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SCSL-03-01-PT
(4586-4667)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Julia Sebutinde, Presiding
Hon. Justice Richard Lussick
Hon. Justice Teresa Doherty

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 23 February 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION REPLY TO THE DEFENCE RESPONSE TO THE PROSECUTION MOTION TO ALLOW WITNESSES TO GIVE TESTIMONY BY VIDEO-LINK

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Anne Althaus

Defence Counsel for Charles Taylor
Mr. Karim A.A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. The Prosecution filed a "Public Prosecution Motion To Allow Witnesses to Give Testimony By Video-Link" ("Motion"). [1] The Prosecution files this Reply to the Defence Response to the Motion. ("Response") filed on 22 February 2007, wherein the Defence requests that the Trial Chamber dismiss the Motion.[2]

II. ARGUMENTS IN THE DEFENCE RESPONSE

1. The Prosecution hereby replies to the Defence arguments in its Response as follows:

2. The Defence reliance on the *Tadic* Decision[3] ignores the evolution of the ICTY Rules of Procedure and Evidence (ICTY Rules) regarding how witness evidence may be introduced at trial. Over time the ICTY Rules have broadened the means by which witness testimony may be introduced into evidence. At the time of the *Tadic* trial and Decision quoted by the Defence, Rule 90 (A) of the ICTY Rules stated that "[w]itnesses shall, in principle, be heard directly by the Trial Chamber....", while the Rules did not define what was encompassed by the language "heard directly"; neither did the Rules contain any provision for video-link testimony or alternative forms of presenting witness evidence.[4] It was only after the judgement in the *Tadic* case that the ICTY amended its Rules to specifically allow video-link testimony,[5] and, later, to allow evidence from

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[1] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-178, "Prosecution Motion to Allow Witnesses to Give Testimony By Video-Link", 9 February 2007 (**The Motion**).
[2] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-190, "Defence Response to Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link", 22 February 2007 (**Response**).
[3] *Prosecutor v. Tadic*, IT-94-1-T, "Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link" (**Tadic Decision**), 25 June 1996, para. 11: "the physical presence of a witness at the seat of the International Tribunal enables the judges to evaluate the credibility of a person giving evidence in the courtroom. Moreover, the physical presence of witness...may help discourage the witness from giving false testimony."
[4] ICTY Rules of Procedure and Evidence, Rev. 6, 6 October 1995, Rev. 9, 25 June and 5 July 1996, and Rev. 10, 3 December 1996.
[5] Rule 90(A), ICTY Rules of Procedure and Evidence, Rev 11, 15 July 1997, sets out: "(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by

witnesses to be put in *via* written statements or prior testimony.[6] As noted in the Motion, Revision 17 of November, 7 1999, relating to Rule 90, deleted the requirement for a showing of "exceptional circumstances", setting out only an "interests of justice" standard.[7] Finally, as of Revision 30 of 12 April 2001, Rule 90 of the ICTY Rules no longer states that "[w]itnesses shall, in principle, be heard directly by the Trial Chamber....".[8]

3. The Prosecution submits that this progressive evolution away from a previous "preference" for in court testimony - to the extent the Rules reflected such a preference, in conjunction with the jurisprudence cited in the Motion[9] - is supportive of an expanded use of video-link testimony as requested by the Prosecution.

4. The decisions of the ICTR Appeals and Trial Chambers in the *Zigiranyirazo* case, quoted in paragraphs 4 and 8 of the Defence Response,[10] are of limited assistance when read in context. The language of the Appeals Chamber Decision, quoted at paragraph 8 does not include any finding that the use of video-link testimony violates the Accused's right to examine or have examined the witnesses against him. [11] Rather, the Appeals Chamber Decision must be read in light of the true nature of the concern expressed by the Trial Chamber. In reaching its decision, the Appeals Chamber considered the Trial Chamber's "misgivings about its ability to adequately follow the testimony of a key witness through the use of video-link", and stated that "these same misgivings, **if valid**", must apply equally to the ability of the accused and his counsel to follow the evidence and proceedings.[12]

5. The Defence Response at paragraph 4 quotes the language of the Trial Chamber

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means of a deposition as provided for in Rule 71 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link."

[6] Rule 92*bis*, Proof of Facts by Other Than Oral Testimony, ICTY Rules of Procedure and Evidence, Rev 19, 13 December 2000.

[7] Rule 71 *bis* of Rev. 17 of November, 7 1999,provided that: "[a]t the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link."

[8] Rule 90 (A) now only says "Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth". The whole ancient Rule 90(A) has been suppressed from the ICTY Rules.

[9] Motion, para.13.

[10] *Prosecutor v. Zigiranyirazo,*ICTR-2001-73-AR73, "Decision on Interlocutory Appeal", 30 October 2006, para 19 (**Zigiranyirazo Appeal Decision**).

[11] Response, paragraph 8 citing Zigiranyirazo Appeal Decision para. 19.

[12] Zigiranyirazo Appeal Decision, para. 19, (emphasis added).

regarding its "misgivings".[13] The "misgivings" expressed by the Trial Chamber are whether it can effectively and accurately assess the testimony and demeanour of a witness testifying by video-link. To determine the nature of the Trial Chamber's concern, it is important to review the final sentence in the quoted paragraph and the following paragraph of that Decision.

6. In paragraph 32, from which the quoted language is taken, the Trial Chamber concludes that it "wishes to hear the witness **uninterrupted** and in person."[14] In the following paragraph, the Trial Chamber's concern is made more express: it is concerned with the **quality** of the video-link transmission. The Trial Chamber "also note[d] that the testimony of witnesses heard through electronic media runs the risk of being less weighty than in-court testimony **if the quality of the transmission impairs the Chamber's assessment of the witness. Given the Chamber's desire to prevent poor transmission impairing the testimony of such an important witness, the Chamber is of the opinion that it will benefit from the physical presence of the witness at trial.**"[15]

7. The Prosecution submits that this language makes clear that the Trial Chamber "misgivings" were based on questions regarding the quality of the technology to be used. This concern can be addressed by ensuring only the most technologically advanced and tested equipment, programs and systems are used for the video-link testimony in this case.

8. In addition, the Prosecution submits that the Trial Chamber's Decision is inconsistent with the Statute of the ICTR and with other jurisprudence of the *ad hoc* Tribunals on this matter.[16] In its Decision, the Trial Chamber "bears in mind" that the Accused has a right to "confront" his accuser.[17] Firstly, the Statute of the ICTR, like the Statute of this Court, does not confer upon the Accused a right of

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[13] Response, para. 4, citing *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T "Decision on Defence and Prosecution Motions related to Witness ADE:Rule 46,66,68, and 75 of the Rules of procedure and Evidence", 13 June 2006, para. 32 (**Zigiranyirazo Trial Chamber Decision**).
[14] Zigiranyirazo Trial Chamber Decision, para. 32 (emphasis added).
[15] Ibid, para. 33 (emphasis added).
[16] Motion, para.11, citing *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, " Decision on the Motion to Allow Witnesses K, L, and M to give their Testimony by means of Video-Link Conference", 28 May 1997, para 15, (**"Čelebići Decision"**).
[17] Zigiranyirazo Trial Chamber Decision, para. 32: "However, the Trial Chamber also bears in mind that the Defence wishes to confront this witness in person and indeed has the right to confront his accuser."

confrontation. Rather, the Accused has a right to examine or have examined the witnesses against him. Secondly, the Accused's right to examine or have examined the witnesses against him is not violated by the use of video-link testimony.[18]

9. The 1988 Decision in the *Coy* case cited at paragraph 6 of the Response[19] is based on the Sixth Amendment to the United States Constitution, which affords an accused the right to "confront" the witnesses against him or her. The United States Supreme Court has interpreted this to mean a face to face confrontation.[20] However, even in the *Coy* case, interpreting the United States Constitutional right of confrontation, the United States Supreme Court did **not** hold that an accused had an absolute right to meet face to face with witnesses against him or her at trial.[2122] In contrast to the US Constitutional guarantee, qualified as it is, Article 17 of the Statute provides an accused no guarantees of a right of confrontation. Rather, the Statute affords an accused the right to examine or have examined the witnesses against him.[23]

10. The Defence argument in paragraph 18 of its Response misperceives the Motion. The Prosecution never argues that judicial efficiency and economy may "override the statutory and fundamental rights of the Accused". The Motion addresses the rights of the Accused in paragraph 11, before it discusses the use of technological advances to enhance judicial efficiency and economy.

11. Furthermore, the Prosecution never argues that monetary and/or administrative concerns justify the use of video-link testimony. Rather the Motion addresses matters which apply to all trials of the type heard by international courts such as this one: how to effectively deal with witnesses from diverse geographic locations, how to deal fairly with witnesses who are survivors of traumatic events, and how to make use of technological advances which allow alternatives to testimony given via the witness' physical presence in the courtroom. It is interesting to note that the Defence contends that the Prosecution requests the implementation of a video-link

[18] See Rule 92*bis*, Proof of Facts by Other Than Oral Testimony, ICTY Rules of Procedure and Evidence, Rev. 19, 13 December 2000; see also Motion, para. 11, in particular footnotes 3 and 4.
[19] Coy v. Iowa, 487 U.S. 1012 (1988).
[20] Ibid.
[21] Ibid, p. 1020-1021.
[22] Maryland v. Craig, 497 U.S. 836 (1990),p. 844.
[23] R. v. Levogiannis, [1993] 4 S.C.R. 475.

for economical reasons, yet the Registry submits that such a video-link would be excessively expensive.[24] In actuality, the Prosecution submits that monetary concerns are not the determinative factor. The determinative factor is by what means can the trial be advanced in a way that protects the rights of the Accused and promotes judicial efficiency.

12. The Motion is not based on monetary matters but rather on matters related to a good and fair administration of justice. Discussion of these matters in the context of the Motion in no way confirms that trial of this Accused in the Netherlands creates an unfair and impracticable situation for all parties concerned. [25]

13. Finally, if the Defence argument is taken to its logical conclusion, absent the consent of the accused, the only means by which witness testimony could be received would be via the witness' live presence in court. This would render invalid any Rule 92*bis* evidence absent the consent of the Accused. The Prosecution submits the existing law allows for admission of Rule 92*bis* evidence, even though it provides a lesser ability to assess credibility than would the video-link procedure proposed by the Prosecution.

III. CONCLUSION

18. For the reasons given above, the Prosecution submits that the Motion should be granted.

Filed in Freetown,
23 February 2007

For the Prosecution,

Brenda J. Hollis
Senior Trial Attorney

[24] *Prosecutor v. Charles Ghankay Taylor* , SCSL-03-01-PT-191, "Registrar' Submission Pursuant to Rule 33 (B) Relating to Issues Pertaining to the Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link Filed on February 2007", paras 2, 3, 16-26.
[25] Motion, para. 18.

INDEX OF AUTHORITIES

SCSL Cases

Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-PT-178, "Prosecution Motion to Allow Witnesses to Give Testimony By Video-Link", 9 February 2007

Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-PT-190, "Defence Response to Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link", 22 February 2007

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(Annex B to Prosecution Motion)

Prosecutor v. Delalić et al. (Čelebići case), IT-96-21-A, " Decision on the Motion to Allow Witnesses K, L, and M to give their Testimony by means of Video-Link Conference", 28 May 1997

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(Annex B to Defence Response)

Other

Coy v. Iowa, 487 U.S. 1012 (1988).

Maryland v. Craig, 497 U.S. 836 (1990).

R. v. Levogiannis, [1993] 4 S.C.R. 475, (June 15, 1993).

ANNEX A

Coy v. Iowa, 487 U.S. 1012 (1988).

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believe it unwise to announce a "fresh" interpretation of our prior cases applying disparate-impact analysis to objective employment criteria. See *ante*, at 2788. Cases in which a Title VII plaintiff challenges an employer's practice of delegating certain kinds of decisions to the subjective discretion of its executives will include too many variables to be adequately discussed in an opinion that does not focus on a particular factual context. I would therefore postpone any further discussion of the evidentiary standards set forth in our prior cases until after the District Court has made appropriate findings concerning this plaintiff's prima facie evidence of disparate impact and this defendant's explanation for its practice of giving supervisors discretion in making certain promotions.

487 U.S. 1012, 101 L.Ed.2d 857

[1012] **John Avery COY, Appellant**

v.

IOWA.

No. 86–6757.

Argued Jan. 13, 1988.

Decided June 29, 1988.

Defendant was convicted of two counts of engaging in lascivious acts with child by the District Court, Clinton County, Iowa L.D. Carstensen, J., and defendant appealed. The Supreme Court of Iowa, 397 N.W.2d 730, affirmed. On appeal, the Supreme Court of the United States, Justice Scalia, held that: (1) confrontation clause provides criminal defendant right to "confront" face-to-face witnesses giving evidence against him at trial, and (2) placement of screen between defendant and child sexual assault victims during testimony against defendant violated defendant's confrontation clause rights.

Reversed and remanded.

Justice O'Connor filed concurring opinion in which Justice White joined.

Justice Blackmun filed dissenting opinion in which Chief Justice Rehnquist joined.

Justice Kennedy took no part in consideration or decision of case.

Opinion on remand, 433 N.W.2d 714.

1. Criminal Law ⇐662.1

Confrontation clause provides criminal defendant right to "confront" face-to-face witnesses giving evidence against him at trial; such confrontation helps to insure integrity of fact-finding process by making it more difficult for witnesses to fabricate testimony. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐662.1, 667(1)
Witnesses ⇐228

Placement of screen between defendant and child sexual assault victims during their testimony at trial violated defendant's right to face-to-face confrontation under confrontation clause. U.S.C.A. Const.Amend. 6.

Syllabus *

Appellant was charged with sexually assaulting two 13–year–old girls. At appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between appellant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The court rejected appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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confronted with the witnesses against him." Appellant was convicted of two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed.

Held:

1. The Confrontation Clause by its words provides a criminal defendant the right to "confront" face-to-face the witnesses giving evidence against him at trial. That core guarantee serves the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the factfinding process by making it more difficult for witnesses to lie. Pp. 2800–2802.

2. Appellant's right to face-to-face confrontation was violated since the screen at issue enabled the complaining witnesses to avoid viewing appellant as they gave their testimony. There is no merit to the State's assertion that its statute creates a presumption of trauma to victims of sexual abuse that outweighs appellant's right to confrontation. Even if an exception to this core right can be made, it would have to be based on something more than the type of generalized finding asserted here, unless it were "firmly ... rooted in our jurisprudence." *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144. An exception created by a 1985 statute can hardly be viewed as "firmly rooted," and there have been no individualized findings that these particular witnesses needed special protection. Pp. 2802–2803.

3. Since the State Supreme Court did not address the question whether the Confrontation Clause error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, the case must be remanded. P. 2803.

397 N.W.2d 730 (Iowa 1986) reversed and remanded.

1. Section 910A.14 provides in part as follows: "The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and

1018 SCALIA, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE, J., joined, *post*, p. 2804. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post*, p. 2805. KENNEDY, J., took no part in the consideration or decision of the case.

Paul Papak, Iowa City, Iowa, for appellant.

Gordon E. Allen, Des Moines, Iowa, for appellee.

1014 Justice SCALIA delivered the opinion of the Court.

Appellant was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight. Appellant contends that this procedure, authorized by state statute, violated his Sixth Amendment right to confront the witnesses against him.

I

In August 1985, appellant was arrested and charged with sexually assaulting two 13-year-old girls earlier that month while they were camping out in the backyard of the house next door to him. According to the girls, the assailant entered their tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him; neither was able to describe his face. In November 1985, at the beginning of appellant's trial, the State made a motion pursuant to a recently enacted statute, Act of May 23, 1985, § 6, 1985 Iowa Acts 338, now codified at Iowa Code § 910A.14 (1987),[1] to

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allow the complaining witnesses to testify either via closed-circuit television or behind a screen. See App. 4–5. The trial court approved the use of a large screen to be placed between appellant and the witness stand during the girls' testimony. After certain lighting adjustments[1015] in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all.

Appellant objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. He argued that, although the device might succeed in its apparent aim of making the complaining witnesses feel less uneasy in giving their testimony, the Confrontation Clause directly addressed this issue by giving criminal defendants a right to face-to-face confrontation. He also argued that his right to due process was violated, since the procedure would make him appear guilty and thus erode the presumption of innocence. The trial court rejected both constitutional claims, though it instructed the jury to draw no inference of guilty from the screen.

