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I. INTRODUCTION

Over the last decade, many state legislatures and courts have changed their laws and procedures to improve prosecution of child sexual abuse cases, eliminate evidentiary barriers, and reduce trauma to child victims in the legal system. These innovative or reform laws have been in response to two major problems in the criminal justice system's handling of child sexual abuse cases. First, many cases of child sexual abuse were not prosecuted due to a lack of physical evidence or eyewitnesses and because the sole witness was a child, often considered to be incompetent or lacking credibility. Second, many began to observe that

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children were traumatized by the criminal justice system.

Legal reforms and innovative approaches adopted in the 1980s include: 1) interdisciplinary teams; 2) a special advocate for the child; 3) special child abuse prosecution units; 4) elimination of mandatory competency requirements for children; 5) closed-circuit television or videotaping of a child's testimony; 6) expert testimony on the typical behaviors of child sexual abuse victims; and 7) special child abuse hearsay exceptions.

As this law reform movement swept the country, however, some questioned their basic need or efficacy, citing a lack of empirical research given the drastic changes in basic trial and legal rights.[1] Perhaps the major challenge has been that these innovations, particularly those involving rules of evidence and trial procedure, violated various constitutional guarantees, particularly the Sixth Amendment rights of defendants in criminal trials.[2]

Most critical analysis and court decisions have addressed whether the defendant's Sixth Amendment "right to be confronted with the witnesses against him" (including the right to cross-examination and physical confrontation at trial) has been violated by the prosecution's use of closed-circuit television of a child's testimony outside the defendant's presence and a child's hearsay statements when the child is not a witness at trial.[3] Several of these state court decisions have reached the United States Supreme Court.[4] This article discusses recent Supreme

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1. Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY 212-13 (S. Ceci, D. Ross & M. Toglia eds. 1989); Gary B. Melton & Ross A. Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child-Witness Research*, *in* CHILDREN'S EYEWITNESS MEMORY, 207, 222 (S. Ceci, M. Toglia & D. Ross eds. 1987).

2. Josephine A. Bulkley, *Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse Cases*, 6 BEHAV. SCI. & L. J. 153 (1988) [hereinafter Bulkley, *Legal Proceedings*]; Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988) [hereinafter Graham, *The Confrontation Clause*]; Josephine A. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985) [hereinafter Bulkley, *Evidentiary and Procedural Trends*]; Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985) [hereinafter Graham, *Indicia of Reliability*].

3. *See supra* note 2; *see also* JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE (1987 & Supp. 1991).

4. White v. Illinois, 112 S. Ct. 736 (1992); Idaho v. Wright, 110 S. Ct. 3139 (1990); Maryland v. Craig, 110 S. Ct. 3157 (1990).

Court decisions dealing with the constitutionality of admitting children's hearsay statements of abuse and closed-circuit television of a child's testimony under the Confrontation Clause.

II. Admission of Children's Out-of-Court Statements of Abuse under the Confrontation Clause

A child's out-of-court statement of abuse often is the most compelling evidence of sexual abuse besides the child's story on the witness stand. Such statements often contain more detail than in-court testimony because they were made closer to the abuse experience, are more spontaneous and have an unrehearsed quality. Because such statements are hearsay, prosecutors routinely seek to admit children's statements of abuse under various hearsay exceptions to the hearsay rule.

The rule against hearsay is intended to prevent admission of out-of-court statements where: 1) there is no opportunity to cross-examine the declarant whose statement is offered by a witness; 2) the statement was not made under oath; and 3) there was no opportunity for the trier of fact to observe the declarant's demeanor.[5] States have adopted numerous hearsay exceptions, however, for admitting statements deemed to be especially reliable because the declarant is considered to be likely to be telling the truth.

Hearsay exceptions commonly used in child abuse cases include the excited utterances or spontaneous declarations exception, exception for statements made for purposes of medical diagnosis and treatment, the residual exception, and the special child abuse exceptions. Approximately half of the states have adopted a special statutory hearsay exception for children's out-of-court statements of abuse.[6] The provisions of most statutes are similar because they were drafted to comply with the confrontation requirements set forth in *Ohio v. Roberts*[7] and the constitutionality of statutes with these requirements have been upheld by state appellate courts.[8]

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5. McCormick, Evidence § 245 (1972).

6. Debra Whitcomb, *When the Victim Is a Child: Issues for Judges and Prosecutors* (National Institute of Justice, U.S. Dept. of Justice, 2d ed. 1992) (forthcoming); Ross Eatman & Josephine A. Bulkley, *Protecting Child/Victim Witnesses: Sample Laws and Materials* 13-15, 53 (A.B.A. 1986).

7. 448 U.S. 56 (1980).

8. *See, e.g.*, Perez v. State, 536 So. 2d 206 (Fla. 1988), *cert. denied*, 492 U.S. 923 (1989); People v. Rocha, 547 N.E.2d 1335 (Ill. App. Ct. 1989); State v. Wright, 751 S.W.2d 48 (Mo. 1988) (en banc); State v. Myatt, 697 P.2d 836 (Kan. 1985); State

The original purpose of the child abuse exceptions was to provide a means of admitting a child's statement of abuse that did not fit the strict or narrow requirements of existing hearsay exceptions.[9] A number of state courts have broadly interpreted the excited utterances exception beyond its purpose by allowing, for example, statements to be

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v. Bellotti, 383 N.W.2d 308 (Minn. Ct. App. 1986); State v. Ryan, 691 P.2d 197 (Wash. Ct. App. 1984) (en banc).

