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Use of Closed Circuit Television for Victims of Child Abuse

Patricia A. Cleaveland

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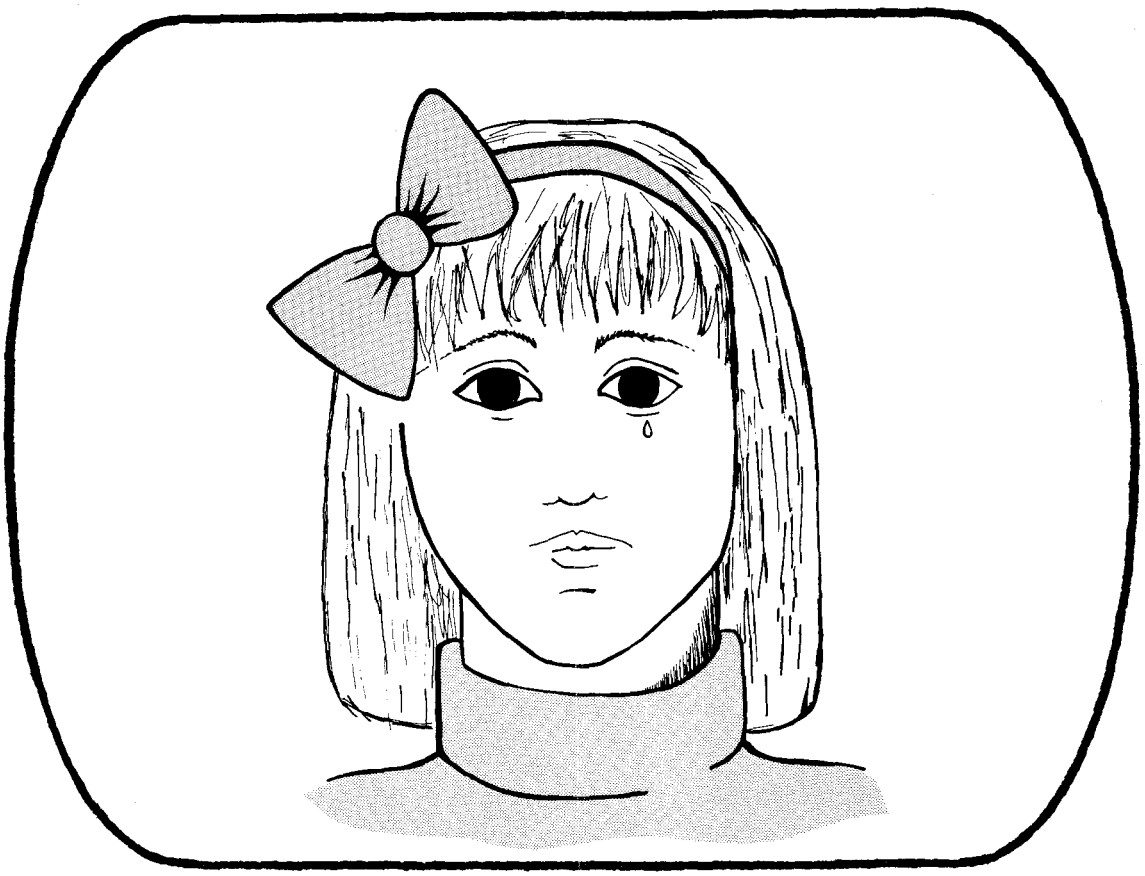
by Patricia A. Cleaveland



Although child sexual abuse occurs frequently, such cases are difficult to prosecute. The child is usually the only witness to the crime. Corroborating physical evidence, if any, may be inconclusive. [1] Children are often found incompetent to testify. If a child does testify, he or she may be easily confused by cross-examination and unable to recall crucial details or relate them to the jury. Currently, there are three types of statutes aimed at reducing the burden that the judicial system places on the child witness. Child hearsay statutes and videotape statutes have been most prominent. The third type, testimony via closed circuit television, has recently been enacted by the Maryland legislature in an effort to strengthen the prosecution's case in child abuse actions while protecting the child victim from further trauma.

This article will evaluate the Maryland closed circuit television statute by concentrating on the confrontation clause and other constitutional guarantees that may be offended. Because of its recent passage, the Maryland statute's constitutionality has not yet been tested. Since there are no similar statutes,[2] it is necessary to analogize it to the child hearsay and videotape statutes.

Part I of this article describes the difficulties faced in prosecuting a child abuse case. Part II discusses the hearsay rule which limits the admission of out-of-court statements. Parts III and IV consider child hearsay and videotape statutes as well as the decisions of state courts with respect to such statutes. Part V discusses the Maryland closed circuit television statute and current case law concerning closed circuit testimony. Part VI addresses the Maryland statute and other constitutional guarantees. In part VII the writer concludes that the Maryland statute is constitutional.

for Victims of Child Abuse

I. The Child Witness in Sexual Abuse Cases

Children are reluctant witnesses.[3] A child may retract a true report of sexual abuse due to guilt, fear of reprisal or anxiety that the offender will be sent to prison.[4] Child abusers often threaten their child victims with violence if the children report the abuse. Consequently, a child victim may be so frightened by the alleged abuser's presence in the courtroom that the child is unable to testify rationally. Parents sometimes decline to press charges rather than subject their abused children to the ordeal of extended litigation requiring repetition of a painful and best-forgotten episode.[5]

When a child testifies at the trial of his accused assailant, he is treated the same way as an adult witness.[6] Child victims are required to testify in the same courts and in the same manner as adults. A courtroom physically accommodates adults, but not younger children, which makes the room especially threatening to them. "No special judges are appointed to hear child victims; the court's formal procedures make no allowances for their protection, and no expert in problems of children's mental hygiene is appointed by the state to support child victims."[7] These procedures contrast sharply with those used in the case of juvenile offenders who are insulated and kept separate from the system that processes adult offenders.