The Iowa Supreme Court affirmed appellant's conviction, 397 N.W.2d 730 (1986). It rejected appellant's confrontation argument on the ground that, since the ability to cross-examine the witnesses was not impaired by the screen, there was no violation of the Confrontation Clause. It also rejected the due process argument, on the ground that the screening procedure was not inherently prejudicial. We noted probable jurisdiction, 483 U.S. 1019, 107 S.Ct. 3260, 97 L.Ed.2d 760 (1987).

II

The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," *California v. Green*, 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the [1016]charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384–387 (1959).

Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), or restrictions on the scope of cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cf. *Delaware v. Fensterer*, 474 U.S. 15, 18–19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*) (noting these two categories and finding neither applicable). The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection—but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least "a right to meet face to face all those who appear and give evidence at trial." *California v. Green*, *supra*, at 175, 90 S.Ct., at 1943–1944. Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of

shall inform the child that the party can see and hear the child during testimony."

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confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak...." Richard II, Act 1, sc. 1.

We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–750, 107 S.Ct. 2658, 2668, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting). For example, in *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the offense[1017] of receiving stolen Government property, we described the operation of the Clause as follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Similarly, in *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *California v. Green, supra*, at 157, 90 S.Ct., at 1934–1935. Last Term, the plurality opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987), stated that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you[1018] disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.... In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, *supra*, at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness,[2] the right of

2. The dissent finds Dean Wigmore more persuasive than President Eisenhower or even William Shakespeare. *Post*, at 2807. Surely that must depend upon the proposition that they are cited for. We have cited the latter two merely to illustrate the meaning of "confrontation," and both the antiquity and currency of the human feeling that a criminal trial is not just unless one can confront his accusers. The dissent cites Wigmore for the proposition that confrontation "was not a part of the common law's view of the confrontation requirement." *Ibid.* To begin with, Wigmore said no such thing. What he said, precisely, was:

"There was never at common law any recognized right to an indispensable thing called con-

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confrontation[1019] "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

[1] The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay v. Boyd*, 351 U.S. 345, 375–376, 76 S.Ct. 919, 935–936, 100 L.Ed. 1242 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the 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[1020]—the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." *Kentucky v. Stincer, supra*, 482 U.S., at 736, 107 S.Ct., at 2662. The State can hardly gainsay the profound effect 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 in the present case. That face-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 a malevolent adult. It is a truism that constitutional protections have costs.

III

[2] The remaining question is whether the right to confrontation was in fact vio-

frontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names." 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974) (emphasis in original).

He was saying, in other words, not that the right of confrontation (as we are using the term, *i.e.*, in its natural sense) did not exist, but that its purpose was to enable cross-examination. He then continued:

"It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution." *Ibid.*

Of course, that does not follow at all, any more than it follows that the right to a jury trial can be dispensed with so long as the accused is justly convicted and publicly known to be justly convicted—the purposes of the right to jury trial. Moreover, contrary to what the dissent asserts, Wigmore did mention (inconsistently with his thesis, it would seem), that a secondary purpose of confrontation is to produce "a certain subjective moral effect . . . upon the witness." *Id.*, § 1395, p. 153. Wigmore grudgingly acknowledged that, in what he called "earlier and more emotional periods," this effect "was supposed (more often than it now is) to be able to unstring the nerves of a false witness," *id.*, § 1395, p. 153, n. 2; but he asserted, without support, that this effect "does not arise from the confrontation of the *opponent* and the witness," but from "the witness' presence before the *tribunal*," *id.*, § 1395, p. 154 (emphasis in original).

We doubt it. In any case, Wigmore was not reciting as a fact that there was no right of confrontation at common law, but was setting forth his thesis that the only essential interest preserved by the right was cross-examination—with the purpose, of course, of vindicating against constitutional attack sensible and traditional exceptions to the hearsay rule (which can be otherwise vindicated). The thesis is on its face implausible, if only because the phrase "be confronted with the witnesses against him" is an exceedingly strange way to express a guarantee of nothing more than cross-examination.

As for the dissent's contention that the importance of the confrontation right is "belied by the simple observation" that "blind witnesses [might have] testified against appellant," *post*, at 2808, that seems to us no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified.

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lated in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. App. 10–11. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine, see *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045–1046, 35 L.Ed.2d 297 (1973); the right to exclude out-of-court statements, see *Ohio v. Roberts*, 448 U.S., at 63–65, 100 S.Ct., at 2537–2539; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself, *Kentucky v. Stincer*, *supra*. To hold that our determination of what [1021] implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: "a right to *meet face to face* all those who appear and give evidence *at trial*." *California v. Green*, 399 U.S., at 175, 90 S.Ct., at 1943–1944 (Harlan, J., concurring) (emphasis added). We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. Cf *Ohio v. Roberts*, *supra*, 448 U.S., at 64, 100 S.Ct., at 2538; *Chambers v. Mississippi*, *supra*, at 295, 93 S.Ct., at 1045–1046. The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not "firmly ... rooted in our jurisprudence." *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987) (citing *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)). The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

The State also briefly suggests that any Confrontation Clause error was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We have recognized that other types of violations of the Confrontation Clause are subject to that harmless-error analysis, see *e.g.*, *Delaware v. Van Arsdall*, 475 U.S., at 679, 684, 106 S.Ct., at 1436, 1438, and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the [1022] jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. The Iowa Supreme Court had no occasion to address the harmlessness issue, since it found no constitutional violation. In the circumstances of this case, rather than decide whether the error was harmless beyond a reasonable doubt, we leave the issue for the court below.

We find it unnecessary to reach appellant's due process claim. Since his constitutional right to face-to-face confrontation was violated, we reverse the judgment of

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the Iowa Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice O'CONNOR, with whom Justice WHITE joins, concurring.

I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may 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.

Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that "[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of [1023] ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only State authorizing the type of screen used in this case. See generally App. to Brief for American Bar Association as *Amicus Curiae* 1a–9a (collecting statutes). A full half of the States, however, have authorized the use of one- or two-way closed-circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 33 States (including 19 of the 25 authorizing closed-circuit television) permit the use of videotaped testimony, which typically is taken in the defendant's presence. See generally *id.*, at 9a–18a (collecting statutes).

While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant. See, *e.g.*, Ala.Code § 15–25–3 (Supp.1987) (one-way closed-circuit television; defendant must be in same room as witness); Ga. Code Ann. § 17–8–55 (Supp.1987) (same); N.Y.Crim.Proc.Law §§ 65.00–65.30 (McKinney Supp.1988) (two-way closed-circuit television); Cal.Penal Code Ann. § 1347 (West Supp.1988) (same). Indeed, part of the statute involved here seems to fall into this category since in addition to authorizing a screen, Iowa Code § 910A.14 (1987) permits the use of one-way closed-circuit television with "parties" in the same room as the child witness.

[1024] Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. We have expressly said as much, as long ago as 1899, *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890, and as recently as last Term, *Pennsylvania v. Ritchie*, 480 U.S., at 51, 107 S.Ct., at 998. But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," *ibid.*, even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. See *ante*, at 2802.

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Rather, the Court has time and again stated that the Clause "reflects a *preference* for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. *Ohio v. Roberts*, 448 U.S. 56, 63–64, 100 S.Ct. 2531, 2537–2538, 65 L.Ed.2d 597 (1980) (emphasis added). See also *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045–1046, 35 L.Ed.2d 297 (1973) ("Of course, the right to confront ... is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). That a particular procedure impacts the "irreducible literal meaning of the Clause," *ante*, at 2803, does not alter this conclusion. Indeed, virtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934–1935, 26 L.Ed.2d 489 (1970), and yet have fallen within an exception to the general requirement of face-to-face confrontation. See, *e.g.*, *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Indeed, we expressly recognized in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), that "a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable," [1025] but we also acknowledged that "this Court has rejected that view as 'unintended and too extreme.'" *Id.*, at 182, 107 S.Ct., at 2782 (quoting *Ohio v. Roberts*, *supra*, at 63, 100 S.Ct., at 2537–2538). In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. See *ante*, at 2803 (citing *Ohio v. Roberts*, *supra*; *Chambers v. Mississippi*, *supra*). The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, *e.g.*, Cal.Penal Code Ann. § 1347(d)(1) (West Supp.1988); Fla.Stat. § 92.54(4) (1987); Mass.Gen.Laws § 278:16D(b)(1) (1986); N.J.Stat.Ann. § 2A:84A–32.4(b) (Supp. 1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

Appellant was convicted by an Iowa jury on two counts of engaging in lascivious acts with a child. Because, in my view, the procedures employed at appellant's trial did not offend either the Confrontation Clause or the Due Process Clause, I would affirm his conviction. Accordingly, I respectfully dissent.

[1026]

A

The Sixth Amendment provides that a defendant in a criminal trial "shall enjoy the right ... to be confronted with the witnesses against him." In accordance with that language, this Court just recently has recognized once again that the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact:

> " 'The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the

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witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" *Kentucky v. Stincer*, 482 U.S. 730, 736–737, 107 S.Ct. 2658, 2662–2663, 96 L.Ed.2d 631 (1987), quoting *Mattox v. United States*, 156 U.S. 237, 242–243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895).

Two witnesses against appellant in this case were the 13-year-old girls he was accused of sexually assaulting. During their testimony, as permitted by a state statute, a one-way screening device was placed between the girls and appellant, blocking the man accused of sexually assaulting them from the girls' line of vision.[1] This procedure did not interfere 1027 with what this Court previously has recognized as the "purposes of confrontation." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Specifically, the girls' testimony was given under oath, was subject to unrestricted cross-examination, and "the jury that [was] to decide the defendant's fate [could] observe the demeanor of the witness[es] in making [their] statement[s], thus aiding the jury in assessing [their] credibility." *Ibid.* See also *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986). In addition, the screen did not prevent appellant from seeing and hearing the girls and conferring with counsel during their testimony, did not prevent the girls from seeing and being seen by the judge and counsel, as well as by the jury, and did not prevent the jury from seeing the demeanor of the defendant while the girls testified. Finally, the girls were informed that appellant could see and hear them while they were on the stand.[2] Thus, appellant's *sole* complaint is the very narrow objection that the girls could not see him while they testified about the sexual assault they endured.

The Court describes appellant's interest in ensuring that the girls could see him while they testified as "the irreducible literal meaning of the Clause." *Ante*, at 2803. Whatever may be the significance of this characterization, in my view it is not borne out by logic or precedent. While I agree with the concurrence that "[t]here is nothing novel" in the proposition that the Confrontation Clause "'reflects a *preference*'" for the witness to be able to see the defendant, *ante*, at 2804, quoting *Ohio v. Roberts*, 448 U.S. 56, 63–64, 100 S.Ct. 2531, 2537–2538, 65 L.Ed.2d 597 (1980) (emphasis added in concurrence), I find it necessary to discuss 1028 my disagreement with the Court as to the place of this "preference" in the constellation of rights provided by the Confrontation Clause for two reasons. First, the minimal extent of the infringement on appellant's Confrontation Clause interests is relevant in considering whether competing public policies justify the procedures employed in this case. Second, I fear that the Court's apparent fascination with the witness' ability to see the defendant will lead the States that are attempting to adopt innovations to facilitate

1. Apparently the girls were unable to identify appellant as their attacker. Their ability to observe their attacker had been limited by the facts that it was dark, that he shined a flashlight in their eyes, and that he told them not to look at him. The attacker also appeared to be wearing a stocking over his head. Thus, the State made no effort to have the girls try to identify appellant at trial, which could not have been done, of course, without moving the screen. Neither did appellant attempt to demonstrate that the girls could not identify him. This case therefore does not present the question of the constitutionality of the restriction on cross-examination that would have been imposed by a refusal to allow appellant to show that the girls could not identify him.

2. Iowa law requires that the court "inform the child that the party can see and hear the child during testimony." Iowa Code § 910A.14(1) (1987). Although the record in this case does not contain a transcript of the court's so advising the girls, the Iowa Supreme Court noted that appellant "makes no assertion [that the] trial court failed to comply with" this or other terms of the statute. 397 N.W.2d 730, 733 (1986). Appellant concedes this point "[f]or purposes of this appeal." Brief for Appellant 5, n. 9.

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the testimony of child victims of sex abuse to sacrifice other, more central, confrontation interests, such as the right to cross-examination or to have the trier of fact observe the testifying witness.

The weakness of the Court's support for its characterization of appellant's claim as involving "the irreducible literal meaning of the Clause" is reflected in its reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join. The majority cites only one opinion of the Court that, in my view, possibly could be understood as ascribing substantial weight to a defendant's right to ensure that witnesses against him are able to see him while they are testifying: "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S., at 157, 90 S.Ct., at 1934. Even that characterization, however, was immediately explained in *Green* by the quotation from *Mattox v. United States*, 156 U.S., at 242–243, 15 S.Ct., at 339–340, set forth above in this opinion to the effect that the Confrontation Clause was designed to prevent the use of *ex parte* affidavits, to provide the opportunity for cross-examination, and to compel the defendant "'to stand face to face *with the jury.*'" *California v. Green*, 399 U.S., at 158, 90 S.Ct., at 1935 (emphasis added).

Whether or not "there is something deep in human nature," *ante*, at 2801, that considers critical the ability of a witness to see the defendant while the witness is testifying, [1029] that was not a part of the common law's view of the confrontation requirement. "There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*" (emphasis in original). 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974). I find Dean Wigmore's statement infinitely more persuasive than President Eisenhower's recollection of Kansas justice, see *ante*, at 2801, or the words Shakespeare placed in the mouth of his Richard II concerning the best means of ascertaining the truth, see *ante*, at 2801.[3] In fact, Wigmore considered it clear "from the beginning of the hearsay rule [in the early 1700's] to the present day" that the right of confrontation is provided "not for the idle purpose of gazing upon the witness, or *of being gazed upon by him*," but, rather, to allow for cross-examination (emphasis added). 5 Wigmore § 1395, p. 150. See also *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974).

Similarly, in discussing the constitutional confrontation requirement, Wigmore notes that, in addition to cross-examination—"the essential purpose of confrontation"—there is a "secondary and dispensable element [of the right:] ... the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom.... [This principle] is satisfied if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed." (Emphasis in original.) 5 Wigmore, § 1399, p. 199. The "right" to have the witness view the defendant did not warrant mention even as part of the "secondary [1030] and dispensable" part of the Confrontation Clause protection.

That the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause is also demonstrated by the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant. For example,

3. Interestingly, the precise quotation from Richard II the majority uses to explain the "root meaning of confrontation," *ante*, at 2801 is discussed in 5 J. Wigmore, Evidence § 1395, p. 153, n. 2 (J. Chadbourn rev. 1974). That renowned and accepted authority describes the view of confrontation expressed by the words of Richard II as an "earlier conception, still current in [Shakespeare's] day" which, by the time the Bill of Rights was ratified, had merged "with the principle of cross-examination." *Ibid.*

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in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Court held that the admission of an out-of-court statement of a co-conspirator did not violate the Confrontation Clause. In reaching that conclusion, the Court did not consider even worthy of mention the fact that the declarant could not see the defendant at the time he made his accusatory statement. Instead, the plurality opinion concentrated on the reliability of the statement and the effect cross-examination might have had. See *id.*, at 88–89, 91 S.Ct., at 219–220. See also *Mattox v. United States*, 146 U.S. 140, 151–152, 13 S.Ct. 50, 53–54, 36 L.Ed. 917 (1892) (dying declarations admissible). In fact, many hearsay statements are made outside the presence of the defendant, and thus implicate the confrontation right asserted here. Yet, as the majority seems to recognize, *ante*, at 2800, this interest has not been the focus of this Court's decisions considering the admissibility of such statements. See, *e.g.*, *California v. Green*, 399 U.S., at 158, 90 S.Ct., at 1935.

Finally, the importance of this interest to the Confrontation Clause is belied by the simple observation that, had blind witnesses testified against appellant, he could raise no serious objection to their testimony, notwithstanding the identity of that restriction on confrontation and the one here presented.[4]

[1031]B

While I therefore strongly disagree with the Court's insinuation, *ante*, at 2800, 2802, that the Confrontation Clause difficulties presented by this case are more severe than others this Court has examined, I do find that the use of the screening device at issue here implicates "a preference for face-to-face confrontation at trial," embodied in the Confrontation Clause. *Ohio v. Roberts*, 448 U.S., at 63, 100 S.Ct., at 2537. This "preference," however, like all Confrontation Clause rights, " 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.*, at 64, 100 S.Ct., at 2538, quoting *Mattox v. United States*, 156 U.S., at 243, 15 S.Ct., at 340. See also *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). The limited departure in this case from the type of "confrontation" that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest.