Several state supreme courts have held that their statutory child abuse exceptions violate the doctrine of separation of powers in that the legislature has adopted a rule of evidence that, under the state constitution, is a power delegated to the judiciary. *See, e.g.*, Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990); Hall v. State, 539 So. 2d 1338 (Miss. 1989); State v. Robinson, 735 P.2d 801 (Ariz. 1987) (en banc). For example, this was the holding in *Drumm v. Commonwealth* in which the Kentucky Supreme Court found that because the Kentucky Constitution vests the judiciary with the power to adopt rules of practice and procedure for the courts, the statute creating a child abuse hearsay exception is "an unconstitutional exercise of rule-making power by the General Assembly." 783 S.W.2d at 382. The court further held that,

> we will not extend comity to this statute because it fails the test of a 'statutorily acceptable' substitute for current judicially mandated procedures. Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky Constitutions, are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply.

Id.

Most child abuse hearsay exceptions provide that a statement may be admitted if the child testifies, or in cases where the child does not testify, the prosecution has demonstrated that the child is "unavailable to testify," and the statement possesses particularized guarantees of trustworthiness (some require trustworthiness only if the child does not testify, while others require it both when the child testifies and does not testify). Whitcomb, *supra* note 6, cites Arizona, Arkansas, Colorado, Florida, Idaho, Kansas and New York in a chart with statutory citations as not requiring an unavailability showing if the child is not produced to testify, however.

Some statutes require an additional showing of corroborative evidence of the abuse when the child does not testify. Whitcomb cites ten states that require corroboration. Some legislation sets out factors the court may consider in deciding whether a statement is trustworthy. According to Whitcomb, *supra* note 6, at least three states list reliability factors.

At least one state statute requires that expert testimony support an unavailability finding based upon emotional trauma to the child. *See, e.g.*, IND. CODE § 35-37-4-6 (1984) (as cited in Bulkley, *Evidentiary and Procedural Trends, supra* note 2, at 649-57).

9. Bulkley, *Evidentiary and Procedural Trends, supra* note 2, at 649-57; Josephine A. Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in* CHILD SEXUAL ABUSE AND THE LAW 153 (J. Bulkley ed., 1981).

admitted that had been made days, weeks, or even months after the sexually abusive event.[10] Other courts, however, have excluded reliable statements of children because more than a few minutes or hours had elapsed since the statement had been made.[11]

The medical diagnosis and treatment exception is also available and has been liberally interpreted by some courts to encompass children's statements of sexual abuse to mental health professionals as well as medical doctors.[12] Too often, however, courts have found that its requirements are not satisfied, thus preventing admission into evidence many statements children make to doctors or mental health professionals.[13]

Some states have adopted the "residual exception," an exception also included in the Federal Rules of Evidence.[14] Considered a "catch-all" exception, it permits statements to be admitted that do not fit the requirements of a traditional exception, but nonetheless possess circumstantial guarantees of trustworthiness equivalent to traditional exceptions. Other requirements must also be met.

The residual exception serves the same purpose as the child abuse exceptions by permitting admission of statements that do not fit the strict requirements of traditional hearsay exceptions. Some have argued that as a legal policy matter, the residual exception is preferable to the child abuse exceptions, because it has broader application and does not carve out an exception for a narrow class of statements while including virtually the same requirements as the residual exception.[15] A number of courts have admitted child abuse statements under this exception, although some courts, including the United States Supreme Court in *Idaho v. Wright*,[16] have found that the child's statement did not possess such guarantees of trustworthiness.

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10. *Id.*; MYERS, *supra* note 3, John E.B. Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 776, 863-65 (1986).

11. *Id.*

12. *See* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989); MYERS, *supra* note 3, at 360-72 (1987), 198-204 (Supp. 1991).

13. *Id.*

14. MYERS, *supra* note 3, at 360-62. *See generally* Bulkley, *supra* note 9; Whitcomb, *supra* note 6.

15. *See* Bulkley, *Evidentiary Theories supra* note 9.

16. 110 S. Ct. at 3141.

III. Admission of Statements When the Child Does not Testify at Trial

The Confrontation Clause of the Sixth Amendment has been interpreted as a rule of preference for "face-to-face confrontation at trial," requiring the "personal presence of the witness at trial, enabling the trier to observe his demeanor as an aid in evaluating his credibility and making false accusations more unlikely because of the presence of the accused and the solemnity of the occasion."[17]

When a prosecutor offers into evidence a child's statement and the child testifies, no confrontation problem is presented, since the defendant has an opportunity to confront and cross-examine the child about his or her out-of-court statements. When the child is not a witness, however, admission of the child's out-of-court statement has been challenged as a violation of the defendant's Sixth Amendment confrontation rights.

Under Supreme Court decisions prior to 1986, if the child was not a witness at trial, even if his or her out-of-court statement of abuse satisfied the requirements of a hearsay exception, its admissibility under the Confrontation Clause was not certain. Under recent Supreme Court decisions dealing with the admission of hearsay and the Confrontation Clause, however, it appears that if a statement satisfies a firmly rooted hearsay exception, it also satisfies the Confrontation Clause. There are five relevant Supreme Court decisions since 1980 dealing with hearsay and the Confrontation Clause: *White v. Illinois*,[18] *Idaho v. Wright*,[19] *Bourjaily v. United States*,[20] *Inadi v. United States*,[21] and *Ohio v. Roberts*.[22]

Idaho v. Wright was a 1990 decision dealing with a young child's statements of sexual abuse to a physician under the residual exception. The Court summarized the relationship it long has described between the hearsay rule and Confrontation Clause, as well as two requirements many believed were constitutional prerequisites to the admission of any hearsay:

> Although we have recognized that hearsay rules and the Con-

17. McCormick, Evidence § 252, at 606 (1972).
18. 112 S. Ct. 736 (1992).
19. 110 S. Ct. 3139 (1990).
20. 483 U.S. 171 (1987).
21. 475 U.S. 387 (1986).
22. 448 U.S. 56 (1980).

> frontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.
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> In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule meet the requirements of the Confrontation Clause . . . . First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. 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. Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[23]

A. *The Unavailability Requirement*

In 1980, the United States Supreme Court in *Ohio v. Roberts*, which involved an absent witness' preliminary hearing testimony, held: "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause *normally requires a showing that he is unavailable*. Even then, his statement is admissible only if it bears adequate indicia of reliability."[24]

Despite this language which was reiterated by the Court ten years later in *Idaho v. Wright*, it was not certain that the Court intended to require a showing of unavailability for all exceptions, since most do not expressly include such a requirement.[25] Indeed, in 1986 *United States*

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23. 110 S. Ct. at 3146 (citations omitted).

24. 448 U.S. at 66 (emphasis added).

25. Graham, *Indicia of Reliability*, *supra* note 2, at 53-55. Graham states that after *Roberts*,

> [t]aken literally, almost every hearsay statement that meets an exception in Rule 803 . . . would seem to require either production of the declarant, or a showing of unavailability before the statement can be received in evidence against the accused.

v. Inadi was decided, in which the Supreme Court held that the general requirement of unavailability does not apply to out-of-court statements made by a non-testifying co-conspirator.[26] Although *Idaho v. Wright* indicated the Court has "applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation and hearsay issues,"[27] *Inadi* (as well as a footnote in *Roberts* itself) makes it clear that the Supreme Court did not mean to impose an unavailability requirement for all hearsay exceptions.[28]

Inadi noted that if the *Roberts* requirements applied to all hearsay, "no out-of-court statement would be admissible without a showing of unavailability . . . . *Roberts*, however, does not stand for such a wholesale revision of the law of evidence . . . ."[29] The Court further stated:

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that Roberts simply reaffirmed a longstanding rule . . . . that applies [an] unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.[30]

Because state courts were unsure after *Inadi* whether unavailability applied to other exceptions, decisions went both ways.[31] The effect

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> Several factors, however, indicate that the Supreme Court did not contemplate such radical change in practice.

Id. at 45 (citations omitted).

26. 475 U.S. at 393-94.

27. *Wright*, 110 S. Ct. at 3146.

28. *Roberts*, 448 U.S. at 65 n.7.

29. 475 U.S. at 392.

30. *Id.* at 394.

31. Some courts have *not* required unavailability in a child abuse cases. *See* Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989); Johnson v. State, 732 S.W.2d 817 (Ark. 1987); People v. Lusk, 267 Cal. Rptr. 146 (Cal. Ct. App. 1990); People v. White, 555 N.E.2d 1241 (Ill. Ct. App. 1990), *aff'd*, 112 S. Ct. 736 (1992); State v. Borland, 786 P.2d 810 (Wash. Ct. App.), *rev. denied*, 793 P.2d 974 (1990).

Courts that *have* required a showing of unavailability in a child abuse case include: People v. Diefenderfer, 784 P.2d 741 (Colo. 1989) (en banc); State v. Allen, 755 P.2d 1153 (Ariz. 1988) (en banc); *In re* Tina K., 568 A.2d 210 (Pa. Super. Ct. 1989); State v. Sorenson, 449 N.W.2d 280 (Wis. Ct. App. 1989).

In some child abuse cases, courts holding that unavailability is not required have focused on the first *Inadi* factor with little or no attention to the other factors. These

of *Inadi* was articulated by the concurring opinion in *Nelson v. Farrey*, which indicated:

> The *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements. Given its broadest construction, *Inadi* stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, *Inadi* does not represent a repudiation of *Roberts*' unavailability discussion. Rather, . . . *Inadi* merely reaffirms and applies the *Roberts* principle that a showing of unavailability is not required in all situations (citations omitted). Thus, . . . *Inadi* represents a directive to lower courts to carefully analyze the facts of a given situation before concluding that a showing of unavailability is constitutionally required.[32]

After *Inadi*, Professor Graham noted that just as *Roberts* does not mean that an unavailability showing is required for all hearsay exceptions, *Inadi* probably does not mean that an unavailability showing is never required.[33] Citing the Supreme Court's decision in *California v. Green*,[34] Graham states: "If the right of confrontation never compels the prosecution to provide available witnesses, it cannot serve its historical function of preventing 'flagrant abuses, trials by anonymous accusers, and absentee witnesses.' "[35]

Nevertheless, in January, 1992, the Supreme Court decided *White v. Illinois*,[36] holding that the Confrontation Clause was *not* violated by admission of a four-year old's statements of sexual abuse, although the child did not testify at trial. The defendant was convicted based solely on testimony from the child's mother, babysitter, a doctor, a nurse and

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decisions reasoned that the child's out-of-court statements, like a co-conspirator's out-of-court statement, are likely to be very different from the child's trial testimony, and the statement therefore constitutes irreplaceable evidence. For example, *Johnson v. State* involved admission of a child's statement of sexual abuse under a child abuse exception that does not contain an unavailability requirement. 732 S.W.2d 817 (Ark. 1987). The Arkansas Supreme Court noted that a child sexual abuse victim may later recant, indicating a strong possibility that a child's earlier statement will be different from her trial testimony. *Id.* at 823.

32. 874 F.2d at 1231.
33. Graham, *The Confrontation Clause, supra* note 2, at 579.
34. 399 U.S. 149, 179 (1970).
35. Graham, *The Confrontation Clause, supra* note 2, at 583.
36. 112 S. Ct. 736 (1992).

a police officer who described what the child told them about the abuse. The statements were admitted under the state's spontaneous declarations and medical diagnosis and treatment exceptions. Although it is not known why, the prosecution did not offer the child as a witness, and the court did not hold a hearing or make a finding that she was unavailable to testify (and the child apparently was in the courtroom).

