Approved March 18, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p~~m. on February 25, 1985 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Talkington and Winter.

Committee staff present:

Mary Torrence, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Dr. Susan Voorhees, The Menninger Foundation
Clark Owens, Sedgwick County District Attorney
Dennis Moore, Johnson County District Attorney
Jim Clark, Kansas County and District Attorneys Association
Suzy Sanders, Kansas Organization of Sexual Assault Centers
Ron Smith, Kansas Bar Association
Joe Cosgrove, Assistant District Attorney, Johnson County

Senate Bill 167 - Admissibility of videotaped testimony by child witnesses in certain cases.

Dr. Susan Voorhees, The Menninger Foundation, works with children who have been abused. She testified in support of the bill. She stated the abuse always causes trauma. The necessary investigation can perpetuate trauma to the child. This secondary trauma can compound the initial psychological damage of the child.

Clark Owens, Sedgwick County District Attorney, testified in support of the bill. He stated he feels this bill will provide relief from the trauma victims go through. With the past several years, there has been a great deal of nationwide interest involving sexual assault children. It is not that it is suddenly appearing. In Sedgwick County, they have experienced an explosion in reporting the crime. In 1982 they filed 31 sexual assault cases; in 1983, 61 cases; and in 1984, 94 cases. He testified he did think this has come about because they implemented procedures to encourage reporting this crime. He explained an individual goes around to the schools educating the children on preventive techniques. After the person has given this talk, some children will come forward to report their experience. They are beginning to see a trend towards looking at victim's rights. This is one more bill oriented toward victim's rights. When testifying in court, witnesses are very nervous. This bill is to try to minimize the amount of trauma when a witness has to testify on sexual assault. There are two categories of sexual assault offenders; one category is strangers, and the second, the people within the family or relatives. When a victim testifies against a family they find there is a different type of testimony. Mr. owens stated they feel they lose sexual assault cases because of the inability to minimize the impact of the court system on the witnesses. He referred the committee to his handout relating a mother's story of her two children who were sexually molested (See Attachment I). He stated, no matter how much you tell the kids the offender will not shoot you in the court room, this has an impact on the child's testimony. Mr. Owens pointed out the best legislation is in Oklahoma and Kentucky, and this bill is like the Oklahoma bill. In Kentucky the videotaping is done preceeding the proceedings and that can be used as direct testimony. He said a year is a long time for a child to remember; the information

Senate Bill 167 continued

is more reliable if the child can give the testimony soon after the sexual assault. The child tends to forget after awhile.

Dennis Moore, Johnson County District Attorney, testified in support of the bill. He stated in the past one-and-a-half years we have seen a great change in reporting the crimes. There is a good law in Kansas in the Child Protection Act, successful prosecution of child sexual abuse. This will give a great deal of strength for the prosecutor to get information to the jury. In the past eight weeks he has been involved in prosecution of two child abuse cases. In both of these cases these children would have been terrified to appear in court because the judge is present, twelve jurors are present, newspaper people, and the child is subject to cross examination. This is traumatic for the child and can put a child over the edge. The bill provides a number of protections for the child. In Johnson County they are filing two to four child sexual abuse cases per week. They are finally able to do what needs to be done in prosecuting those people.

Jim Clark, Kansas County and District Attorneys Association, testified this bill is not a prosecutor's bill, it is a victim's bill. This is to the child's benefit. An impartial camera to record the child's statements is much better and more reliable for the child victim.

Suzy Sanders, Kansas Organization of Sexual Assault Centers, testified in support of the bill. The organization she represents maintains hotlines. The problem is what to do with the information. Do they try to deal with what happens to the kid? Do they make it worse for the child? Most frequently they decide to put the child in counseling and take them away from the person. The organization is going into the schools with education programs; people in schools are required by law to report any incidents they hear. She said school people have grave concern with addressing that issue because of the trauma to the victim. Now at least there is a possibility that this can be videotaped. This is one of the choices that will be available to encourage them to report.

Ron Smith, Kansas Bar Association, testified the association has taken no position on this bill. He was appearing in an informational capacity. He stated the use of videotaped testimony, whether for children or not, is an important growth technique in preserving evidentiary testimony. A copy of his testimony is attached (See Attachment II).

Joe Cosgrove, Assistant District Attorney for Johnson County, testified in support of the bill. He stated the availability to use videotape or television monitor testimony of young children would be a welcome, modern and humane addition to our justice system. A copy of his testimony is attached (See Attachment III). During committee discussion a committee member inquired if there was any problem with allowing a child to use a doll as a model in connection with the testimony? Mr. Cosgrove replied, yes, it is a very valuable way to demonstrate the crime. Another committee member inquired if the Kentucky and Oklahoma laws have been before the courts? Clark Owens replied, he cannot find the statutes that have been challenged. The committee member suggested requesting an attorney general's opinion.

The hearings on Senate Bill 167 were concluded.

Senator Burke presented a request for a committee bill that deals with the issue of hazing. Following the explanation, Senator Burke moved to introduce the bill and hold for next session. Senator Winter seconded the motion. The motion carried.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 25, 1985.

Senator Winter presented a request for a committee bill concerning hostile take over of corporations. Following the explanation, Senator Winter moved to introduce the bill. Senator Burke seconded the motion. The motion carried.

In the 10:00 A.M. committee meeting, February 22, 1985, Kathleen Sebelius, Kansas Trial Lawyers, had requested two committee bills. Senator Gaines moved to introduce the bills. Senator Langworthy seconded the motion. Because there was no quorum, the committee did not vote on the motion. Today the motion carried to introduce the committee bills.

The meeting adjourned.

Copy of guest list attached (See Attachment IV).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-25-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
January H. Scott	Topeka, Ks	KCPCA
Helen Stephens	Prairie Village	Child adoption Jo Cty Task force
Suzy Sanders	Topeka, K	KADSAC
Susan Voorhees	Topeka Ks	The Morningers, Inc
Shirley Lanus	K.C.M.O	KCK Jr. League
Ruth Smith	K. City	KCK Jr. League
Louise Moody	K.C.K	KCK Jr. League
Susan Rohrer	KC	KCK Junior League
Dorian Martin	Seneca, Kansas	KCK Junior League
Claudia Shoults	K.C.Ks	KCK Jr. League
Ruth Welkin	Topeka	Girl Scouts
Doug Brehm	Topeka	Intern - Atty General
Mary Rice	Lawrence	Intern - Atty General
Mike Slotsky	Lawrence	Intern Sn Parrish
Jim Clark	Lawrence	KCDAA
Clark V. Owens	Wichita Kansas	District Attorney
Dennis Moore	Johnson County Courthouse Olathe	D.A.
Bob Bann	Topeka Ks	SRS/48
Elizabeth G. Taylor	"	KAD VP
Kathleen C Selsees	"	KTLA

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LUCY, A MOTHER OF TWO CHILDREN WHO WERE SEXUALLY MOLESTED, SHARES HER STORY AND INSIGHTS ABCUT THE PROBLEM AND COMMENTS ON HOW THE PROBLEM IS DEALT WITH IN LOUISVILLE, KENTUCKY.

