to establish bias or motive to lie or to ask the witness to explain his out-of-court statements. Nothing guarantees that cross-examination will be effective. In Delaware v. Fensterer,[114] for example, an expert witness could not recall which of three methods was used to extract a human hair that the expert had analyzed; however, the expert was capable of testifying about the general basis for his opinion. No sixth amendment violation occurred because the defense had an opportunity to probe the witness's testimony on the stand, exposing its defects and weaknesses.

Compare Fensterer, in which a cogent witness is unable to recall certain facts, with the situation in which a witness, while physically present and

competent to testify, is mentally or psychologically unable to testify in a courtroom setting. This is the situation presented in United States v. Lyons,[115] where the teenaged victim was both deaf and severely retarded. The victim was unable to coherently respond to either direct or cross-examination; therefore, the trial court allowed the introduction of a videotaped, out-of-court statement in which the victim re-enacted the offense.[116] The videotape was certainly probative, but, by admitting it into evidence, the trial court tacitly acknowledged that the victim's in-court testimony was worthless. Under these circumstances, the videotaped statement actually was a substitute for in-court testimony.[117] It cannot fairly be said that the accused had a fair opportunity to cross-examine the victim about her videotaped statement when the basis for its introduction was the victim's inability to testify verbally.

C. RESTRICTIONS ON FACE-TO-FACE CONFRONTATION

The "face-to-face" aspect of the Confrontation Clause is at the heart of the controversy surrounding child witness protection statutes. The right to

physically confront one's accuser in court is both a separate component of the clause and a means of ensuring the efficacy of cross-examination.[118] The issue is whether face-to-face, eyeball-to-eyeball confrontation can be removed from the other elements in a way that essentially preserves the defendant's Sixth Amendment confrontation rights.

Prior to Coy v. Iowa, most Supreme Court decisions discussed the Confrontation Clause with respect to the constitutionality of out-of-court statements or restrictions on cross-examination.[119] In Coy, for the first time, the Court specifically recognized that the literal right to face-to-face confrontation was guaranteed by the Sixth Amendment.[120] The right was deemed "essential to a fair trial in a criminal prosecution." The Court refused to speculate about the existence of any exceptions to face-to-face confrontation, except to note that, if there were an exception, it would have to be "firmly . . . rooted in our jurisprudence."[121] An exception created in 1985 by the Iowa legislature was not viewed as firmly rooted.

In Coy, the courtroom was darkened and the defendant was hidden behind a screen during the testimony by two young girls. The girls testified that they had been sexually assaulted; however, they were unable to identify their attacker because he had worn a mask.[122] Nonetheless, the trial court authorized the extraordinary procedure pursuant to an Iowa statute that imposed a presumption of trauma in all child abuse cases when the victim was under fourteen years of age.[123]

The need to protect child victims, as a class, was held insufficient to outweigh a defendant's rights of confrontation when the court makes no specific finding of trauma to a particular victim. In a concurring opinion, Justice O'Connor agreed that the Sixth Amendment guaranteed face-to-face confrontation. However, she indicated that the right was not absolute and might "give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."[124]

Two years later, the Court decided Maryland v. Craig,[125] in which it recognized an exception based

upon a "State's interest in the physical and psychological well-being of child abuse victims . . ." under certain circumstances, provided "the reliability of the testimony is otherwise assured."[126]

The Maryland statute at issue in Craig required a finding by the trial court that the child would be so traumatized if forced to testify in the presence of the accused as to be unable to reasonably communicate.[127] This was satisfied by expert testimony at trial that particular children, if forced to testify in the presence of the accused, "would probably stop talking and . . . withdraw and curl up," or "become highly agitated . . . [and] refuse to talk or if he did talk, that he would choose his subject regardless of the questions . . . ."[128] Reliability of the out-of-court testimon was assured by the fact that every element of confrontation, other than the physical presence of the accused, had to be satisfied. The child was required to testify under oath; subject to full cross-examination; and in a manner that allowed the judge, jury, and accused to observe the child's demeanor.[129]

The Coy and Craig decisions established the right of face-to-face confrontation as an essential element that can be outweighed only by a compelling state interest. The protection of child victims from the further trauma of physically confronting their assailants in court is such an interest, but only when the trauma is so serious that it severely impairs the child's ability to communicate. The extent of psychological damage that is necessary to support the use of televised or videotaped testimony was explicitly stated by Justice Scalia: "I presume that when the Court says 'trauma would impair the child's ability to communicate,'. . . it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here . . . . Any implication beyond that would in any event be dictum."[130] By failing to clearly distinguish between two separate interests --- psychological injury to the child and the truth-finding function of a trial --- the Craig opinion created a far larger exception.

V. THE RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

> *No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .*[131]

The focus of Supreme Court decisions under the Confrontation Clause is the fairness and reliability of a criminal trial.[132] Fairness and reliability are also at the heart of Fifth Amendment due process, which is applied to the states under the Fourteenth Amendment of the United States Constitution.

The theory of due process includes procedural and substantive aspects. Procedural due process protects the fairness of a criminal trial by incorporating the specific guarantees of the Bill of Rights.[133] The concern is not with the underlying law but with the process by which the law is enforced.[134] In comparison, substantive due process looks to the fairness of the underlying law.[135] If the law restricts a fundamental right, the restriction must be necessary to promote a compelling state interest.[136] Fundamental rights are those rights that are inherent to our system of justice.[137] The right to a fair

trial has long been considered a fundamental right.[138]

Although procedural and substantive due process are separate concepts, there is a great deal of overlap.[139] Essentially, procedural due process is the means used to ensure substantive due process. In addition to specific procedural safeguards, substantive due process encompasses a broader degree of fundamental fairness.[140]

In Coy, an issue involving substantive due process was raised by the manner in which the defendant was hidden during the girls' testimony. The courtroom was darkened and the defendant was hidden behind a screen. Only the defendant's silhouette, which was emphasized by spotlights, was visible. These arrangements created an "eerie atmosphere" and gave a definite impression of guilt.[141]