The child abuse victim who is required to testify in court may experience severe psychological stress. The trauma of reliving the past experience can be very damaging to the child. Some commentators have suggested that legal intervention in response to child sexual abuse often constitutes a second victimization of the child.[8] The judicial system has not been sensitive to the victimization that a child may face in the courtroom.[9] Consequently, legislators have passed legislation aimed at reducing the trauma to a child witness.

II. Hearsay and the Confrontation Clause

Child hearsay statutes create a special exception to the hearsay rule for statements made by child victims of abuse, enabling a third person to repeat in court the child's description of the abusive act. Videotape statutes allow the child's testimony to be preserved on videotape for presentation to the jury at trial. Maryland's closed circuit television statute allows the child to testify outside the courtroom and the physical presence of the defendant by means of closed circuit television. These statutes deprive defendants of the opportunity to confront their accusers face-to-face before a jury. Arguably, the statutes violate the sixth amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him."[10] This federal right is binding on the states.[11]

Child hearsay, videotape, and technically, closed circuit television statutes permit the admission at trial of hearsay evidence. Hearsay evidence is defined as out-of-court statements offered to prove the truth of the matter asserted.[12] The hearsay rule is related to but not identical to the confrontation right. Originally,

> [t]he primary object of the [confrontation clause of the sixth amendment] . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief.[13]

The belief is that face-to-face confrontation at trial enhances the truth seeking process. Generally, witnesses must be present at trial where the defendant is allowed to cross-examine them.[14] The jury may thus observe the demeanor of witnesses while under oath and subject to cross-examination by the defense.[15] As outlined by the Supreme Court,

> confrontation (1) insures that the witness will give his statement under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; and (3) permits the jury that is to decide defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[16]

Hearsay statements are found inadmissible because they lack this test of reliability.[17] If literally applied, the sixth amendment's confrontation clause would bar the admission of all hearsay evidence unless the out-of-court declarant testified at trial.[18] But courts have never interpreted the confrontation clause to exclude all out-of-court statements.[19] In *Mattox v. United States*[20] the Supreme Court ruled that the general prohibition of hearsay evidence "must occasionally give way to considerations of public policy and the necessities of the case."[21] The Court continued by stating that "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[22]

As the Supreme Court has noted, "[a] number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[23] An example is the exception for dying declarations.[24] This exception is based on the belief that a person facing imminent death is prone to speak the truth.[25]

The Supreme Court has found out-of-court statements admissible when the declarant testifies at trial based on the reasoning that the opportunity to cross-examine the declarant about the out-of-court statement sufficiently tests its reliability.[26] If the declarant does not testify, and therefore is not present for cross-examination at trial, out-of-court statements are admissible only if they meet the requirements established by *Ohio v. Roberts.*[27] The first

requirement is that the state must show that the declarant is "unavailable."[28] Secondly, the statement is admissible only if it bears adequate "indicia of reliability."[29] Reliability can be demonstrated by showing either that the evidence falls within a "firmly rooted" hearsay exception[30] or that it bears "particularized guarantees of trustworthiness."[31]

The unavailability requirement reconciles two competing interests. The defendant has the right to confront the declarant.[32] On the other hand, when confrontation is not possible, the prosecution should be able to present hearsay evidence representing competent testimony rather than no evidence at all.[33] By demonstrating unavailability the state justifies frustrating the defendant's interest in confronting and cross-examining the witness.

In child sex abuse cases, certain "firmly rooted" hearsay exceptions have been used to admit out-of-court statements made by the child victim. Most widely used has been the "excited utterance"[34] which allows the admission of statements made by the child while under the stress of excitement caused by a startling event or condition. Also used have been "statements made for purposes of medical diagnosis or treatment."[35] The result, however, has been that many courts strain the rationales of these exceptions by extending the allowable time lapse, and have admitted statements made several hours or even days after the event.[36]

If a child is found "unavailable" to testify, other possible traditional hearsay exceptions that have been used include "statements made under belief of impending death"[37] and "former testimony."[38] The latter exception is the rationale behind videotape statutes which permit depositions of child victims to be presented to the jury at trial. Although these exceptions have been useful in admitting some statements of child victims, most statements are still excluded.

III. Child Hearsay Statutes

Eight states[39] have enacted hearsay statutes creating a special exception to the hearsay rule for statements made by child victims of sex abuse. This exception enables the person to whom the child spoke, for example, the child's mother or doctor, "to repeat in court the child's description of the abusive act."[40] There are three rationales generally offered in support of a hearsay exception for child reports of sexual abuse.[41] The first is necessity. Necessity is based on the belief that a child is unable to testify about such sensitive matters and traditional hearsay exceptions do not allow the child's out-of-court statements to be admitted. The second finds the child's hearsay testimony to be inherently reliable. A child's out-of-court statements may be more reliable than his actual in-court testimony since a child's ability to relate events under the pressure of cross-examination may be limited.[42] The third reason is that child victims need to be protected from the trauma resulting from courtroom testimony.[43]

Washington and Kansas were the first two states to pass child hearsay statutes.[44] The Washington statute applied to a child victim under ten years of age.[45] In order to find "sufficient indicia of reliability" the court must consider the time, content and circumstances of the child's statement. If the child is unavailable as a witness, corroborative evidence of the act must be established.[46] The Kansas statute,[47] on the other hand, requires that the court find that the child victim is unavailable as a witness, that the statement is "apparently reliable" and the child was not induced to make the statement falsely by use of threats or promises.[48]

Most of the child hearsay statutes adopt the standards of unavailability of the child victim as a witness and adequate "indicia of reliability" of the statement set forth in *Ohio v. Roberts* for resolving confrontation clause challenges to the hearsay rule.[49] Five of the statutes[50] direct that the court should admit hearsay statements only if it finds that the statement is supported by sufficient indicia of reliability. All five statutes also require that the child testify at trial or be found unavailable as a witness. If the child is not available to testify, most of the statutes require corroboration of the abusive act.[51] The Illinois statute allows testimony by the child that he or she complained of such act to another as well as testimony by the person to whom the child complained that such complaint was made in order to corroborate the child's testimony.[52]