LUCY: I think the situation my children were involved in is kind of classic. It's the way it happened. Larry was an upstanding member of the community. I'd known him for years. I was crazy about Larry and his wife. It wasn't just a babysitting situation, they were friends of mine. And she babysat, so she babysat with my children. There were a number of children there.

I'm a conscientious mother. I didn't just drop the kids off. You know, I talked to them daily about what was happening with the children. And yet Larry molested Amy and Steven both and a number of other children for more than three years before I knew anything about it.

My little girl didn't show any signs of any problems. My little boy was having emotional problems all that time. I discussed them at length with Larry and Edith. He was seeing a counselor, being tested. It went on for years. And it went on with the other children too. There were eventually five children who testified in court. Without any of us knowing anything about it, not anything at all. The professionals who treated Steven didn't have any hints that he was involved in anything like that. So in that way it was your typical case.

Larry was a nice fellow. He was the choir director at his church, he'd been president of the Kiwanis, he'd taught at the community college here, you couldn't want to meet a nicer guy.

I've got several band wagons I've gotten on. One of them is teaching the children. I had talked to my children. My youngest sister was molested when she was little. So I was more aware of it than other people. I had taught the kids, I thought, everything I needed to teach them.

When Steven told me about it, it was just a fluke. We happened to be talking about sexual abuse that night. I had read an article in the newspaper. I guess I used the right words that night. I don't know why Steven told me that night. When I was talking about it, never dreaming for a minute that this really needed to be said in our home, it hadn't crossed my mind that this was going to happen to my kids. I was just being conscientious, and Steven just real quietly said "Mom, Larry did all those things to me."

And of course it all progressed and he told me they had been horribly molested for years. And one of the things that he said was I had told them about bad people and Larry wasn't a bad person, Larry was a nice man. I liked Larry. I told them, "Respect Larry, Larry's

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a nice man, do what Larry and Edith tell you. They're good people". That was a big mistake we all make. We tell our kids about the sick people, the crazy people, the mean looking people and the child molester isn't. Larry's so typical in that.

I was immediately overwhelmed with guilt. Just overwhelmed with feeling guilty. I immediately said to the kids, "Oh God, you've been miserable all these years", and they said, "No". They liked it at Larry and Edith's except when Larry was molesting them. They're just little kids. They played. Their friends were there. They liked it there except for that and they just excepted that. That was a part of the way things were going to be.

They kept it a secret. It never crossed their minds to tell anybody. Steven said he had wanted to tell me all the time but he had never planned on telling me. It kind of slipped out that night. Amy, I think, is still real irritated with herself that she ever did tell me. It opened up a great big can of worms with her that she didn't want to deal with. She didn't want to think about that. She'd put that in a place in her head that she intended to keep it all her life. And she will still say, "I should never have told you, it didn't do anything but cause trouble." It was all over with. They weren't going to the sitters there anymore. As far as they were concerned,and I think they still feel that way a lot, life would've been easier if they'd never opened their mouths. And that's, I think, a sad reflection on our society.

Amy and Steven have been through hell. It was all over with two years ago. We reported it, we went to the police. We did all the right things. We went through the court process. It took over a year. They've been through intensive counseling. They've been through hell. And it's not over.

Larry's in jail now. But they're still scared of him. Steven was up last night talking about, "Well, what if Edith comes and tries to kill us?" They're scared, that's all there is to it. I tell Steven, "You know, Edith is not going to come try to kill us." But after I put him to bed, I went down to the basement to do the laundry, and I caught myself looking out the door. I don't ever walk past the back door that I don't look out.

I'm scared of Edith too. I have no reason to think that Edith is not going to go out to the pen and see Larry and just get all hot and decide Lucy is the one that started this, and by God I'm going to go kill her. Chances are Edith's not going to do it. I keep telling Steven Edith's not going to do it. But, I don't know that she won't. It's just, it's opened up fear in us that we didn't have before. It's gotten better of course over time.

I can't say enough about the Exploited/Missing Child Unit here. The people that worked with my kids knew so much what they were

doing. I was so paranoid, I told Leo Hobbs when we went down there for them to interview the children, the social worker and the police officer were going to take the children individually in a room and interview them. I said "No way, you don't talk to them without me." I wasn't letting anybody near my children. They were so good. It didn't take but just a minute to realize that they knew what they were doing. They know how to talk to the kids. We were down there for almost four hours. The kids walked out of there chitchatting. We were at the back door, it was after midnight and they were locking up the doors, and we looked down and Amy was dragging along one of the anatomically correct dolls. She had just gotten real comfortable with those people down there. They knew what they were doing. They're so well trained. They made Amy and Steven feel comfortable.

The police officer that we worked with did so much to make Amy and Steven feel safer. Larry was arrested but he got out the next day. They just figured he was going to come kill them. They talked to Mike Simpson, the officer that worked with us. I called him and asked "Mike, what do I do? They're scared to death." He got on the phone with them and he talked to them and he said, "I'm not going to let Larry hurt you." He said it to them over and over again. I could go on forever about how good the people were that we worked with.

We ran into a lot of court delay. It just drove me crazy. It was reported in April. We were supposed to have gone to court in November. Two days before, after meeting with the prosecutor, the social worker, the police detectives, the kids going over their testimony, visiting the courtroom, we were so scared, we were about to die, and they delayed the trial until the next April. It just about killed us, it really did. We had been miserable for months, and all we could think of was getting it over with. I know the court systems are full and crowded. I don't know if there's a way you can ask them to make a exception for children. I don't know why you couldn't. Children are darned important.

I'm not going to be ashamed of this. I don't want my children to be ashamed of it. We've been victims of a crime. If somebody had shot my kids I wouldn't have been quiet about it and I'm not going to be quiet about this. I don't want my kids to have any reason at all to feel like they have to be ashamed of being a victim of a crime. I figure I need to let them know I'm not ashamed of it. I didn't do anything wrong as a mother. I know that. I'm a good mother, they're good kids. None of us did anything wrong. Larry's the person that's wrong.

The legislation that we've passed here I think is wonderful. I wished we'd had it a couple of years ago. One thing I feel very strongly about after watching my kids is testifying in front of the offender. Every one of these kids was scared to death Larry was going

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to kill them right there in the courtroom. They weren't sure he wasn't until they walked out. Leo and I were talking about the possibility of closed circuit testimony. I just think it would make the biggest difference in the world if I had been able to tell Amy and Steven, "You're not going to have to see Larry." It would've worked out the same in the end. They would've gotten Amy and Steven's testimony. Larry could've looked at them through a one way mirror or something. He could've had his rights. But they wouldn't have had to spend a year being scared Larry was going to shoot them under the table in the courtroom. That I think is terribly important.