Because Coy was decided on sixth amendment grounds, the Court specifically declined to discuss the due process issue,[142] reserving it for a more appropriate case. The issue of whether a specific

measure, designed for witness protection, might deprive an accused of his right to a fair trial, remains viable.[143]

The presumption of innocence, while not expressly articulated in the Constitution, has long been recognized as a basic component of a fair trial.[144] When a courtroom practice or procedure erodes the presumption of innocence, it must be subjected to strict scrutiny.[145] The test is whether a reasonable possibility exists that a juror might base his decision as to guilt or innocence on matters other than the evidence introduced at trial.[146] Accordingly, the Court has held that standing trial in prison clothes is inherently prejudicial because it serves as a constant reminder of the defendant's status.[147] Appearing before the jury in shackles also erodes the presumption of innocence by marking the defendant as dangerous.[148]

Some amount of prejudice is unavoidable. For example, the mere fact that an individual is seated next to counsel at the defense table indicates that he is accused of committing a crime. Therefore, not every practice that tends to single out the accused is "inherently prejudicial,"[149] but only those practices and procedures that, in the mind of a juror, brand the accused with "an unmistakeable mark of guilt."[150] "Reason, principle and common human experience" dictate whether an accused is "branded" by a specific procedure.[151] In Holbrook v. Flynn, the Court held that the use of armed troopers in the courtroom was not inherently prejudicial since there was a "wide range of inferences that a juror might reasonably draw from the officers' presence."[152]

Even if a practice is inherently prejudicial, due process is not violated when the practice serves an essential state interest that is, on balance, more compelling than the rights asserted by the defendant.[153]

Due process concerns are raised by several aspects of child witness protection laws. First, if the state presents an expert witness to establish

evidence of trauma, can the accused insist that the child be examined by a defense expert? Second, what is the proper evidentiary standard to support a finding of trauma? Third, do certain procedures erode the presumption of innocence by singling out the accused in the courtroom? Fourth, can the state use a victim's videotaped statement in addition to in-court testimony?

The right of an accused to a defense expert in the context of witness protection statutes is a matter of first impression. The probable result is that an accused would be entitled to expert assistance only if it were essential to the presentation of a defense.[154] This view comports with Ake v. Oklahoma,[155] in which the Supreme Court held that the state must provide a defense expert upon a preliminary showing by the accused that his sanity at the time of the offense will be a significant issue. The emotional vulnerability of a child witness merely affects the method of testimony, rather than an issue in chief; therefore, it is unlikely that an accused could make the necessary showing.

As to the second issue, the standard of proof for a preliminary showing of trauma should be based

upon the presentation of clear and convincing evidence by the proponent.[156] The accused would have an opportunity to present rebuttal evidence, short of personally confronting the child, thereby defeating the purpose of a child protection statute. Expert assistance would not be necessary to rebut a presumption of trauma if the expert's sole function would be to engage in a "fishing expedition."

The third question raises issues about the fundamental fairness of the alternative procedure. Any procedure that tends to single out the accused with an "unmistakable mark of guilt" is impermissible.[157] A partition or screen that shields the accused from view during the child's testimony creates a clear presumption of guilt. If a child is able to testify before judge, jury, and counsel but not before the accused, the only possible conclusion is that the child fears the accused. Methods such as closed-circuit television are preferable to screens or protective barriers because they focus attention on the child and allow a juror reasonably to conclude that the alternative arrangement was necessary because of the child's sensitivity or tender years.

The fourth question, concerning the admissibility of videotaped hearsay when the child is in court or is subject to compulsory process by the accused, raises both substantive and procedural due process problems. Resolution of the issue depends on the nature of the videotaped statement and the purpose for which it is introduced. If the declarant's testimony has been attacked on the stand --- as a recent fabrication, for example --- the proponent may always rehabilitate the witness with a prior consistent statement.[158] If the hearsay is an adversarial videotaped deposition, it may be admitted in lieu of live testimony by agreement of the parties even if the child is available.[159] If, however, the hearsay is a nonadversarial videotaped statement made to a social worker or government investigator for a prosecutorial purpose, admission is barred by procedural due process incorporating the Sixth Amendment right to confrontation.[160]

Confrontation is essential to the adversarial system because it provides the best means of discovering truth and accuracy. The truthfulness of a viedeotaped hearsay statement to a social worker or investigator is suspect for two reasons. First, delayed cross-examination on the prior ex parte

statement is not an adequate substitute for contemporaneous cross-examination because, with time, "false testimony is apt to harden and become unyielding to the blows of truth."[161] The taping and the trial may take place months apart. During that time, the child will quite likely have contact with prosecutors, social workers, and relatives who, "consciously or unconsciously, may influence the child."[162] This must be distinguished from the situation in Green, where the hearsay in question was a prior inconsistent statement and was subject to cross-examination at the time it was made.[163] Second, such statements are generally taken during the child's conversation with a therapist or other individual who is predisposed to believe the child, and occurs in a protected non-adversarial setting; therefore, it lacks the necessary indicia of reliability. The mere fact that a jury can evaluate the child's demeanor and the child states, on videotape, that he is telling the truth, is not an adequate substitute for meaningful cross-examination.[164]

The admission of an investigative statement is also barred by the substantive due process right to fundamental fairness. First, the defendant may be

forced to call the child as his witness, "thereby running the very real risk of incurring the wrath of the jury and inflaming the jury to the point of making the trial fundamentally unfair."[165] Second, the improper admission of videotaped hearsay is worse than the improper admission of written or spoken hearsay because videotape "makes a more lasting and intense impression on jurors than other forms of proof."[166] Finally, videotapes are prone to misuse. At least one trial court improperly allowed a videotape to be re-played by the jury during deliberations, thereby placing undue emphasis on the child's testimony.[167] This practice, in the opinion of one appellate court, "was equivalent to allowing a live witness to testify a second time in the jury room."[168]

VI. DISCUSSION OF THE PROPOSED RULE

The proposed rule is based on an amalgam of child witness protection statutes enacted by other states and by the federal government.[169] The state laws contain wide variations concerning authorized alternatives, requisite findings of fact, and protection of the

rights of the accused. The proposal attempts to draw the best possible balance between protecting the constitutional rights to due process and confrontation and enhancing the truth-finding function of a trial.