Currently under consideration by the Governor's Task Force in Maryland is the Child Advocacy Model Statute prepared by the ABA Resource Center.[53] This statute involves a proposed hearsay exception for a child's statement of sexual abuse. In the proposal, if the court finds that specific requirements are satisfied, an out-of-court statement made by a child under the age of eleven years is admissible into evidence in any judicial proceeding. The statement may be admitted if the child testifies at trial, including testimony by closed circuit television, or if the child is found unavailable. The proposed statute specifically states what constitutes unavailability. Unavailability includes:

> death; absence from the jurisdiction; total failure of memory; persistent refusal to testify despite court orders to do so; physical or mental disability; privilege; incompetency at trial (including inability to communicate at all about the offense due to extreme fear or other similar reason); or substantial likelihood of severe emotional trauma from testifying in open court and in the physical presence of the defendant, jury and public, or trauma from testifying by any other means including videotaped deposition or closed-circuit television.[54]

Another requirement in the proposal, is that the statement must possess particularized guarantees of trustworthiness. The proposal outlines thirteen factors the court may consider in making such a determination. For example, the declarant's personal knowledge of the event; certainty that the statement was made, including the credibility of the person testifying about the statement; any apparent motive to lie or partiality by the declarant, including interest, bias, corruption, coercion; whether more than one person heard the statement, etc. Finally, notice must be given to the defendant prior to trial of the prosecution's intention to introduce the statement.

Child hearsay statutes do not violate the confrontation clause as long as the child victim is available to testify and be cross-examined at trial. Frequently, however, the court finds that the child is unavailable to testify because of the child's incompetence[55] or medical unavailability.[56] Consequently, the defendant is denied the opportunity for cross-examination. One legal commentator has stated that a finding of unavailability of a child victim as a witness is not warranted based on the likelihood of emotional trauma nor the incompetency of the child since neither makes it impossible for the child to testify in court.[57] On the other hand, if a child is so frightened or inarticulate to allow any meaningful examination, a finding of unavailability is justified since the effect is that relevant testimony is not elicited. In such circumstances, the child's hearsay statement should be admitted if properly corroborated.

The lack of corroboration of the abusive act is a frequent difficulty found in child abuse cases. The question is, therefore, what constitutes sufficient corroboration so that a child's statement may be admitted. The Washington Supreme Court has held that adequate indicia of reliability of a statement made by a child victim of sexual abuse must be found in circumstances surrounding the making of the out-of-court statement and not from subsequent cor-

roboration of the criminal act.[58] The Washington Court of Appeals held that the fact that the statute requires "corroborative evidence of the act" does not fulfill the high standard of reliability necessary to use the child hearsay exception, since corroboration of sexual abuse alone does not lend particular trustworthiness to the child's statement regarding the identity of the abuser.[59]

IV. Videotape Statutes

The second method for admitting a child's statement of sexual abuse into evidence is by videotape. Thirteen states have enacted videotape statutes[60] which allow the child's testimony to be taken prior to trial in the presence of a judge, the defendant, and both attorneys and preserved on videotape for presentation to the jury at trial. The purpose of these statutes is to spare the child repeated appearances in court and permit the child to withdraw quickly from the judicial process.[61] These statutes usually permit cross-examination[62] since most involve the videotaping of depositions[63] or preliminary hearings.[64]

In states that allow videotaped testimony to be used in lieu of the child's testimony at trial, the statutes require that the defendant be present and that cross-examination be allowed during the videotape.[65] All of these statutes except Arkansas and New Mexico[66] require that the court find the child unavailable to testify at trial before the videotape is admissible. Four other statutes[67] require that the child victim be available to testify at trial before the videotape is admissible but allow the testimony to be taken outside the presence of both prosecution and defense attorneys. These statutes require, however, that the person conducting the interview must be present at the trial and be available to testify or be cross-examined by either party. The Wisconsin statute[68] allows the videotape to be used in lieu of or in addition to the direct testimony of the child at trial.

Once the videotaped testimony is found to be admissible, it is treated as the "functional equivalent of testimony in court."[69] Videotaped testimony offered later is hearsay, and the Supreme Court has held that prior testimony can be admitted only under the same constraints as other hearsay evidence.[70] Therefore, under the requirements of *Roberts*, videotaped testimony would be admissible only if the child testified at trial about the testimony or the state demonstrated that the child was unavailable.

The Supreme Court has treated past testimony as ordinary hearsay in two instances. First, where the defendant had no adequate opportunity for cross-examination at the earlier hearing,[71] and second, where the defendant failed to conduct vigorous cross-examination and had no way of knowing that the witness would not testify at trial.[72] On the other hand, most videotape statutes allow full opportunity for cross-examination when the testimony is recorded, and the defendant is on notice that the videotaped testimony may be used in lieu of the child's testimony at trial. At the time the testimony is taken, these statutes preserve the essential elements of confrontation – the oath, the opportunity to observe the witness, demeanor of the witness, and the right to cross-examine.[73] These elements provide "all that the sixth amendment demands: 'substantial compliance with the purpose behind the confrontation requirement'."[74]

The child abuse victim who is required to testify in court may experience severe psychological stress.