Pre-trial video taping I think would be fantastic. Even if it couldn't be used in the courtroom. Right before the trial when I was going over the children's original statements with them, Amy got terrified two days before the trial. She couldn't remember something. It was written right there and that's what she had said. She just plain couldn't remember. It had been a long time. Amy was terrified. She thought she had made it all up. She just got hysterical and she said "Mom, I don't remember ever saying that, I must of lied, I must of made it all up." It took a couple of hours for me to be able to drop little hints until finally something clicked in her head and she remembered it all. That little girl was so relieved. "Oh God, Mom I'm so glad I haven't been lying." She really thought she was. If we'd had a video tape of Amy sitting there in the police department that she could've looked over and refreshed her mind and we didn't have to spend days reading these gory transcripts so that Amy could remember what had happended to her a year and a half before, it would've been just a tremendous help to us. Even if it can't be used in the courtroom.

One other biggie Leo and I were talking about is counseling for the children. I've been paying $62 an hour for my children to see a child psychologist. It's not time for it to stop yet. I'm going broke doing it, but they have to have it. While I was talking to Leo I said, "You know if I'd thought of it, if we had taped some of the sessions with my kids and let somebody listen to it, somebody would pay attention when they said these kids need counseling".

LEO HOBBS: How many of the other kids that were victims along with your children are in counseling or have been in counseling?

LUCY: One.

LEO HOBBS: That's a tragedy.

LUCY: The other parent's have not taken their children to counseling.

LEO HOBBS: It's easier to not confront the problem. And it's easier to just ignore it and say they're OK. As long as the children

aren't exhibiting bizarre behavior or anything like that, then you can ignore it. And the things these people don't realize is that that is back in these children's mind in a dead zone somewhere that is eventually going to manifest itself in some type of behavior.

CAPT. PRICE: All of us are involved in the area of investigating the crimes and so forth but at the same time most of us are also parents, and I want you to know we appreciate your willingness to meet with us and share your story because it could happen to any one of us. In looking back over the entire situation can you think of anything at all that had you known what you now know, would have tipped you off. Is there anything that we can watch for in our children's behavior?

LUCY: There were a few things, and the more people I talk to the more this one point keeps cropping up, little girls with bladder infections and kidney disorders. My little girl had them. Almost all the parent's I've talked to who have little girls who were molested, it turns out that these little girls had bladder infections. My pediatrician cried when I told him what had happened. He said "God, why didn't I think of that?" Amy's bladder infections particularly were caused by fecal contamination. Amy was one of those little kids who smiled all the time. Nobody would've suspected anything was ever wrong with Amy. But that's a biggie.

The psychologist said that, when he looked back over our file to write a report for the court, he noticed in the initial survey he gave me, I did put that Steven masturbated a great deal and seemed to show an unusual interest in sex for his age. A lot of kids are interested in sex today. So you don't know. He was five years old at the time. We write off a lot of things or find other reasons, and there are other reasons of course why some things happen. Steven had a great deal of real serious emotional problems all this time, but I did everything I could to get help for him. He saw a counselor. He was evaluated extensively. It never came out.

CAPT. PRICE: What was this individual telling these youngsters to keep them from telling?

LUCY: He held knives to them and told them he would kill them. If he didn't kill them he'd kill me.

Somebody pointed out to me and I think it's something that we need to do in our education of the kids, is to tell the kids and then mom, go home and ask your child if anybody has ever done that to them. I never came right out and said, "You know, Steven I've just explained these things to you. Has anyone ever done that to you?" I think if you're giving them an out, you're giving them an opportunity to say yes.

I'm convinced the key to it is educating the children. I'm absolutely convinced and my kids are to. Educational television not

long ago did a series that I thought was really good. Amy said it wasn't accurate. She proceeded to sit down and write a little skit and say, "Mom this is the way it ought to be." And Amy's little skit came right to the point. That's it. This man is putting his hands on this girl's vagina. This man is putting his mouth on the little boy's penis. And Amy, who is nine years old, sat there in the living room and said, "They don't know what they're talking about, they're not even talking about sexual abuse." Big deal if they're talking about bad touches, tell the kids what a bad touch is.

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RON SMITH
Legislative Counsel

KANSAS BAR ASSOCIATION

SB 167
Senate Judiciary Committee
February 15, 1985

Mr. Chairman. Members of the committee. My name is Ron Smith. I am Legislative Counsel for the Kansas Bar Association.

The Kansas Bar Association represents 4,200 of the state's 5,800 attorneys. Our attorney-members are in every county, practice all types of law, represent both plaintiffs and defendants. Their common bond is they want a good legal system within which they can help Kansas citizens with their problems.

Our legislative policies are considered by the Legislative Committee of the KBA, which makes recommendations to the Executive Council. The Council consists of 21 lawyers from across the state. Ten members are elected by geographic districts. Our Executive Council includes members of the Judiciary.

We believe our Legislative Positions constitute a considered and rational approach to the important issues facing the Kansas Legislature.

The Kansas Bar Association has taken no position on this legislation. I appear here today in an informational capacity.

I believe SB 167 represents at least part of the future in the law. Our profession has been described as the last of the cottage industries. We require court appearances for witnesses, unless they are dead, and then we sometimes preserve their testimony with depositions.

The use of videotaped testimony--whether for children or not--is an important growth technique in preserving evidentiary testimony.

Video depositions and testimony are becoming commonplace, although slower to come to this area of the country than others. The American Bar Association and American Law Institute are planning a nationwide closed-circuit satellite network that will allow lawyers in different parts of the country to:

1. Make court appearances without costing their clients travel time and expenses;

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2. participate in CLE without leaving their home city (In fact, KBA has just recently set up dishes in Wichita and Topeka for use in future CLE conferences by satellite);

3. take depositions by satellite relay;

Further, accident reconstruction through computer simulation is also about to be perfected, with all its attendant evidentiary problems.

I give you this background to show you that SB 167 is the tip of a rather large high-tech iceberg. In my opinion, it will be a beneficial iceberg.

Videotaping evidence

This bill speaks a problem in the law, and some important constitutional criminal law concepts.

The Sixth Amendment gives people accused of crime the right to confront their accuser, and cross-examine. However, child sex and physicial abuse is on the increase. More is reported all the time. In Kansas, we've made it a requirement to report such abuse to appropriate authorities.

The Sixth Amendment is not absolute with regard to excluding all hearsay statements. (Pointer v. Texas, 380 U.S. 400, 1964; Dutton v. Evans, 400 U.S. 74, 1970)

I've included an article by prosecutor Tom Morgan concerning use of videotape testimony in child abuse cases in Georgia. Keep in mind he is speaking about Georgia, not Kansas. You can see that the Georgia case law regarding admissibility of pre-recorded testimony is very similar to the provisions of SB 167, so Mr. Morgan's comments have some relevance to your discussion of SB 167. Of course, Atlanta was the scene of some very unforunate child murder and abuse cases in the late 1970s, and this issue is very visible in that region of the country.

I. Problems with Hearsay Rules

The hearsay rule says that testimony is irrelevant--and therefore kept out of court--if such testimony is an "out-of-court statement used to prove the truth of the matter asserted" and it does not fall into one of the exceptions to the hearsay rule found in KSA 60-460. Hearsay evidence for which there is no exception is excluded regardless whether it is a criminal or civil matter.

The most common exception to the hearsay rule is if the person making the out-of-court statement is in the courtroom and subject to

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cross examination.

However, the person making the statement must first be a competent witness. The statutory requirement to be a witness is that (1) a witness be able to express themselves and be understood by the jury, and (2) understand the duty of a witness to tell the truth. (K.S.A. 60-417).