A. ALTERNATIVE MEANS OF TESTIMONY: CLOSED CIRCUIT TELEVISION

Two-way closed circuit television is the procedure that least infringes upon the defendant's right to face-to-face confrontation. One-way closed circuit television allows the defendant and jury to observe the child's demeanor while he is testifying. The two-way procedure has the additional advantage of projecting the defendant's image into the room where the child is testifying. In Craig, the Court specifically rejected any requirement that the child attempt to testify by a two-way procedure before resorting to one-way closed circuit;[170] however, the better practice is to adopt the stricter standard where a fundamental liberty interest is involved.[171]

The New York legislature was more stringent than the Supreme Court. The New York statute authorizes only the two-way procedure as an alternative to

traditional in-court testimony,[172] in order "to preserve (to the greatest extent consistent with the objective of insulating the child) protection against dilution of the defendant's right [to confrontation]."[173]

The proposed rule expresses a preference for testimony by two-way closed circuit television for the reasons expressed by the New York legislature. Ultimate discretion concerning the best means of testimony in a particular case rests in the military judge. If a procedure other than two-way closed circuit television is used, the military judge should state the reasons in the findings of fact.

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B. VIDEOTAPED TESTIMONY

Televised testimony is similar to traditional in-court testimony, in that the witness's statements are spontaneous and occur contemporaneously with the trial. Videotaped statements are subject to greater abuse because they can be taken by anyone, at any time, under conditions which may or may not comply with testimonial safeguards.

Several courts have held that their state's particular statutory scheme violates the sixth amendment with respect to the admissibility of videotaped statements.[174] The suspect legislation typically permits a child's ex parte videotaped statement to be admitted into evidence provided the child is available at trial for cross-examination. Such legislation has been criticized on both practical and constitutional grounds.

These problems are not insurmountable, provided it is recognized that a videotaped, out-of-court statement is hearsay which, because of its special nature, has a greater impact upon a jury than the equivalent written statement. In order to be admissible, a videotaped statement must possess the same indicia of reliability

as any evidentiary exception to the hearsay rules and must, in addition, afford the defendant an opportunity for meaningful confrontation. The Colorado Criminal Code[175] and the Federal Code of Criminal Procedure[176] provide two examples of well written statutes that allow videotaped depositions of child victims. Both statutes require a particularized showing of unavailability, which is defined in terms of a child's inability to testify under normal courtroom procedures. Most importantly, both statutes protect the right of confrontation by requiring contemporaneous cross-examination, under oath, while the child can be observed and heard by the defendant.

The proposed military rule specifically allows a military judge to authorize a pretrial videotaped deposition as an alternative of last resort. A pretrial videotape should be authorized only if there is a likelihood of child snatching or retraction due to threats by the accused.[177] A videotaped deposition is not equivalent to in-court testimony and the child should be called to testify by means of closed circuit television unless the child is unavailable.[178] Under those circumstances, a pretrial deposition would

protect the right of an accused to adversarial cross-examination and would ensure compliance with the basic requirements set forth in subparagraph E of the proposed rule. The rationale for allowing use of videotaped depositions is to minimize the present use of less reliable *ex parte* hearsay statements.[179]

C. FINDINGS

The proposed rule adopts the "substantial impairment" standard; that is, authorization of an alternative means of testimony must be based on a finding that the child's ability to testify is substantially impaired because of fear, trauma, or mental and psychological infirmity. The rule does not require a finding that the child is completely unable to testify. States have not adopted the strict unavailability standard espoused by Justice Scalia in the Craig dissent.[180] The more liberal "substantial impairment" standard is more consistent with the tenor of the majority opinion in Craig and with the dual rationale of protecting abused children from further trauma and enhancing the

truth-finding function of a criminal trial.

The rule requires the military judge to issue particularized findings that state the factual basis for his determination that the child's testimony would be impaired by face-to-face contact with the accused. The findings may be substantiated by either personal observation or expert testimony, provided the evidence is adequate to support a determination of substantial impairment. The rule deliberately provides for broad discretion in this area to discourage a "battle of the experts." Certain facts are readily observable and understandable by the average layman --- for example, facial expressions and physical reactions --- and if this evidence is sufficiently detailed on the record, expert testimony would be cumulative. The Craig opinion refused to require a specific form of supporting evidence,[181] and states have taken opposing views concerning the need for expert testimony of trauma.[182]

The New Jersey statute allows a trial court to authorize televised testimony provided the witness is sixteen years of age or younger and the court finds, after an in camera hearing, that "the witness would

suffer severe emotional or mental distress if required to testify in open court."[183] The court must also enter separate, narrowly tailored findings based on the impact upon the child if forced to testify in the presence of the defendant, the jury, and spectators.[184] The level of trauma must be "severe," but is not further defined. In light of the degree of specificity required in the findings, it is safe to assume that the injury to the child must be more than de minimus.[185] While trauma is normally established by expert testimony based upon a psychiatric examination, expert evidence is not required in all cases. In State v. Crandall,[186] the trial court was held competent to determine whether in-court testimony would cause excessive stress, based upon the judge's personal observation of the child. Regardless of the means used, the trauma must be established by a preponderance of the evidence or, if the defendant objects to the televised procedure, by the clear and convincing standard of evidence.[187]

The New Jersey statute generally comports with the Craig criteria for an adequate showing of necessity.[188] First, the statute requires the trial court to hear evidence and determine whether use of the

procedure is necessary to protect a particular child.[189] Second, the statute requires the court to enter findings of fact that specifically address the impact of the defendant's presence upon the child.[190] Third, the statute requires that, during the child's testimony, the defendant and his attorney are able to confer privately by means of a separate audio system.[191] Finally, the statute requires that the mental distress the child would suffer as a result of face-to-face confrontation be more than de minimus.[192] These requirements have been incorporated into the proposed courts-martial rule.