Arguably, the requirement of direct physical confrontation is the least important element of the confrontation clause. At the time the Constitution was drafted, live testimony was the only way that a jury could observe the demeanor of a witness.[75] This element may have been the result of the inability to foresee technological developments that would permit cross-examination and confrontation without physical presence. The Supreme Court has held that "a primary interest secured by [the confrontation clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause in the absence of physical confrontation."[76]

Most courts have admitted videotape testimony as evidence even though there was no direct physical confrontation at trial. In *State v. Melendez*[77] the Arizona Court of Appeals upheld the use at trial of a videotaped deposition of a six-year-old sexual abuse victim, noting that the defendant and his counsel were present during the videotaping and had the right to cross-examine the witness.[78] Evidence was presented that the witness, as a result of fear, would become uncommunicative if called to testify before a jury. In holding that no prejudice resulted to the defendant, the court stated that "the circumstances justified the trial court's invocation of modern technology to meet the special needs of a witness and to afford the defendant his constitutional right to confrontation."[79] A Florida court acknowledged the need to exclude the defendant from a deposition because of emotional trauma to his child victim.[80] In *Commonwealth v. Stasko*[81] the Supreme Court of Pennsylvania approved the constitutionality of videotapes, stating that the three purposes of the right of confrontation (oath, cross-examination, and demeanor) are well served by the videotaped deposition.

Interestingly, the Ninth Circuit Court of Appeals had no objection to the trial court allowing videotaped testimony of children at trial.[82] In order to relieve their apprehensiveness about appearing in court, the trial judge and the parties agreed to substitute the children's videotape testimony for their live testimony. During deliberations, the jury requested permission to replay in the jury room the videotaped testimony of the children. The Ninth Circuit found an abuse of discretion in replaying the videotape stating that videotape testimony serves as the functional equivalent of a live witness.[83]

Videotapes may not faithfully convey the witness' demeanor, however, and may impede the jury's determination of credibility. Addressing objections made by the defendant in a murder case, the California Court of Appeals "concede[d] that testimony through a television set differs from live testimony, [but] the process does not significantly affect the flow of information to the jury. Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function."[84] It found that videotape was no less valid or less reliable than the reading of a written transcript and stated that fair new procedures that facilitate proper fact finding are allowable.[85] Therefore, generally, videotape testimony is admissible when the defendant is given an opportunity to cross-examine the witness and when the court finds that the child is unavailable to testify at trial.

V. Section 9-102 and the Confrontation Clause

The Maryland legislature has attempted to reduce the psychological harm to a child victim testifying in a child abuse case through the passage in 1985 of Section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code.[86] The statute allows a judge, under certain circumstances, to order the child's testimony to be taken outside both the courtroom and the physical presence of the defendant and shown live by means of closed circuit television. Before a child may testify in this fashion, the judge must first determine that testimony by the child victim in the courtroom will result in the child suffering such serious emotional distress that the child could not reasonably communicate.[87]

While the child is testifying by closed circuit television, only the prosecuting attorney, the attorney for the defendant and the judge may question the child.[88] The prosecuting attorney, the attorney for the defendant, the operators of the closed circuit television equipment and any person whose presence, in the opinion of the court, contributes to the well-being of the child may be in the room with the child when he testifies.[89] During the child's testimony, the judge and the defendant shall be in the courtroom.[90] Closed circuit television may not be used if the defendant is representing himself pro se.[91]

Section 9-102 is aimed at easing the trauma of a child witness by allowing the child's testimony to be taken outside the presence of the defendant. Also, it is carefully drafted to protect the rights of the defendant. A judge may order the testimony of a child victim to be taken outside the courtroom and simultaneously shown in the courtroom by means of a closed circuit television *only* if he determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. Essentially, the child becomes an unavailable witness. The defense attorney is permitted in the room with the child when the child testifies assuring a full opportunity for cross-examination. During cross-examination the defendant is able to consult with the defense attorney by an appropriate electronic method.

Because of the absence of the witness from the courtroom, closed circuit testimony, as in videotape, may implicate the defendant's right to confrontation of witnesses. The Eighth Circuit Court of Appeals, in *United States v. Benfield*,[92] found that the use of a videotape deposition of a traumatized adult kidnap victim at trial violated the defendant's constitutional right to confrontation. The court held that the right of confrontation normally includes a face-to-face meeting at trial at which time cross-examination takes place.[93]

In *Benfield*, the victim developed a psychiatric infirmity following the ordeal and her treating psychiatrist indicated that she could not be subpoenaed for trial for several months.[94] The trial court granted the government's request for a videotaped deposition and ordered that the defendant could be present at the deposition, but not within the vision of the victim. During the deposition, the defendant sat in another room and observed the proceedings on a monitor. He was allowed to stop the questioning by sounding a buzzer in order to consult with counsel. Counsel was allowed to conduct cross-examination.[95]

The court stated that "a videotaped deposition supplies an environment substantially comparable to a trial; but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm."[96] Recollection, veracity and communication are influenced by a face-to-face challenge. The court went on to hold that, if narrow in scope, an exception to the face-to-face requirement could be based on necessity or waiver.[97]

Although the holding was rendered in the context of a conviction of violation of a municipal ordinance, a proceeding civil in nature, the court in *Kansas City v. McCoy*[98] held that the confrontation clause did not demand the physical presence of the witness in the courtroom. In *McCoy*, the defendant was convicted of a city ordinance prohibiting possession of marijuana. The court held that the confrontation clause did not require that an expert witness giving testimony against the defendant be physically present in the courtroom, and that the use of a closed circuit television system by which the witness and persons in the courtroom were visible and able to hear each other, was sufficient.[99] The court based its decision on precedent which established that the requirement of the physical presence of the witness in the courtroom must occasionally give way to considerations of public policy and the necessities of the case,[100] and that an adequate opportunity for cross-examination may satisfy the confrontation clause even in the absence of physical confrontation.[101]

A New Jersey superior court held in *State v. Sheppard*[102] that the use of videotape[103] testimony of a ten-year-old abuse victim would be permitted, and in an extended analysis, found that the defendant's right of confrontation would not be violated. The court distinguished *Benfield* on several grounds. It stated that *Benfield* involved a deposition in which the jury was not present to see and hear the actual testimony whereas, here, the jury would watch, by means of a monitor in the courtroom, the ten-year-old as she testified. In *Benfield* the victim was an adult and not a child. Additionally, the defendant in *Benfield* was not charged with sexual abuse. These factors convinced the court that the competing interests involved warranted dispensing with confrontation. Since there was no curtailment of the right of cross-examination (the central purpose of confrontation), the procedure was upheld.[104]