Using this law, Kansas courts have allowed testimony of a 4-year-old through hearsay statements made to the Mother, under the contemporaneous statements exception to the hearsay rule. (State v. Rodriquez, 8 K.A. 2d 353, a 1983 indecent liberties with a child case). This exception states:

> "A statement which the judge finds was made (1) while the declarant (child) was perceiving the event or condition which the statement narrates, describes or explains, (2) while the declarant was under the stress of a nervous excitement caused by such perception or (3) if the declarant is unavailable as a witness, by the declarant at the time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort." [KSA 60-460(d)]

The problem with this exception in child abuse videotapes is that the videotaped deposition is not "contemporaneous" with the described harm. The child has had an opportunity to sit, reflect, perhaps be coached by a grownup, and therefore the contemporaneous statements exception would not apply.

It creates a problem, in that a mother can testify as to the excitement of her child, and what the child said under the circumstances. That's admissible. But the child might be so young the child cannot understand the duty of a witness to tell the truth, and therefore the court must reject direct testimony by the child—even in open court.

Further, a parent who wants to "get back" at the defendant for an unrelated issue might fabricate the alleged statement of a child. An example is a spouse in divorce actions getting back at the other spouse by alleging sexual abuse of a child.

Note also, in child abuse cases verses other types of cases where adults are witnesses, the adult can give and sign a statement that is transcribed, and the statement can be used later to refresh the adult's memory as to what happened. The child not only can't read, the child can't write. How can you refresh a young witness' memory except through activities which might be considered "coaching."

II. Procedural Problems Under SB 167
Section 1

Section 1 allows the recording of an oral statement for later use in a proceeding brought under the Kansas Code for Care of Children. (See lines 21-22) This is basically Chapter 39 of our code. Line 26 says the prerecorded statement is "admissible in evidence" if the pre-requisites are met. The pre-requisites are contined in lines 27 through 47.

Statements pursuant to Section 1 do not require a court order be made before the taking of the statement in order for the statement to be admissible.

No attorney can directly supervise the taking of the statement. Further, in lines 41-43, the qualifications of the person conducting the interview are not set forth. Are we going to let a police officer question the child, and later testify in the matter? Is it to be a child guidance counselor, or child psychologist?

In fact, under section 1, a parent who has an interest in the testimony, can videotape a statement of the child at home which might pass this test as evidence if a judge determines the recording is reliable.

I suggest the following amendment:

> in line 42, after the word "recording" by inserting the phrase "is a disinterested and unbiased person and ".

This amendment would appear to solve this problem.

Section 2

Section 2 outlines the method by which a judge can order a videotape statement "be taken..." In other words, the statement does not yet exist, it will be used in a Child Code case, and the statute will assure reliability of the recorded statement BEFORE it is taken.

Lines 71-72 appear to allow a parent to sit in on the taking of the deposition, but they cannot question the child. I assume they will be positioned so they can't signal the child, either. Since in line 73, the word "may" is used, I assume a judge can rule that a parent not be present as well.

In subsection 2(c), lines 82-84, it indicates that testimony taken pursuant to this section means a child is not compelled to testify at court. Keep in mind, however, that if a party objects to the resulting statement, and the court throws out the statement, the child either must

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directly testify, or that child's testimony will not get into evidence.

Since we're dealing with a statement which is scheduled to be taken before a hearing is held, you may want to consider another subsection 2(d) as follows:

> "Objections by any party to the proceeding that the resulting recorded statement is inadmissible must be made pursuant to a written motion timely filed with the court at least fourteen days prior to any scheduled proceeding. An objection to admissibility under this section shall specify the portion of such statement which is objectionable, and the reasons therefore. In the court's discretion, failure to make timely objection may constitute waiver of the right to object to the admissibility of such recorded evidence. This subsection shall not apply to objections to admissibility for reasons that the recorded statement has been materially altered."

Further, while I think it is good that attorneys be allowed to examine the child, an attorney's cross-examination can be intimidating. You might consider whether some cautionary language is necessary in line 75. Their tone of questioning should be appropriate to the circumstances and subject matter of the statement.

This might not be a problem, however, because if we are recording a statement on videotape, the jury or judge will see the demeanor of the attorney, and might hold it against them if they get too rough in questioning the child.

Further, the prosecution might seek protective orders from the court, and retake the evidentiary recording. A court finding that an attorney is purposefully delaying a proceeding through inappropriate techniques of cross-examination might be declared in contempt of court, pay a fine, or both. So there are ways of controlling such abuse.

Section 3

Section 3 controls the taking of a recorded statement when a child is the victim of a crime. It's very similar to section 2, but has the same limitations as my discussion about Section 2.

I also suggest another amendment in line 116, after the comma, as follows:

"and during the taking of such statement

shall arrange such statement to be taken in such a manner as to allow defense counsel to consult with the defendant in private,"

This amendment is needed because if a child were testifying in open court, especially during direct examination, a defendant can help guide his attorney in directions of cross-examination. If the defense attorney is separated from his client during examination, the client cannot help direct the attorney's cross-examination into relevant areas. The attorney and his client must be able to communicate or you might not have appropriate due process protection.