In contrast, the New York statute is far more specific. Authorization under New York law is predicated upon a finding, established by clear and convincing evidence, that there exist "such extraordinary circumstances as would cause the child witness to suffer severe mental and emotional harm."[193] Any one or more of the following factors may be considered by the trial court:

1) whether the circumstances were particularly heinous;

2) whether the child was particularly vulnerable due to a pre-existing mental or physical condition;

3) whether the defendant was in a position of authority with respect to the child;

4) whether the offense was part of an on-going course of conduct committed over an extended period of time;

5) whether a deadly weapon or dangerous instrument was used;

6) whether the defendant inflicted serious physical injury;

7) whether the defendant threatened physical violence or the dissolution of the family if the child reported the incident;

8) whether the defendant is living in the same household with the child, has ready access to the

child, or is providing financial support to the child; and

9) whether, according to an expert witness, the child is particularly susceptible to psychological harm.[194]

In addition, the trial judge may make his own observations concerning the ability of the child to testify in the defendant's presence,[195] provided he does not rely solely upon those observations.[196] Although the statutory factors appear all-inclusive, they have been narrowly interpreted by the New York courts to require more than a finding that the child will testify more easily outside the courtroom or the presence of the defendant. As stated by the New York Court of Appeals in People v. Cintron:

> The requirements . . . are not satisfied by findings which relate merely to the ease which with the child victim is able to testify or to the usefulness or effectiveness of the testimony the victim is able to give. The findings must relate to the effect that testifying in court will have on the mental

> or emotional well-being of the child. . . . Indications that the child was afraid of the defendant and could testify more readily in his absence, while consistent with the likelihood that the child will suffer 'severe mental or emotional harm,' simply do not prove it.[197]

The trial court must set forth the basis for its findings with sufficient specificity so that a reviewing court may determine whether the requisite showing was "clearly and convincingly made."[198]

The testimonial procedures of the New York law safeguard the defendant's right to contemporaneously cross-examine and observe the child while the child is testifying under oath.[199] If a court cannot obtain the necessary audio and video equipment, it is specifically enjoined from using the out-of-court procedure.[200] The statute also provides that, "[u]pon request . . . the court shall instruct the jury that they are to draw no inference from the use of live, two-way closed circuit television . . . ."[201] This provision addresses the due process concern that a special procedure may affect the presumption of

innocence. The special instruction, together with the two-way closed circuit procedure, serve to minimize the intrusion upon a defendant's sixth amendment rights. The proposed courts-martial rule includes a similar provision.

VI. CONCLUSION

As videotape and television technology becomes more accessible throughout society, its use by courts will increase. The new technology offers great advantages to defendants, as well as to prosecutors and victims. First, children are notoriously unpredictable and the use of videotaped depositions may offer greater opportunity for the defense to plan its case and avoid surprises. Second, televised testimony during which the child remains calm, may be far less prejudicial than an in-court appearance during which the child breaks down on the stand. Third, many children are unresponsive on the stand or unable to recall their prior statements, in which case the defense is left with a hearsay statement and a child who cannot be cross-examined. An alternative procedure which preserves the fundamental protections of confrontation

and which encourages children to fully explain the facts is, in many ways, preferable to the current practice of presenting an uncommunicative child and resorting entirely to hearsay. Most importantly, alternatives to in-court testimony, under limited conditions, serve the interests of justice by allowing the truth to be fully presented.

The use of televised testimony and videotaped depositions presents problems, as well as opportunities. If, for example, the alternative procedures are constitutional, can they be used for other classes of vulnerable victims, such as the elderly or handicapped? For constitutional purposes, no principled distinction can be drawn between children and any other group in need of special protection. That issue, however, is beyond the scope of this thesis. The issue herein discussed is whether the changes, particularly in military courts, should occur in response to ad hoc decisions by trial judges or as part of a reasoned and deliberate process. In support of the latter, the Appendix sets forth a proposed rule for courts-martial governing the use of alternatives to in-court testimony by child witnesses.

APPENDIX

ALTERNATIVES TO LIVE IN-COURT TESTIMONY

A) MOTION. In a proceeding involving an alleged offense against a child who is less than 16 years of age, the trial counsel, trial defense counsel, or the military judge, *sua sponte*, may move that the child's testimony be taken in one of the following ways, in descending order of preference:

i) two-way closed circuit television;

ii) one-way closed circuit television; or

iii) videotape.

B) NOTICE. The proponent of the motion shall serve opposing counsel and the military judge with a copy of the motion at least five days prior to trial. The motion shall set forth, with particularity, the factual

basis for the request. In the event that the child's inability to testify in-court, in the presence of the defendant, becomes apparent during the court-martial, or in the event of a sua sponte ruling by the military judge, the party opposing the motion or ruling shall be allowed an adequate opportunity to respond.

C) FINDINGS. Prior to the issuance of any order authorizing the child to testify via closed circuit television or videotape, the military judge must make detailed findings, on the record, that the child is unable to testify in open court, in the presence of the defendant, for any or all of the following reasons:

i) the child is so fearful that his ability to truthfully and accurately relate events in an intelligent and understandable manner is substantially impaired;

ii) there is a substantial likelihood, established by expert testimony, that the child would suffer long-term emotional or psychological trauma if forced to confront the

defendant in court;

iii) the child suffers a mental or psychological infirmity such that he is unable to communicate in court, either verbally or through American Sign Language or the equivalent; or

iv) conduct or statements by the defendant, whether performed or expressed in-court or out-of-court, causes the child to be unable to testify truthfully and accurately.

D) COMPETENCY. Nothing in this Rule shall be construed to abrogate Military Rule of Evidence 601. A child who is determined to be incompetent to testify in-court shall also be deemed incompetent to testify via videotape or closed-circuit television.