In *White*, the Court essentially followed its reasoning in *Inadi*. The Court reiterated three major reasons for not imposing an unavailability requirement for the spontaneous declarations and medical diagnosis exceptions.[37] First, unlike former testimony, which is a weaker form of live testimony, statements under these exceptions have independent evidentiary significance, are made in a context very different from trial, and like co-conspirator statements, "are usually irreplaceable as substantive evidence."[38] Moreover, in *White*, the Court indicated that spontaneous declarations and medical diagnosis statements are made in "contexts that provide substantial guarantees of their trustworthiness."[39]

Second, the Court indicated in *Inadi* and *White* that there is little benefit to the unavailability rule, since the statements are admissible whether the declarant is unavailable, or available and produced by the prosecution. *Inadi* stated that nothing is excluded "unless the prosecution makes the mistake of not producing an otherwise available witness."[40] *Inadi* further noted that the unavailability rule is not particularly useful because it is not likely to produce much testimony that adds to the truth-determining process, "[since] presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses."[41] Both *White* and *Inadi* stated that the defendant can subpoena those witnesses not called by the state. Third, *White* and *Inadi* found that the unavailability rule places significant and additional burdens on the criminal justice system and fact-finding process.[42]

Most importantly, the *White* opinion indicated: "[W]here proffered hearsay has sufficient guarantees of trustworthiness to come within a firmly rooted hearsay exception to the hearsay rule, the Con-

37. *Id.* at 738.
38. *Inadi*, 475 U.S. at 394.
39. *White*, 112 S. Ct. at 743.
40. *Inadi*, 475 U.S. at 396.
41. *Id.* at 397.
42. *Id.* at 398.

frontation Clause is satisfied."[43] This statement is significant, because as noted above, the Court has previously refused to equate the Confrontation Clause with the hearsay rule, indicating that some evidence admissible under a hearsay exception is excluded by the Confrontation Clause. Yet *White* signifies the end of this principle for firmly rooted exceptions. *Idaho v. Wright* made it clear that if a statement satisfies a firmly rooted exception, the reliability requirement is satisfied; after *White*, if a statement satisfies a firmly rooted exception, the Confrontation Clause is satisfied. For exceptions that are not firmly rooted, however, such as the residual and child abuse exceptions, *White* leaves open whether unavailability would be required by the Confrontation Clause. As noted above, some child abuse exceptions do not require unavailability[44] and the residual exception does not have an unavailability requirement.

Although the *White* case settles an uncertain constitutional issue, its practical impact may not be great. First, there are few cases in which the prosecution would not want a child to testify unless she was in fact "unavailable" (for example due to severe trauma, absolute refusal to testify, or incompetency). Most prosecutors believe that a child's live testimony is critical to obtaining a conviction. Indeed, in the past, courts' failure to find children competent as witnesses frequently resulted in cases that were dismissed or not prosecuted.

Second, even in cases where a child may be traumatized or refuse to testify, prosecutors are likely to attempt options such as closed-circuit television or excluding the public from the courtroom to enable the child to testify outside the presence of the defendant or public. The Supreme Court has indicated such approaches are not unconstitutional if necessity for their use (for example, due to emotional distress of the child) is shown on a case-by-case basis.[45] The use of these innovations is preferred to having no witness at all.

The effect of *White* generally will be to relieve the state from proving that a child who is unable to testify is "unavailable." There also may be occasions where prosecutors seek to admit a child's out-of-court statements without having the child testify, but be unable to prove the child is "unavailable to testify." It is in these situations that the unavailability rule would prevent admission of a child's out-of-court state-

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43. *White*, 112 S. Ct. at 743.

44. *See supra* note 8.

45. Maryland v. Craig, 110 S. Ct. 3157 (1990); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

ments unless the child is called by the prosecution to testify. Without either the child as a witness or his or her out-of-court statements, the prosecution would likely fail.

One such situation is where parents do not allow their child to testify because of fear of causing the child emotional distress, although there would be insufficient evidence of emotional trauma to satisfy the unavailability requirement. A recent California case allowed the admission of a child's hearsay statements without requiring a showing of unavailability, where the child was not a witness because his father would not allow him to testify.[46]

A second situation is where a prosecutor has a case with excellent testimony from several adults as to what the child told them (as in *White v. Illinois*) and perhaps other evidence of sexual abuse. The child witness, although competent and not likely to be severely traumatized by testifying, may not be a credible or sympathetic witness, particularly if the case involves a very young child and a good defense attorney likely to impeach the child's credibility because of his or her young age. The prosecution may prefer not to have the child testify for fear of hurting its case.

Lastly, although in most jurisdictions it may not be difficult to establish emotional trauma to satisfy the unavailability requirement, some courts may require very high thresholds for demonstrating emotional distress. For example, on remand to the Maryland Court of Appeals from the United States Supreme Court's decision in *Maryland v. Craig*, the Maryland court reaffirmed its first holding in *Craig v. Maryland*[47] establishing a strict standard for a finding of emotional distress.

It should be emphasized that *White* does not mean that the prosecution can *prevent* an available child from testifying, since the defendant can call the child for cross-examination. If the child is truly available, the state should be required to produce the child; if the child is not produced, the prosecution then should be required to show that the child was unavailable (e.g., due to incompetency, trauma or refusal to communicate). Whether defendants will exercise their right to call the child to testify remains to be seen. Defendants may hesitate for fear of alienating the jury by forcing the child to testify and causing him or her distress and creating hostility toward the defendant.

Indeed, in some states, under a statute allowing admission of a child's videotaped statement, prosecutors routinely have offered a

46. *Lusk*, 267 Cal. Rptr. 146 (Ct. App. 1990).
47. 588 A.2d 328 (Md. 1991).

child's videotaped statement in lieu of the child's direct testimony, making the child available for cross-examination. Most courts have held that this procedure does not violate the defendant's confrontation rights as long as the child is made available for cross-examination (although others have held that the Confrontation Clause is violated by failing to allow cross-examination at the time the statement was taken).[48] Often, defendants have not called the child to testify for fear of creating sympathy for the child.[49]

Indeed, in Justice Marshall's dissenting opinion in *United States v. Inadi*, he noted that the defendant's right to call the declarant himself does not satisfy confrontation since "the Confrontation Clause gives a defendant a *right* to be confronted with the witnesses against him, not merely an opportunity to seek out witnesses on his own."[50] Justice

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48. Cases holding that confrontation is not violated by admission of a videotaped statement in lieu of the child's direct testimony as long as the child is available for cross-examination include: State v. Schaal, 806 S.W.2d 659 (Mo. 1991) (en banc), *cert. denied*, 112 S. Ct. 976 (1992); State v. Tarantino, 458 N.W.2d 582 (Wis. Ct. App.), *rev. denied*, 461 N.W.2d 444 (1990); Miller v. State, 517 N.E.2d 64 (Ind. 1987); State v. Feazell, 486 So. 2d 327 (La. Ct. App. 1986); State v. Johnson, 729 P.2d 1169 (Kan. 1986).

Both Texas and Tennessee courts have found that their statutes violated the Confrontation Clause. State v. Pilkey, 776 S.W.2d 943 (Tenn. 1989), *cert. denied*, 494 U.S. 1046 (1990); Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988). Texas' highest court in criminal cases in 1987 held that the Confrontation Clause is violated by admission of a videotaped interview without the prosecution offering the child for direct and cross-examination, or not allowing for cross-examination at the time the interview is given. *Long*, 742 S.W.2d at 320. The court indicated: "The courts of this state and country have never had to confront and review a trial procedure that requires the defendant to call as a witness his accuser if he wants to question the witness." *Id.* at 320. A more recent case, however, held that the Texas statute was not, on its face, unconstitutional, but that it must be constitutionally applied as set forth in *Long;* i.e., requiring the state to call the child to testify on direct examination.) *See* Briggs v. State, 789 S.W.2d 918 (Tex. Crim. App. 1990).

49. *See, e.g., Schaal*, 806 S.W.2d at 663-64; *Tarantino*, 458 N.W.2d at 589; *Long*, 742 S.W.2d at 315; Graham, *The Confrontation Clause, supra* note 2, at 583-84. Steven Chaney, *Videotaped Interviews with Child Abuse Victims, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (A.B.A. 1985); Ross Eatman, *Videotaping Interviews with Child Sexual Offense Victims*, 7 CHILDREN'S LEGAL RTS. J. 13 (1986).

50. 475 U. S. at 406. Marshall first indicated that: "*Roberts* consciously sought to lay down an analytical framework applicable to all out-of-court declarations introduced by the prosecution for the truth they contain." *Id.* at 402-03. This point is supported by language in *Idaho v. Wright* which cites *Roberts* in setting out *both* the unavailability and reliability requirements. Second, Marshall pointed out that extraju-

Marshall further stated that requiring the defendant to call declarants as his witnesses "may deny the defendant certain tactical advantages vouchsafed him by the Confrontation Clause."[51]

Graham noted that *Inadi* represented a departure from the Supreme Court's earlier decisions (including *Dutton v. Evans* and *Ohio v. Roberts*) that indicate confrontation requires the prosecution to call an available witness whose testimony is crucial or devastating at trial for examination and cross-examination by the defense.[52] *White* appears to represent an even further erosion of this confrontation requirement. Because the child victim's testimony is so important, it seems hard to imagine that the prosecution constitutionally may present the accusatory hearsay statements of an available yet non-testifying child declarant, leaving it to the defendant to call the child for cross-examination.

In conclusion, hopefully *White* will not create the specter of prosecutors routinely deciding not to call a child, the primary accusatory witness, despite his or her ability to testify, instead relying on other evidence of the abuse, and defendants not calling the child for fear of alienating the jury. On the other hand, lack of an unavailability rule may benefit children by permitting some prosecutions that otherwise could not go forward, without significantly abridging defendant's confrontation rights. It is hoped that *White* simply makes it unnecessary for the state to prove a child is unavailable when he or she is actually unable to testify, since prosecutors generally need the child as a witness. In those few cases where the prosecutor fails to produce a child who may be available to testify, defendants hopefully will exercise their right to call the child.

B. *The Reliability Requirement*

The Court held in *Bourjaily v. United States*[53] that because the co-conspirator exception is firmly rooted, an independent inquiry into the reliability of a co-conspirator's statement is not required.[54] Affirming its holding in *Roberts* and *Bourjaily*, *Idaho v. Wright* in 1990 stated: "Admission under a firmly rooted hearsay exception satisfies the

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dicial statements may still be admitted if, in good faith, the prosecution is unable to produce the declarant. *Id.* at 406.

51. *Id.* at 408.
52. Graham, *The Confrontation Clause*, *supra* note 2, at 583.
53. 483 U.S. 171 (1990).
54. *Id.* at 183.

constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."[55]

If a statement does not fall within a firmly rooted exception, however, the Court has found that it is presumptively unreliable, but nevertheless may be admitted if supported by a showing of "particularized guarantees of trustworthiness."[56] In *Idaho v. Wright*, the Supreme Court held that the residual exception is not firmly rooted. Moreover, the child abuse exceptions also would not be considered firmly rooted. Therefore, under the residual and child abuse exceptions, the prosecution must demonstrate a statement's trustworthiness.

In assessing the trustworthiness of the statements in *Wright*, the United States Supreme Court rejected the Idaho Supreme Court's "apparently dispositive weight . . . on the lack of procedural safeguards at the interview,"[57] which included the doctor's failure to videotape the interview, use of leading questions and preconceived idea of the child's disclosures. The Court refused to "read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant."[58]

Numerous courts have found that a child's statement of abuse was sufficiently trustworthy to meet the requirements of both the particular hearsay exception involved as well as the Confrontation Clause.[59] *Wright* cited a number of federal and state cases which the Court indicated identify factors that "properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable."[60] *Wright* indicated that it would not "endorse a mechanical test for determining 'particularized guarantees of trustworthiness.' Rather, the unifying principle is that these factors relate to whether the child was particularly likely to be telling the truth when the statement was made."[61] The Court upheld the approach of determining the trustworthiness of a particular statement by examining "the totality of the cir-

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55. 110 S. Ct. 3139, 3147.
56. *Id.* at 3152.
57. *Id.* at 3148.
58. *Id.*
59. See the cases cited in *Idaho v. Wright*, 110 S. Ct. at 3150. See also MYERS, *supra* note 3, at 362-71 (1987), 207-14 (Supp. 1991), for a list of factors and cases regarding reliability.
60. 110 S. Ct. at 3150 (citations omitted).
61. *Id.*

cumstances that surround the making of the statement and that render the declarant particularly worthy of belief."[62]

Nevertheless, *Idaho v. Wright* found that the two and half year old's statements to a physician did not possess particularized guarantees of trustworthiness to satisfy the Confrontation Clause. The Court noted: "Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy."[63] Concerned with the suggestive manner of the doctor's interview, the Court also indicated that the statement was not made in circumstances of reliability similar to those required for excited utterances or statements for purposes of medical diagnosis. The Court held:

> Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, we agree with the court below that the state failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness under the Confrontation Clause to overcome that presumption."[64]

In conclusion, after *Wright*, a statement that falls within a firmly rooted exception is presumed reliable for confrontation purposes. For exceptions that are not firmly rooted, a statement's trustworthiness must be proven. While many statements may satisfy a hearsay exception or the Confrontation Clause trustworthiness requirement, some, as in *Wright*, may not.

IV. Closed-Circuit Television or Videotaping of a Child's Testimony Outside the Defendant's Presence

As noted earlier, over the last decade, more than half the states have adopted legislation permitting alternative testimonial procedures, primarily in criminal proceedings for child abuse victims.[65] Most stat-

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62. *Id.*

63. *Id.* at 3152.

64. *Id.* at 3152-53.

65. Debra Whitcomb et al., When the Victim is a Child: Issues for Judges and Prosecutors (Washington, D.C., National Institute of Justice, Office of Development, Testing, and Dissemination 1985); Eatman & Bulkley, *supra* note 6. Brief of

utes permit a child to testify in another room outside the presence of the defendant, judge, jury and public, and to have her testimony either televised into the courtroom during trial or videotaped prior to trial.[66]

Since the mid-1980s, however, numerous court decisions have addressed the question of whether the use of "one-way" television or videotaping, in which the child testifies outside the physical presence of the defendant, violates the defendant's Sixth Amendment right of confrontation.[67] These laws also have been challenged as violating other constitutional guarantees, including the defendant's right to a public and a jury trial, Sixth Amendment right to be present at trial and right to self-representation, and due process rights.[68]

It was not until 1990, in a case called *Maryland v. Craig*,[69] that the United States Supreme Court finally decided that the Confrontation Clause does not preclude the elimination of a face-to-face meeting between the child and defendant as long as it is necessary to achieve an important public policy such as protecting a child witness from the trauma of testifying in the defendant's presence. In 1988, in an earlier case that reached the Supreme Court, *Coy v. Iowa*, the Supreme Court declined to decide whether face-to-face confrontation could give way to protecting a child witness in a case involving use of a screen in the courtroom to prevent the child from having to view the defendant during her testimony.[70]

In *Coy*, the Court did not reach the face-to-face confrontation issue because it found the defendant's confrontation right had been violated by an Iowa statute that failed to require a threshold finding that the screen was "necessary to further an important public policy."[71]

Amicus Curiae American Bar Association, Coy v. Iowa, 487 U.S. 1012 (1988); INVESTIGATION AND PROSECUTION OF CHILD ABUSE, NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE, AMERICAN PROSECUTORS RESEARCH INSTITUTE (P. Toth & M. Whalen eds. 1987).

66. *See supra* note 65.

67. MYERS, *supra* note 3.

68. Bulkley, *Evidentiary and Procedural Trends*, *supra* note 2; Josephine A. Bulkley, *Introduction: Background and Review of Child Sexual Abuse Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5 (1985); MYERS, *supra* note 3, at 245-50.

69. 110 S. Ct. 3157 (1990).

70. 487 U.S. 1012 (1988).

71. Like the Iowa statute, some state statutes do not require a finding of necessity. Although some courts have found such statutes unconstitutional, see, e.g., *State v. Murphy*, 542 So.2d 1373 (La. 1989), others have made a determination that use of such procedures may be permitted as long as the court finds it necessary to protect a particular child witness. *See, e.g.*, Commonwealth v. Willis, 716 S.W.2d 224 (Ky.

Nevertheless, the Court emphasized that face-to-face confrontation constituted the irreducible, literal meaning of the clause, and that if it could be abridged, it could only be done after individualized findings by the Court that a particular witness needs protection.

Following the *Coy* decision, state courts were still left with the unanswered question of whether physical confrontation could be eliminated if a showing of necessity were made. Many state appellate courts followed the O'Connor and White concurring opinion in *Coy*,[72] (later adopted by the *Craig* majority), indicating that protection of child witnesses is an important public policy, and procedures for protecting a child from the trauma of testifying in court or the defendant's presence may be used if the trial court makes a case-specific finding of necessity. Even before *Coy*, this was the holding of most state court decisions.[73]

In *Maryland v. Craig*, a majority of the U.S. Supreme Court justices, led by Justice O'Connor, held that protection of a child witness constitutes an important public policy which, upon a proper showing of necessity, justifies an exception to face-to-face confrontation. The United States Supreme Court agreed with the Maryland Court of Appeals 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."[74] The Court held:

> [I]f 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 con-

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1986) (decided in 1986 before both *Coy* and *Craig*).

72. *See, e.g.*, State v. Chisholm, 777 P.2d 753 (Kan. 1989); State v. Conklin, 444 N.W.2d 268 (Minn. 1989); State v. Tafoya, 765 P.2d 1183 (N.M. Ct. App. 1988). See MYERS, *supra* note 3, at 238-40, for a list of cases.

73. *See, e.g.*, Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); State v. Cooper, 353 S.E.2d 451 (S.C. 1987); State v. Daniels, 484 So. 2d 941 (La. Ct. App. 1986); State v. Tafoya, 729 P.2d 1371 (N.M. Ct. App. 1986); Turner v. State, 716 S.W.2d 569 (Tex. Ct. App. 1986); State v. Sheppard, 484 A.2d 1330 (N.J. Super. Ct. App. Div. 1984); *see also* Josephine A. Bulkley, *After Coy v. Iowa: The Status of Videotaping, Closed-Circuit Television and Other Methods for Taking A Child's Testimony Outside the Defendant's Presence, in The Fourth National Conference on Children and the Law, National Legal Resource Center for Child Advocacy and Protection* 292 (A.B.A. 1988); Eatman & Bulkley, *supra* note 1, at 56-60.

74. 110 S. Ct. at 3167.

frontation with the defendant.[75]

Furthermore, the *Craig* case set forth broad guidelines for a showing of necessity. *Coy* did not elaborate on "individualized findings of necessity." Before *Craig*, some decisions required a finding of trauma to the child specifically caused by the defendant's presence,[76] although many state court decisions suggested that a finding of trauma to the child from testifying in open court was sufficient. Many decisions prior to *Craig* also held that expert testimony or testimony from lay witnesses, such as parents, regarding trauma to the child satisfied the necessity requirement.[77] Some courts indicated that the judge should observe or question the child to determine whether she would be traumatized.

In many cases, the child may begin testifying in the usual manner but "freeze up" or break down on the witness stand, which courts have cited as justification for use of videotaping or closed-circuit television. Some courts specifically have required questioning of the child in the defendant's presence in order to determine whether the accused's presence intimidated or traumatized the child.[78] One of these cases was *Craig v. State*,[79] in which the Maryland Court of Appeals held that while there are valid exceptions to face-to-face confrontation,

> a statutory inquiry which looks generally to a child's inability to testify in open court [is] . . . too broad to satisfy the necessity re-

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75. *Id.* at 3169.

76. Thomas v. People, 803 P.2d 144 (Colo. 1990) (showing of impact of testifying in defendant's presence required); State v. Vincent, 768 P.2d 150 (Ariz. 1989); State v. Jarzbek, 554 A.2d 1094 (Conn. 1989); State v. Conklin, 444 N.W.2d 268 (Minn. 1989) (statute requires determination that presence of defendant would psychologically traumatize the child making her unavailable to testify); State v. Thomas, 442 N.W.2d 10 (Wis. 1989) (preliminary hearing testimony of child who was unable to communicate in defendant's presence sufficient showing of trauma); State v. Darby, 563 A.2d 710 (Conn. App. Ct. 1989); State v. Albert, 778 P.2d 386 (Kan. Ct. App. 1989); State v. Crandall, 555 A.2d 35 (N.J. Super. Ct. 1989) (lack of finding by trial court that child would experience distress from testifying in the defendant's presence). *See* Craig v. State, 560 A.2d 1120, 1127 (Md. 1989), *vacated*, 110 S. Ct. 3157 (1990), for other cases that mention the effect of the defendant on the child's testimony.

77. State v. Spigarolo, 556 A.2d 112 (Conn.), *cert. denied*, 493 U.S. 933 (1989); McGuire v. State, 706 S.W.2d 360 (Ark. 1986).

78. *Craig*, 560 A.2d at 1122; Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989); State v. Thomas, 442 N.W.2d 10 (Wis.), *cert. denied*, 493 U.S. 867 (1989); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).

79. 560 A.2d 1120 (Md. 1989), *vacated* 110 S. Ct. 3157 (1990).

> quirement [and] whether a child is unavailable to testify in the *Roberts* sense should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness' inability to testify in the presence of the accused.[80]

The court indicated the child must be questioned by the judge (either in or out of the courtroom) in the defendant's presence to determine if she is unable to reasonably communicate because of serious emotional distress produced by the defendant's presence. The court also required that two-way television, a less restrictive alternative, must be attempted prior to use of a one-way procedure.

The Supreme Court imposed three minimal requirements to satisfy the necessity showing: 1) there must be a case-specific finding of necessity; 2) the trauma to the child must be caused by the defendant's presence, not just courtroom trauma; and 3) the emotional distress must be "more than *de minimis, i.e.*, more than mere nervousness or excitement or some reluctance to testify . . . ."[81] The Supreme Court found that the Maryland statute, which requires a finding that the child will suffer "serious emotional distress such that the child could not reasonably communicate," met constitutional standards.

The Supreme Court, in addressing how necessity must be established, disagreed with the Maryland Court of Appeals' requirements that the child must be questioned in the defendant's presence and two-way television must first be attempted. The Supreme Court refused "to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of one-way television procedure."[82] The Court indicated that the trial court could have found that expert testimony was sufficient to establish that the children's testimony in the defendant's presence would result in serious emotional distress.

Craig made it clear that preserving safeguards of adverseness and reliability, including the oath, cross-examination, and observation of the witness' demeanor by the jury, judge and defendant, renders use of a one-way procedure "functionally equivalent to . . . live, in-person testimony."[83] *Craig* noted that such assurances of reliability and adverseness "are far greater than those required for admission of hearsay

80. *Id.* at 1126.
81. *Craig*, 110 S. Ct. at 3169 (emphasis added).
82. *Id.* at 3171.
83. *Id.* at 3166.

testimony under the Confrontation Clause."[84]

The effect of *Craig* should be to affirm the status quo, since most state appellate courts prior to *Craig* had permitted use of one-way procedures for children found to be traumatized by testifying at trial. Indeed, during the past year since *Craig* was decided, a number of decisions have allowed one-way closed-circuit television or videotaped depositions based on the *Craig* decision where the requirements were met.[85] Some courts, however, have held that the defendant's right of confrontation was violated where specific findings of necessity were not made or other similar requirements were not satisfied.[86] In deciding whether to request protective procedures in future cases, prosecutors should consider carefully whether trauma to the child would be caused specifically by the defendant's presence as opposed to testifying in court. If it appears a child may suffer distress from testifying in the courtroom, other alternatives where the defendant remains physically present could be considered, such as closing the courtroom to the general public (although other constitutional guarantees must be examined when considering such approaches, too) or using a videotaped deposition prior to trial in which the defendant is present.

Moreover, some courts may establish stricter requirements than *Maryland v. Craig* such as requiring two-way closed-circuit television or the child to be questioned in the defendant's presence to determine if

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84. *Id.* at 3167.

85. Spigarolo v. Meachum, 934 F.2d 19 (2nd Cir. 1991); Thomas v. Guenther, 754 F. Supp. 833 (D. Colo. 1991); Government of V.I. v. Riley, 750 F. Supp. 727 (D.V.I. 1991); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 111 S. Ct. 956 (1991); Thomas v. People, 803 P.2d 144 (Colo. 1990) (en banc); State v. Crandall, 577 A.2d 483 (N.J. 1990); State v. Self, 564 N.E.2d 446 (Ohio 1990); *In re* G.T., 588 A.2d 621 (Vt. 1991); State v. Lamb, 798 P.2d 506 (Kan. Ct. App. 1990); *In re* Vanidestine, 463 N.W.2d 225 (Mich. Ct. App. 1990); People v. Guce, 560 N.Y.S.2d 53 (N.Y. App. Div.), *appeal denied*, 565 N.E.2d 524 (1990).

Some state courts also have held that the right of confrontation is not violated when a child's testimony is videotaped by deposition before trial where the defendant is present during the deposition. Although obvious, courts indicate that the defendant's face-to-face confrontation right has not been abrogated, and they also hold that the Confrontation Clause is not violated although the jury is unable to observe the child's demeanor at the time she testifies. Hardy v. Wigginton, 922 F.2d 294 (6th Cir. 1990); Vigil v. Tansy, 917 F.2d 1277 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 995 (1991); People v. Schmitt, 562 N.E.2d 377 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 154 (1991).

86. *E.g.*, State v. Peters, 587 A.2d 587 (N.H. 1991); Edwards v. State, 568 So. 2d 123 (Fla. 5th Dist. Ct. App. 1990); D.A.D. v. State, 566 So. 2d 257 (Fla. 5th Dist. Ct. App. 1990).

she would be traumatized. In fact, some state statutes permit only "two-way" closed-circuit television,[87] in which the child is able to see the defendant on a monitor in the room where he or she is testifying and another monitor televises the child's testimony in the courtroom. The Supreme Court merely established minimum, threshold requirements for allowing one-way television below which state courts may not go.

Indeed, after the Supreme Court remanded *Craig* to the Maryland Court of Appeals, the Court of Appeals affirmed its earlier holding establishing a strict standard for a finding of emotional distress.[88] The Supreme Court remanded the case because it wanted to give the Maryland court an opportunity to reconsider its earlier ruling, since its first decision was made before the Supreme Court had addressed the confrontation issue. The first Maryland Court of Appeals *Craig* decision interpreted the Supreme Court's 1988 decision in *Coy v. Iowa* (which did not decide whether face-to-face confrontation was required) as establishing a "high threshold" for a finding of necessity, which the Maryland appeals court indicated the trial court had not met.

The Supreme Court stated in *Maryland v. Craig* that "we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today."[89] Nevertheless, in the second *Craig v. Maryland*[90] decision, the Court of Appeals again held that the judge should question the child personally, preferably in the defendant's presence, although indicating such an approach was discretionary rather than mandatory. Additionally, in direct contrast to the United States Supreme Court, the Maryland court stated that expert testimony, while permissible, was generally not sufficient to establish emotional trauma.[91]

Some state courts also may decide that one-way television violates a defendant's right of confrontation under their state constitution giving defendants the right to a "face-to-face" meeting with witnesses against them.[92] The Pennsylvania Supreme Court indicated that it was unnecessary to decide the federal confrontation question because its de-

87. Whitcomb, *supra* note 1.
88. Craig v. State, 588 A.2d 328 (Md. 1991).
89. 110 S. Ct. at 3171.
90. 588 A.2d 328 (Md. 1991).
91. *Id.* at 332.
92. Brady v. State, 575 N.E.2d 981 (Ind. 1991); Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991).

cision was based on the state constitution. The court further indicated that it never has been bound by the Supreme Court's interpretation of similar federal constitutional provisions.

Both the Indiana and Pennsylvania courts stated that the words "face-to-face" distinguish their state's Confrontation Clause from the federal Constitution (which requires the defendant to "be confronted with the witnesses against him"[93]). The Pennsylvania Supreme Court held that because the child was not unavailable or had not been subject to cross-examination in the presence of the accused during prior testimony, the defendant's state confrontation right was violated.[94]

V. CONCLUSION

From *Globe Newspaper* in 1981 to *White v. Illinois* in 1992, prosecutors have received favorable treatment in child sexual abuse cases. The *Craig* and *White* decisions clearly indicate the Court is willing to make exceptions to the defendant's confrontation rights in cases involving sexual abuse of a child. Yet these decisions are not merely indicative of the Court's view of child victims, but illustrate their preference in general for the prosecution's position in criminal cases. Moreover, although the Court has allowed exceptions in child abuse cases, it has not meant that defendants' confrontation rights completely have been abrogated.

In practice, most cases of child sexual abuse never reach the trial stage. More importantly, in such cases of abuse that go to trial, prosecutors want and need a live child witness. It is only in the exceptional case when a particular child cannot testify at all or cannot testify in open court or in front of the accused—because he or she would be too traumatized or refuses to communicate—that evidentiary methods such as closed-circuit television or admission of the child's out-of-court statements make it possible for prosecutors to initiate or win prosecutions that otherwise would fail.

93. U.S. CONST. amend. VI.
94. *Ludwig*, 594 A.2d at 284-85.