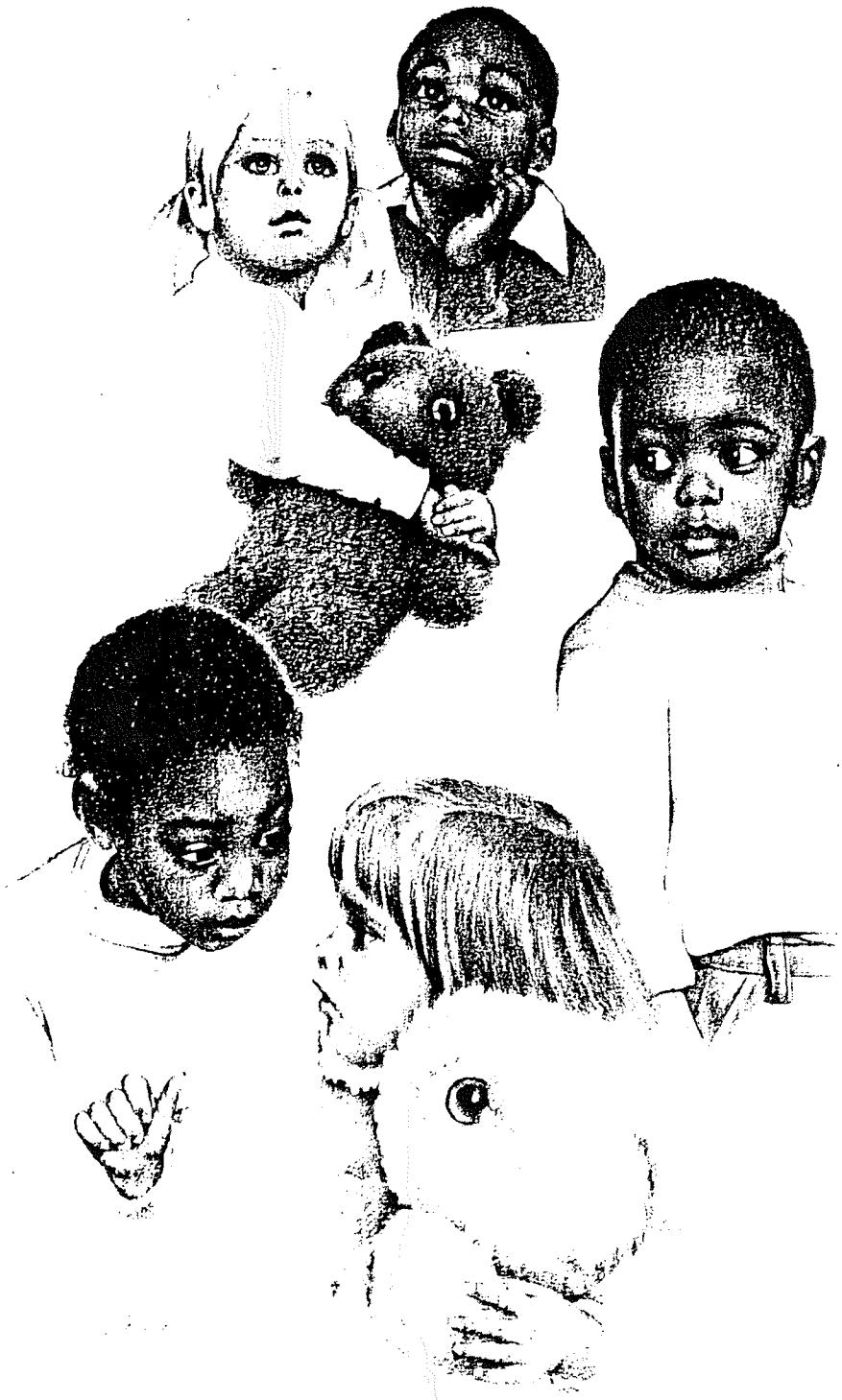
My suggested language for section 2 about timely objections to admissibility is even more important in criminal matters. Again, you might want another subsection 3(d).

Thank you.

II

THE NEED FOR A SPECIAL EXCEPTION TO THE HEARSAY RULE IN CHILD SEXUAL ABUSE CASES

by J. Tom Morgan



The number of child sexual abuse cases has increased dramatically in the past few years. There was a 200% increase nationally in the reporting of child sexual abuse cases from 1976 to 1982.[1] One metropolitan Georgia county reported a 400% increase in child sexual abuse cases from 1976 to 1983.[2] It is not known whether child molestation is a recent epidemic in our society, or if reporting of these types of cases has risen because of a new social awareness of this problem. These cases are not restricted to any demographic area or socioeconomic class of people.

Because teachers, doctors, and social workers are required by law to report to the authorities all cases of child sexual abuse which come to their attention, many cases will involve the judicial process.[3] The evidentiary rules currently followed in Georgia, however, do not address the unique problems inherent in the testimony of children.

The most difficult problem with the prosecution of child sexual abuse cases is the inability of the child to recall the event or events at trial. Unfortunately, present rules of evidence involving recollection of events at trial are impracticable as applied to children. The video tape recording of a counselor's interview with the child regarding the sexual abuse is an effective way of presenting the child's story since the details are fresh in the child's memory at the time of the interview. However, this recording may not be admissible in Georgia because of its hearsay characteristics. This article will deal with the problem of recollection of children in sexual abuse cases, examine

of the video tape recording child's first interview with a counselor, discuss the obstacles in admitting this recording at trial, and recommend legislation which would allow the admissibility of the recording in child sexual abuse cases.

Recollection Problems with the Child Witness

Once a child has been shown to the court to be a competent witness, the child is qualified to give testimony. A child is competent to testify if the child understands the meaning of the oath and that it is wrong to lie, and promises to tell the truth.[4] Some children as young as four years of age have been found to be competent witnesses.[5] A child's competency to testify as an adult, however, does not erase the problems encountered with witnesses who are children.

The memory of children as to time, date, location and sequence of events is very limited,[6] and the longer the defendant is able to delay the trial, the more the child will forget. Memory lapse is also a symptom of a sexually abused child.[7] In child sexual abuse cases, the memory of the child regarding dates, locations, people, and events is critical because in most cases the only evidence for the State is the testimony of the child. Since these cases are predominantly nonviolent in nature, and the offense is perpetrated in secrecy, corroboration of the child's testimony is rare. Without a good recollection of detail from the victim, the chances of a conviction in child sexual abuse cases are weak.

Adults have a better ability to recall facts, and like all witnesses, they are also able to "refresh" their memory at trial.[8] In practice, an adult on the stand can read a statement containing the adult's version of the incident, written by the police or the adult at the time of questioning, and then testify from recollection thus refreshed if the statement is written by the police, or from recollection recorded if the statement is written by the adult.[9] Many children in sexual abuse cases lack the necessary writing and vocabulary skills to explain the details of the incidents in writing and will therefore be unable to testify from present recollection recorded. If the child's statements are written by someone else, many children, even if they are able to read the statement on the witness stand, will not be able to comprehend the statement or will not be able to testify from their memory now refreshed as required by the rules of evidence.[10]

The conscientious prosecutor will always prepare a child for the trauma of testifying. To take a child into court unprepared would be cruel to the child and would also be detrimental to the prosecution's case. Usually the child will have forgotten much of what he or she told the authorities during the first interview and is embarrassed by the lack of ability to remember and by the content of the testimony. This situation demands that the prosecutor review with the child prior to trial all the facts which the child previously told to the first person who interviewed the child.

The problem with rehearsing a child prior to trial is that the child will sound rehearsed when he or she testifies. The child's testimony in court will sound unbelievable because the child is not testifying from what the child remembers, but rather from what the child has been told to remember. It is not unusual for a lawyer to ask a child why the child remembers a particular fact and for the child to respond, "Because Mr. D.A. reminded me." If the prosecutor does not prepare the child, however, the prosecutor may not even be able to elicit the necessary information from the victim to get beyond a defense motion for a directed verdict.

Video Taping the Child's First Interview

Prosecutors in Georgia are becoming aware of a valuable piece of evidence that would help juries when a child is unable to recall important facts regarding the events of the sexual abuse. This evidence is a video tape recording of the child's first interview with a professional counselor.

The interview should be held immediately after the sexual abuse is reported to the authorities. The interview should be conducted solely by a professional counselor with expertise in interviewing victims of child sexual abuse and should be held in a "family room" setting. A one-way mirror and concealed microphones should be installed in the interview room so that the child will not feel inhibited.

The probative value of the child's interview is tremendous if the interview is performed under the circumstances described above. The incident or incidents are fresh in the child's memory at the time of the interview, and the child is able to recall a detailed account of the events. If the child has difficulty describing the incident, the counselor can utilize anatomically correct dolls so that the child can physically describe instead of verbalize what occurred. In the case where the child is a pawn to accuse an innocent party of a crime, the interview will usually bring forth any falsity or unexplainable inconsistencies in the child's story.