E) PROCEDURE. When an alternative to live, in-court testimony is authorized, the procedure shall

adhere, as closely as possible, to the requirements of traditional, in-court confrontation, to include the following:

i) the child's testimony must be sworn;

ii) the child's testimony must be subject to full adversarial cross-examination by trial defense counsel;

iii) the defendant must be able to see and hear the child while the child is testifying and to communicate contemporaneously with his defense counsel;

iv) the trial counsel, trial defense counsel, and military judge must be physically present during the child's testimony;

v) the child's demeanor and tone while testifying, whether via videotape or closed circuit television, must be observable by the trier of fact;

vi) two-way closed-circuit television, which

projects the image of the defendant in the room where the child is testifying, shall be used in preference to other alternatives because it most closely approximates live, in-court testimony.

F) INSTRUCTIONS. If a defendant elects to be tried by a court-martial composed of officer and/or enlisted members, the military judge, sua sponte, shall instruct the members that they are to draw no adverse inference from the special procedures.

G) AUTHENTICATION OF VIDEOTAPES. The trial counsel shall ensure that the recording equipment is capable of making an accurate recording, the operator is competent, the quality of the recording is sufficient to allow the trier of fact to assess the demeanor of the child, and the recording is accurate and is not altered. Only one continuous recording of the child's testimony shall be made. The necessity for pauses in the record or for multiple recordings shall be established at trial.

H) TRANSMITTAL OF VIDEOTAPES. The complete record of the examination of the child, including the images

and voices of all participants, shall be preserved on videotape, in addition to being stenographically recorded. The videotape shall be appended to the trial transcript and shall be forwarded to the Court of Military Review for the appropriate service.

1 Comment, Videotape Trials: Legal and Practical Implications, 9 Colum. J.L. & Soc. Prob. 363, 372 (1973).

2 Ms. Myrna Raeder, Chairperson of the ABA Criminal Procedure & Evidence Committee, stated, "If a picture is worth a thousand words, then quality video is invaluable . . . . When the jury begins deliberations, there's no doubt that video provokes their memory in a manner that live testimony or still photographs cannot." See Mark Curriden, Crime Scene Videos, ABA JOURNAL, May 1990, at 32.

3 The concern is that jurors will give more consideration to the videotape than to other evidence. Professor Ron Carlson of the University of Georgia warned that, "The high-tech industry is making criminal trials more exciting, vivid and colorful . . . . Studies show jurors weigh graphic visuals considerably more than routine evidence. The courts just have to be careful in policing the use of these videos to make sure it doesn't turn the courtroom into nothing more than theatrics." ABA JOURNAL at 32.

4 See Ala. Code s 15-25-2 (Supp. 1989); Alaska Stat. Ann. s 12.45.046 (Supp. 1989); Ariz. Rev. Stat. Ann. ss 13-4251, 4253(B), 4253(C) (1989); Ark. Code Ann. s 16-44-203 (1987); Cal. Penal Code Ann. s 1346 (West Supp. 1990); Colo. Rev.

Stat. ss 18-3-413, 18-6-401.3 (1986); Conn. Gen. Stat. s 54-86g (1989); Del. Code Ann., tit. 11, s 3511 (1987); Fla. Stat. s 92.53 (1989); Ga. Code Ann. s 17-8-55 (Supp. 1989); Haw. Rev. Stat. ch. 626, Rule Evid. 616 (1985); Idaho Code s 19-3024A (Supp. 1989); Ill. Rev. Stat., ch. 38, para. 106A-2 (1989); Ind. Code s 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code s 910A.14 (1987); Kan. Stat. Ann. s 38-1558 (1986); Ky. Rev. Stat. Ann. s 421.350(4) (Baldwin Supp. 1989); La. Rev. Stat. Ann. s 15:283 (West Supp. 1990); Md. Cts. & Jud. Proc. Ann. s 9-102 (1989); Mass. Gen. Laws Ann., ch. 278, s 16D (Supp. 1990); Mich. Comp. Laws Ann. s 600.2163a(5) (Supp. 1990); Minn. Stat. s 595.02(4) (1988); Miss. Code Ann. s 13-1-407 (Supp. 1989); Mo. Rev. Stat. ss 491.675 - 491.690 (1986); Mont. Code Ann. ss 46-15-401 to 46-15-403 (1989); Neb. Rev. Stat. s 29-1926 (1989); Nev. Rev. Stat. s 174.227 (1989); N.J. Rev. Stat. s 2A:84A-32.4 (Supp. 1898); N.H. Rev. Stat. Ann. s 517:13-a (Supp. 1989); N.M. Stat. Ann. s 30-9-17 (1984); N.Y. Crim. Proc. Law ss 65.00 - 65.30 (McKinney Supp. 1990); Ohio Rev. Code Ann. s 2907.41(A), (B), (D), (E) (Baldwin 1986); Okla. Stat. tit. 22, s 753(c) (Supp. 1988); Ore. Rev. Stat. s 40.460(24) (1989); 42 Pa. Cons. Stat. ss 5982, 5984 (1988); R.I. Gen. laws s 11-37-13.2 (Supp. 1989); S.C. Code s 16-3-1530(G) (1985); S.D. Codified Laws s 23A-12-9 (1988); Tenn. Code Ann. s 24-7-116(d), (e), (f) (Supp. 1989); Tex. Crim. Proc. Code Ann., art. 38.071, s 4 (Vernon Supp. 1990); Utah Rule

Crim. Proc. 15.5 (1990); Vt. Rule Evid. 807(d); (Supp. 1989); Va. Code s 18.2-67-9 (1988); Wis. Stat. Ann. s 967.04(7) to (10) (West Supp. 1989); Wyo. Stat. s 7-11-408 (1987).

5 Comprehensive Crime Control Act of 1990, Public Law No. 101-647, s 225, 18 U.S.C. s 3509 (1990).

6 See United States v. Batten, 31 M.J. 205 (C.M.A. 1990) (three-year-old child testified from behind a screen while viewed via one-way closed circuit television); United States v. Lyons, 33 M.J. 543 (A.C.M.R.), pet. granted, 34 M.J. ___ (C.M.A. 1991) (mentally and physically handicapped child re-enacted assault via videotape); United States v. Palacio, 32 M.J. 1047 (A.C.M.R. 1991) (videotaped interview by criminal investigator was introduced when child was unavailable).