The fact that closed circuit testimony is a live process may enable it to avoid entirely some of the challenges leveled against videotaped testimony.[105] Closed circuit testimony is instantaneous so it permits spontaneous examination and cross-examination of a witness in the presence of the trier of fact. It cannot be edited, as a videotape can, and, therefore, offers less likelihood of distortion as regards both the testimony and the demeanor, and hence the credibility of the witness.[106]

Testimony offered pursuant to Maryland's closed circuit television statute is more reliable than the traditional hearsay statement introduced into evidence by a third person's testimony. Under Section 9-102, the facts are stated directly by the child and are not biased by the views of the individual relating the child's statement in court. In addition, sixth amendment goals are satisfied by cross-examination and the opportunity to observe the demeanor of the witness, without direct confrontation. This statute allows the witness to avoid the trauma of courtroom interrogation as well as the trauma of confrontation with the defendant.

Section 9-102 has not yet been tested by the courts. The primary challenge it must pass is the confrontation clause. This statute should pass such a challenge. The protection of the confrontation clause is not absolute. As the Supreme Court held in *Mattox*, "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[107] Competing interests may warrant dispensing with confrontation at trial.[108]

This statute advances such competing interests. It attempts to remedy the difficulties encountered in prosecuting crimes in which the only witness is a young child

sometimes so frightened and traumatized as to be unable to communicate. Second, it protects young victims from the prolonged ordeal of recounting the abusive acts in open court. The state holds an interest in protecting young children, alleged victims of abuse, from the trauma of repeated appearances and extended testimony in open court in the presence of the alleged assailant. Closed circuit testimony does not significantly infringe upon the defendant's confrontation rights. As long as the defendant can observe the child's testimony and can confer with his attorney during cross-examination, the essential safeguards of confrontation are preserved.

An argument offered in opposition to the statutes that permit child victims to testify outside the presence of a defendant is that of "where will the line be drawn?" Arguably, the same interests are involved in cases of adult victims of rape, crimes against elderly persons, "mob" cases or in any such cases in which the victims are severely frightened and may suffer further trauma in testifying against their alleged assailant. The state should give more protection to these victims. The response to this argument is that the state has a greater interest in protecting a child victim. A child is more vulnerable than an adult. A child has not developed the mechanisms an adult has to enable him to cope with the stress and pressures involved in prolonged prosecutions. Therefore, greater protection of the child victim is justified.

Prejudice to the defendant is another objection made concerning this type of testimony. Such testimony may create the impression that it is "special." This objection, however, should be dealt with on a case-by-case basis. A judge may, in his discretion, refuse to admit evidence that is purely prejudicial.[109]

Although hearsay, closed circuit testimony would still satisfy the guidelines established by *Roberts*. Before a child may testify in this manner the court must, in effect, determine that the child is unavailable. Reliability may be tested by the jury through the observance of the child's demeanor while subject to cross-examination. Under these circumstances, it is clear that closed circuit testimony sufficiently safeguards a defendant's confrontation rights so as to prevail under such an attack.

Because the Maryland statute narrowly limits the circumstances in which closed circuit testimony may be used and preserves the critical elements of the trial setting, the constitutional rights of the defendant are preserved. At the same time, victims of child abuse are protected from further psychological harm associated with testifying in open court.

VI. Section 9-102 and other Constitutional Guarantees

Closed circuit testimony may offend other clauses of the United States Constitution including the public trial and compulsory process clauses of the sixth amendment,[110] the due process clause of the fourteenth amendment,[111] and the freedom of the press clause of the first amendment.[112] The compulsory process clause guarantees the defendant a "right to put on the stand a witness who is physically and mentally capable of testifying to events that he personally observed, and whose testimony would have been relevant and material to the defense."[113] Thus, defendants have a right to call available and competent witnesses on material and relevant issues. However, this right is not absolute. This guarantee is not offended when the witness is unavailable including when the witness refuses to testify.[114] A finding of unavailability is required before the closed circuit television is put into operation.

Most courts have admitted videotape testimony as evidence even though there was no direct physical confrontation at trial.

Under the sixth amendment the defendant has a right to a public trial,[115] and under the first amendment the public and press have a right of access to criminal trials.[116] Special procedures which protect the child witness by limiting access to the courtroom may affect these rights. Under the Maryland statute, only access to the room where the child is testifying is limited. The courtroom would still be open to the press and public. Moreover, these guarantees are not absolute. A defendant's right to a public trial may be curtailed in order to protect the psychological well-being of victim witnesses.[117]

Due process considerations of "fundamental fairness"[118] may be implicated if the prosecution is granted advantages or options it does not generally enjoy.[119] Due process is satisfied, however, if the advantages are related to the need of protecting child witnesses and facilitating the fact finding process. Closed circuit testimony, more so than videotape testimony, is live testimony simultaneously shown in the courtroom while the witness is testifying.

VII. Conclusion

Under Section 9-102, the testimony of a child victim may be taken outside the courtroom and the physical presence of the defendant if the judge finds that testimony by the child victim in the courtroom will result in the child suffering such serious emotional stress that the child could not reasonably communicate. The Maryland statute narrowly limits the circumstances in which closed circuit testimony may be used and preserves the critical elements of the trial setting. As the Supreme Court has held, an adequate opportunity for cross-examination may satisfy the confrontation clause even in the absence of physical confrontation. The state's interest in protecting young victims of child abuse from further trauma and facilitating the prosecution of their alleged assailants warrants dispensing with the defendant's face-to-face confrontation when the essential elements of his or her confrontation rights are satisfied.

Notes

[1] Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MAR. L. REV. 1, 6 (1984).