The recording of the child's interview may already be used in Georgia by investigators, prosecutors, and grand juries prior to trial to avoid the ordeal of having the child being repeatedly interviewed by strangers. The recording may also be shown to a defendant and his or her attorney during plea negotiations in an effort

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(Continued from page 51)

to convince the defendant to plead so that the child will not have to testify in open court.[11] In addition, the recording of the child's first interview would also be beneficial at trial to enable the jury to hear exactly what the child's story was when the child could best recall the events of the molestation.

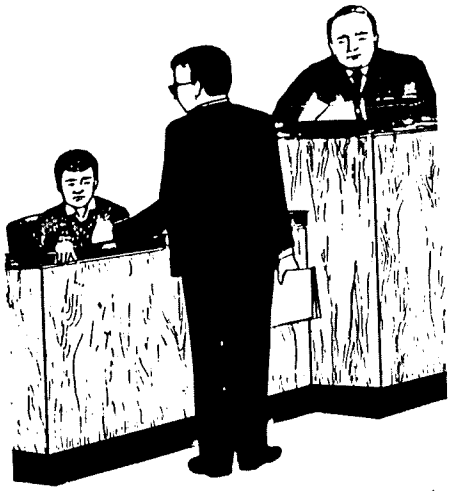
Problems with the Admissibility of the Child's Taped Interview

Video tape recordings are admissible in Georgia if, in addition to all other evidentiary requirements, the court is satisfied that the following conditions are met: the mechanical transcription device was capable of taking testimony; the operator of the device was competent to operate it; the authenticity and correctness of the recording is established; it is shown to the court that there have been no changes, additions, or deletions; the manner of the preservation of the recording is shown; the speakers are identified; and the testimony elicited was freely and voluntarily made without duress.[12] In criminal cases, video tape recordings of defendant's confessions have already been admitted into evidence when the above conditions have been met.[13]

It appears that the video tape recording of a child's statements is admissible evidence at trial in some states,[14] but its admissibility in trial under the present law in Georgia is questionable. One objection to the admission of the recording into evidence is that it violates the rule against hearsay.

The Georgia Supreme Court has cited *McCormick's* definition of hearsay which is "...testimony in court, or written evidence of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[15] As discussed previously, the child in a sexual abuse case cannot remember the details of the sexual abuse incident, and the taped interview is the most reliable evidence of the truth of the child's statements. Following *McCormick's* definition it would appear that the taped interview would be inadmissible under the hearsay rule because it is an out-of-court statement, offered in court, to prove the truth of the witness's statements contained in the recording.

It is interesting to note that on at least two occasions the Court of Appeals ruled that statements made prior to trial by a witness on the stand are not hearsay.[16] In *Webb v. State*, the trial court allowed the victim in a rape case to testify to statements she made to her father. The



defense appealed the trial court's ruling on the ground that the statements were hearsay. The Court disagreed with the defendant and ruled, "...the hearsay rule prohibits the witness from testifying as to what another person said; it does not apply to what the witness himself said."[17] The Court in *Webb* relied on the Georgia statutory definition which defines hearsay evidence as, "...evidence which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of *other* persons."[18] An argument could be presented that when a child takes the stand and testifies that the evidence is a recording of her statements, then the statements are not hearsay because the recording is not the testimony of another person but instead they are the actual recorded statements made by the witness who is not testifying in court.[19] There is also a question whether the courts would reach a different conclusion from that in *Webb* if the only evidence of the witness's prior statements was a video tape recording, and the witness on the stand could not independently recall her [illegible] statements. In any event, cu[illegible] case law in Georgia does not offer any decisive authority for the proposition that a child's taped interview is not hearsay.

Another objection to the video tape recording of the child's interview may be raised if the recording is offered to support the child's statements at trial or offered after the child has been impeached. In Georgia, a witness cannot be sustained or rehabilitated by prior consistent statements.[20] Since many children become frightened and confused immediately when they are sworn and get their first look at the jury, it is not difficult for an attorney to impeach a child with inconsistent statements made in direct and cross examination.[21]

The rationale for not allowing prior consistent statements into evidence is that they are a form of hearsay which do not fall under any recognized exceptions and do not meet the guarantees of trustworthiness.[22] In *Parker v. State*, the defendant was charged with the offenses of incest and aggravated sodomy.[23] The trial court allowed testimony of the victim's mother and a representative from the Department of Family and Children Services regarding statements the child made to them as to the circumstances of the incest and sodomy. The Court of Appeals reversed the conviction on the grounds that a witness's testimony cannot be corroborated by prior consistent statements. The Court stated, "If the rule were otherwise a person might contrive an entirely false account of some occurrence and, after relating this version of the events to several persons, call them in corroboration when at a later time he uttered the same untruthful story on the witness stand."[24] The reasons for prohibiting prior consistent statements may be justifiable when adult witnesses are concerned, but these same reasons hardly seem applicable to a child witness who has been interviewed under the conditions outlined earlier.

The only method to rehabilitate a witness in Georgia after the witness has been impeached by inconsistent statements is to introduce into evidence the good character of the witness.[25] This requirement presents an interesting quandary for the prose-

c when a child has been imp d. (e.g., "John, can you tell us whether or not your classmate, Mary, has a good reputation in your kindergarten community?")

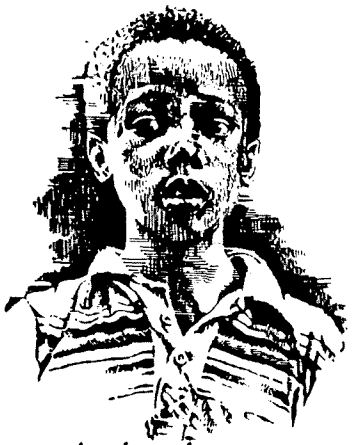
The admission of the video tape recording of the child's interview with a counselor is not admissible under any presently recognized exceptions to the hearsay rule. At first glance, two exceptions to the hearsay rule-the exception to explain conduct and the res gestae exception-appear to favor admitting the child's taped interview. However, the courts have narrowed the parameters of these two exceptions to the point that they would not apply in most child sexual abuse cases.

The recording may have been admissible under the exception to explain conduct[26] before the Georgia Supreme Court decision in *Teague v. State*.[27] This exception could have been applied if an officer testified in court that based on his or her observation of the child's interview the defendant was arrested. Even the actual statements of the child could have been admitted to explain the officer's conduct.[28] However, in *Teague*, the Supreme Court admonished prosecutors for stretching the explanation of conduct exception beyond its intended boundaries and held that only on rare occasions would such evidence be admissible.[29] Even before *Teague* the Georgia Supreme Court ruled that statements made by a child to a witness concerning the child's physical abuse could not be admitted to explain the witness's reasons for taking the child to the doctor.[30] Thus there is authority against applying the explanation of conduct exception to the hearsay rule to admit a child's taped interview into evidence.

An argument could be presented in some child sexual abuse cases that the recording should be admitted under the res gestae exception to the hearsay rule.[31] This exception allows out-of-court statements into evidence which were made during or near the event and are free from afterthought. The knowledge of a child's sexual abuse, however, may not be known for several hours or even days after the incident. In *Sanborn v. State*, the court held that it was error to allow a mother to testify to statements her daughter made four hours after she was molested.[32] The res gestae exception would therefore not be appropriate to allow the tape recorded interview of the victim in most child sexual abuse cases.