7 Within the past four years, the Supreme Court has dramatically altered the law in this area. See White v. Illinois, 112 S. Ct. 736 (1992) (Confrontation Clause was not violated, regardless of declarant's availability, if out-of-court statement fell within firmly rooted hearsay exception); Idaho v. Wright, 110 S. Ct. 3139 (1990) (admission of out-of-court statement under residual hearsay exception violated Confrontation Clause because statements lacked sufficient indicia of reliability drawn from surrounding circumstances); Maryland v. Craig, 110 S. Ct.

3157 (1990) (protecting child witness from further trauma may outweigh right to face-to-face confrontation if child would suffer severe trauma); Coy v. Iowa, 108 S. Ct. 2798 (1988) (placing screen between child victims and accused during children's testimony violated Confrontation Clause absent individualized showing of need).

8 Craig, 110 S. Ct. at 3171.

9 United States v. Thompson, 31 M.J. 168, 173 n.3 (C.M.A. 1990).

10 See, e.g., Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (judge may preclude testimony of surprise defense witness); Illinois v. Allen, 397 U.S. 337 (1970) (judge may place disruptive client in shackles).

11 See United States v. Romey, 32 M.J. 180 (C.M.A. 1991); United States v. Batten, 31 M.J. 205 (C.M.A. 1990); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990); United States v. Williams, 33 M.J. 754 (A.C.M.R. 1991).

12 Id.

13 U.S. CONST. art. III. Courts must address issues on a fact specific basis in the context of a justiciable case or

controversy. Courts are prohibited from creating policy through "judicial legislation."

14 Craig, 110 S. Ct. at 3169, 3171.

15 See California v. Green, 399 U.S. 149, 155-56 (1970) (Confrontation Clause and hearsay rules are designed to protect similar values but are not coextensive).

16 In Craig, the Supreme Court did not require that trial courts use the least restrictive alternative to in-court testimony. See 110 S. Ct. at 3171. Nonetheless, when the procedure affects the fundamental right to confrontation, it is better to err on the side of caution.

17 110 S. Ct. 3157, 3167.

18 Id. at 3169.

19 See Romey, 32 M.J. 180; Batten, 31 M.J. 205; Thompson, 31 M.J. 168; Williams, 33 M.J. 754.

20 Id.

21 Thompson, 31 M.J. 169.

22 Williams, 33 M.J. 754.

23 31 M.J. 169, 173 n.6.

24 32 M.J. 180.

25 Id. at 184.

26 31 M.J. 205.

27 29 M.J. 541, 544 (A.F.C.M.R. 1989).

28 Id. at 544.

29 Id.

30 Id.

31 Id. at 545.

32 Id. at 544.

33 32 M.J. 180, 183.

34 110 S. Ct. at 3170-71.

35 See, e.g., N.J. Rev. Stat. s 2A:84A-32.4 (1985) (personal observation of child by trial judge sufficient to justify finding of trauma).

37 110 S. Ct. at 3167-68 n.2-n.4.

38 Mattox v. United States, 156 U.S. 237 (1895).

39 Compare Justice Scalia in Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988):

> [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by the malevolent adult. It is a truism that constitutional protections have costs.

with Justice O'Connor in Maryland v. Craig, 110 S.Ct. 3152, 3167 (1990):

> [A] State's interest in the physical and psychological will-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accuser in court.

40 110 S.Ct. at 3166.

41 G. Russell Nuce, Child Sexual Abuse: A New Decade for the Protection of Our Children? 39 Emory L.J. 581 n.4 (1990) (Of 261 child abuse cases tracked over a two year period in Washington D.C., only eight cases were brought to trial.); see also Sandra Evans & Robert O'HarrowJr., In Sex Cases, Efforts Turn to Civil Suits, WASH. POST, Mar. 15, 1992, at B1, B5.

42 197 N.J.Super 411 (1984).

43 197 N.J.Super. at 416-17.

44 See Nuce, supra n.41, at 616; Ellen Foreman, To Keep the Balance True: The Case of Coy v. Iowa, 40 Hastings L.J. 437, 453 (1989); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich. L.Rev. 809, 811-17 (1987).

45 Coy, 108 S. Ct. at 2809 (Blackmun, J., dissenting).

46 197 N.J. Super. at 411.

47 Id. at 416-17.

48 Craig, 110 S.Ct. at 3172-73 (Scalia, J., dissenting).

49 Coy, 108 S. Ct. at 2802.

50 Elizabeth Vaughn Baker, Psychological Expert Testimony in Child Sex Abuse Prosecutions, 50 La. L.Rev. 1039, 1042-45 n.30 (1990) (Results of one study showed that, of sample cases involving custody or visitation disputes, 55% of child abuse reports were unsubstantiated.). See also Liz Hunt, Psychologists Divided on Children Testifying, WASH. POST, July 26, 1991, at A3 (Professor Stephen J. Ceci, speaking before the American Psychological Association, warned that, "Some people are vigilante interviewers, looking not to disconfirm but to confirm . . . . They think 'he did it and I'm going to get whatever I can to convict him' . . . . [Interviewers] must be open to alternative hypotheses.").

51 Baker, 50 La.L.Rev. at 1043-44.

52 Craig, 110 S.Ct. at 3175.

53 See Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

54 Id.

55 Id. at 606-07.

56 Id. at 608-09.

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

58 Holbrook v. Flynn, 457 U.S. 560 (1986).

59 See Lee v. Illinois, 476 U.S. 530, 540 (1986); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

60 See Arizona v. Vincent, 44 Cr. L. 2322 (Jan. 19, 1987).

61 See Maryland Courts & Judicial Procedure Code Ann. s 9-102 (1989), which provides, in pertinent part:

> (a)(1) In a case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that the testimony

by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

62 U.S. CONST. amend VI.

63 Diane V. Vaillancourt, State v. Thomas: Face to Face with Coy and Craig --- Constitutional Invocation of Wisconsin's Child-Witness Protection Statute, 1990 Wis. L>Rev. 1613, 1616 (1990). See also United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).

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

65 Coy, 487 U.S. 1012; Craig, 110 S.Ct. 3139.

66 156 U.S. 237 (1895).

67 Craig, 110 S.Ct. 3139.

68 112 S. Ct. 736 (1992).

69 156 U.S. 237.

70 Id. In Mattox, the defendant was re-tried for murder. The Court admitted into evidence the prior in-court testimony of two witnesses who had died prior to the second trial. The confrontation clause was satisfied where both physical confrontation and cross-examination had been complied with at the first trial.

71 Id. at 242-43.

72 Id. at 244.

73 399 U.S. 149 (1970).

74 Id. at 155-56.

75 Id. at 158.

76 In Green, the Supreme Court listed three components of the confrontation clause and their purposes:

> Confrontation: (1) insures that the witness will give his statement under oath --- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;

(2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth;" (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (quoting 5 J. WIGMORE, EVIDENCE, s 1367 (1940)).

77 448 U.S. 56 (1980).

78 Id. at 65.

79 Id. at 66.

80 Id. (quoting Mattox, 156 U.S. at 244).

81 See White v. Illinois, 112 S. Ct. 736 (1992); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986).

82 475 U.S. 387.

83 Id. at 395-96.

84 Id. at 396-97.

85 483 U.S. 171. Bourjaily, like Inadi, involved co-conspirators' statements made during the course of the conspiracy.

86 Id.

87 Id. at 182-84.

88 Id.

89 112 S. Ct. 736

90 Id. at 741.

91 Id.

92 110 S. Ct. 3139 (1990).

93 The Idaho residual hearsay exception, Rule 803(24), is identical to the federal and military rule. It provides, in pertinent part:

> Rule 803. Hearsay Esceptions; availability of declarant immaterial. The following are not

excluded by the hearsay rule, even though the declarant is available as a witness.

. . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence.

94 110 S.Ct. at 3147.

95 Id. at 3149.

96 Id.

97 112 S. Ct. at 742

98 Id.

99 Roberts, 448 U.S. at 66.

100 See White, 112 S. Ct. at 739, 742 n.7. In White, the Court noted that the accused never called the child as a witness. In his concurring opinion, Justice Thomas, joined by Justice Scalia, stated that nothing in White diminishes the right to compulsory process, which exists separate and apart from confrontation clause requirements.

101 Military Rule of Evidence 806 provides:

> When a hearsay statement . . . has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay

statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

102 Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting 5 J.WIGMORE, EVIDENCE s 1395, at 123 (3d ed. 1940) (emphasis in original).

103 See generally Craig, 110 S.Ct. 3157; Kentucky v. Stincer, 107 S.Ct. 2659 (1987); Roberts, 448 U.S. 56; Chambers v. Mississippi, 410 U.S. 284 (1973); Green, 399 U.S. 149; Douglas v. Alabama, 380 U.S. 415 (1965).

104 Chambers, 410 U.S. 284 (1973).

105 Davis, 415 U.S. 308 (1974).

106 Chambers, 410 U.S. at 284.

107 Davis, 415 U.S. at 308.

108 Chambers, 410 U.S. at 284.

109 Id.

110 Id.

111 Id.

112 See 415 U.S. at 308. Alaska Statute s 47.10.080(g) prevented juvenile criminal records from being disclosed or used in any other proceeding.

113 Id. at 315.

114 474 U.S. 15 (1985).

115 33 M.J. 543 (A.C.M.R. 1991).

116 The videotape was allowed under the residual hearsay exception, Mil. R. Evid. 803(24), on the ground that it was the best available evidence and was more probative than her in-court testimony. The videotape was made at the behest of criminal investigative agents with the assistance of the victim's special education teacher and a translator for the hearing impaired.

117 This should be distinguished from United States v. Morgan, 31 M.J. 45 (C.M.A. 1991). In Morgan, a child's videotaped statement, which was made by criminal investigators, was admitted as a prior consistent statement to

rebutt the defense theory that the child's in-court testimony was a recent fabrication.

118 "[T]he right to face to face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss --- the right to cross-examine the accuser; both ensure the integrity of the fact-finding process." Coy v. Iowa, 108 S. Ct. at 2802, citing Kentucky v. Stincer, 107 S. Ct. 2658, 2662 (1987). In Stincer, the Court found no Sixth Amendment violation when an accused was excluded fron a pretrial hearing to determine the competency of a witness.

119 Coy, 108 S. Ct. at 2800-01. Prior to Coy, face-to-face confrontation was recognized as a component of the confrontation clause, but was not extensively discussed. Only recently has it become technologically possible to view the demeanor of a witness under cross-examination if that witness were not physically present.

120 Id.

121 108 S.Ct. at 2803 (quoting Bourjaily, 107 S.Ct. 2775, 2783).

122 Brief for the Appellant at 16, Coy v. Iowa, 108 S. Ct. 2798 (1988) (No. 86-6757).

123 See Iowa Code s 910A.14 (Supp. 1985), which provides, in part:

> Upon its own motion or upon motion for either party, in a proceeding when the child is under the age of 14, the court may order use of the one-way closed-circuit television, or the confinement of the witness behind a screen or mirror, at the same time ensuring that the party and counsel can confer, and informing the child that he or she can be seen or heard.

124 Coy, 108 S. Ct. at 2803.

125 Craig, 110 S.Ct. 3157 (1990).

126 110 S.Ct. at 3166-67.

127 See Md. Cts. & Jud. Proc. Ann. s 9-102, supra note 29.

128 Craig, 110 S.Ct. at 3167.

129 Id. at 3177.

130 This is the interpretation set forth by Justice Scalia:

> I presume that when the Court says "trauma would impair the child's ability to communicate" . . . it means that trauma would make it impossible for the child to communicate . . . . Any implication beyond that would in any event be dictum.

Craig, 110 S.Ct. at 3174 n.1 (Scalia, J., dissenting).

131 U.S. CONST. amend V.

132 RONALD P. ROTUNDA, JOHN E. NOWAK & J. NELSON YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE s 17.9.

133 Id. at ss 15.2, 17.1.

134 Id. at ss 14.6, 17.1.

135 Id.

136 Estelle v. Williams, 425 U.S. 501, 503 (1976).

137 Id.

138 Coffin v. United States, 156 U.S. 402 (1895).

139 ROTUNDA, et al, at s 17.3; Long v. State, 742 S.W.2d 302, 320 (Tex. Crim. App. 1987).

140 ROTUNDA at s 17.1.

141 Brief for the Appellant, supra n.122, at 16.

142 108 S.Ct. at 2799.

143 Id.

144 Coffin v. United States, 156 U.S. 402 (1895).

145 Estelle v. Williams, 425 U.S. 501, 503 (1976).

146 Id.

147 425 U.S. 501; Holbrook v. Flynn, 475 U.S. 560 (1986).

148 Tyars v. Finner, 709 F.2d 1274 (9th Cir. 1983).

149 475 U.S. 560.

150 Estelle, 425 U.S. 501.

151 Id. at 504.

152 Holbrook, 475 U.S. 560.

153 Estelle, 425 U.S. at 503; Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

154 See

155 105 S. Ct. 1087 (1985).

156 See N.Y. Crim. Proc. Law s 65.10(1).

157 Estelle, 425 U.S. 501.

158 See Military Rule of Evidence

159 Long, 742 S.W.2d at 322-23.

160 Id.

161 State v. Saporen, 205 Minn. 358, 362 (1937).

162 Id.

163 Green, 399 U.S. 149 at 156.

164 Long, 742 S.W.2d at 322-23.

165 Amescua v. State, 751 S.W.2d 709 (Tex. App. 1988); Romines v. State, 717 S.W.2d 745 (Tex. App. 1986).

166 TEXAS LAWYER, June 18, 1990, at 23, citing Ochs v. Martinez, (No. 04-89-00007-CV) (May 16, 1990) (allegations of abuse pursuant to a custody action).

167 United States v. Binder, 769 F.2d 595, 600-01 (9th Cir. 1985). Judge Skopil, writing for the court, stated: "Permitting the replay of videotaped testimony . . . was equivalent to allowing a live witness to testify a second time in the jury room."

168 Id.

169 Crime Control Act of 1990, supra n.5.

170 Craig, 110 S. Ct at 3171.

171 Amicus Brief by Nat'l. Ass. of Crim. Defense Lawyers at 16, Coy v. Iowa, 108 S. Ct. 2798 (1988) (No. 86-6757).

172 N.Y. Crim. Proc. Law s 65.00(4), 65.10(2) (McKinney 1984). New York law also permits videotaped proceedings, but only as to grand jury investigations. See s 190.32.

173 The National Association of Criminal Defense Lawyers [hereinafter NACDL] noted that closed circuit television was far preferable to a screening device because it allows the jury to draw a wide range of inferences and does not single out the defendant as the cause of the child's fear. See Brief by the NACDL as Amicus Curiae at 16-17, Coy v. Iowa, 108 S.Ct. 2798 (1988) (No. 86-6757).

174 See, e.g., State v. Pikey, 45 Cr.L. 2440 (Tenn. Sup.Ct.) (Aug. 9, 1989); People v. Bastien, 45 Cr.L. 2242 (Ill Sup.Ct.) (June 19, 1989); Commonwealth v. Bergstrom, 402 Mass. 534 (1988); Long v. State, 742 S.W.2d 302 (Tex. Cri. App. 1987).

175 Col. Rev. Stat. ss 18-3-413, 18-6-401.3 (1986).

176 Crime Control Act of 1990, supra n.5.

177 See Palacios, 32 M.J. 1047. The accused was convicted by the trial court entirely on the basis of hearsay.

178 A deposition is an out-of-court statement, albeit with a greater degree of reliability than other types of hearsay.

179 See Lyons, 33 M.J. 543; Palacios, 32 M.J. 1047. In both cases, nonadversarial videotapes were admitted into evidence.

180 Justice Scalia adopted that an inability to testify be tantamount to physical unavailability in order to justify abrogation of face-to-face confrontation.

115 197 N.J.Super. 411 (1984).

181 Craig, 110 S. Ct. at 3171.

182 Compare State v. Crandall, 120 N.J. 649 (1990) (personal observation sufficient) with People v. Cintron, 75 N.Y. 2d 249, 266-67 (1990) (expert testimony required). See also People v. Costa, 160 A.D. 2d 889 (App. Div. 1990) (The trial court must set forth its findings with sufficient specificity so that the reviewing court may determine whether the requisite showing was "clearly and convincingly made.").

183 N.J. Rev. Stat. s 2A:84A-32.4(b).

184 Id.

185 See In re B.F., 230 N.J.Super. at 153; Davis, 229 N.J.Super. at 66 (the court set forth nine pages of special findings).

186 State v. Crandall, 120 N.J. 649 (1990).

187 In re B.F., 230 N.J.Super. at 153.

188 Craig, 110 S. Ct. at 3170.

189 N.J. Rev. Stat. s 2A:84A-32.4 (1985).

190 Id.

191 In the Matter of Wolf, 231 N.J.Super. 365 (App. Div. 1989). When the New Jersey child protection statute was used in a civil hearing to determine the loss of a teacher's tenure rights, the procedure was improper since the teacher could see and hear the children's testimony but could not confer with counsel unless the proceedings were halted.

192 N.J. Rev. Stat. s 2A:84A-32.4 (1985).

193 N.Y. Crim. Proc. Law s 65.10(1).

194 N.Y. Crim. Proc. Law s 65.20(9).

195 N.Y. Crim. Proc. Law s 65.20(10).

196 People v. Cintron, 75 N.Y.2d 249 (1990).

197 Id. at 266.

198 Id. at 263.

199 N.Y. Crim. Proc. Law s 65.30.

200 N.Y. Crim. Proc. Law s 65.30(4).

201 N.Y.Crim. Proc. Law s 65.30(6).