[2] Arizona, Louisiana, Kentucky and Texas have a provision in their videotape statutes which allow the testimony of a child sexual abuse victim to be taken via closed circuit television. These sections provide that a court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom. The location of the defendant during this procedure is not specified. The statutes state that the defendant may observe and hear the testimony, but the court must ensure that the child cannot hear or see the defendant. Therefore, the lack of specifics in these statutes make it unclear as to how much the Maryland statute may resemble them.

[3] Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985).

[4] Skoler, *supra* note 1, at 6 (When a child retracts his report or refuses to testify, he or she becomes unavailable to testify).

[5] Note, *supra* note 3, at 807.

[6] Libai, *The Protection of a Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 978 (1969).

[7] *Id.*

[8] Skoler, *supra* note 1, at 2.

[9] Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 643 (1982).

[10] U.S. CONST. amend. VI.

[11] *Pointer v. Texas*, 380 U.S. 400 (1965).

[12] *See* FED. R. EVID. 801(c).

[13] *Barber v. Page*, 390 U.S. 719, 721 (1968) (quoting *Mattox*, 156 U.S. at 242-243).

[14] *See Pointer*, 380 U.S. at 406-07 (Introduction at trial of transcript of witness' preliminary hearing testimony violated defendant's right of confrontation since the statement was made without an adequate opportunity for cross-examination); *Mattox*, 156 U.S. at 242-43 (General rule is that witness must be present at trial so that defendant has opportunity for cross-examination).

[15] *See California v. Green*, 399 U.S. 149, 158 (1970) (Substantive use at trial of a witness' prior inconsistent statement was upheld on the basis that when statement was made defendant was present, represented by counsel, had full opportunity for cross-examination and witness was actually produced at trial).

[16] *Id.*

[17] *See Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) ("Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury") (quoting *Green*, 399 U.S. at 158).

[18] *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

[19] *Roberts*, 448 U.S. at 63.

[20] 156 U.S. 237 (1895).

[21] *Id.* at 243 (quoted in *Roberts*, 448 U.S. at 64).

[22] *Id.*

[23] *Chambers*, 410 U.S. at 298-299; *see Roberts*, 448 U.S. at 66 ("Certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' ").

[24] *See* FED. R. EVID. 804(b)(2) ("A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death").

[25] *See Mattox*, 156 U.S. at 244 ("The sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath").

[26] *See Chambers*, 410 U.S. at 301 (Out-of-court statements could have been admitted since declarant was present in the courtroom, was under oath and was available for cross-examination by the State); *Green*, 399 U.S. at 158-61 ("Confrontation Clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and subject to full and effective cross-examination").

[27] 488 U.S. 56 (1980).

[28] *Id.* at 66.

[29] *Id.*

[30] *See e.g.*, FED. R. EVID. 803 & 804 (Present sense impression, excited utterance, former testimony, statement against interest, etc.).

[31] *Roberts*, 448 U.S. at 66.

[32] The Supreme Court held in *Barber v. Page*, 390 U.S. 719 (1968), that the State must show that a witness is "actually unavailable." In *Barber* the witness was incarcerated in a federal prison in another state. Finding that the state had made no effort to produce the witness, the Court stated that the state must use a good faith effort to produce the witness before the witness could be found "unavailable." Distinguishing *Barber*, the Supreme Court held in *Mancusi v. Stubbs*, 408 U.S. 204 (1972), that the test of unavailability is whether the state is "powerless" to compel the witness' attendance. In *Mancusi* the witness had removed himself permanently to a foreign country.

[33] *See Mattox*, 156 U.S. at 243 (The Court reasoned that a criminal who had been convicted by testimony of a certain witness should not go free as a result of that witness' unavailability at a subsequent trial).

[34] FED. R. EVID. 803 (2).

[35] *See* FED. R. EVID. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

[36] *Smith v. State*, 6 Md. App. 581, 586-88, 252 A.2d 277, 280-81 (1969) (Held child's statement, made four or five hours after the alleged occurrence, fell within res gestae exception to hearsay evidence rule).

[37] FED. R. EVID. 804(b)(2).

[38] FED. R. EVID. 804(b)(1).

[39] COLO. REV. STAT. § 13-25-129 (Supp. 1984): ILL. ANN. STAT. ch. 38, § 115-10, (Smith-Hurd Supp. 1985); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1985); KAN. STAT. ANN. § 60-460(dd) (1983); MINN. STAT. § 595.02(3) (Supp. 1985); S.D. CODIFIELD LAWS ANN. § 19-16-38 (Supp. 1985); UTAH CODE ANN. § 76-5-411 (Supp. 1985); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986).

[40] Note, *supra* note 3, at 808.

[41] Skoler, *supra* note 1, at 7.

[42] *Id.* at 6.

[43] *Id.* at 7.

[44] WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986); KAN. STAT. ANN. § 60-460(dd) (1983).

[45] WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986).

[46] WASH. REV. CODE ANN. § 9A.44.120(b) (Supp. 1986).

[47] KAN. STAT. ANN. § 60-460(dd) (1983) (Statute is not limited to sexual abuse but may also be used in proceedings to determine if a child is a deprived child or a child in need of care).

[48] KAN. § 60-460(dd)(2).

[49] *Roberts*, 448 U.S. at 67-8.

[50] COLO. REV. STAT. § 13-25-129(1)(a) (Supp. 1984); IND. CODE ANN. § 35-37-4-6(c)(1) (Burns Supp. 1985); MINN. STAT. § 595.02(3)(a) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 19-16-38(1) (Supp. 1985); WASH. REV. CODE ANN. § 9A.44.120(1) (Supp. 1986).

[51] COLO. REV. STAT. 13-25-129 (Supp. 1984); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1985); MINN. STAT. § 595.02(3) (Supp. 1985); UTAH CODE ANN. § 76-5-411 (Supp. 1985); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986).

[52] ILL. ANN. STAT. Ch. 38, § 115-10 (Smith-Hurd Supp. 1985).