Special Exceptions to the Hearsay Rule

The unique circumstances of child sexual abuse cases demonstrate a need for a special exception to the hearsay rule so that a video tape recording of a child's interview with a counselor may be admitted into evidence. *McCormick* states that the reasons for the hearsay rule are oath, personal presence at trial, and cross examination of the witness.[33] *Wigmore* reasons that the major rationale underlying the rule against



hearsay is that the accuracy and trustworthiness of the declarant can best be tested by cross examination.[34] When a child takes the stand and swears that the evidence is a video recording of her statements, that when she gave the statements they were the truth, and that the statements were freely and voluntarily given, and the child is available for cross examination, then the reasons for the objections as to the hearsay character of the evidence are eliminated.

Opposing counsel might object to the admission of the taped interview on the grounds that the witness could not be confronted when he or she made the recorded statements,[35] but the United States Supreme Court and the State Supreme Court have ruled that not all hearsay evidence violates the Confrontation Clause of the Sixth Amendment.[36] In any event, as explained above, the witness would be available for cross examination regarding the witness's previous statements.

In Georgia, an exception to hearsay rule requires a necessity the exception and a guaranty of the trustworthiness of the evidence.[37] The nature of the circumstances of child sexual abuse cases, the controlled conditions of the interview, and the availabilty for cross examination of the witness who made the statements should meet the requirements of necessity and trustworthiness.

The Courts on their own may recognize a special exception to the hearsay rule,[38] or an exception to the hearsay rule may be introduced by statute.[39] Because there is currently no authority in Georgia for the admissibility of a taped interview of a witness, prosecutors will be reluctant to risk presenting such evidence in a child molestation case and face the possibility of a reversal on appeal. Thus, it is unlikely that there will be a case addressing this issue for the courts to decide in the near future. Statutory legislation seems the best method for achieving an exception to the hearsay rule in child sexual abuse cases.

Exceptions In Other Jurisdictions Which Allow The Out-of-Court Statements of Children

The Federal Rules of Evidence would allow the admissibility of the video tape recording of the child's interview under Rule 803(5) or Rule 803(14). Rule 803(5) allows a record or memorandum to be read into evidence if such record was made when the witness once had knowledge about the events, and they were fresh on his or her memory, but at trial the witness lacks sufficient recollection of the facts.[40] Rule 803(14) is a catch-all rule that gives the court discretion to allow into evidence hearsay testimony which does not fit into any recognized exception.[41] The hearsay statements admitted under Rule 803(14) must still meet the traditional safeguards of trustworthiness.[42]

Some states have recognized the inherent problems with the testimony of children in sexual abuse cases. Some state courts have formulated a "tender years" exception to the hearsay rule to allow into evidence out-of-court statements made

(Continued on page 54)

C[ ] SEXUAL ABUSE

(Continued from page 53)

by children who are victims of sexual abuse.[43] Other states enacted legislalation making a special exception to the hearsay rule for the out-of-court statements of children.[44] In 1982 the Washington State Legislature enacted a statute which provided an exception to the hearsay rule in child sexual abuse cases.[45] This statute specifically applies only to out-of-court statements made by children under the age of ten. This statute reads in part:

> A statement made by a child under the age of 10 describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted if there is corroborative evidence of the act....

Minnesota and Kansas have recently adopted similar statutes.[46] Since these statutes do not limit the persons who are allowed to repeat the child's statements, a child's statements could be fabricated at trial by persons who had an interest in prosecuting the defendant.

New York's Family Court Act authorizes the admission of, "...previous statements made by the child relating to any allegations of abuse or neglect..." in child protection proceedings.[47] In California the video tape recording of the victim at the preliminary hearing may be admitted in lieu of the child's testimony at trial if the trial court finds that further testimony by the child would cause emotional trauma.[48] The New York and California statutes appear to have extremely limited applications.

Recommendations

The Georgia legislature may enact a residual exception to the rule against hearsay such as Rule 803(14) in the Federal Rules[49]; or it could enact a rule such as Rule 803(5) allowing recordings to be admitted of all witnesses who cannot recall what they previously stated[50], or it could design legislation specifically addressing the admissibility of the recorded statements of children in sexual abuse cases. Because of the special need for an exception to the rule against hearsay in child sexual abuse cases, the latter option is the most preferable.

Georgia law proclaims, "The object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence."[51] In cases of child sexual abuse the discovery of truth is thwarted by the weaknesses of the victim. The employment of video recording equipment during a child's interview with a counselor under controlled circumstances and a special exception to the hearsay rule to allow the taped interview to be admitted in trial would greatly enhance the trier of fact's ability to discover the truth.

FOOTNOTES

1. Collins, *Studies Find Sexual Abuse of Children Is Widespread*, N.Y. Times, May 13, 1982, at 1, Col.1, at 10, Col.2. Newsweek Magazine reported that 100,000-500,000 children will be molested in the United States this year. *A Hidden Epidemic*, Newsweek, May 14, 1984, p.30.
2. K. Rinehart, L. Wise, *Child Sexual Abuse*, an unpublished report of the DeKalb County Child Welfare Advisory Committee, January 24, 1984, p.1.
3. O.C.G.A. §19-7-5.
4. O.C.G.A. §24-9-5; *Bearden v. State*, 159 Ga. App. 892, 285 S.E.2d 606 (1981).
5. *Smallwood v. State*, 165 Ga. App. 473, 301 S.E.2d 670 (1973).
6. A.D. Yarmey, *The Psychology of Eyewitness Testimony*, pp. 203- 205 (1979). See also Melton, Bulkley, and Wulkan, *Competency of Children as Witnesses*, in Child Sexual Abuse and the Law, p. 135 (J. Bulkley 5th ed. 1984).
7. Berliner, Blick, and Bulkley, *Expert Testimony On the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in Child Sexual Abuse and the Law, p. 172 (J. Bulkley 5th ed. 1984).
8. O.C.G.A. §24-9-69.
9. *Id.*, *Bradshaw v. State*, 162 Ga. App. 750, 293 S.E.2d 360 (1982).
10. *Id.*
11. In Hennepin County, Minn. fifty-five of seventy defendants pled guilty before trial after viewing a taped interview with the victim. Interview with Mary Ellison, Director of Victim Witness Sexual Assault Services, Offi the County Attorney, Hennepin Cou Minn. (Sept. 26, 1984).
12. *Allen v. State*, 146 Ga. App. 815, 247 S.E.2d 540 (1978).
13. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).
14. Kansas Stat. Ann. ch.60, art.460 §dd (1982); Minn. Stat. §595.02 sub. 91 (1984); Wash. Rev. Code §9A.44.120 (1982).
15. *Reed v. State*, 249 Ga. 52, 56 ftn. 3, 287 S.E.2d 205 (1972); McCormick, Evidence §246.
16. *Webb v. State*, 154 Ga. App. 395, 268 S.E.2d 438 (1980); *Sellers v. White*, 104 Ga. App. 148, 121 S.E.2d 385 (1961).
17. *Webb v. State*, 154 Ga. App. 395, 397, 268 S.E. 2d 438 (1980).
18. O.C.G.A. §24-3-1 (emphasis added).
19. McCormick, Evidence §251 (1977).
20. *Estil v. C&S Bank*, 153 Ga. 618, 113 S.E. 552 (1922); *Parker v. State*, 162 Ga. App. 859, 275 S.E. 2d 258 (1980); *Douglas v. Herringdine*, 117 Ga. App. 72, 159 S.E. 2d 711 (1967). In Federal Courts prior consistent statements may be admitted in the trial judge's discretion. *U.S. v. Greene*, C.A. Ill. 1974, 497 F. 2d 1078, Cert. denied 95 S.Ct. 829, 420 U.S. 909, 42, L.Ed. 2d 839 (1974).
21. E. Loftus, *Eyewitness Testimony*, p. 162 (1979).
22. *Parker v. State*, 162 Ga. App. 271, 290 S.E.2d 518 (1982).
23. *Id.*
24. *Id.* at 274.
25. O.C.G.A. §24-9-83.
26. O.C.G.A. §24-3-2; *Momon v. State*, 249 Ga. 865, 294 S.E.2d 482 (1982).
27. *Teague v. State*, 252 Ga. 534, 537, 314 S.E.2d 910 (1984).
28. *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972); *Coleman v. State*, 124 Ga. App. 313, 183 S.E.2d 608 (1971).
29. *Teague v. State*, 252 Ga. 534, 537, 314 S.E.2d 910 (1984).
30. *Stamper v. State* 235 Ga. 165, 219 S.E. 2d 140 (1975).
31. O.C.G.A. §24-3-3.
32. *Sanborn v. State*, 159 Ga. App. 608, 284 S.E.2d 110 (1981).
33. McCormick, Evidence §245 (1977).
34. 5 Wigmore, Evidence §1362 (Chadburn rev. 1974);
35. Green, Georgia Law on Evidence §219 (1983).
36. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210 (1970); *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1964); *Littles v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980)
37. O.C.G.A. §24-3-1; *Irby v. Brooks*, 246 Ga. 794, 272 S.E.2d 183 (1980).
38. *Rea v. Pursley*, 170 Ga. 788, 154 S.E. 325 (1930).
39. There are at least thirteen exceptions to the hearsay rule in the Code. O.C.G.A. §24-3-2 through §24-3-16.
40. FED. R. EVID. 803(5).
41. FED. R. EVID. 803(14).
42. *Id.*
43. *People v. Edgar*, 113 Mich. App. 528, 317 NW2d 675 (1982); *State v. Pace*, La., 301 So. 2d 323 (1974).
44. Kansas Stat. Ann. ch. 60, art. 460 §dd; Minn. Stat. §595.02 Sub. 9; Wash. Rev. Code §9A.44.120 (1982).
45. Wash. Rev. Code §9A.44.120 (1982).
46. Minn. Stat. §595.02 Sub. 3; Kansas Stat. Ann. ch. 60, art. 460 §dd.
47. N.Y. JUD. §246 (McKinney 1983).
48. Calif. Rep. Chapter 4.5 §1346(d) (1983).
49. FED. R. EVID. 804 (14).
50. FED. R. EVID. 803(5).
51. O.C.G.A. §24-1-2.

2-25-85

February 25, 1985

May it please this Committee, I am Joe Cosgrove, Jr., an Assistant District Attorney for Johnson County, Kansas. I primarily prosecute criminal child sexual abuse cases.

I am grateful for this opportunity to express my support of Senate Bill 167 and House Bill 2377 and the concept of videotape testimony of children witnesses.

The availability to use videotape or television monitor testimony of young children would be a welcome, modern and humane addition to our justice system.

There are occasions where children because of fear of the defendant or courtroom or jury do not want to testify or their testimony is inhibited. I've had a child hide her face behind the doll we were using when she testified. Sometimes parents, whether right or wrong, do not want their children to testify. Prosecutors are then placed in an awkward position of balancing the worth of the case to the community and the trauma of the child and family.

However, if such legislation is enacted, I would not expect overuse or abuse by prosecutors. I've had a 6 year-old testify. No witness is more dramatic in a courtroom than a child. Obviously, not all counties would have the equipment and finances. However, legal availability for certain cases is the key.

The merits of these bills are their details on procedure for making the tapes.

2/25/85
Attach. III

Creative and progressive legislation involves some risks when reviewed by the court.

Criminal defendants and juveniles accused of committing a crime would definitely raise 6th Amendment right to confrontation issues if videotape or television testimony is allowed against them.

The 6th Amendment confrontation clause has been said to provide for face to face confrontation by the victim/accused so the demeanor of the witness can be seen and the defendant can cross-examine the witness.

In light of this guarantee there are several progressive states that have made the decision that society's interest in protection of children is great enough that videotape testimony is valuable and necessary even with the dictates of the 6th Amendment.

However, of note a couple of cases have held that if the defendant could not see the victim or the victim did not know the defendant was viewing her the 6th Amendment was violated.

Thus, the legislature must be cognizant of these type of principals and holdings when reviewing section 3 of the bills which apply to criminal cases.

Sec. 3(b)2 privides for cross-examination.

Sec. 3(b)4 allows the defendant to see and hear the testimony of the child.

The issues will center on whether it is unconstitutional under Sec. 3(b)4 if the child is not allowed to hear or see the defendant.

III

Obviously, the framers of the constitution and earlier jurists did not contemplate videotapes and television.

But, the constitution is a living document. In addition it should be remembered that the right to confrontation is not absolute and that cross-examination is the key to confrontation. Moreover, jurisprudence has long recognized different hearsay exceptions which technically violate the 6th Amendment.

Recently, this legislature enacted another hearsay exception, K.S.A. 60-460dd, which from my experience has enabled prosecution of cases that previously could never have been filed.

Under K.S.A. 60-460dd the child, if found to be disqualified or unavailable as a witness, never testifies about the substance of the allegations. Instead another witness testifies for him or her. Thus, there is no confrontation.

State v. Pendleton, 10 Kan. App.2d 26 (1984) recently reviewed K.S.A. 60-460dd and found that it did not violate the 6th Amendment.

The court notes hearsay is allowed upon showings of unavailability of the witness and reliability of his statements.

These bills as written are a very positive step forward in child sexual abuse prosecutions. I believe our judiciary would follow the holdings and reasoning of Pendleton if called upon to review this legislation.

III

However, to further limit confrontation claims of defendants the legislature may wish to consider language requiring a showing to the judge that trauma would be done to the child if she testifies and that the victim/witness be put on notice the defendant will see and hear the tape or monitor.

In sum, I urge the enactment of videotape and TV monitor legislation after consideration of the 6th Amendment issue. The availability of such legislation would be a vaulable tool to prosecutors in their representation of the children of our communities. The continued progressive legislation in this area of child sexual abuse by this body is greatly appreciated by members of law enforcement and the children of this state.

Thank you again for this opportunity and your consideration of this matter.