Indisputably, the state interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from 0.67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse. See American Association for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting 1985, pp. 3, 18 (1987). The prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered. "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming.[1032]" D. Whitcomb, E. Shapiro, & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors 17–18 (1985). Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioural disturbance in children." G. Goodman, et al., The Emotional Effects of Criminal Court Testimony on

4. The Court answers that this is "no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified." *Ante*, at 2802, n. 2. The Court's comparison obviously is flawed. To begin with, a deaf or mute witness who was physically incapable of being cross-examined presumably also would be unable to offer any direct testimony. More importantly, if a deaf or mute witness were completely incapable of being cross-examined (as blind witnesses are completely incapable of seeing a defendant about whom they testify), I should think a successful Confrontation Clause challenge might be brought against whatever direct testimony they did offer.

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Child Sexual Assault Victims, in The Child Witness: Do the Courts Abuse Children?, Issues in Criminalogical and Legal Psychology, No. 13, pp. 46, 52 (British Psychological Assn. 1988). See also Avery, The Child Abuse Witness: Potential for Secondary Victimization, 7 Crim.Just.J. 1, 3–4 (1983); S. Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse 133–134 (1982).

Thus, the fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.[5] Because of these effects, I agree with the concurring opinion, *ante*, at 2805, that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here—the "preference" for having the defendant within the witness' sight while the witness testifies.

Appellant argues, and the Court concludes, *ante*, at 2803, that even if a societal interest can justify a restriction on a
1033 child witness' ability to see the defendant while the child testifies, the State must show in each case that such a procedure is essential to protect the child's welfare. I disagree. As the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace.[6] I would not impose a different rule here by requiring the State to make a predicate showing in each case.

In concluding that the legislature may not allow a court to authorize the procedure used in this case when a 13-year-old victim of sexual abuse testifies, without first making a specific finding of necessity, the Court relies on the fact that the Iowa procedure is not " 'firmly . . . rooted in our jurisprudence.' " *Ante*, at 2803, quoting *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987). Reliance on the cases employing that rationale is misplaced. The requirement that an exception to the Confrontation Clause be firmly rooted in our jurisprudence has been imposed only when the prosecution seeks to introduce an out-of-court statement, and there is a question as to the statement's *reliability*. In these circumstances, we have held: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S., at 66, 100 S.Ct., at 2539. See also *Bourjaily v. United States*, 483 U.S., at 182–183, 107 S.Ct., at 2782–2783. Clearly, no such case-by-case inquiry into reliability is needed here. Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-examination,
1034 there can be no argument that their testimony lacked sufficient indicia of reliability.

For these reasons, I do not believe that the procedures used in this case violated

5. Indeed, some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective procedures. See *State v. Sheppard*, 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Note, Parent–Child Incest: Proof at Trial Without Testimony in Court by the Victim, 15 U.Mich.J. L. Ref. 131 (1981).

6. For example, statements of a co-conspirator, excited utterances, and business records are all generally admissible under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission. See Fed.Rules Evid. 801(d)(2), 803(2), 803(6). As to the first of these, and the propriety of their admission under the Confrontation Clause without any special showing, see *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), and *Bourjaily v. United States*, 483 U.S. 171, 181–184, 107 S.Ct. 2775, 2781–2783, 97 L.Ed.2d 144 (1987).

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appellant's rights under the Confrontation Clause.

II

Appellant also argues that the use of the screening device was "inherently prejudicial" and therefore violated his right to due process of law. The Court does not reach this question, and my discussion of the issue will be correspondingly brief.

Questions of inherent prejudice arise when it is contended that "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542–543, 85 S.Ct. 1628, 1632–1633, 14 L.Ed.2d 543 (1965). When a courtroom arrangement is challenged as inherently prejudicial, the first question is whether "an unacceptable risk is presented of impermissible factors coming into play," which might erode the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976). If a procedure is found to be inherently prejudicial, a guilty verdict will not be upheld if the procedure was not necessary to further an essential state interest. *Holbrook v. Flynn*, 475 U.S. 560, 568–569, 106 S.Ct. 1340, 1345–1346, 89 L.Ed.2d 525 (1986).

During the girls' testimony, the screening device was placed in front of the defendant. In order for the device to function properly, it was necessary to dim the normal courtroom lights and focus a panel of bright lights directly on the screen, creating, in the trial judge's words, "sort of a dramatic emphasis" and a potentially "eerie" effect. App. 11, 14. Appellant argues that the use of the device was inherently prejudicial because it indicated to the jury that appellant was guilty. I am unpersuaded by this argument.

Unlike clothing the defendant in prison garb, *Estelle v. Williams, supra*, or having the defendant shackled and gagged, *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), using 1035the screening device did not "brand [appellant] ... 'with an unmistakable mark of guilt.'" See *Holbrook v. Flynn*, 475 U.S. at 571, 106 S.Ct., at 1347, quoting *Estelle v. Williams*, 425 U.S., at 518, 96 S.Ct., at 1699 (BRENNAN, J., dissenting). A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant. See 475 U.S., at 570, 106 S.Ct., at 1346.

In addition, the trial court instructed the jury to draw no inference from the device:

> "It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing." App. 17.

Given this helpful instruction, I doubt that the jury—which we must assume to have been intelligent and capable of following instructions—drew an improper inference from the screen, and I do not see that its use was inherently prejudicial. After all, "every practice tending to single out the accused from everyone else in the courtroom [need not] be struck down." *Holbrook v. Flynn*, 475 U.S., at 567, 106 S.Ct., at 1345 (placement throughout trial of four uniformed state troopers in first row of spectators' section, behind defendant, not inherently prejudicial).

I would affirm the judgment of conviction.

ANNEX B

Maryland v. Craig, 497 U.S. 836 (1990).

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cumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respondent's[835] conviction and remand for it to consider in the first instance whether the child's statements bore "particularized guarantees of trustworthiness" under the analysis set forth in this separate opinion.

For these reasons, I respectfully dissent.

497 U.S. 836, 111 L.Ed.2d 666

[836]MARYLAND, Petitioner

v.

Sandra Ann CRAIG.

No. 89-478.

Argued April 18, 1990.

Decided June 27, 1990.

Defendant was convicted in the Maryland Circuit Court, Howard County, Raymond J. Kane, Jr., J., of sexual offenses and assault and battery arising from her operation of preschool and abuse of preschool students, and defendant appealed. The Court of Special Appeals, affirmed, 76 Md.App. 250, 544 A.2d 784,. Defendant petitioned for writ of certiorari. The Court of Appeals, 316 Md. 551, 560 A.2d 1120, reversed and remanded. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) confrontation clause did not categorically prohibit child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television; (2) finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis; but (3) observation of child's behavior in defendant's presence and exploration of less restrictive alternatives to use of one-way closed circuit television procedure were not categorical prerequisites to use of one-way television procedure as a matter of federal constitutional law.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, in which Justices Brennan, Marshall and Stevens joined.

Opinion on remand, 322 Md. 418, 588 A.2d 328.

1. Criminal Law ⇐662.1

The central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐662.1

A face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐662.8

In narrow circumstances, the confrontation clause permits the admission of hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐662.1

Face-to-face confrontation with witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

Child assault victim's testimony at trial of child abuse defendant through use of one-way closed circuit television procedure autho-

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rized by Maryland child witness protection statute did not impinge upon the truth seeking nor symbolic purposes of the confrontation clause; procedure required that child witness be competent to testify and testify under oath, defendant retained full opportunity for contemporaneous cross-examination, and judge, jury and defendant were able to view witness' demeanor and body by video monitor. Md.Code, Courts and Judicial Proceedings, § 9–102, U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure permitting a child witness in abuse case to testify at trial in the absence of face-to-face confrontation with the defendant. U.S.C.A. Const.Amends. 6, 14.

7. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

Determination of whether use of procedure permitting a child witness to testify in a child abuse case without face-to-face confrontation with the defendant is justified by the State's interest in protecting witness from the trauma of testifying must be made on a case specific basis; trial court must determine whether use of one-way closed circuit television procedure is necessary to protect welfare of particular child witness, must find that child witness would be traumatized by the presence of the defendant, not by the courtroom generally, and must find that the emotional distress suffered by child witness in presence of defendant is more than mere nervousness, excitement or reluctance to testify. Md.Code, Courts and Judicial Proceedings, §§ 9–102, 9–102(a)(1)(ii); U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

Testimony of child witnesses in child abuse case by one-way closed circuit television would be admissible under the confrontation clause to the extent that a proper finding was made that use of procedure was necessary to protect child witness from trauma; witnesses were under oath, were subject to full cross-examination and could be observed by judge, jury and defendant as they testified. Md.Code, Courts and Judicial Proceedings, § 9–102; U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐662.1, 662.65
Witnesses ⇐228

Observation of child abuse victims' behavior in defendant's presence and consideration of less restrictive alternatives to one-way closed circuit television procedure, although possibly strengthening grounds for use of protective measures, were not categorically prerequisites to use of television testimony procedure as a matter of federal constitutional law. Md.Code, Courts and Judicial Proceedings, § 9–102; U.S.C.A. Const. Amends. 6, 14.

Syllabus *

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against 837 them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e.g.*, *Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy, supra*, at 1021. Pp. 3162–3166.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 3166–3170.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 3166–3167.

(b) A State's interest in the physical and psychological well-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 accusers in court. The fact that most States have enacted simi-

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lar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e.g., Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature |838 documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 3167–3169.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis.* Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 3169–3170.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 3170.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 3170–3171.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 3171.

J. Joseph Curran, Jr., Baltimore, Md., for petitioner.

|839 William H. Murphy, Jr., Baltimore, Md., for respondent.

|840 Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland

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statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[1] To invoke the procedure, the [841] trial judge must first "determin[e] 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." Md.Cts. & Jud.Proc.Code Ann. § 9–102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. [842] The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9–102(a)(1)(ii), if required to testify in the courtroom. App. 7–59. The Maryland Court of Appeals characterized the evidence as follows:

> "The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig....' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'" 316 Md. 551, 568–569, 560 A.2d 1120, 1128–1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial

1. Maryland Cts. & Jud.Proc.Code Ann. § 9–102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5–701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines 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.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) 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.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) 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."

For a detailed description of the § 9–102 procedure, see *Wildermuth v. State*, 310 Md. 496, 503–504, 530 A.2d 275, 278–279 (1987).

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court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65–66. The trial court further found that, "based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably[843] communicate." *Id.*, at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md.App. 250, 544 A.2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.*, at 556–562, 560 A.2d, at 1122–1125, but concluded:

> "[U]nder § 9–102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.*, at 566, 560 A.2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9–102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9–102 may be invoked." *Id.* 316 Md., at 554–555, 560 A.2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U.S. 1041, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990).

[844]II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S., at 1016, 108 S.Ct., at 2801 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–750, 107 S.Ct. 2658, 2669, 2669, 2670, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality opinion); *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911); *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899); *Mattox v. United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy, supra*, 487 U.S., at 1015–1016, 108 S.Ct., at 2800; *Mattox, supra*, 156 U.S., at 242, 15 S.Ct. at 339 (Confrontation Clause intended to prevent conviction by affidavit); *Green, supra*, 399 U.S., at 156, 90 S.Ct., at 1934

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(same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa*, we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting *Green*, *supra*, 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014–1015, 108 S.Ct., at 2799–2800. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that |845any exception to the right "would surely be allowed only when necessary to further an important public policy"—*i.e.*, only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.*, at 1021, 108 S.Ct., at 2803; see also *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.*, at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*.

[1] The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, *supra*, 156 U.S., at 242–243, 15 S.Ct., at 339–340.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath—thus impressing him with |846the 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'; [and] (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." *Green*, *supra*, 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings. See *Stincer*, *supra*, 482 U.S., at 739, 107 S.Ct., at 2664 ("[T]he right to confrontation is a func-

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tional one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 514 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland v. Washington*, 466 U.S. 668, 684–685, 104 S.Ct. 2052, 2062–2063, 80 L.Ed.2d 674 (1984).

[2] We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra*, 487 U.S., at 1019–1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... That face-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 [847] reveal the child coached by a malevolent adult"); *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries *373–*374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy*, 487 U.S., at 1017, 108 S.Ct., at 2801 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green*, 399 U.S., at 157, 90 S.Ct., at 1934, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts, supra*, 448 U.S., at 69, 100 S.Ct., at 2540 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting *Green, supra*, 399 U.S., at 166, 90 S.Ct., at 1939); see also *Stincer*, 482 U.S. at 739–744, 107 S.Ct., at 2664–2667 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis v. Alaska*, 415 U.S. 308, 315–316, 94 S.Ct. 1105, 1109–1110, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer, supra*, 380 U.S., at 406–407, 85 S.Ct., at 1069; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

[3] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite [848] the defendant's inability to confront the declarant at trial. See, *e.g.*, *Mattox*, 156 U.S., at 243, 15 S.Ct., at 339 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations");

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Pointer, supra, 380 U.S., at 407, 85 S.Ct., at 1069 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox*, for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240–244, 15 S.Ct., at 338–340. We explained:

> "There is doubtless reason for saying that . . . if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.*, at 243, 15 S.Ct., at 339–340.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts*, 448 U.S., at 63, 100 S.Ct., at 2537. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.*, at 64, 100 S.Ct., at 2538 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), and citing *Mattox, supra*). We have recently held, 849 for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[4] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts, supra*, 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox, supra*, 156 U.S., at 243, 15 S.Ct., at 339–340. "[W]e have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily, supra*, 483 U.S., at 182, 107 S.Ct., at 2782. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e.g., Kirby*, 174 U.S., at 61, 19 S.Ct., at 578 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case"); *Chambers, supra*, 410 U.S., at 295, 93 S.Ct., at 1045 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with wit-

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nesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee
[850] of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim.L.Bull. 99, 107–108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, *e.g., Illinois v. Allen*, 397 U.S. 337, 342–343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie*, 480 U.S., at 51–54, 107 S.Ct., at 998–1000 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor v. Illinois*, 484 U.S. 400, 410–416, 108 S.Ct. 646, 653–657, 98 L.Ed.2d 798 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke*, 488 U.S. 272, 280–285, 109 S.Ct. 594, 599–602, 102 L.Ed.2d 624 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial 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. See 487 U.S., at 1021, 108 S.Ct., at 2803 (citing *Roberts, supra*, 448 U.S. at 64, 100 S.Ct., at 2538; *Chambers, supra*, 410 U.S. at 295, 93 S.Ct., at 1045); *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring).

[851] III

[5] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox*, 156 U.S., at 242, 15 S.Ct., at 389; see also *Green*, 399 U.S., at 179, 90 S.Ct., at 1946 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effective confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," *Coy, supra*, 487 U.S., at 1020, 108 S.Ct., at

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2802, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts*, 448 [852] U.S., at 66, 100 S.Ct., at 2539. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982); see also *New York v. Ferber*, 458 U.S. 747, 756–757, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749–750, 98 S.Ct. 3026, 3040–3041, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York*, 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, *supra*, 458 U.S., at 757, 102 S.Ct., at 3354. In *Globe Newspaper*, for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U.S., at 608–609, 102 S.Ct., at 2620–21. This Term, in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that " '[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and [853] psychological well-being of a minor" is "compelling." ' " *Id.*, at 109, 110 S.Ct. at 1696 (quoting *Ferber*, *supra*, 458 U.S., at 756–757, 102 S.Ct., at 3354–55).

[6] We likewise conclude today that a State's interest in the physical and psychological well-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 accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy*, 487 U.S., at 1022–1023, 108 S.Ct., at 2803–2804 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; [2] 24 States have authorized the use of

2. See Ala.Code § 15–25–2 (Supp.1989); Ariz. Rev.Stat.Ann. §§ 13–4251 and 4253(B), (C) (1989); Ark.Code Ann. § 16–44–203 (1987); Cal.Penal Code Ann. § 1346 (West Supp.1990); Colo.Rev.Stat. §§ 18–3–413 and 18–6–401.3 (1986); Conn.Gen.Stat. § 54–86g (1989); Del. Code Ann., Tit. 11, § 3511 (1987); Fla.Stat. § 92.53 (1989); Haw.Rev.Stat., ch. 626, Rule

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one-way |854 closed circuit television testimony in child abuse cases;[3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[4]

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth v. State*, 310 Md. 496, 518, 530 A.2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov.1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report* (Dec. 1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979, 4,615 cases of child abuse were investigated; in 1984, |855 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9–102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.*, at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.*, at 517, 530 A.2d, at 285.