[53] R. Eatman & J. Buckley, *Protecting Child Victim/Witnesses: Sample Laws and Materials*, A.B.A. 1986, at 5–6.

[54] *Id.*

[55] *See* FED. R. EVID. 601.

[56] *See* FED. R. EVID. 804(a)(4) ("unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity").

[57] Note, *supra* note 3, at 818-19.

[58] *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984).

[59] *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538 (1984).

[60] ARIZ. REV. STAT. ANN. § 13-4251 to -4253 (Supp. 1985); ARK. STAT. ANN. § 43-2035 to -2036 (Supp. 1985); CAL. PENAL CODE § 1346 (West Supp. 1984); COLO. REV. STATE § 18-3-413 (Supp. 1984); FLA. STAT. ANN. § 90.90 (Supp. 1984); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1984); KY. REV. STAT. § 421.350 (Supp. 1985); LA. REV. STAT. ANN. § 15.440.1 to -440.6 (West Supp. 1985); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1985); MONT. CODE ANN. § 46-15-401 to -403 (1985); N.M. STAT. ANN. § 30-9-17 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 to -10 (Supp. 1984); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1984); WIS. STAT. ANN. § 967.04(7) (1985) & 967.041 to -.043 (West Supp. 1985).

[61] Note, *supra* note 3, at 808.

[62] ARK. STAT. ANN. § 43-2035 to -2036 (Supp. 1985); CAL. PENAL CODE § 1346 (West Supp. 1984); COLO. REV. STAT. § 18-3-413 (Supp. 1984); FLA. STAT. ANN. § 90.90 (Supp. 1984); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1985); N.M. STAT. ANN. § 30-9-17 (Supp. 1984); WIS. STAT. ANN. § 967.04(7) & 967.041 to .043 (West Supp. 1985).

[63] ARK. STAT. ANN. § 43-2035 to -2036 (Supp. 1985); COLO. REV. STAT. § 18-3-413 (Supp. 1984); N.M. STAT. ANN. § 30-9-17 (Supp. 1984); WIS. STAT. ANN. § 967.04(7) & 967.041 to .043 (West Supp. 1985).

[64] CAL. PENAL CODE § 1346 (West Supp. 1984).

[65] ARK. STAT. ANN. § 43-2035 (Supp. 1985); CAL. PENAL CODE § 1346 (West Supp. 1984); COLO. REV. STAT. § 18-3-413 (Supp. 1984); FLA. STAT. ANN. § 90.90 (Supp. 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1985); MONT. CODE ANN. § 46-15-401 (1985); N.M. STAT. ANN. § 30-9-17 (Supp. 1984); WIS. STAT. ANN. § 967.04(7) (1985).

[66] ARK. STAT. ANN. § 43-2035 (Supp. 1985) (Videotape shall be used in lieu of direct testimony); N.M. STAT. ANN. § 30-9-17 (Supp. 1984) (Videotape shall be viewed at trial in lieu of direct testimony).

[67] ARIZ. REV. STAT. ANN. § 13-4251 (Supp. 1985); KY. REV. STAT. § 421.350 (Supp. 1985); LA. REV. STAT. ANN. § 15.440.1 (West Supp. 1985); TEX. CRIM. PROC. ANN. § 38.071 (Vernon Supp. 1984).

[68] WIS. STAT. ANN. § 967.04(7) (1985).

[69] *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985) (The court stated that videotape testimony "serves as the functional equivalent of a live witness").

[70] *Roberts*, 448 U.S. at 65.

[71] *See, e.g., Pointer*, 380 U.S. at 407 (Preliminary hearing testimony in which defendant was unrepresented by counsel and no cross-examination of witness was conducted was held inadmissible at trial).

[72] *See, e.g., Barber*, 390 U.S. at 725 (Court held that defendant's failure to cross-examine witness at preliminary hearing did not constitute waiver of the defendant's confrontation rights).

[73] Note, *supra* note 3, at 823.

[74] *Roberts*, 448 U.S. at 69 (quoting *Green*, 399 U.S. at 166).

[75] *Parker*, *supra* note 9, at 695.

[76] *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (Prosecution's reading of an alleged accomplice's confession denied defendant his right of cross-examination secured by the confrontation clause).

[77] 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1982).

[78] 135 Ariz. at 394, 661 P.2d at 657.

[79] *Id.*

[80] *State v. Dolen*, 390 So.2d 407 (Fla. 5th Dist. Ct. App. 1980) (The court has discretion to exclude the defendant from the depositions pursuant to FLA. R. CRIM. P. 3.220 without interfering with the defendant's right to confrontation where the witness will be available for trial); *see also Jones v. State*, 445 N.E.2d 98 (Ind. 1983) (Trial court's refusal to permit defendant to be present at taking of deposition of prosecuting witnesses did not deny the defendant his right to confrontation where the witnesses testified in open court and the defendant was able to confront them and thoroughly cross-examine them there).

[81] 471 Pa. 373, 370 A.2d 350 (1977).

[82] *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985).

[83] *Id.* at 600 ("Permitting the replay of the videotaped testimony was equivalent to allowing a live witness to testify a second time in the jury room").

[84] *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

[85] *Id.* at 410, 114 Cal. Rptr. at 420.