Given the State's traditional and " 'transcendent interest in protecting the welfare of children,' " *Ginsberg*, 390 U.S., at 640, 88 S.Ct., at 1281 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7–13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual

Evid. 616 (1985); Ill.Rev.Stat., ch. 38, ¶ 106A–2 (1989); Ind.Code §§ 35–37–4–8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan.Stat. Ann. § 38–1558 (1986); Ky.Rev.Stat.Ann. § 421.-350(4) (Baldwin Supp.1989); Mass.Gen.Laws § 278:16D (Supp.1990); Mich.Comp.Laws Ann. § 600.2163a(5) (Supp.1990); Minn.Stat. § 595.-02(4) (1988); Miss.Code Ann. § 13–1–407 (Supp. 1989); Mo.Rev.Stat. §§ 491.675–491.690 (1986); Mont.Code Ann. §§ 46–15–401 to 46–15–403 (1989); Neb.Rev.Stat. § 29–1926 (1989); Nev. Rev.Stat. § 174.227 (1989); N.H.Rev.Stat.Ann. § 517:13–a (Supp.1989); N.M.Stat.Ann. § 30–9–17 (1984); Ohio Rev.Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla.Stat., Tit. 22, § 753(C) (Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5984 (1988); R.I.Gen. Laws § 11–37–13.2 (Supp.1989); S.C.Code Ann. § 16–3–1530(G) (1985); S.D.Codified Laws § 23A–12–9 (1988); Tenn.Code Ann. §§ 24–7–116(d), (e), (f) (Supp.1989); Tex.Code Crim.Proc. Ann., Art. 38.071, § 4 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989); Wis.Stat. §§ 967.04(7) to (10) (1987–1988); Wyo.Stat. § 7–11–408 (1987).

3. See Ala.Code § 15–25–3 (Supp.1989); Alaska Stat.Ann. § 12.45.046 (Supp.1989); Ariz.Rev. Stat.Ann. § 13–4253 (1989); Conn.Gen.Stat. § 54–86g (1989); Fla.Stat. § 92.54 (1989); Ga. Code Ann. § 17–8–55 (Supp.1989); Ill.Rev.Stat., ch. 38, ¶ 106A–3 (1987); Ind.Code § 35–37–4–8 (1988); Iowa Code § 910A.14 (Supp.1990); Kan. Stat.Ann. § 38–1558 (1986); Ky.Rev.Stat.Ann. §§ 421–350(1), (3) (Baldwin Supp.1989); La. Rev.Stat.Ann. § 15:283 (West Supp.1990); Md. Cts. & Jud.Proc.Code Ann. § 9–102 (1989); Mass.Gen.Laws § 278:16D (Supp.1990); Minn. Stat. § 595.02(4) (1988); Miss.Code Ann. § 13–1–405 (Supp.1989); N.J.Stat.Ann. § 2A:84A–32.4 (Supp.1989); Okla.Stat., Tit. 22, § 753(B) (West Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa. Cons.Stat. §§ 5982, 5985 (1988); R.I.Gen. Laws § 11–37–13.2 (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 3 (Vernon Supp. 1990); Utah Rule Crim.Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp.1989).

4. See Cal.Penal Code Ann. § 1347 (West Supp. 1990); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19–3024A (Supp.1989); Minn.Stat. § 595.02(4)(c)(2) (1988); N.Y.Crim. Proc.Law §§ 65.00 to 65.30 (McKinney Supp. 1990); Ohio Rev.Code Ann. §§ 2907.41(C), (E) (1987); Va.Code Ann. § 18.2–67.9 (1988); Vt. Rule Evid. 807(e) (Supp.1989).

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Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug.1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[7] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.*, 457 U.S., at 608–609, 102 S.Ct., at 2621 (compelling interest in protecting |856child victims does not justify a *mandatory* trial closure rule); *Coy*, 487 U.S., at 1021, 108 S.Ct., at 2803; *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring); see also *Hochheiser v. Superior Court*, 161 Cal.App.3d 777, 793, 208 Cal.Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e.g.*, *State v. Wilhite*, 160 Ariz. 228, 772 P.2d 582 (1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277 (1989); *State v. Davidson*, 764 S.W.2d 731 (Mo.App.1989); *Commonwealth v. Ludwig*, 366 Pa.Super. 361, 531 A.2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth*, *supra*, 310 Md., at 524, 530 A.2d, at 289; see also *State v. Mannion*, 19 Utah 505, 511–512, 57 P. 542, 543–544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. *Coy*, *supra*, 487 U.S., at 1019–1020, 108 S.Ct., at 2802–03, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child |857abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra*, at 3166–3167. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e.g.*, *Coy*, *supra*, 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18–24; *State v. Sheppard*, 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40

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U. Miami L.Rev. 181, 203–204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich.L.Rev. 809, 813–820 (1987).

[8] In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

[9] The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there |858 is a " 'case-specific finding of necessity.' " 316 Md., at 564, 560 A.2d, at 1126 (quoting *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify ... should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A.2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.*, at 565, 560 A.2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9–102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.*, at 566, 560 A.2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that "§ 9–102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.*, at 566, 560 A.2d, at 1127; see also *Wildermuth*, 310 Md., at 523–524, 530 A.2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A.2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9–102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required |859 to limit the defendant's right of confrontation through invocation of § 9–102 ... was not made here." *Id.*, at 570–571, 560 A.2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.*, at 568, 560 A.2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's pres-

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ence on the child witnesses." *Id.*, at 569, 560 A.2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9–102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find—indeed, on the evidence before him, *could not have found*—that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9–102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9–102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.*, at 570–571, 560 A.2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to |860 explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.*, at 568–571, 560 A.2d, at 1128–1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii). See *id.*, at 568–569, 560 A.2d, at 1128–1129; see also App. 22–25, 39, 41, 43, 44–45, 54–57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [*Coy*] before § 9–102 may be invoked," 316 Md., at 554–555, 560 A.2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted |861 with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face

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his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante*, at 3167.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

[862] I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante*, at 3166. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante*, at 3163–3164. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988), quoting *California v. Green*, 399 U.S. 149, 175, 90 S.Ct. 1930, 1943–44, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

[863] The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' " *ante*, at 3165. (emphasis added by the Court). But *Roberts*, and all the other "precedents" the Court enlists to prove the implausible,

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dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial,* did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante,* at 3166. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to |864 describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry v. Leeke,* 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.,* "[i]n *judicial proceedings,* [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who |865 knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him.*" The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confronta-

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tion Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante*, at 3166. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy, supra*, 487 U.S., at 1020–1021, 108 S.Ct., at 2803.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante*, at 3166–3167. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho v. Wright*, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S., at 65, 100 S.Ct., at 2538. We have permitted a few exceptions to this general rule—*e.g.*, for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States v. Inadi*, 475 U.S. 387, 395, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986). "Live" closed-circuit television testimony, however—if it can be called hearsay at all—is surely an example of hearsay as "a weaker substitute for live testimony," *id.*, at 394, 106 S.Ct., at 1126, which can be employed only when the genuine article is unavailable. "When [886] two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts, supra* (requiring unavailability as precondition for admission of prior testimony); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, uncross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green*, as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-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 a malevolent adult." *Coy*, 487 [887] U.S., at 1020, 108 S.Ct., at 2802. To say

1. I presume that when the Court says "trauma would impair the child's ability to communicate," *ante*, at 3170, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud.Proc.Code Ann. § 9–102(a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

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that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," *ante*, at 3167, an "interest in protecting" such victims "from the emotional trauma of testifying," *ante*, at 3169. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest—as far as the Confrontation Clause is concerned [2]—is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the 3868present context, innocent defendants accused of particularly heinous crimes. 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. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am.J.Crim.L. 227, 230–233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 708–711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983–1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra*, at 239–240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation,

2. A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question—initially, at least, and perhaps exclusively—the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

concluded that there was an "absence of credible testimony and [a] lack of 1869significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.*, at 9; answers were suggested by telling the children what other witnesses had said, *id.*, at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.*, at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.*, at 10–11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.*, at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation,870 because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante*, at 3169. If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

ANNEX C

R. v. Levogiannis, [1993] 4 S.C.R. 475, (June 15, 1993).

Indexed as:

R. v. L. (D.O.)

Her Majesty The Queen, Appellant;
v.
D.O.L., Respondent, and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General for Saskatchewan and the Attorney General for Alberta, Interveners.

[1993] 4 S.C.R. 419
[1993] S.C.J. No. 72
File No.: 22660.

Supreme Court of Canada

1993: June 15 / 1993: November 18.*

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Judgment on constitutional questions rendered from the bench on June 15, 1993.

Constitutional law — Charter of Rights — Fundamental justice — Fair trial — Videotaped statement of young complainant in sexual assault case admitted into evidence pursuant to s. 715.1 of Criminal Code — Whether s. 715.1 infringes s. 7 of Canadian Charter of Rights and Freedoms — Whether s. 715.1 offends evidentiary rules against admission of hearsay evidence and prior consistent statements — Whether accused's right to cross-examine complainant violated — Whether judicial discretion in s. 715.1 consistent with principles of fundamental justice — Whether age limit contained in s. 715.1 arbitrary — Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Constitutional law — Charter of Rights — Fair trial — Public hearing — Presumption of innocence — Videotaped statement of young complainant in sexual assault case admitted into evidence pursuant to s. 715.1 of Criminal Code — Whether s. 715.1 infringes s. 11(d) of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Criminal law — Videotaped evidence — Accused charged with sexual assault — Videotaped statement of young complainant made five months after alleged offence admitted into evidence pursuant to s. 715.1 of Criminal Code — Whether videotape made within reasonable time — Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Criminal law — Trial — Reasonable doubt — Whether trial judge applied proper test for weighing evidence.

Criminal law — Trial — Function of judge — Apprehension of bias — Examination of witnesses — Whether trial judge's interventions during trial raised reasonable apprehension of bias.

The accused was charged with sexual assault alleged to have taken place between September 1985 and March 1988. Following a medical examination of the complainant, a 9-year-old girl, the police began their investigation in May 1988 and a videotaped interview of the complainant took place in August 1988. At the preliminary inquiry, the complainant testified before the court. At trial, the Crown sought to introduce the videotaped interview of the complainant pursuant to s. 715.1 of the Criminal Code. That section provides that in any proceeding relating to certain sexual offences "in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape". The accused sought a declaration that s. 715.1 was unconstitutional but the trial judge upheld the section. Following a voir dire, the videotaped interview was admitted into evidence and the accused was convicted. The Court of Appeal allowed the accused's appeal and declared s. 715.1 unconstitutional. The court held that s. 715.1 contravened ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms and could not be sustained under s. 1. A new trial was ordered.

Held: The appeal should be allowed. Section 715.1 of the Code is constitutional.

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ.: Section 715.1 of the Code is a response to the dominance and power which adults, by virtue of their age, have over children. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.

Section 715.1 does not infringe s. 7 or 11(d) of the Charter. Section 715.1 does not offend the rules of evidence against the admission of hearsay evidence and prior consistent statements. In addition, as there is no constitutionally protected requirement that cross-examination be contemporaneous with the giving of evidence, the accused's right to cross-examine has not been violated. The admission of the videotaped evidence does not make the trial unfair or not public, nor does it in any way affect an accused's right to be presumed innocent. Moreover, the incorporation of judicial discretion into s.

715.1, which permits a trial judge to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value, ensures that s. 715.1 is consistent with fundamental principles of justice and the right to a fair trial protected by s. 7 or 11(d) of the Charter. The age limit of 18 contained in s. 715.1 is not arbitrary. This limit is consistent with laws which define the age of majority and with the special vulnerability of young victims of sexual abuse.

The trial judge did not make a reversible error when he concluded that, in the circumstances of the case, the videotape was made within a reasonable time. Nor did he err in stating or applying the test to be used in weighing the evidence. Finally, the trial judge's intervention during the trial did not raise a reasonable apprehension of bias.

Per L'Heureux-Dubé and Gonthier JJ.: The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. It is well established that, in many instances, the court process is failing children, especially those who have been victims of sexual abuse, who are then subjected to further trauma as participants in the judicial process. If the criminal justice system is to effectively perform its role in deterring and punishing child sexual abuse, it is vital that the law provide a workable, decent and dignified means for the victim to tell her story to the court. Section 715.1 is a modest legislative initiative working toward this end. The constitutionality of s. 715.1 is to be examined from a contextual approach which recognizes the staggering numbers of sexual offences reported each year and the innate power imbalance between the abuser and the abused child, which is often tied to both the gender and the age of the victim and the perpetrator. By preserving an early account of the child's complaint and by providing a procedure for the introduction of the child's story into evidence at the trial, s. 715.1 facilitates the attainment of the truth. It also curbs the trauma that a child called to testify in a case of sexual abuse is forced to endure. Although s. 715.1 does not totally eliminate the need for a child to speak in front of the court, the end goal of making the criminal justice process more accommodating to children is accomplished. The limited scope of s. 715.1 is a legislative attempt to balance the objectives of that section with the right of an accused to a fair trial.

Section 7 of the Charter entitles an accused to a fair trial but it does not entitle him to the most favourable procedures that could possibly be imagined. Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In particular, children may have to be treated differently by the criminal justice system in order that it may provide them with the protections to which they are rightly entitled and which they deserve. Further, the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. These rules are not cast in stone and will evolve with time. As well, they should not be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just.

The accused's right to a fair trial under s. 7 of the Charter has not been infringed by the admission of the videotaped statement pursuant to s. 715.1. The provisions of s. 715.1 accommodate the traditional rules of evidence. First, even assuming that videotaped evidence is hearsay, s. 715.1 does not offend the rules against the admission of hearsay evidence. Under s. 715.1, the concern generally associated with hearsay that the prior statement may be unreliable does not present a real danger because a young complainant whose videotaped statement is admitted at trial through s. 715.1 must testify in court and must adopt the contents of the videotape. There is no reason to require circumstances of necessity or circumstantial indicators of reliability as prerequisites to the admission of evidence which does not carry the dangers inherent in the admission of hearsay evidence. The rules of necessity and reliability were designed as substitute requirements, in instances where an exception to the rules of evidence is mandated. They do not necessarily apply to legislative initiatives. In any event, the criteria of necessity and reliability can easily be met. Reliability arises from the presence of the child at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court and the accused's ability to cross-examine the child. Necessity stems from the child's possible loss of memory by the time of trial or from the negative consequences that the child may suffer if obliged to testify at trial.

Second, the rationale for excluding prior consistent statements made by a witness is not applicable to s. 715.1. The videotaped evidence is not being admitted to bolster the credibility of the child witness or to provide superfluous information. This evidence is highly relevant and probative since it is the only evidence before the court with regard to the details of the child's sexual abuse. Section 715.1 simply provides a different means of giving evidence.

Third, the opportunity to cross-examine the complainant at trial, rather than at the time of the filming of the videotape, provides an adequate means of testing the complainant's evidence. Under s. 715.1, the manner of questioning, the reaction, the responses and the entire circumstances of the taking of the evidence are before the court through the medium of videotaping. By ensuring an opportunity for the accused to test the videotaped evidence, s. 715.1 provides full protection for the rights of an accused. Contemporaneous cross-examination is not protected by the Charter.

In addition to the power to expunge or edit statements where necessary, the trial judge has discretion under s. 715.1 to refuse to admit the videotape in evidence if its prejudicial effect outweighs its probative value. Properly used, this discretion to exclude admissible evidence ensures the validity of s. 715.1 and is consistent with fundamental principles of justice necessary to safeguard the right to a fair trial enshrined in the Charter.

The limit of 18 years of age in s. 715.1 is not arbitrary. Section 715.1 is a legislative attempt to partly shield the most vulnerable of witnesses, children and young women, from the severe effects that all witnesses, regardless of age, suffer in sexual abuse cases. The inclusion in s. 715.1 of all complainants up to the age of 18 is required by

their continued need for protection and is in conformity with international and domestic instruments.

Section 715.1 does not infringe s. 11(d) of the Charter. Out-of-court statements admitted into evidence at trial do not deny an accused the guarantee of a public hearing. Further, the fact that the child's testimony is on videotape in no way colours the accused's guilt or innocence.

The videotaped testimony of the complainant was made within a reasonable time, pursuant to s. 715.1, and was properly admitted into evidence. What is or is not "reasonable" depends entirely on the circumstances of a case. Here, the videotape was made five months after the offence was reported. The trial judge, after reviewing all the circumstances of the case, concluded that the time period in videotaping the complainant's evidence was reasonable. The trial judge correctly directed himself in law and did not err in his assessment of the evidence.

The trial judge applied the proper test for weighing the evidence. Whether an account given by an accused might reasonably be true is not the proper test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole. The only question for the trier of fact at the end of the trial is whether or not, on the whole of the evidence, the Crown has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If there is a reasonable doubt, the accused must be acquitted.

Finally, in cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the questions being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. The trial judge's conduct in this case did not prevent the mounting of a proper defence, nor did it demonstrate favouritism toward the complainant in such a way as to preclude a fair trial.

Per Major J.: Section 715.1 of the Code does not infringe ss. 7 and 11(d) of the Charter. The conclusions with respect to the non-constitutional issues were agreed with.

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By L'Heureux-Dubé J.

Referred to: R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Meddoui, [1991] 2 W.W.R. 289; R. v. Toten (1993), 83 C.C.C. (3d) 5; Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 110 S.Ct. 3157 (1990); R. v. B. (K.G.), [1993] 1 S.C.R. 740; R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. B. (G.), [1990] 2 S.C.R. 30; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Khan, [1990] 2 S.C.R. 531; R. v. Marquard, [1993] 4 S.C.R. 223; Ares v. Venner, [1970] S.C.R. 608; R. v. Smith, [1992] 2 S.C.R. 915; R. v. Potvin, [1989] 1 S.C.R. 525; R. v. Argue, Ont. Ct. (Gen. Div.), October 2, 1991, unreported; Baron v. Canada, [1993]

1 S.C.R. 416; R. v. Corbett, [1988] 1 S.C.R. 670; P. (D.) v. S. (C.), [1993] 4 S.C.R. 141; Bank of Montreal v. Bail Ltée, [1992] 2 S.C.R. 554; Lapointe v. Hôpital Le Gardeur, [1992] 1 S.C.R. 351; M. (M.E.) v. L. (P.), [1992] 1 S.C.R. 183; R. v. Duguay, [1989] 1 S.C.R. 93; Lensen v. Lensen, [1987] 2 S.C.R. 672; R. v. W. (D.), [1991] 1 S.C.R. 742; Brouillard v. The Queen, [1985] 1 S.C.R. 39.

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APPEAL from a judgment of the Manitoba Court of Appeal (1991), 73 Man. R. (2d) 238, 3 W.A.C. 238, 6 C.R. (4th) 277, 65 C.C.C. (3d) 465, allowing the accused's appeal from his conviction on a charge of sexual assault and ordering a new trial. Appeal allowed.

Marva J. Smith and Deborah L. Carlson, for the appellant.
Rocky Kravetsky, Jill K. Duncan and Gene G. Zazelenchuk, for the respondent.
Ivan Whitehall, Q.C., and Kimberly Prost, for the intervener the Attorney General of Canada.
Scott C. Hutchison, for the intervener the Attorney General for Ontario.
Lucie Rondeau and Dominique A. Jobin, for the intervener the Attorney General of Quebec.
Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.
Thomson Irvine, for the intervener the Attorney General for Saskatchewan.
Written submissions only by Jack Watson, for the intervener the Attorney General for Alberta.
Solicitor for the appellant: The Department of Justice, Winnipeg.
Solicitors for the respondent: Zazelenchuk & Associates, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.
Solicitor for the intervener the Attorney General for New Brunswick: Paul M. LeBreton, Fredericton.
Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.
Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ. was delivered by

¶ 1 **LAMER C.J.**:— I have read the reasons of Madame Justice L'Heureux-Dubé and concur in her result. It is my view that s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, is a response to the dominance and power which adults, by virtue of their age, have over children. Accordingly, s. 715.1 is designed to accommodate the needs and to safeguard the interests of young victims of various forms of sexual abuse, irrespective of their sex. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.

¶ 2 I would answer the constitutional questions in the same manner as my colleague. As s. 715.1 neither offends the principles of fundamental justice nor violates the right to a fair trial, it cannot be said to limit the rights guaranteed under s. 7 or 11(d) of the Canadian Charter of Rights and Freedoms. The respondent has failed to establish that s. 715.1 offends the rules of evidence against the admission of hearsay evidence and prior consistent statements. In addition, as there is no constitutionally protected requirement that cross-examination be contemporaneous with the giving of evidence, the respondent has failed to show that his fundamental right to cross-examine has been violated. The admission of the videotaped evidence does not make the trial unfair or not public, nor does it in any way affect an accused's right to be presumed innocent.

¶ 3 Moreover, the incorporation of judicial discretion into s. 715.1, which permits a trial judge to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value, ensures that s. 715.1 is consistent with fundamental principles of justice and the right to a fair trial protected by ss. 7 and 11(d) of the Charter. The age limit of eighteen contained in s. 715.1 is not arbitrary, but rather is consistent with laws which define the age of majority to be eighteen years and with the special vulnerability of young victims of sexual abuse.

¶ 4 As I have found there to be no violation of either s. 7 or 11(d) of the Charter, it is unnecessary to consider whether s. 715.1 can be justified under s. 1 of the Charter.

¶ 5 Finally, I would agree with my colleague's disposition of the non-constitutional issues in this case. The trial judge did not make a reversible error when he concluded that, in the circumstances of the case, the videotape was made within a reasonable time. Nor did he err in stating or applying the test to be used in weighing the evidence. Lastly, the respondent failed to establish that the trial judge's intervention during the trial raised a reasonable apprehension of bias.

¶ 6 Accordingly, I would allow the appeal and reinstate the conviction at trial.

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

¶ 7 L'HEUREUX-DUBÉ J.:-- This case raises a number of complex and important issues. Among these are the accused's right to a fair trial and to face his accuser and the criminal justice system's responsibility to seek the truth. As well, the complexities of dealing with the special circumstances involving child witnesses and the difficulties that child victims encounter when attempting to relay their plight of abuse to the courts must be examined. More precisely, this Court is being asked to determine the constitutionality of s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46 (as amended by c. 19 (3rd Supp.), s. 16), which states:

> 715.1 In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

Judgment was rendered, in part, from the bench on June 15, 1993, answering the constitutional questions in the following terms:

> We reserve our decision as regards the non-constitutional grounds raised by respondent. We are ready to answer the constitutional questions now, with reasons to follow.

1. Does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 7 of the Canadian Charter of Rights and Freedoms?

   Answer: No.

2. If the answer to the first question is in the affirmative, does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?

   Answer: This question does not arise.

3. Does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 11(d) of the Canadian Charter of Rights and Freedoms?

   Answer: No.

4. If the answer to the third question is in the affirmative, does s. 715.1 of the

Criminal Code, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: This question does not arise.

Facts

¶ 8 In October 1988, the respondent, D.O.L., was charged with three counts of sexual assault alleged to have taken place between September 1985 and March 1988, and three counts of sexual interference alleged to have occurred between January 1988 and March 29, 1988.

¶ 9 The complainant, R.S., was born on March 12, 1979, and disclosed the sexual occurrences in March of 1988. In May 1988, following a medical examination of the complainant, the police began an investigation of the allegations. In August 1988, a videotape interview of the complainant took place. The complainant, a female child who was nine years old at the time of the videotaping, indicated that the respondent, her grandfather, had put his hand inside her "privates" and had touched her "chest". She further indicated that this had happened "lots of times". R.S. also mentioned that the respondent had warned her not to tell anybody or else he would hurt her.

¶ 10 The respondent was charged in October 1988. At the preliminary inquiry, held in May and June 1989, the complainant testified before the court. At the trial, held in November and December 1989, the Crown sought to introduce the videotaped interview of the complainant, pursuant to the dispositions of 715.1 of the Criminal Code. The respondent moved for a declaration that s. 715.1 was unconstitutional as it contravened ss. 7 and 11(d) of the Canadian Charter of Rights and Freedom. The trial judge dismissed the motion, upholding the constitutionality of s. 715.1.

¶ 11 Following a voir dire, at which the complainant, her mother and the sergeant involved in making the videotape testified, the videotaped interview was admitted into evidence. The trial judge convicted the respondent on one count of sexual assault. No verdict was entered with respect to the count of sexual interference by application of the Kienapple principle. The other counts of sexual assault related to two other complainants.

¶ 12 On June 18, 1991, the Court of Appeal for Manitoba allowed the respondent D.O.L.'s appeal against conviction and declared s. 715.1 of the Criminal Code unconstitutional: (1991), 73 Man. R. (2d) 238, 3 W.A.C. 238, 6 C.R. (4th) 277, 65 C.C.C. (3d) 465. A new trial was ordered.

Judgments

Court of Queen's Bench of Manitoba

¶ 13 At trial, Scollin J. found no merit in the respondent's argument that s. 715.1 of the Criminal Code offended the Charter. With regard to the correct test to be applied to ascertain guilt, he considered the duty of a judge or jury to determine whether, upon the whole of the evidence, they were satisfied beyond a reasonable doubt that the accused had committed the offence charged. He held that the test to be met is whether the Crown has proven their case beyond a reasonable doubt and that:

> Whether an account given by, or on behalf of, an accused might reasonably be true, is not in my view the honest and proper and established test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole.

Applying this test, Scollin J. found the respondent guilty on one count of sexual assault.

Court of Appeal for Manitoba (1991), 6 C.R. (4th) 277

¶ 14 In four separate and concurring opinions, the Court of Appeal for Manitoba allowed the respondent D.O.L.'s appeal against conviction, declared s. 715.1 of the Criminal Code unconstitutional and ordered a new trial.

Helper J.A. (Scott C.J.M. concurring)

¶ 15 Helper J.A. noted the impossibility of enumerating an exhaustive list of the principles of fundamental justice and the importance of maintaining a balance between the accommodation of changing values and the protection of the rights of accused persons. She held that s. 715.1 represents a departure from the general principles of evidence in criminal proceedings. Although Helper J.A. recognized that the purpose of s. 715.1 of the Criminal Code was valid and the concern a substantial and pressing one, she expressed grave concern with regard to the effect of the legislation. She stated (at pp. 290-91):

> Section 715.1 clearly offends the common law evidentiary rule that precludes the admission in evidence of previous consistent statements. Its effects, however, are not confined only to common law rules of evidence. The legislation ignores two fundamental elements of the criminal trial process which have developed in our judicial system over the centuries:
>
> (1) the general principle that evidence must be presented in a public courtroom, in the presence of the accused, accompanied by some formality; and
> (2) the right of an accused to be present when evidence is presented or recorded in order to have the opportunity to test that evidence by cross-examination of the witness.
>
> Section 715.1 violates both s. 7 and s. 11(d) of the Charter and results in

an unfair trial.

¶ 16 Helper J.A. then considered whether s. 715.1 of the Criminal Code may be justified under s. 1 of the Charter. Notwithstanding her determination that the purpose of the legislation, increasing evidence in the prosecution of sexual offences, is a pressing and substantial concern to society, she concluded that s. 715.1 did not meet its objective. She held (at pp. 292-93):

> Section 715.1 does not meet its objective. There appears to be little sense in protecting a child from the formality of a courtroom for the purposes of direct examination and yet subjecting him or her to the rigours of cross-examination in the setting which is designed to be avoided by the legislation. To require a child to testify at a preliminary hearing, on a voir dire at trial, to be cross-examined and be shielded only in the giving of direct evidence, falls short of the aim of the legislation.

Further, she discussed whether the rights of an accused are infringed as little as possible by s. 715.1 and held (at p. 300):

> I cannot read into a legislation a requirement that the Crown prove either reliability or necessity. A comparison of ss. 715.1 and 715 leads me to conclude that the criteria of necessity and reliability were specifically excluded from s. 715.1. The result is that the accused faces an impossible onus and the inherent discretion of a trial judge is rendered nugatory. Once the Crown has proved the minimum requirements of s. 715.1, the accused must convince the court that the prejudicial value of the evidence outweighs its probative value or the circumstances of the taking of the evidence are unfair.
>
> The first test cannot be met. There is no question the evidence is prejudicial. Its probative value is the essence of the Crown's case.
>
> The second test is equally inapplicable. The legislation specifically provides for the taking of evidence in the absence of the accused, without his knowledge, without court supervision and without the opportunity at the time to cross-examine. The legislation, therefore, precludes the exercise of any real judicial discretion. It instead provides for the mechanical application of the legislation.

¶ 17 Accordingly, she concluded that the infringement resulting from s. 715.1 may not be justified under s. 1 of the Charter and the section was, thus, unconstitutional.

Twaddle J.A.

¶ 18 Twaddle J.A. commenced his analysis by declaring that s. 715.1 of the Criminal Code constituted a departure from the general rule that evidence in a criminal trial can only be given by a witness viva voce in the courtroom. In reference to s. 7 of the Charter, although recognizing that this section does not guarantee adherence to established

principles or rules of evidence, he found a principle of fundamental justice in the law of evidence that precluded the admission of videotaped testimony. According to Twaddle J.A., where the possibility exists that an accused may go to prison, an out-of-court statement by a witness can only be admitted to prove the truth of the witness' statement if the guarantees of necessity and reliability are met. Consequently, he considered whether s. 715.1 of the Criminal Code addressed the requirements of necessity and reliability. He indicated concern that the section was not limited to instances where the videotaped evidence was necessary in order to protect the young complainant from the trauma of testifying. In his opinion, the desirability to protect a class of witnesses did not meet the criterion of necessity. As to the requirement of reliability, Twaddle J.A. held that (at pp. 312-13):

> The guarantee of reliability is addressed by the requirement that the child testify. But, paradoxically, it is this very requirement which makes the admission of the statement unnecessary. If the statement is to fulfil the reliability test, it must fail the test of necessity.
>
> In any event, the opportunity which the accused is given to cross-examine the witness at the trial is insufficient to guarantee the reliability of the statement.

¶ 19 Having found that s. 715.1 of the Criminal Code infringed s. 7 of the Charter, Twaddle J.A. proceeded to determine whether s. 715.1 was justified pursuant to s. 1 of the Charter. Although he was convinced that the goals of recording the child complainant's evidence before it is weakened by the lapse of time and protecting the child were of pressing and substantial importance, he maintained that the first part of the goal was achieved without regard to the right of the accused to reliable evidence. Twaddle J.A. was also of the view that, since s. 715.1 did not exempt the child from giving evidence at the preliminary inquiry or from being subject to cross-examination at trial, the purpose of the section was not achieved. He concluded that the section could not be justified under s. 1 of the Charter.

O'Sullivan J.A.

¶ 20 O'Sullivan J.A. agreed with the reasons of Helper J.A. and Twaddle J.A. However, he wrote separate reasons on three issues not considered by them, the burden of proof, the time factor and the discretion conferred upon the trial judge.

¶ 21 With regard to the burden of proof, O'Sullivan J.A. felt that the trial judge erred in imposing too high a burden on the respondent. With regard to the time factor, he determined that the trial judge made an error in holding that the tape was taken within a reasonable time of the alleged offences. Finally, O'Sullivan J.A. held that a discretion conferred upon the trial judge to exclude evidence on the ground of unfairness should not be read into s. 715.1 but, if such a discretion did exist, it should be to prevent against evidence being rehearsed, coached or led.

Lyon J.A.

¶ 22 Lyon J.A. concurred with the common results arrived at by his colleagues. He did not agree, however, with O'Sullivan J.A. that the trial judge imposed too high a burden on the respondent. In considering the general rule to determine guilt or innocence of an accused and its application, he wrote (at pp. 322-23):

> I am satisfied that the sheet anchor test in any criminal prosecution, indeed, the only fundamental rule of general application in determining guilt or innocence, is whether the Crown, on the totality of the evidence, has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If, on the other hand, the trier of fact is left with a reasonable doubt as to the accused's guilt, the accused is entitled to the benefit of that doubt and he must be acquitted. There is no alternative or substitute for this basic principle of law.

The Issues

¶ 23 The four following constitutional questions were stated by the Chief Justice on September 16, 1992:

1. Does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to the first question is in the affirmative, does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?
3. Does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 11(d) of the Canadian Charter of Rights and Freedoms?
4. If the answer to the third question is in the affirmative, does s. 715.1 of the Criminal Code, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?

¶ 24 As I noted earlier, the judgment rendered from the bench on June 15, 1993 answered questions 1 and 3 in the negative and, as a result, questions 2 and 4 did not need to be answered.

¶ 25 In addition to the above constitutional issues, the respondent raised the following three non-constitutional issues:

1. Whether the videotaped testimony of R.S. has been recorded within a reasonable time after the offence, pursuant to s. 715.1 of the Code.
2. Whether the trial judge erred in failing to use the "might reasonably be

true" evidentiary test to determine if the accused should be convicted or acquitted.

3. Whether the trial judge's interjections and commentary during the questioning of the witnesses created a reasonable apprehension of bias.

¶ 26 The reasons underlying the Court's unanimous decision as regards the constitutional questions, as well as the decision with regard to the non-constitutional matters remain to be dealt with.

The Context

¶ 27 At the outset, I believe that it is important to recall the context in which the determination of all the issues involved in this appeal must be considered. As I wrote in R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 647:

> It is my view that the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis. The strength of this approach was discussed by Wilson J., in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1352. She states at p. 1355 that, "(o)ne virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context."

¶ 28 In the case at hand, the horrible ordeal through which R.S. has suffered for the past eight years of her now 14-year-old life, is sadly not an uncommon occurrence in our present day Canadian society. Further to our dismay, the anguish and hardship to which R.S. has been subjected depict a typical situation of child sexual abuse. R.S. is a little girl who was fondled on multiple occasions by someone whom she knew and trusted, her grandfather. R.S. did not immediately disclose the incidents for she feared the consequences of telling. Since disclosure, R.S.'s world has been further upheaved by the development of a rift in her family unit. Each year, in Canada, the number of children who face traumatic situations of sexual abuse and the resulting aftermath, similar to that endured by R.S., increases. This trend has been well documented in the Report of the Committee on Sexual Offences Against Children and Youths (Sexual Offences Against Children (1984)), a report often referred to as the Badgley Report, as well as in many other publications and studies. From 1983 to 1988, reports of sex crimes increased over 100 percent, reaching a staggering 29,111 offences across Canada in 1988 (Department of Justice Canada, Research Section, Sexual Assault Legislation in Canada: An Evaluation (Report No. 5 1990), at p. 28). Regrettably, children represent a significant percentage of those victimized. It has been estimated that almost 80 percent of sex crimes are committed against girls and boys and young women and men under the age of 20 (N. Bala and M. Bailey, "Canada: Recognizing the Interests of Children" (1992-93), 31 J. Fam. L. 283, at p. 292). The Badgley Report warns that one in two females will be the victim of unwanted sexual acts. Further, the fact that children are most often sexually abused by an adult in a position of power or trust increases the pain suffered by the

victim. In fact, studies indicate that 75 percent of perpetrators are known to the children whom they abuse (B. W. Dziech and Judge C. B. Schudson, On Trial: America's Courts and Their Treatment of Sexually Abused Children (2nd ed. 1991), at p. 8, citing a Los Angeles Times poll and the American Humane Association statistics on child abuse victims). This relational power imbalance also serves to delay, as it did in this case, or ultimately in many cases, to prevent disclosure. The respondent's use of threats of reprisal should R.S. tell of her abuse, likely had a much stronger impact on R.S. who trusted, loved and respected D.O.L.

¶ 29 Another issue that must be kept at the forefront of this analysis is the innate power imbalance which exists between the abuser and the abused child. Statistics of the Institute for the Prevention of Child Abuse reveal that in Canada one in four girls and one in ten boys will be victims of sexual assault before they reach the age of 18 (R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15, at p. 16). Another important concern in my view, one that, judging from their concurring opinions, some colleagues do not seem to share, is the power imbalance tied to the gender of the victim and perpetrator. However, since according to the above statistics and the fact that the Badgley Report has observed that 98.8 percent of suspected perpetrators of child sexual assault are male, it cannot be ignored. Further, the Rogers Report (Reaching for Solutions (1990)) identified persistent social attitudes in which women and children continue to be viewed as sexual objects. Those who are objectified are then blamed for their own victimization, which results as a consequence of their objectification (Rogers Report, at pp. 11, 17-18). The issue of gender as it relates to child sexual abuse has, in many instances, been overlooked (L. Clark, "Boys Will Be Boys: Beyond the Badgley Report" (1986), 2 C.J.W.L. 135, at p. 137). In fact, the Badgley Report remarks, without any further comment or analysis, that all of the assailants in a particular study were adult males. In her comments on the Badgley Report, Clark cites numerous examples from the report where the fact that the perpetrators of sexual abuse were almost exclusively male continues to go unnoticed. In essence, it appears that the problem, detailed by Clark, A. H. Young ("Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992), 11 Can. J. Fam. L. 11) and many other authors, is a failure to recognize that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age. Young comments in her article (at pp. 20-21):

> One cannot help but be struck by the parallel between the historical discrediting of children, and that of women who report sexual assaults, as reflected in the following passage from the eminent evidence scholar, John Wigmore [Wigmore on Evidence, vol. 3A (Chadbourn rev. 1970), at p. 736]:
>
> > Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by their inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or

> emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.

¶ 30 The innate power imbalance between the numerous young women and girls who are victims of sexual abuse at the hands of almost exclusively male perpetrators cannot be underestimated when "truth" is being sought before a male-defined criminal justice system. In this light, I suggest that throughout this analysis one must continue to have regard to the context exposed by this Court in Seaboyer, supra. We cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions within the criminal justice system which hold stereotypical and biased views about the victimization of women. In the report of the Solicitor General of Canada, Canadian Urban Victimization Survey: Reported and Unreported Crimes (1984), the statistics in this regard are noted at p. 10:

> Analysis of reasons for failure to report incidents confirms many of the concerns which have already been noted by rape crisis workers -- that women fear revenge from the offender (a factor in 33% of the unreported incidents) and, even more disturbingly, that they often fail to report because of their concern about the attitude of police or courts to this type of offence (43% of unreported incidents).

(See also L. L. Holmstrom and A. W. Burgess, The Victim of Rape: Institutional Reactions (1983), at p. 58, and P. Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 217.) These stereotypical views are equally relevant where children are involved. A recognition of the gendered nature of child sexual abuse and of the way in which young women are particularly victimized does not, of course, imply the denial of the trauma and pain experienced by boys and adolescent victims of sexual abuse. They are also too often silenced by a society which tends to disbelieve them and to stigmatize them by calling into question their sexual identity once they do disclose the abuse. We live in a society which continues to blame even the most innocent of victims.

Legislative Background

¶ 31 Child sexual abuse has been described as the perfect crime (B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 St. Mary's L.J. 279, at pp. 280-306). The combination of the power imbalance between the victim and the perpetrator, both through the dynamics of age and gender, acts in conjunction with the fact that there are likely no other witnesses to the crime other than the assailant and the young victim. Further, difficulties faced by the young complainant as she tries to seek justice in the somewhat alien criminal justice system act to limit the attainment of the truth in the court process. Unfortunately, the barriers to justice faced by child victims remain almost as steadfast today as they have for decades. In fact, despite the increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction rate remains unchanged. In 1986, only one in five of those charged with child sexual assault were

convicted compared to a conviction rate of four out of five of those accused of other offences (A. McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990), 19 Man. L.J. 549, at p. 563). As "increasing numbers of sexual assault cases involving children come through the courts, it has become apparent that the traditional treatment of children and their evidence is unsatisfactory" (Young, supra, at p. 11 (synopsis)). Professor Bala succinctly sets out the problem with which courts are faced:

> The traditional response of the Canadian criminal justice system to child sexual abuse has contributed to the "double victimization" of children. Because of their social, psychological, economic and intellectual positions, children are the most frequent victims of unwanted sexual acts. Our legal and social systems failed our children, initially by allowing them to become victims. And when cases of sexual abuse have been dealt with by the legal system, children have too often been the victims of "secondary trauma", produced by their mistreatment in that system.
> ("Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., Discrimination in the Law and the Administration of Justice (1993), 232, at p. 233.)

¶ 32 In an attempt to remove or limit the barriers encountered by child victims of sexual assault and the urgent need to end the cycle of abuse, where an abused male frequently becomes an abuser and an abused female is often revictimized (McAllister, supra, at p. 295), the enactment of s. 715.1 of the Code was precipitated.

¶ 33 I suggest that a proper starting point for discussion of the legislation must be in the context of developing a criminal justice system that, as the Rogers Report, supra, proposes (at p. 57): "[used] to its fullest extent must be an important part of the strategy for dealing with child sexual abuse". As M. Brennan stated at the Commonwealth Law Conference, with respect to the problems related to child sexual abuse in the courts:

> The fundamental question remains: how can "truth" be an outcome of a process which restricts and actively denies the experiences of one of the major players?
> ("The Battle for Credibility" (1993), 143 New Law Journal 623, at p. 626.)

Section 715.1 of the Criminal Code seeks to include the experience of young complainants in the criminal justice system. The respondent alleges that, as a result of this enactment, principles of fundamental justice, particularly with regard to a fair trial, are infringed. Both at trial and at the Court of Appeal, as well as in the argument submitted to this Court, the crux of the argument revolved around the larger purpose, as compared to the actual effect of the legislation. Accordingly, it is essential to address the goals of the legislation, as apparent from the section.

¶ 34 I agree with the submission that the goals of s. 715.1 are not unique but multifaceted. First, I find that the section is designed to preserve an early account of the child's complaint in order to assist in the discovery of the truth and to provide a procedure for the introduction of the child's story into evidence at the trial. R. G. Mosley, senior general counsel for the Department of Justice, said when introducing s. 715.1 before the Standing Senate Committee on Legal and Constitutional Affairs that:

> ... the videotape ... is simply a means of getting the child's earlier statement before the court in the belief that that early statement will be an accurate and, hopefully, more complete account of what took place.
> (Standing Senate Committee on Legal and Constitutional Affairs, Proceedings, Issue No. 2, November 20, 1986, at p. 2:23.)

¶ 35 Secondly, the procedures set out in s. 715.1 are designed to diminish the stress and trauma suffered by child complainants as a byproduct of their role in the criminal justice system. This "system induced trauma", as described by J. R. Spencer and R. H. Flin (The Evidence of Children: The Law and the Psychology (1990), at pp. 290-97) and by Professor Bala ("Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", supra), often ultimately serves to revictimize the young complainant. Further, the most recent report of the House of Commons entitled Four-Year Review of the Child Sexual Abuse Provisions of the Criminal Code and the Canada Evidence Act (formerly Bill C-15) by the Standing Committee on Justice and the Solicitor General, dated June 1993 (at p. 11), indicates that s. 715.1 was intended to preserve the evidence of the child and to remove the need for them to repeat their story many times. It is often the repetition of the story that results in the infliction of trauma and stress upon a child, who is made to feel that she is not being believed and that her experiences are not being validated. In response to those who suggest that the purpose of s. 715.1 is in no way geared to assist the child witness, it would be difficult to imagine how the legislators could have ignored the benefit such a provision would have in limiting the strain imposed on child witnesses, who are required to provide detailed testimony about confusing, embarrassing and frightful incidents of abuse in an intimidating, confrontational and often hostile courtroom atmosphere. Finally, and most importantly, the limited scope of the rule is, in my view, a legislative attempt to balance these objectives with the rights of an accused to a fair trial.

¶ 36 Whilst the primary purpose of s. 715.1 may be the attainment of truth, the section is particularly focused on the needs of children and the special protections that they require in order to expose that truth. Children, for example, find it stressful to face their perpetrator while they are testifying and to tell their story in front of strangers. It is these types of concerns at which s. 715.1 is aimed. In the words of Kerans J.A. in R. v. Meddoui, [1991] 2 W.W.R. 289 (Alta. C.A.), s. 715.1 is "a modest modification of the existing law of evidence to recognize the difficulties some child witnesses have in the articulation of their testimony" (p. 295). An alternate view was recently expressed by the Ontario Court of Appeal in R. v. Toten (1993), 83 C.C.C. (3d) 5 where Doherty J.A. stated (at pp. 20-21):

> ... I do not agree that s. 715.1 is intended to protect the young complainant from the trauma associated with testifying in a public forum and in the presence of the accused. Indeed, s. 715.1 has been criticized because it fails to provide that protection.

Doherty J.A. goes on to quote comments made by Professor Spencer ("Child Witnesses -- A Further Skirmish" (1987), 137 New Law Journal 1127), regarding proposed English legislation admitting videotapes. Professor Spencer contends (at p. 1128):

> The courts are not concerned with protecting witnesses, or defendants, or anyone, except as something secondary to their main purpose, which is discovering the truth in order to do justice.

Assuming that the above quote supports Doherty J.A.'s assertion, which is not clear to me, I disagree with Doherty J.A. on this point. I suggest that the Charter requires that we bring these multiple considerations foremost in our mind, as truth cannot be attained in a vacuum. In my opinion, Professor Spencer, in fact, gives credence to the multifaceted purposes of legislation such as, s. 715.1 of the Criminal Code. In our quest for the truth, if the defendant's rights must not be infringed, neither must the complainant be further victimized. Children require special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved. These special requirements stem not so much from any disability of the child witness, but from the fact that our ordinary criminal and courtroom procedures have been developed in a time when the participation of children in criminal justice proceedings was neither contemplated nor plausible. A "court system, established with adult defendants and witnesses in mind, does not easily accommodate children's special needs" (G. Goodman et al., Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims (1992), at p. 3). Children have suffered and continue to suffer immense hardship from the court process. I do not believe that, when drafting s. 715.1, the legislators could have ignored detailed accounts, such as set out by Spencer and Flin, supra, at p. 72:

> I was accused of lying, fabrication and made to feel as though I was the accused and not an innocent nine-year-old victim....The defence lawyer treated me roughly as though I was 19 instead of nine-year- old, shouting at me, muddling me, confusing me. I hated him and still do for the way he treated me. The trouble is that after 23 years I still have horrible dreams now and then -- not about the incident at the cinema [the assault], but of the court appearance I made.
>
> . . .
>
> At the age of seven I was indecently assaulted by a lad who was known to our family. Trying to explain to my parents was hard but to stand up in court and explain was impossible. He sat there watching me all the

time. Of course he got away with it like so many do.

It has also been observed that court proceedings often have severe and dire consequences on a child's ability to get on with her or his daily life. In a significant number of cases, the fear of contaminating required testimony has forced the delay of needed therapy and counselling (Spencer and Flin, supra). Finally, a research paradigm designed to calculate the incidence of stress suffered by child witnesses revealed many instances of nervous behaviour by children testifying in court. Children called to testify demonstrated great nervousness through acts such as twisting hair, attempting to leave the witness stand or the courtroom before the end of the session and in one instance crying (P. E. Hill and S. M. Hill, "Videotaping Children's Testimony: An Empirical View" (1987), 85 Mich. L. Rev. 809, at p. 816).

¶ 37 In response to the respondent's concerns, one must now ask whether the force of s. 715.1 meets the multifaceted objects set out above. Again, using the words of Kerans J.A. in Meddoui, supra, at p. 295, I agree that s. 715.1 does:

> ... [offer] the witness the choice, even if the witness can recall the events in question, to refer, while testifying, to an earlier taped account provided that the witness can recall the taping and can and does affirm that, at the taping, he was honest and truthful. When the witness makes such a reference, the tape becomes evidence in proof of the truth of its contents.

As previously stated, s. 715.1 of the Criminal Code is an attempt to facilitate the attainment of the truth and to curb the trauma that children called to testify in cases of sexual abuse are forced to endure. Although s. 715.1 does not totally eliminate the need for a child to speak in front of the court, the end goal of making the criminal justice process more accommodating to children is accomplished. In this regard I strongly disagree with Helper J.A. when she states (at pp. 292-93):

> Section 715.1 does not meet its objective. There appears to be little sense in protecting a child from the formality of a courtroom for the purposes of direct examination and yet subjecting him or her to the rigours of cross-examination in the setting which is designed to be avoided by the legislation. To require a child to testify at a preliminary hearing, on a voir dire at trial, to be cross-examined and be shielded only in the giving of direct evidence falls short of the aim of the legislation.

¶ 38 In fact, although the aim of s. 715.1 is not to completely eliminate the need for the child to testify in court, as pointed out by the appellant, the current formulation of s. 715.1 leads to this end in a very significant number of cases. There is strong confirmation that videotaped evidence may often assist in eliciting a guilty plea, once the accused and his counsel have viewed the child describing the incident (D. Whitcomb, E. R. Shapiro and L. D. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors (1985), at p. 60). Further, in the case at hand, the use of the videotape allowed the Crown prosecutor to proceed with her case while asking very few questions

of the complainant. In addition, although the defence counsel had a full opportunity to question R.S., counsel chose only to ask three questions with respect to the sexual acts. Therefore, in R.S.'s case, the use of the videotape evidence almost totally eliminated the need for her to recount once again the sexual violations of her body.

¶ 39 A further advantage afforded by s. 715.1 is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which, according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand. Scientific study has indicated that, as compared to the courtroom setting, the quality and reliability of children's testimony is significantly enhanced in a smaller, more intimate, videotape environment (Spencer and Flin, supra). The numerous other advantages of videotaped evidence include the fact that videotaped testimony enables the court to hear a more accurate account of what the child was saying about the incident at the time it first came to light. Secondly, the tape of an early interview will reveal how the child was questioned. Thirdly, a suspect may have the opportunity to view the videotape during the course of an investigation. Fourthly, the videotape of an early interview, if used in evidence, can supplement the evidence of a child who is inarticulate or forgetful at trial. I find that these numerous advantages gained through the implementation of s. 715.1 are concrete. Even though the section has not been used extensively, researchers indicate that "these devices have had some positive effects in terms of reducing the "system induced" trauma to children of involvement in criminal proceedings" (Bala and Bailey, supra, at p. 293). For the children who benefit, a few instances mean a great deal more than statistics. It has been found that the length of time children were in the stand decreased with the use of video. As well, there appeared to be a benefit to the victims in that they could get on with treatment. Ultimately:

> If a child is compelled to be physically present in court, the psychological cost can be quite severe. This cost may ultimately be passed on to society if, as a result of the child's inability to testify, a guilty perpetrator is improperly released.

(Hill and Hill, supra, at p. 827.)

¶ 40 Section 715.1 of the Criminal Code acts to remove the pressure placed on a child victim of sexual assault when the attainment of "truth" depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. Section 715.1 ensures that the child's story will be brought before the court regardless of whether the young victim is able to accomplish this unenviable task.

¶ 41 It is interesting to note that state legislatures in the United States have endeavoured to redress the difficulties of child testimony in a manner similar to s. 715.1 of the Criminal Code. In fact, as of 1991, at least 37 states permitted the introduction of a child's videotaped statement into evidence under certain conditions (see M. A. Rittershaus, "Maryland v. Craig: Balancing the Interests of a Child Victim Against the

Defendant's Right to Confront his Accuser" (1991), 36 San Diego L. Rev. 104, at p. 105). Each state approached the task of balancing the rights of the accused and the attainment of truth in a slightly different manner (J. C. Yuille, M. A. King and D. MacDougall, Child Victims and Witnesses: The Social Science and Legal Literatures (1988), at p. 44). For example, the Fla. Stat. Ann. sec. 92.53 (West 1992) provides that videotaped statements may be used where there is "a substantial likelihood that a victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court".

¶ 42 A number of state Acts have been criticized on the grounds of potential constitutional invalidity, as a result of infringements on the rights of the accused. In particular, both the United States Constitution and numerous state constitutions guarantee the defendant the right to confront those witnesses testifying against him or her at trial, a right on which the Canadian Charter is silent. In addition, concerns similar to those presently before this Court have been raised. These include the administering of an oath to the child witness and the right to cross-examination (McAllister, supra, at p. 316).

¶ 43 The United States Supreme Court first examined the constitutionality of these legislative enactments in 1988 in Coy v. Iowa, 487 U.S. 1012 (1988). In Coy, the issue was whether a screen placed in front of the witness infringed upon the accused's right to confront his accuser. While the United States Supreme Court, in this case, found that the accused's right to confront his accuser was infringed, subsequently in Maryland v. Craig, 110 S.Ct. 3157 (1990), it re-examined the constitutionality of similar legislation in the Maryland statute, with the use of one-way closed-circuit television and its effects on the rights of the accused. In Craig, the "Court modified its definitional view of the confrontation clause to allow for case-by-case exceptions to face-to-face confrontations" (Rittershaus, supra, at p. 106). In delivering the opinion of the majority of the United States Supreme Court, O'Connor J. stated at p. 3167:

> We likewise conclude today that a State's interest in the physical and psychological well-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 accusers in court.

It is my opinion, that s. 715.1 of the Criminal Code similarly realizes this important objective. This being said, does s. 715.1 infringe the accused's rights under ss. 7 and 11(d) of the Charter.

Constitutionality of Section 715.1

¶ 44 Our Court has reached the conclusion, in its oral judgment delivered from the bench, that s. 715.1 of the Criminal Code is consistent with ss. 7 and 11(d) of the Charter. Sections 7 and 11(d) assert:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the

principles of fundamental justice.

11. Any person charged with an offence has the right

. . .

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

It must be recalled that the respondent's challenge to the constitutionality of s. 715.1 pursuant to ss. 7 and 11(d) of the Charter, is solely framed on a breach of the principles of fundamental justice and the right to a fair trial. Accordingly, the respondent's concerns focus primarily on evidentiary rules: the admission of hearsay evidence, prior consistent statements, the lack of opportunity for contemporaneous cross-examination, the scope of judicial discretion, and the effect of the age of the complainant. I will survey each of these points in turn.

Section 7

¶ 45 I will first deal with the respondent's concerns with regard to the breach of his rights under s. 7 of the Charter. Given the legislative background, the respondent's argument appears to be that the procedure in s. 715.1 threatens to deprive him of his right to liberty in a way which does not accord with the principles of fundamental justice by depriving him of a right to a fair trial.

¶ 46 Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In R. v. B. (K.G.), [1993] 1 S.C.R. 740, this Court recognized the need to balance the accused's interests in a criminal trial with the interests of society. (See also R. v. Seaboyer, supra, at pp. 603-4 and 622.) The respondent submits that the effect of s. 715.1 of the Criminal Code is to allow, as evidence at trial, statements taken out of court "without any of the procedural requirements, controls and safeguards that are built into the traditional trial process and that have become fundamental to our system of justice". One must recognize that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice.

¶ 47 In the case at hand, in the determination of what is fair, one must bear in mind the rights and the capabilities of children. As McLachlin J. recognized in R. v. W. (R.), [1992] 2 S.C.R. 122, at p. 133: "... it may be wrong to apply adult tests for credibility to the evidence of children". Wilson J. expressed a similar view in R. v. B. (G.), [1990] 2 S.C.R. 30, at pp. 54-55, in reference to the appeal judge's treatment of the child witness' evidence:

> . . . it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults.

¶ 48 Children may have to be treated differently by the criminal justice system in order that it may provide them with the protections to which they are rightly entitled and which they deserve. Even in this particular case, when the interests of the child witness may seem completely at odds with those of the accused, one must recall the words of La Forest J. in R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362:

> It seems to me that s. 7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

¶ 49 Therefore, the question is not whether the accused can imagine a situation where his rights would be greater but rather, whether s. 715.1 violates his rights. In this respect, the respondent points to numerous rules of evidence in an attempt to demonstrate such a violation. In his view, the admission of videotaped statements by a child complainant under s. 715.1 results in the admission of hearsay and prior consistent statements. He further points to the lack of opportunity for contemporaneous cross-examination. Although s. 7 does not guarantee strict adherence to particular rules of evidence, but, in fact, guarantees that a person shall not be deprived of her or his liberty in a manner contrary to the principles of fundamental justice, I will deal with each of these concerns in turn.

¶ 50 Before dealing specifically with these arguments, however, it is important to note recent developments in the law of evidence. The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just. A just result is best achieved when the decision-makers have all relevant and probative information before them. It would seem contrary to the judgments of our Court (Seaboyer and B. (K.G.), supra) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth seeking process. Consequently, adherence to such strict rules as suggested by the respondent, besides not being constitutionally required, may result in valuable information not being brought to the court's attention. Moreover, the Court has recently sought to further remove obstacles to the truth seeking process, in a genuine attempt to return to the basic goal of truth-finding (see R. v. Khan, [1990] 2 S.C.R. 531, R. v. W. (R.), supra, and R. v. Marquard, [1993] 4 S.C.R. 000). Rules of evidence, as much as the law itself are not cast in stone and will evolve with time. This is amply demonstrated by even a superficial overview of our legal history and the way in which rules were developed through the centuries. In order to deal with the respondent's specific arguments, I will now discuss his concerns relating to hearsay.

Hearsay

¶ 51 The respondent submits that s. 715.1 of the Criminal Code infringes the rule against hearsay and, consequently, infringes the principles of fundamental justice. However, as legal history dictates, even an exception to the rule regarding hearsay is not really an exceptional occurrence. In fact, it has been observed that exceptions to the hearsay rule are "as "fundamental" as the rule" (A. McGillivray, "R. v. Laramee: Forgetting Children, Forgetting Truth" (1991), 6 C.R. (4th) 325, at p. 334, commenting on Ares v. Venner, [1970] S.C.R. 608).

¶ 52 The concern, with regard to the admissibility of hearsay evidence, is that an out-of-court statement may be relied upon as proof of the truth of its contents without any opportunity, through cross-examination, to test its veracity. In the case at hand, even assuming for the sake of argument that the videotaped evidence is hearsay, traditional considerations which govern here, such as those that were before this court in Khan, supra, are not present. In Khan, the young declarant was not available for cross-examination. As a result, the Court decided that the tests of necessity and reliability had to be met before the hearsay statement could be admitted into evidence, thus creating a judicial exception. However, in the present case, a child, whose videotaped statement is admitted at trial through s. 715.1, must testify in court and must adopt under oath the statement that she or he has made on the videotape. The concerns enunciated in Khan, supra, are simply not present here. Once the child at trial adopts the videotaped evidence, that evidence is no longer strictly hearsay. The trier of fact will then be able to assess the credibility of the child. In the words of Doherty J.A. in Toten, supra, at p. 34:

> I can see no reason to require circumstances of necessity or circumstantial indicators of reliability as pre-requisites to the admission of evidence which does not carry the dangers inherent in the admission of hearsay evidence.

¶ 53 The rules of necessity and reliability were designed as substitute requirements, in instances where an exception to the rules of evidence is mandated. These rules do not necessarily apply to legislative initiatives. In the instance of s. 715.1, consideration must be had for the prerogative of Parliament to reform the law of evidence and to adopt, in so doing, its own substitute rules to insure reliability and necessity; in this case, the availability of the child witness and the possibility of cross-examination. This prerogative should not be unduly limited by a court, without a clear basis for justification (R. v. Smith, [1992] 2 S.C.R. 915). There is none here.

¶ 54 In any event, in the case at hand, the tests of necessity and reliability can easily be met. Reliability arises from the presence of the child at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court and the accused's ability to cross-examine the child. Necessity stems from the child's possible loss of memory by the time of trial or from the negative consequences that the child may suffer if obliged to testify at trial. Therefore, in this regard, I disagree with the findings of Twaddle J.A. that the necessity test does not import the need to protect witnesses from having to testify at trial. The severe consequences that could result should the videotape not be admitted as evidence and the child is unable to give

relevant and reliable evidence at trial, in addition to the law's duty to protect children in such circumstances, in my view meet the test for necessity. As Professor Young (supra, at p. 35) points out in relation to the appeal court judgment in this case:

> The Court's concern with the absence of the necessity requirement from the videotape provision is misplaced for a few reasons. First, the requirement that one would have to show necessity in each case to justify the admission of videotaped evidence would once again force children to conform to adult norms which were not developed with them in mind. One of the positive elements of the videotape provision ... is precisely the fact that it contemplates the particular realities of children and the fact that they may have trouble repeating or indeed recalling all the details in court.

The respondent's argument as to hearsay must fail.

Prior Consistent Statements

¶ 55 The respondent's second line of attack on the constitutionality of s. 715.1 of the Criminal Code is that the admission of prior consistent statements violates the fundamental principles of justice. The general evidentiary rule with regard to the admission of prior consistent statements is expressed by Wigmore:

> When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.
> (Wigmore on Evidence, vol. 4 (Chadbourn rev. 1972), (SS) 1124, at p. 255.)

In my opinion, the above rationale for excluding prior consistent statements made by a witness is not applicable to s. 715.1 of the Criminal Code. This Court has dealt at length with evidentiary concerns, and the potential violation of an accused's rights in this regard, in Seaboyer, supra, and, most recently, with respect to videotaped testimony in B. (K.G.), supra.

¶ 56 Although the admittance of a prior consistent statement would, perhaps, be considered an exception to the general rule, the facts of this case are quite different from situations regularly caught by the rule against prior consistent statements. As a result of s. 715.1 of the Criminal Code, the prior consistent statement is not being admitted to bolster the credibility of the child witness or to provide superfluous information. The videotaped evidence is the only evidence before the court with regard to the details of the child's sexual abuse. It is, in fact, the evidence itself, as if the child were giving it in open court or in lieu of open court evidence. Thus, I agree with the appellant that the videotaped evidence is highly relevant and probative and is neither "unnecessary [or]

valueless". Section 715.1 of the Code simply provides a different means of giving evidence. In that sense, it cannot even be said that it affords an exception to the rule against the admissibility of prior consistent statements, the rationale of which does not apply in this case.

¶ 57 I would dismiss this argument.

Cross-examination

¶ 58 Finally, the respondent argues that cross-examination of the young complainant at trial, rather than at the time of the filming of the videotape, does not provide sufficient opportunity to test the evidence of the child witness. When dealing with a similar issue in B. (K.G.), supra, the Court accepted the notion that the opportunity to cross-examine at trial provides an adequate means to test the evidence of a witness. In B. (K.G.), it was found that contemporaneous cross-examination was not protected by the Charter, in a case dealing with a prior inconsistent videotaped statement which was admitted for the truth of its contents. In the present case, the sole difference is that the videotaped statements have been adopted by the witness and are consistent. As a result of the adoption, the concern that the prior statement may be unreliable is considerably diminished, if not annulled, because the witness, present in front of the court and the accused, endorses the truth of her past statements. As the Court found in B. (K.G.), the concerns with respect to the potential problems associated with hearsay and reliability of evidence are not significant when videotaped testimony is involved. Under s. 715.1, the manner of questioning, the reaction, the responses and the entire circumstances of the taking of the evidence are before the court through the medium of videotaping. The Court in B. (K.G.) held that cross-examination at trial was sufficient to remedy the absence of opportunity to cross-examine at the time of making the initial statements. A fortiori, the same rationale applies to videotaped prior consistent statements, such as the one at issue here.

¶ 59 Further, in R. v. Potvin, [1989] 1 S.C.R. 525, this Court considered a provision which was somewhat similar to s. 715.1 of the Criminal Code. In that case, s. 643(1) of the Code was challenged. It provides that, in instances where certain prior conditions are met, evidence initially given at a preliminary inquiry may be read in at trial, when a witness is unable to give further testimony at trial. Wilson J., speaking for the Court, held that, while the accused does have a fundamental right to cross-examine a witness, this examination does not have to occur at the trial. These remarks of Wilson J. were followed in R. v. Argue, Ont. Ct. (Gen. Div.), October 2, 1991, unreported, at p. 10, by Tobias J. who disagreed with Helper. J.A.'s views in the present case. In Argue, supra, Tobias J. found that s. 715.1 of the Criminal Code provides full protection for the rights of an accused, both at common law and under the Charter, by ensuring an opportunity for the accused to test the videotaped evidence. I agree. In the case at hand, I do not find that the accused's right to cross-examination will be thwarted by the fact that cross-examination is not contemporaneous and, per se, the inevitable delay in cross-examination does not render s. 715.1 constitutionally deficient.

¶ 60 In conclusion, therefore, it is my opinion that the respondent's rights under s. 7 of the Charter have not been infringed by the admission of videotaped testimony under s. 715.1 of the Criminal Code and the provision is, accordingly, constitutional. It does not infringe the principles of fundamental justice guaranteed by s. 7 of the Charter.

Section 11(d)

¶ 61 I will now turn to the respondent's submissions that s. 715.1 of the Criminal Code violates his right under s. 11(d) of the Charter "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Many of the same concerns as arise in considering "the principles of fundamental justice" guaranteed under s. 7 may be protected under s. 11(d). However, as I have already dealt with these issues, I will focus, at this time, solely on the concerns which fall directly under s. 11(d). In this regard, the respondent submits that the fact that out-of-court statements are admitted into evidence at trial denies him the guarantee of a public hearing. I do not find this submission persuasive. Out-of-court statements are admitted into evidence in judicial proceedings everyday without any suggestion that the trial is unfair or not public. Further, the fact that the child's testimony is on videotape, in my opinion, in no way colours the accused's guilt or innocence. The respondent's submissions on this point are minimal and, frankly, do not deserve a longer discussion. I do not find that s. 11(d) of the Charter is infringed by s. 715.1 of the Criminal Code.

Judicial Discretion

¶ 62 Even if one were to conclude that s. 715.1 creates an exception to the general rules of evidence, which I do not, it would be a very minimal exception indeed. In this regard, I agree with the appellant's submission that the wording of s. 715.1 itself supports the interpretation that such a provision accommodates traditional rules of evidence and judicial discretion. Thus, in addition to the power to expunge or edit statements where necessary, the trial judge has discretion to refuse to admit the videotape in evidence if its prejudicial effect outweighs its probative value. Properly used, this discretion to exclude admissible evidence ensures the validity of s. 715.1 and is conversant with fundamental principles of justice necessary to safeguard the right to a fair trial enshrined in the Charter. Most recently, and following earlier decisions, in Baron v. Canada, [1993] 1 S.C.R. 416, this Court held that residual judicial discretion may be constitutionally required in order to provide a mechanism for balancing the rights of the accused and those of the state.

¶ 63 It is further important to note that s. 715.1 does not operate in a vacuum. In fact, at trial, Scollin J. directly asked counsel if there were any parts of the videotaped testimony that would be inadmissible had the child been in the witness box. Counsel explicitly replied that there were not. This judicial discretion has its foundation in the judge's duty to ensure a fair trial for the accused (R. v. Corbett, [1988] 1 S.C.R. 670). In Corbett, when referring to the rules of evidence Dickson C.J. observed at p. 697:

> ... basic principles of the law of evidence embody an inclusionary policy

> which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

¶ 64 Section 715.1, in my view, has been carefully crafted to leave room for the application of this principle, in allowing for judicial discretion to reject evidence where its probative value is outweighed by its prejudicial effect. All relevant evidence must be admissible unless it is excluded for compelling policy reasons. La Forest J. expressed the view in Corbett, supra, at p. 745, that:

> ... "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.

¶ 65 In a case where the protection of s. 715.1 is called upon, the child victim must testify at trial and attest to the truth of the statements made earlier as recorded by videotape. The child may then be subjected to cross-examination on the contents of the taped evidence and the making of the tape. In addition to the child adopting all or part of her prior statements, other limitations exist in that the videotape will only be admissible for a victim under 18 years of age and the video must be made within a reasonable time. However, even before the videotape may be admitted, a voir dire must be held to review the contents of the tape and to ensure that any statements made in the videotape conform to the rules of evidence. Any statements which are in conflict with rules of evidence may be expunged from the tape. There are a number of factors which the trial judge could take into account in exercising his or her discretion to exclude a videotaped statement:

(a) The form of questions used by any other person appearing in the videotaped statement;
(b) any interest of anyone participating in the making of the statement;
(c) the quality of the video and audio reproduction;
(d) the presence or absence of inadmissible evidence in the statement;
(e) the ability to eliminate inappropriate material by editing the tape;
(f) whether other out-of-court statements by the complainant have been entered;
(g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);
(h) whether the prosecution has been allowed to use any other method to

facilitate the giving of evidence by the complainant;
(i) whether the trial is one by judge alone or by a jury; and
(j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

¶ 66 In conclusion on this aspect, consideration must be had for the prerogative of Parliament to make such reforms to the law of evidence from time to time as best serves the interests of justice. The recent decision of our Court in B. (K.G.), supra, best illustrates such need. As I stated above, this prerogative should not be unduly limited without a clear basis for justification. The provisions of s. 715.1 accommodate the traditional rules of evidence as well as judicial discretion. As such, these provisions are not unconstitutional.

Age Limit

¶ 67 The final argument put forward by the respondent with respect to the constitutionality of s. 715.1 and ascribed to by Helper J.A. on appeal, is to the effect that the age of the complainant affects the viability of s. 715.1 of the Criminal Code. According to the respondent, the limit of 18 years of age is arbitrary and as such renders the section unconstitutional. I disagree. Whether the complainant is a young child or an adult woman, all victims of sexual abuse who are required to relive, through detailed testimony, the horrendous events through which they have suffered, experience doubly what is already significant pain. There is a need for greater recognition of the severe effects that all witnesses, regardless of age, suffer in such instances. Section 715.1 is a legislative attempt to partly shield the most vulnerable of those witnesses, children and young women. The purpose of the legislation remains the same regardless of the age of the complainant and the need for protection may even be enhanced in the case of young women. A young woman of 15, 16 or 17 years of age will, in most instances, be in a situation of power imbalance vis-à-vis the perpetrator, as a result of both her sex and her age. As well, there will be many instances where the accused is in a position of trust and this may often result in additional emotional turmoil and confusion. Young women are particularly vulnerable at the age when they commence to assert their sexuality. As a result, such an experience in adolescence, may be even more traumatic and have more long term effects than if suffered at an earlier age.

¶ 68 Empirical data sheds some light on this issue. For example, a Toronto study indicated that the highest percentage of reported rapes that were classified by the police as unfounded, were in the 14- to 19-year-old age group. In this age group, 69 percent of reports were classified as unfounded (Clark, supra, at pp. 143-44). This trend of disbelief continues and worsens when the charge is one of gang rape or multiple rape. Clark in her article, at p. 144, states:

> ... that this [survey] indicates clearly that those aged thirteen to nineteen (especially fourteen to seventeen) are seriously discriminated against in terms of getting any legal redress for their multiple sexual victimization.

¶ 69 The United Nations Convention on the Rights of the Child, Can. T.S. 1992 No. 3, defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (Article 1). This international convention, to which Canada is a signatory, demands that Canadian children under the age of 18 be protected as a class (Articles 19 and 34). In all Canadian provinces, the age of majority is 18 years of age or more and, in addition, legislation such as the Young Offenders Act, R.S.C., 1985, c. Y-1, applies to children up to the age of 18. I find that the inclusion of all children up to the age of 18 under the protections afforded by s. 715.1 of the Criminal Code is required by the continued need for such protection and is in conformity with international and domestic instruments. As such, it is in no way arbitrary and, accordingly, it was perfectly legitimate for Parliament to draw the line where it did. A claim of unconstitutionality of s. 715.1 on such a basis must be rejected.

¶ 70 In conclusion, s. 715.1 of the Criminal Code applies to a class of crimes where the complainants are young and in which the subject matter of the crime requires that the child provide intimate and embarrassing details about the events that occurred -- the unwanted interference with the child's body. The children involved are generally scared, helpless and in emotional turmoil. Their world has fallen apart. In such circumstances as described here, which are far from unique, they feel betrayed by someone whom they should have been able to trust and are often revictimized by a criminal justice system that places them in the spotlight. They are subjected to repeated questioning and gruelling analysis whereas they would expect such treatment to apply rather to the person responsible, in their view, for criminal acts. If the criminal justice system is to effectively perform its role in deterring and punishing child sexual abuse, it is vital that the law provide a workable, decent and dignified means for the victim to tell her or his story to the court. In my opinion, s. 715.1 is a modest legislative initiative working toward this end. For the reasons outlined above, I find that s. 715.1 does not infringe either s. 7 or 11(d) of the Charter. A s. 1 analysis is, therefore, unnecessary.

Non-Constitutional Issues

¶ 71 I now turn to the three non-constitutional issues, which I reproduce here for the sake of convenience:

1. Whether the videotaped testimony of R.S. has been recorded within a reasonable time after the offence, pursuant to s. 715.1 of the Code.
2. Whether the trial judge erred in failing to use the "might reasonably be true" evidentiary test to determine if the accused should be convicted or acquitted.
3. Whether the trial judge's interjections and commentary during the questioning of the witnesses created a reasonable apprehension of bias.

¶ 72 I will deal with each question in order.

Reasonable Time

¶ 73 Section 715.1 provides that "a videotape [be] made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of". In this case, a five-month period of time elapsed between the time the offence was first reported and the making of the videotape. The respondent alleges that such a lapse of time is not "reasonable" and, consequently, the videotape should not have been admitted into evidence. This was the finding of Helper J.A. on appeal. I disagree. What is or is not "reasonable" depends entirely on the circumstances of a case. The trial judge in this case, taking into consideration all such circumstances came to the conclusion that the lapse of time in this instance was reasonable. On the voir dire the trial judge stated:

> But in the end of the day, the test must be, has the Crown proved beyond a reasonable doubt that the videotape was made within a reasonable time after the alleged offence?
>
> . . .
>
> In this case I am satisfied that the, despite the unnecessary delay by the police, the eventual making of the tape in August was within a reasonable time after the alleged offence. ... I simply observe that in this, in this context, [s.] 715.1, where you are dealing with young children, what is reasonable in one case may not be in the other. But the boundaries of reasonableness are indeed almost as variable as the historical boundaries of Poland. But I do think in this case given the ages, given the age involved, that the tape satisfies the test of [s.] 715.1, and accordingly, the tape, in respect of [R.S.] will be marked Exhibit 1.

¶ 74 As this Court has repeatedly said, a court of appeal should not interfere lightly with findings of fact unless it concludes that the trial judge has made an egregious error either by failing to recognize or misinterpreting an important and relevant piece of evidence or by reaching an erroneous conclusion (see P. (D.) v. S. (C.), [1993] 4 S.C.R. 141; Bank of Montreal v. Bail Ltée, [1992] 2 S.C.R. 554, at pp. 572-73; Lapointe v. Hôpital Le Gardeur, [1992] 1 S.C.R. 351; M. (M.E.) v. L. (P.), [1992] 1 S.C.R. 183; R. v. Duguay, [1989] 1 S.C.R. 93; and Lensen v. Lensen, [1987] 2 S.C.R. 672). In this case, the Court of Appeal did not indicate which such error the trial judge committed, nor did they state upon which facts they relied in order to reverse the trial judge's findings of fact. In my view, the Court of Appeal simply substituted its opinion to that of the trial judge. This, in my view, it was not entitled to do.

¶ 75 Beyond the facts of this case, however, what should the determination of the reasonableness of the length of delay take into consideration? In reaching a conclusion as to the reasonableness of time, courts must be mindful of the fact that children, for a number of reasons, are often apt to delay disclosure. As McLachlin J. wrote in R. v. W. (R.), supra, at p. 136:

> . . . victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

Studies abundantly confirm this fact as part of the child abuse syndrome. (See, among others, R. C. Summit, "The Child Sexual Abuse Accommodation Syndrome" (1983), 7 Child Abuse & Neglect 177, at pp. 181-88; and G. Renaud, "Judicial Notice of Delayed Reporting of Sexual Abuse: A Reply to Mr. Rauf" (1993), 20 C.R. (4th) 383.)

¶ 76 Further, depending on where the child resides and whether facilities are available, as well as the necessity of prior investigation to ensure the seriousness of the allegations, some delay will necessarily accrue. On the other hand, such determination must also take into account social science data which makes clear that recollection decreases in accuracy with time. Flin and Spencer in "Do Children Forget Faster?", [1991] Crim. L.R. 189, at p. 190, indicate that, although children may have clear and accurate memories at the time of the occurrence, studies illustrate that children's memories may fade faster than those of adults. There is, thus, a clear advantage to gathering evidence from a child as early as possible. Videotaped evidence offers one avenue to accomplish this end. The child's evidence is gathered and preserved, many months and often years, before the trial is held.

¶ 77 The reasonableness of the delay in gathering such evidence may further depend on a number of factors which only a case-by-case analysis will be able to determine. This approach is not new. The reasonableness of a search, for example, requires a case-by-case analysis, as do a number of other instances. This case-by-case analysis is the function of the trial judge. In the present case, the trial judge, after reviewing all the circumstances of this case, concluded that the delay in videotaping the child's evidence was reasonable. My own reading of the evidence brings me to the same conclusion. Accordingly, since the trial judge correctly directed himself in law and did not err in his assessment of the evidence, it was an error on the part of the Court of Appeal to intervene.

¶ 78 I now turn to the respondent's second non-constitutional concern, the appropriate test for the determination of guilt or innocence.

Appropriate Test

¶ 79 The respondent submitted a brief to the trial judge with regard to the appropriate test for weighing the evidence and in particular with regard to assessing the credibility of witnesses. He argued that the proper test was whether an account given by, or on behalf, of an accused might "reasonably be true". The trial judge did not agree and explained:

> Whether an account given by, or on behalf of, an accused might reasonably be true, is not in my view the honest and proper and established test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole. If one were to determine criminal cases simply on an academic test, unrelated to all the other facts, of whether something might reasonably be true, much of the impact of truly and compellingly credible Crown evidence such as that here, would go for naught, and truth would be subjugated by plausibility.

In my view, the trial judge was correct, as was O'Sullivan J.A. who succinctly enunciated the test as follows (at p. 317):

> The only question for the trier of fact at the end of the trial is whether or not, on the whole of the evidence, the Crown has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If there is a reasonable doubt, the accused must be acquitted.

This is the proper test on which Cory J. in R. v. W. (D.), [1991] 1 S.C.R. 742, at pp. 757-58, expanded as follows:

> A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The respondent's submissions on this point, also made to us, cannot succeed.

¶ 80 The respondent further argues that the trial judge erred in his assessment of the evidence. In my view, the trial judge, having applied the proper test, correctly assessed the evidence. It is clear that he believed the complainant, such as he had the right to do and found that the Crown had proven its case beyond a reasonable doubt. The respondent has not succeeded in convincing me that the trial judge was wrong.

Reasonable Apprehension of Bias

¶ 81 The final issue raised by the respondent is whether the trial judge may have acted in such a manner as to raise a reasonable apprehension of bias, as per Brouillard v. The Queen, [1985] 1 S.C.R. 39. In Brouillard, Lamer J., for the Court, held that the judiciary should not be seen as "entering the ring" or acting on behalf of one of the parties. However, he wrote p. 48:

> ... although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is seen to be done. It is all a question of manner. [Emphasis added; italics in original.]

The respondent argues, while conceding that the trial judge can and should ask questions of witnesses in the course of their testimony, that the trial judge exceeded his role and participated in the proceedings to such an extent that an apprehension of judicial bias resulted.

¶ 82 It is my view that, in the case at hand as well as in other cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the questions being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm. The trial judge, in this case, did not prevent the mounting of a proper defence, nor did he demonstrate favouritism toward the witness in such a way as to preclude a fair trial. I find that the trial judge in this instance did nothing more than "intervene for justice to be done".

¶ 83 With regard to the non-constitutional issues raised, then, the respondent has conveyed no persuasive argument that the trial judge erred either in his findings of fact or as to the reasonableness of the time factor involved in making the videotaped statement or in stating the proper test or in its application to the facts of the case or, finally, that the trial judge demonstrated bias.

Conclusion

¶ 84 The respondent's attack on the constitutionality of s. 715.1 of the Criminal Code is unfounded. Both the context and the legislative background indicate that Parliament was rightly concerned at one point with the treatment of abused children by the judicial system, as well as the consequences for those children who recount in court difficult, at times horrendous, experiences. With this notable purpose in mind, as well as social science data and stories told by abused children and without ignoring the rights of an accused to a fair trial, s. 715.1 was enacted. The goal pursued by such legislative enactment was, and continues to be, the protection of child witnesses and the attainment of the truth through the mechanism of videotaped statements. To achieve the required degree of fairness to the accused, as prescribed by ss. 7 and 11(d) of the Charter, on the other hand, Parliament ensured that judges enjoy the necessary discretion to set aside, edit or disallow such statements if their prejudicial effect outweighs their probative value. Moreover, preconditions to the admission of such statements were imposed. These include requirements that the child adopt her or his statements at trial, that the child be made available for cross-examination and that the applicability of the section be limited to certain sexual offences against children under 18 years of age. It is my view that Parliament has been successful in striking a balance between the rights of the accused, the fairness of the trial and the interests of society. The fundamental principles of justice have not been infringed, nor does the application of s. 715.1 to children of 18 years of age or less constitute such an infringement. Thus, the constitutionality of s. 715.1 of the Criminal Code is ensured.

¶ 85 In assessing legislation such as s. 715.1 of the Criminal Code, courts must be mindful that:

> The child's experience with the criminal justice system will color his or

> her future interactions with it. A negative experience may result in an unwillingness to report crimes later on. Some adult women, molested as children, hesitate to report the sexual assault of their own children because of the way they were treated by the legal system.
>
> (G. Goodman and V. S. Helgeson, "Child Sexual Assault:
>
> Children's Memory and the Law" (1985), 40 U. Miami L. Rev. 181, at p. 206.)

In the words of the then Minister of Justice Ramon Hnatyshyn, when Bill C-15, which implemented s. 715.1 of the Criminal Code was introduced, we must

> ... affirm the rights of our children and our youth, both boys and girls, to the integrity of their person as well as access to the justice system. (House of Commons Legislative Committee on Bill C-15, Minutes of Proceedings and Evidence, Issue No. 1, November 27, 1986, at p. 1:18.)

¶ 86 As to the other issues raised in this case, the trial judge correctly applied the principles as well as the proper test for weighing the evidence and, in the discharge of his duties, did not demonstrate any bias that would have vitiated the trial. His decision must stand.

¶ 87 Accordingly, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the conviction at trial.

The following are the reasons delivered by

¶ 88 MAJOR J.:-- I have read the reasons of Justice L'Heureux-Dubé in this appeal. The constitutional questions were answered on June 15, 1993 and I agree with the disposition of them.

¶ 89 I agree with the conclusion respecting the non-constitutional questions and that the appeal be allowed and the conviction be reinstated.