[86] MD. CTS. & JUD. PROC. CODE ANN. § 9-102

(Supp. 1985).
[87] *Id.* § 9-102(a)(ii).
[88] *Id.* § 9-102(a)(2).
[89] *Id.* § 9-102(b)(1).
[90] *Id.* § 9-102(2).
[91] *Id.* § 9-102(3)(c).
[92] *Id.* 593 F.2d 815 (8th Cir. 1979).
[93] *Id.*
[94] *Id.* at 817.
[95] *Id.*
[96] *Id.* at 821.
[97] *See, e.g., State v. Sheppard,* 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. 1984) (In prosecution for sexual assault and child abuse the defendant waived his right to confrontation by threatening to kill the victim).
[98] 525 S.W.2d. 336 (1975).
[99] *Id.* at 339.
[100] *Mattox,* 156 U.S. at 237.
[101] *Douglas,* 380 U.S. at 415.
[102] 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. 1984).
[103] *See id.* at 484 A.2d at 1332. Although the court used the term "videotape," the procedures to be employed are analogous to closed circuit television.
[104] *Id.,* 484 A.2d at 1334.
[105] Annot., 80 A.L.R.3d 1212, 1214 (1977).
[106] *Id.*
[107] *Mattox,* 156 U.S. at 243.
[108] *Roberts,* 448 U.S. at 64 (quoting *Chambers,* 410 U.S. at 295).
[109] *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . .").
[110] U.S. CONST. amend. VI.
[111] U.S. CONST. amend. XIV.
[112] U.S. CONST. amend. I.
[113] *Washington v. Texas,* 388 U.S. 14, 23 (1967).
[114] *Id.* at 23 n. 21.
[115] U.S. CONST. amend. VI.
[116] *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604 (1982).
[117] *Id.* at 606-07.
[118] *See California v. Trombetta,* 104 S. Ct. 2528, 2532, (1984) ("Under the due process clause of the fourteenth amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness").
[119] *E.g.,* Some videotape statutes permit the admission of videotape testimony, recorded prior to trial, in lieu of direct testimony at trial.

Patricia A. Cleaveland *is a recent graduate of the University of Baltimore School of Law.*

Johnson v. Mountaire Farms of Delmarva
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Although the court's decision in *Johnson* is in line with the majority of other state holdings, it is at odds with the slowly developing current trend. In fact, on May 31, 1985, the Court of Appeals of Maryland held that §44 of the Act allows an employee to hold his employer's insurer liable under the theory of intentional infliction of emotional distress resulting from the actions of the insurer. *Young v. Hartford Accident & Indemnity,* 303 Md. 182, 492 A.2d 1270 (1985); *see also Gallagher v. Bituminous Fire and Marine Insurance Company,* 303 Md. 201, 492 A.2d 1280 (1985). *Johnson* seems to put an end to any further expanding of the exclusive remedy exceptions under the Act. In Maryland, as in the majority of jurisdictions, without a showing of a "deliberate intention" to injure an employee, an employer will not be held liable outside of the Act, no matter how grossly negligent he might be. The end result in *Johnson* was that Rodney Adams' estate, because Rodney had no dependents, could only recover medical and funeral expenses.

–Stephen A. Markey, III

U.S.V. 1966 Beechcraft Aircraft: COURT UPHOLDS THIRD PARTY FORFEITURE UNDER 21 U.S.C. §881

In *U.S. v. 1966 Beechcraft Aircraft,* 777 F.2d 947 (4th Cir. 1985), the United States Court of Appeals for the Fourth Circuit followed precedents from the Second, Fifth and Eleventh Circuits to hold that the use of an airplane to transport conspirators to the scene of a drug deal exposes that vehicle to forfeiture under 21 U.S.C. §881 (1982). The court further held that an airplane owned by an uninvolved third party was subject to forfeiture because of his "conscious indifference." *Id.* at 952.

In early 1983, an informant in Greenville, South Carolina contacted the Drug Enforcement Agency (DEA) about a possible cocaine sale. The informant was directed to negotiate a buy and a DEA surveillance operation began. The informant arranged a deal with Brown and Montgomery to buy ten kilograms of cocaine for $500,000. In late February, Montgomery flew to Ft. Lauderdale, Florida to meet with Gerant and Butler, the cocaine suppliers, and Coddington, a middleman, to negotiate the purchase. After weighing the cocaine and checking its purity, Montgomery flew back to Greenville.

Gerant and Coddington then flew a 1966 Beechcraft from Ft. Lauderdale to South Carolina. There was circumstantial evidence suggesting that the Beechcraft carried the ten kilograms of cocaine. Butler flew a 1969 Aerostar from Ft. Lauderdale to South Carolina with a passenger, Hanna. All parties involved in the deal met at a Howard Johnson's and eventually all were arrested, with the exception of Coddington, who escaped. In addition to recovering the cocaine from an automobile, a search of the hotel rooms revealed an electric money counter, a microscope, several guns, $4,960 in cash and a marijuana cigarette. A search of the Beechcraft revealed documents indicating that Gerant and Butler were on the plane in the Bahamas three months earlier.

Under authority granted by 21 U.S.C. §881(b)(4), law enforcement officers seized the two airplanes once it was determined they were used to promote the drug transaction. Forfeiture proceedings against Total Time Aircraft, Inc., the owner of the Beechcraft, and Sundance Air, Inc., the owner of the Aerostar, were instituted in federal district court. The consolidated cases were tried without a jury and the district court ruled both aircraft were subject to forfeiture. Sundance Air is a Florida corporation wholly owned by Gerant. The district court determined that by transporting two drug conspirators, Gerant was utilizing the corporation's plane to assist in the illegal act of selling cocaine. Therefore, the Aerostar was used to "facilitate the sale, transportation, possession or concealment of cocaine" which the corporation was aware of through its owner and was subject to forfeiture. *Id.* at 949.

Total Time, is also a Florida corporation owned by David and Virgil Seeright. Total Time allowed Gerant to use the Beechcraft on several occasions, including the trip to South Carolina. The district court found that the Beechcraft transported the cocaine on this particular trip, concluding that it was used to further the "sale, transportation, possession or concealment" of cocaine in violation of 21 U.S.C. §881(a)(4). It further found that David Seeright, the corporation's president, did not inquire into the "purpose of the trip, or what cargo would be carried, required no signed contract, had no clear understanding as to when the plane would be returned, and received no money for its use." *Id.* at 950. In addition, a flight plan was not filed and there was no insurance on the plane. The district court concluded that Total Time did nothing to guard against the illegal use of its plane, and therefore, was not an "innocent owner" within the meaning of the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht*