To See or Not to See the Defendant: Expanding the Use of Florida's Special Procedures for Taking the Testimony of Witnesses

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TO SEE OR NOT TO SEE THE DEFENDANT: EXPANDING THE USE OF FLORIDA’S SPECIAL PROCEDURES FOR TAKING THE TESTIMONY OF WITNESSES†

GLENN F. LANG

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GLENN F. LANG*

I. INTRODUCTION

At both the 1989 and the 1990 Regular Sessions of the Florida Legislature, lawmakers introduced bills to make special procedures currently available for the testimony of an alleged child victim of certain abuse offenses available to "aged persons" and "disabled adults." Section 90.803(23), Florida Statutes, currently provides a hearsay exception for certain statements of a child victim of abuse. Florida law also provides for the presentation of a child victim's testimony at trial by means of videotape or closed-circuit television.

The hearsay exception makes a child's statements admissible without the child testifying in the presence of the defendant. Before such statements are admissible, however, the testimony must meet certain requirements. The videotape and closed-circuit television procedures each contain special provisions permitting a child to give his or her testimony outside of the presence of the defendant if the testimony satisfies certain conditions set out in the particular statute. All of these statutes have been the subject of considerable legal controversy. Similar controversy has surrounded comparable statutes in other states.

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The views expressed in this Article are solely those of the author and do not represent the views of any other individual, or any association, organization, or institution, public or private. The author wishes to express his gratitude to Katherine Chandler for her dedication in typing the original manuscript.

1. See infra notes 343-48 and accompanying text.
2. FLA. STAT. § 90.803(23)(1989).
3. See id. § 92.53 (videotape); id. § 92.54 (closed-circuit television).
4. See id. § 90.803(23)(a)-(c).
5. See id. § 92.53(1),(4),(7) (videotape); id. § 92.54(1),(4),(5) (closed-circuit television).
6. See infra notes 222-81 and accompanying text.
7. See infra notes 158-216 and accompanying text.
In its recent decision in *Maryland v. Craig*, the United States Supreme Court upheld Maryland's closed-circuit television statute against a challenge that it violated the defendant's constitutional right of confrontation. The statute provided for taking the child's testimony outside of the presence of the defendant. While the *Craig* decision may have settled one legal controversy surrounding such statutes, it is unlikely that it represents the final challenge to such laws.

This Article presents some of the legal and practical questions left unanswered after the *Craig* decision and suggests the Florida Legislature carefully consider these questions before making Florida's special procedures for child testimony available to any other category of witness. One can understand the legislative proposals to expand the use of Florida's special procedures only in relation to the procedures currently available in Florida and other jurisdictions. Part II of this Article traces the historical development of special procedures for child testimony and presents the psychological research on such procedures. The Article discusses the statutes and case law governing special procedures for children in Part III. Part III also examines the statutes in those few states which make special procedures available for the disabled or the elderly. In Part IV, the Article examines Florida legislative proposals to make the current special procedures available to aged persons and disabled adults. Part V raises certain legal and practical questions inherent in such proposals and concludes that the Florida Legislature should give careful consideration to these questions before deciding to expand the use of special procedures for witness testimony.

II. BACKGROUND

A. Historical Perspective

The movement in the legal community to protect child victims and witnesses from the rigors of trial testimony traces back to a law review article published in 1969. In that article, David Libai offered two proposals to protect child victims. The first dealt with taking the child's testimony at trial; the second set out a special procedure for taking the child's testimony prior to trial.

9. *Id.* at 3161.
11. See *Id.* at 1014-25.
12. See *Id.* at 1028-32.
Under the first proposal, a child victim would give testimony at trial in a "child-courtroom." The courtroom's design would allow the court to take the child victim's testimony in an informal and relaxed manner. The child would give his or her testimony in a "judge's room" arranged to contribute to the child's security and psychological comfort. Only four people would be in the judge's room with the child: the judge, the prosecutor, defense counsel, and a "child examiner." A one-way mirror would separate the accused, the jury, and the public from the judge's room and enable them to observe everything that occurs there. The author was of the opinion that "the Child-Courtroom protects, by technological means, the essence of the accused's right to confront the child witness at trial."

The "child examiner" would have almost exclusive responsibility for the interrogation of a child victim of a sexual offense. The examiner would have training in the dynamics of human behavior and experience in interviewing techniques so as to be able to balance the competing interests of protection of the child and efficient investigation. The examiner would interview the child victim as soon after the alleged crime as practical. The interview would be videotaped and would be available for introduction at the trial.

The second proposal would grant a "special hearing" for the child victim. The purpose of this proposal would be to take the child's testimony in the child-courtroom after the accused's arrest but before the trial so that the child could testify and forget about the offense as soon as possible. Since the function of the special hearing would be to take the child's testimony for submission as evidence at trial, the prosecution would fully inform defense counsel of the charge, grant the defense access to all the evidence in the prosecution file, including the recording of the child's story as told to the child examiner, and give the defense the opportunity for full cross-examination of the child.

13. See id. at 1016-17.
14. Id. at 1017.
15. Id.
16. Id.
17. Id.
18. Id. at 1020.
19. Id. at 986-1003.
20. Id.
21. Id.
22. Id.
23. Id. at 1028.
24. Id. at 1028.
25. Id. at 1029-30.
Child-Courtroom is that a confrontation between the accused and the child can be had without the accused, the jury, and the public being seen by the child." 26

The court would record the special hearing on videotape for presentation at trial. 27 Libai saw the child's testimony in the special hearing as closely analogous to the former testimony hearsay exception with the advantage that the jury could observe the witness's demeanor. 28 The author was confident the special hearing procedure would overcome any Confrontation Clause or hearsay objections. 29 As the following discussion shows, Libai's proposals were more than a decade ahead of their time.

One commentator noted that "[i]n the late 1970's it became apparent that many sexual assault victims were children." 30 Concurrently, a movement began whose purpose was to establish the rights of victims and witnesses. 31 In 1977, the federal government funded two programs devoted specifically to accommodating children as victims or witnesses. 32 Thus, the stage was set for the initiation of a movement to enact state legislation providing specific protection to child victims.

In a 1982 law review article, Jacqueline Parker revived, refined, and expanded upon Libai's proposals and drafted state legislation to implement her proposals. 33 For example, instead of Libai's "child examiner," Parker proposed a "child hearing officer" (CHO). The CHO would be "a specially trained attorney that the State employed to act as counsel and advocate for a child victim witness . . . ." 34 The court would appoint the CHO whenever the State began an investigation of a crime against a child. 35 The CHO would have standing to move the court for a variety of procedures designed to protect the child victim or witness from trauma. 36

With respect to the child's testimony, Parker offered two proposals similar to Libai's. The State could take a "special deposition" of the

26. Id. at 1030.
27. Id.
28. Id. at 1030-31.
29. See id. at 1030-32.
31. See id. at 168.
32. Id. at 168-69.
34. Id. at 665.
35. Id. at 666.
36. Id. at 666-67.
child in a "child hearing courtroom" and offer the deposition at trial in lieu of the child's live testimony. This proposal mirrors Libai's "special hearing". At trial, the court could take the child's testimony using "special testimony," wherein the child could not see the defendant, the jury, or the public, but they could see the child through a one-way mirror or via closed-circuit television. This proposal embodies Libai's "child-courtroom".

Parker advocated broader use of her refined version of Libai's proposals. While Libai would apply his proposals only to child victims of sexual offenses, Parker would have her proposals apply to child victims of other crimes as well. Additionally, she would have her proposals apply to a non-victim child who is a witness in a criminal case or in civil litigation such as removal of the child from an abusive parent, tort cases involving mental distress, and divorce proceedings.

In the same year that Parker published her article, the American Bar Association (ABA) published a report which contained numerous recommendations to improve the disposition of civil and criminal child sexual abuse cases. One recommendation established the underlying philosophy for the entire set of recommendations. It called for the use of innovative approaches to protect the child from further abuse, to prevent additional trauma to the child and family, and to treat the child, family, and where appropriate, the offender.

The ABA made several recommendations to prevent additional trauma to the child by modifying aspects of the legal process perceived as being especially harmful. As a general principle, the report recommended that in criminal cases, the court keep "in person" testimony by the child to a minimum.

The recommendation encompassed two parts. First, the report recommended that a child who was a victim of sexual abuse should testify at preliminary hearings or grand jury proceedings only if needed. As an example of how to implement this part of the recommendation,
the commentary noted state statutes which provided for the use of videotaped depositions of the child victim’s testimony in a criminal sex offense case.48

The second part of the recommendation called for the development of procedures to avoid the need for the child’s testimony in open court when necessary to prevent trauma to the child.49 The commentary noted Libai’s proposed creation of a special “child-courtroom,”50 but rejected it on the basis of a California case which held that the Sixth Amendment right to confront witnesses means the right to physical face-to-face confrontation.51

The American Bar Association’s report also made several recommendations with respect to evidentiary issues in child sexual abuse cases. One such recommendation was to create a special exception to the hearsay rule for a child’s out-of-court statement regarding sexual abuse.52 Such statements would be admissible as long as the child testifies or there is corroborative evidence of the abuse.53 The recommendation required the proponent of the statement to give sufficient notice to the adverse party of his or her intention to use it.54 Before admitting the statement into evidence, the judge would determine if admission of the statement would best serve the purpose of the evidence rules and the interests of justice.55 In deciding whether to admit the statement, the court also was to “consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the [alleged] offender, the reliability of the assertion, and the reliability of the child witness . . . .”56

The commentary to the recommendations noted that the existing hearsay exceptions, such as those for statements of present bodily feelings, symptoms, and conditions, and for excited utterances, do not permit the admission of most statements of child sexual abuse.57 Thus, the report recommended the adoption of either a special hearsay exception, as outlined above, or a “residual” exception, as found in the Federal Rules of Evidence.58 According to the commentary, “[i]t may be more sensible to adopt a broader, residual exception than a special

48. Id. at 12.
49. Id. at 11-12.
50. See supra text accompanying notes 13-18.
51. RECOMMENDATIONS, supra note 43, at 12 (citation omitted).
52. Id. at 34.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id. at 34-35.
58. Id. at 35; see Fed. R. Evid. 803(24).
exception.'" This would prevent what some perceive as a proliferation of exceptions which has led to a confusing set of specific rules and to an excessively categorical and superficial approach to hearsay.  

Parker's proposals and the ABA recommendations sparked a number of state legislatures to act. Within three years after publication of the proposals and recommendations, many states enacted laws reflecting some or all of them. Today, a majority of states have done so.

With respect to the ABA recommendation to admit out-of-court statements by a child victim of sexual abuse, states have chosen to ignore the ABA's statement that it may be more sensible to adopt a residual exception. Instead, they have enacted a special hearsay exception for such statements. Following Libai's proposal for a "special hearing" and Parker's parallel proposal for a "special deposition," states have provided for the admission at trial of the videotaped testimony of a child victim of sexual abuse.

States have embodied Libai's "child-courtroom" and Parker's "special testimony" innovations in statutes authorizing the taking of a child victim's testimony at trial in a manner which at some level removes the child from the open courtroom setting. State laws have accomplished this by providing for the physical isolation of certain trial participants, e.g., the victim, the defendant, or the jury, while simultaneously providing isolated participants access to the proceeding through a one- or two-way mirror or closed-circuit television.

The ABA recommendations rejected the notion that the court appoint an attorney to act as counsel and advocate for the child victim witness. Appointment of such an attorney was thought to interfere with the adversary process in criminal cases. Thus, the recommendations rejected the essence of Parker's proposal for a "child hearing officer." No state legislature has enacted this concept.

The movement to enact laws protecting the child victim witness from the stress of testifying at trial lacked an empirical basis. Several authors who were instrumental in the movement acknowledged this fact, but called for reform anyway based upon psychiatric literature

59. RECOMMENDATIONS, supra note 43, at 35.
60. Id.
63. See, e.g., id. § 92.53.
64. See, e.g., id. § 92.54.
or accounts from those who worked with child victims. However, at least one commentator noted that without empirical data showing how children react to specific legal procedures, the need for and scope of special approaches was uncertain. Other commentators urged that reform should focus on investigative techniques and pretrial procedures which would lessen the trauma to the child during the early stages of the case.

Some commentators pointed out that there was no evidence that children in general cannot testify in open court or that the experience universally traumatizes children. These commentators suggested that, in fact, the opposite may be true. Both experience and empirical research showed that for some child victims, participating in the criminal justice system was psychologically beneficial. Thus, Melton suggested that the most effective general strategy for research to facilitate the protection of child witnesses "would be to identify special vulnerabilities of child witnesses who have particular psychological or demographic characteristics, and then test specific interventions or procedural changes to reduce trauma or foster adaptation in those groups."

Within the general strategy for research, Melton offered some specific directions. First, psychologists should identify the individual and situational factors correlated with the psychological harm of testimony in open court. Psychologists could accomplish this by studying the factors which trigger the reactions of child victims to the legal process. This might provide relevant information for deciding which cases warrant special procedures.

Second, Melton suggested that psychologists might better spend their energy studying ways to make the present system more responsive. Children's perceptions of the nature of the criminal process need to be identified, and research must give attention to children's

66. See Libai, supra note 10, at 982-85; Parker, supra note 33, at 644-47 (relying largely on Libai's work);Bulkley, supra note 61, at 10-11.

67. See Bulkley, supra note 61, at 10.


70. Berliner, supra note 30, at 174-75 (counselors have found this to be true); Melton, supra note 69, at 120 (citing studies showing that the experience may be cathartic).

71. Melton, supra note 69, at 120.

72. Id. at 119.

73. Id.

74. Id.

75. Id.
understanding of all of the steps in criminal prosecution, both pretrial and trial.\textsuperscript{76}

B. Psychological Studies

The federal government has provided funding for some of the research projects suggested in the literature. In 1985, $2 million in federal grants became available for projects such as assessing the long-term impact of child sexual abuse on the victim and studying the effect on the family of the disclosure of child sexual abuse.\textsuperscript{77} Funds also were available for the development of educational materials geared to preschool age children and for the development of professional training curricula for legal, case management, and treatment personnel, including techniques for communicating, interviewing, and relating to children.\textsuperscript{78} Researchers are only now completing and publishing the results of many of these projects.

A research team led by Professor Goodman has recently completed a study which examined the emotional effect on child sexual assault victims of giving testimony in criminal court.\textsuperscript{79} This research is significant because the United States Supreme Court cited the work in support of its recent decision in Maryland v. Craig.\textsuperscript{80} The researchers concluded that for at least some children, testifying in criminal court has adverse emotional effects.\textsuperscript{81} "Specifically, a subgroup of children who testify do not show as rapid or complete improvement as children who do not testify."\textsuperscript{82} This conclusion raises a number of issues.

The study involved a sample of 218 child sexual assault victims from three prosecutorial districts in the Denver, Colorado area.\textsuperscript{83} From the sample, researchers compared the behavior disturbance of a group of those who testified in their case, "testifiers", to a matched control group of those who had not testified, "nontestifiers." Testifiers gave testimony either at preliminary, motion, or competency hearing, trial, or sentencing. A testifier received psychological tests

\textsuperscript{76} See id.
\textsuperscript{78} Id.
\textsuperscript{80} 110 S. Ct. 3157, 3168-69 (1990); see infra text accompanying notes 205-08. The Supreme Court also cited a portion of the brief for the American Psychological Association as Amicus Curiae. The Goodman study was cited extensively in the brief. For a discussion of the brief, see infra notes 206-07 and accompanying text.
\textsuperscript{81} G. Goodman, supra note 79, at 114.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 14-15.
upon referral of the case for prosecution, prior to testifying, at three months and seven months after first testifying, and after prosecution ended. The research team interviewed testifiers immediately before and after giving testimony. The team also observed and recorded their behavior during testimony. Each testifier was matched with a nontestifier who received psychological tests upon referral for prosecution, and at approximately the same time that the testifier received follow-up testing. The matched pair usually received follow-up tests within a week of each other.

The study found that testifying in criminal court had negative effects for some, but not all, of the child sexual assault victims. The negative effects were more apparent in the short rather than the long term; however, these effects were still present, especially for a specific subgroup of children, after conclusion of the case.

On three-month follow-up, the behavior adjustment of the testifiers and nontestifiers did not differ significantly. On seven-month follow-up, the nontestifiers generally showed improvement but the testifiers, as a group, did not. However, within the group of testifiers about half showed improvement and about half did not. At this second follow-up, the researchers identified several factors which predicted the improvement in the subgroup of testifiers. The predictors included giving testimony multiple times, maternal support, and corroborating evidence. Thus, the study related the improved behavior adjustment in the subgroup of testifiers to testifying fewer times, having maternal support, and having corroborating evidence of the abuse.

Children who testified repeatedly had more trauma in their lives, such as divorce or separation of parents, death of a parent, placement outside the home, or moving to a new home. The researchers could not explain the correlation between testifying multiple times and trauma other than victimization, but they offered some possibilities. Correlation analyses showed that court observers rated children who experienced more trauma in their lives as more credible witnesses. The

84. Id. at 14.
85. Id. at 27-28.
86. Id. at 28.
87. Id. at 104.
88. Id.
89. Id. at 53.
90. Id.
91. Id. at 54.
92. Id. at 56.
93. Id. at 47.
existence of corroborative evidence was also more likely in these children's cases. The credibility of such children as witnesses coupled with the existence of corroborative evidence might incline prosecutors to take these cases to trial, which, in turn, would require more court appearances by the children. However, a good case for the prosecution may be detrimental to the child. While a child who has other traumas in life may be a more credible witness, thereby leading the prosecution to call that child to testify numerous times, the research associated giving testimony numerous times without lack of maternal support with poor behavior adjustment.

On final follow-up, the nontestifiers and a subgroup of testifiers continued to improve, but a second subgroup of testifiers did not. The testifiers who did improve were more likely to have had their cases continued than were testifiers who did not improve. The researchers could not fully explain this relationship, but suggested negative effects simply may diminish with time. Other than number of continuances, there was no other significant predictor of the subgroup's improvement by the time of final follow-up.

Based upon interviews with the testifiers before and after they testified, giving testimony was not the ordeal they feared it would be. However, despite the general trend for more positive responses to testifying once it was over, the children's negative feelings about testifying in front of the defendant did not change.

The researchers also observed the testifiers when they were on the stand. "[C]hildren who were most upset about testifying in front of the defendant had a more difficult time answering the prosecutor's questions." Further, children who felt threatened by the defendant, e.g., due to the severity of the assault, appeared to be more anxious on the stand. However, the manifest anxiety of these children was to their advantage, because the study concluded that observers perceived more anxious children as more credible witnesses.

The study found that the courts used few innovative procedures. Only one child testified over closed-circuit television; none testified on videotape. The researchers attributed the failure to use these innova-

94. Id. at 47-48.
95. Id. at 57.
96. Id. at 58.
97. Id.
98. Id.
99. Id. at 71.
100. Id. at 68.
101. Id. at 90.
102. Id. at 91.
103. Id. at 80.
tions to several factors including doubts about the constitutionality of such procedures, concern for meeting the requisite showing of necessity in order to use any particular procedure, and concern that use of the procedures would reduce the judge's or jury's sympathy for the child. The researchers did not study how attorneys prepared children for giving testimony, but they reported their impression that attorneys only infrequently made systematic attempts at such preparation.

Goodman's study reveals that some children who testify exhibit poor behavior adjustment when compared to other children who testify and to nontestifiers. The behavior of the nontestifiers and some testifiers tended to improve over the time period studied, although to a lesser extent for the latter. Number of times of testifying, maternal support, and corroborative evidence were predictors of improved behavior in the subgroup of testifiers. Unfortunately, the study found that the best witnesses, the ones the prosecution has the least reservation about calling because they possess the most credibility, are also the ones with the most trauma in other areas of their lives. The high level of stress in several areas of their lives makes them least able to withstand the negative effects of multiple court appearances. Given the attractiveness of these children as witnesses, the prosecution may not be able to resist calling them despite the potential adverse consequences to such children. Moreover, prosecutors may prefer not to use innovative techniques such as videotaped testimony or closed-circuit television, because such techniques may engender less sympathy in the judge or the jury.

While not a part of her study, Goodman reported that systematic attempts at preparing children to give testimony were infrequent. Perhaps greater emphasis on familiarizing the child with the courtroom situation would allow the prosecution to take advantage of the child’s credibility as a witness, while avoiding the negative effects to the child of multiple appearances.

The study found that generally, children who testified were apprehensive about testifying in the presence of the defendant. The children who this prospect upset most had the most difficulty in answering the prosecutor's questions. Those who felt most threatened by the defendant appeared the most anxious on the stand; however, the heightened appearance of anxiety tended to increase their credibility. One could argue that the reported apprehension about testifying in the presence of the defendant is not unique to children. The elderly, the handi-

104. Id.
105. Id. at 110.
capped, and any other victim of a crime against his or her person are likely to have similar reactions.

Given the potential disincentive that Goodman’s study revealed for prosecutors to use techniques such as videotaped testimony or closed-circuit television and the availability of reforms with equal or greater potential for effectiveness, state laws providing special procedures for the protection of child witnesses at trial may have missed their mark. Improvements in investigative techniques and pretrial procedures, such as familiarizing children with the courtroom scenario, may be more valuable in reducing trauma to the child victim. Such techniques and procedures may make it possible for the child to testify in person at the trial, to the advantage of the prosecution. These same innovations may reduce the negative effects of testifying to a comparable, or greater, extent than videotaped testimony or closed-circuit television. Another advantage of such improvements is that attorneys can implement them without legislative action.

Recently, the federal government has shifted its emphasis and begun to fund projects to assess the impact of state laws providing special protection to child victims of sexual abuse. The government has funded projects to study how the special protections available at trial affect the child victim and the case outcome, to conduct a national survey of prosecution practices, and to examine and compare the outcome of the prosecution of child sexual abuse cases in nine jurisdictions.106 Because these projects only recently have received funding, the results will not be available for some time. Thus, empirical data presently do not exist on how often the courts use legislatively enacted protections for child victims, their effect on the case outcome, or their usefulness in shielding the child victim from trauma.

III. EXISTING LEGAL AUTHORITY

A. Statutes and Rules

1. Florida Statutes

Florida was in the forefront of the movement to enact legislation providing special protection to child victim witnesses. The Legislature

has enacted laws providing for the taking of testimony on videotape and via closed-circuit television. It also has enacted a separate hearsay exception for the out-of-court statements of a child victim of sexual abuse.

In 1979, the Legislature provided for the admission of videotaped testimony of a child victim of sexual battery or child abuse who was eleven years of age or younger. Before using this procedure, the provision required the court to find that the child would suffer severe emotional or mental strain from testifying in open court.

In 1984, the Legislature expanded the videotape statute. The new statute made the procedure applicable to witnesses other than the victim who are under the age of sixteen. Under certain conditions, a judge no longer had to preside at the videotaping. Lawmakers added a provision requiring the defendant and defense counsel to be present at the videotaping, unless the defendant waived such right.

In 1985, lawmakers enacted comprehensive legislation that provided several new protections for child victims and witnesses and enhanced the existing protections. This legislation made several important changes to the videotape statute.

The new law lowered the standard of proof that the proponent must show to obtain an order for the videotaping of testimony. Proponents no longer had to show severe emotional or mental distress, rather they need only show that the child would suffer at least moderate emotional or mental harm, or is otherwise unavailable as defined in the evidence code. A new provision permitted either party to request an interpreter to aid in formulating methods of questioning the child and in interpreting the child’s answers.

The Legislature made two other changes to the videotape statute in 1985. First, the statute retained the requirement that the defendant and counsel be present at the videotaping, but gave the court discre-
tion to require the defendant to view the testimony outside the presence of the child.115 The defendant could view the testimony "by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant."116 Second, before taking any of the steps available pursuant to the law, the court must make specific findings of fact on the record.117 The videotape statute has had no substantive amendments since 1985.

The 1985 legislation also created two new protections for children. One provided for the taking of testimony via closed-circuit television.118 The other provided a new exception to the rule against hearsay for the statement of a child victim of sexual abuse.119 The closed-circuit television provision has received no substantive amendments since its enactment. The only amendment to the hearsay exception is a clarification with respect to the cases in which it is applicable.120

The closed-circuit television provision is similar to the videotape statute. However, there are important differences. Both procedures are available to a victim or other witness under the age of sixteen.121 The law requires the same relaxed showing to use either procedure. Proponents must show that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm from testifying in open court or that the child is otherwise unavailable.122 The court must make specific findings of fact on the record as a basis for its ruling.123

The closed-circuit television provision differs from the videotape provision in the cases to which they are applicable. The closed-circuit television procedure is applicable only in cases involving a sexual offense.124 The videotape procedure is applicable in either a sexual abuse case or a child abuse case.125

Under the closed-circuit television procedure, only certain persons may be in the room with the child during the taking of testimony. These include the judge, the prosecutor, the defendant, the defendant's attorney, the equipment operators, an interpreter, and a person

115. Id. (amending Fla. Stat. § 90.90(4) (Supp. 1984)).
116. Id.
117. Id. (amending Fla. Stat. § 90.90(7) (Supp. 1984)).
118. Id. § 6, 1985 Fla. Laws at 143 (codified at Fla. Stat. § 92.54 (1985)).
119. Id. § 4, 1985 Fla. Laws at 141 (codified at Fla. Stat. § 90.803(23) (1985)).
120. See infra text accompanying notes 139-42.
122. Id.
123. Id. §§ 92.53(7), .54(5).
124. Id. § 92.54(1).
125. Id. § 92.53(1).
who the court has determined will contribute to the well-being of the child.126 During the taking of the child's testimony, the court can require the defendant to view the testimony from the courtroom.127 If the court so requires, it must permit the defendant to see and hear the child's testimony, but it also must ensure that the child cannot hear or see the defendant.128

The hearsay exception protects the statement of a child victim of sexual abuse or a sexual offense. The exception is effective even though the declarant is available.129 The exception applies only to the statement of a child victim who is less than twelve years of age physically, mentally, emotionally, or developmentally.130 It protects the child's statements "describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child."131

The statement must meet two prerequisites before a court can admit it into evidence. First, the court must conduct a hearing to determine whether the circumstances surrounding the statement provide sufficient safeguards of reliability.132 In making its determination, the court may consider a number of factors including the following: the age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child victim.133

The second prerequisite for the admission of the child's statement is that the child must either testify or be unavailable as a witness.134 To admit the statement because the child is unavailable, other corroborative evidence of the abuse or offense must exist.135 A child victim witness is unavailable if the court finds that the child's participation in the trial would result in a substantial likelihood of severe emotional or mental harm.136 Thus, the hearsay statement must meet a stricter standard for admission than videotaped or closed-circuit televised testimony.

126. Id. § 92.54(3).
127. Id. § 92.54(4).
128. Id.
129. Id. § 90.803(23).
130. Id. § 90.803(23)(a).
131. Id.
132. Id. § 90.803(23)(a)(1).
133. Id.
134. Id. § 90.803(23)(a)(2).
135. Id. § 90.803(23)(a)(2)(b).
136. Id.
In a criminal action, the defendant must receive notice at least ten days before trial that the prosecution will offer a hearsay statement in evidence pursuant to the provision. The court must make specific findings of fact on the record as to the basis for its ruling.

The evidentiary special protections are available for use in certain criminal or civil cases. In response to the First District Court of Appeal’s decision in Childress v. State, the Florida Legislature at its 1990 Regular Session clarified the cases to which the hearsay exception applies.

Under the old law, the hearsay exception was applicable to a child’s statement describing "any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child . . . ." Based upon language in the preamble to the session law which created the exception, the First District Court of Appeal held that the exception applies only to a sexual child abuse case, and not to a non-sexual child abuse case.

As amended, the exception now applies to a child’s statement describing "any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child . . . ." Thus, the exception is available in civil and criminal cases involving sexual or non-sexual abuse of a child.

The videotape and closed-circuit television protections are not available in the same cases. A child’s testimony "in a sexual abuse case or child abuse case, whether civil or criminal in nature," can be videotaped for use at trial in lieu of testimony in open court. Testimony of a child victim of or witness to "an unlawful sexual act, contact, intrusion, penetration, or other sexual offense [may] be taken outside of the courtroom and shown by means of closed circuit television." The language of the videotape procedure explicitly provides that the procedure is available in both sexual abuse and child abuse cases, whether civil or criminal in nature. Thus, this provision applies to a
case involving a sexual offense with or to a child or in a non-sexual child abuse case.

The language of the closed-circuit television procedure refers only to sexual offenses involving children. No reference is made to child abuse. Thus, this provision is applicable only in cases involving sexual offenses.

The three evidentiary special protections noted above, recording testimony on videotape, taking testimony via closed-circuit television, and the special hearsay exception, apply only to children under certain ages. They do not apply to the elderly or to disabled adults. In this regard, Florida is consistent with the majority of states. Only five states which make special protections available to children also make them available to others.\textsuperscript{145} Three of the five states have laws specifically extending one or more of the evidentiary special protections to disabled adults.\textsuperscript{146} No statute extends a specific special evidentiary protection to the elderly.

2. Other Jurisdictions

The federal rules of evidence do not provide a specific hearsay exception for the out-of-court statements of a child victim or witness. The federal rules do provide a residual exception within the list of exceptions applicable when the availability of the declarant is immaterial.\textsuperscript{147} Under this exception, the federal courts have admitted the out-of-court statements of a child victim of sex related crimes.\textsuperscript{148} Neither the federal rules nor the federal statutes provide for the use of videotaped or closed-circuit televised testimony of a child victim at trial.

In 1986, the National Conference of Commissioners on Uniform State Laws adopted a uniform rule of evidence to provide special protection to children.\textsuperscript{149} The uniform rule includes hearsay, videotape, and closed-circuit television protections.\textsuperscript{150} The rule makes the protections applicable to the statements or testimony of a child who is a victim of, or witness to, acts of "sexual conduct" or "physical violence."\textsuperscript{151} The rule suggests making these protections available to a minor under the age of twelve.\textsuperscript{152}

\textsuperscript{145.} See infra text accompanying notes 310-31.
\textsuperscript{146.} See infra text accompanying notes 310-320.
\textsuperscript{147.} FED. R. EVID. 803(24).
\textsuperscript{150.} Id.
\textsuperscript{151.} Id.
\textsuperscript{152.} Id.
No state has adopted the uniform rule as written. A majority of states, however, either have promulgated rules of evidence or enacted statutes that parallel some parts of it. At least thirty states provide a hearsay exception for the out-of-court statements of children in certain criminal or civil cases. Fifty-three states have a provision for admission of the videotaped testimony of a child at hearing or trial in certain cases. Finally, thirty-one states provide for the taking of a child’s testimony over closed-circuit television in certain cases.

B. Case Law

1. United States Supreme Court

(a) Coy v. Iowa

The sixth amendment to the United States Constitution provides an accused the right to confront witnesses. Specifically, the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." A similar provision is found in the Florida Constitution.

In Coy v. Iowa, the United States Supreme Court decided that an Iowa statute providing special protection at trial to child victims violated the defendant’s right to confrontation. In holding the statute unconstitutional by a six to two vote, the Court left open the question of what, if any, special protections it would uphold as constitutional. Justice Scalia delivered the opinion of the Court.

Under a 1985 Iowa statute intended to protect child victims of sexual abuse, the state moved to allow the complaining witnesses, two 13-year old girls, to testify either via closed-circuit television or from behind a screen. The trial court approved the placement of a large screen between the defendant and the witness stand during the vic-

155. Id. at 3167-68 & nn.3-4.
156. U.S. Const. amend. VI.
159. Id. at 1014.
WITNESS TESTIMONY

After adjustments to the lighting in the courtroom, the screen would allow the defendant dimly to perceive the witnesses, but it would block them from seeing the defendant. The Court held that this procedure violated the defendant's right to confront the complaining witnesses.

The Court stated that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." The Court, noting the plain language of the clause, the Latin origin of the word "confront," Shakespeare's descriptive portrayal of the root meaning of confrontation in one of his plays, and case law, meant face-to-face meeting in the literal sense. Although it acknowledged a trial court may not compel the witness to gaze upon the defendant, the Court could not ignore the profound effect on the witness of standing in the presence of the person the witness has accused.

Considering the facts of the case before it, the Court found that the use of a screen blocking the witnesses' view of the defendant as each testified violated the defendant's right to a face-to-face meeting. The Court rejected the state's suggestion that the necessity of protecting victims of sexual abuse outweighed the right of confrontation. While noting it has held that certain rights the confrontation clause confers are not absolute and may give way to other important interests, the Court found such rights are

not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine, the right to exclude out-of-court statements, and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself.

The Court carefully distinguished those cases where implicit rights under the confrontation clause must take into account other important interests from its holding in the instant case that there are identifiable exceptions, in light of other important interests, to the literal meaning of the clause. For the majority, the literal meaning of the clause was

160. Id.
161. Id. at 1014-1015.
162. Id. at 1015-16.
163. Id. at 1016-19 (citations omitted).
164. Id. at 1019.
165. Id. at 1020-22.
166. Id.
167. Id. at 1020 (citations omitted).
168. Id. at 1020-21 (citation omitted).
that a defendant has a right to meet *face-to-face* witnesses who give evidence at trial.

The Court left for another day the question of whether there exist any exceptions to this right. The Court noted, however, that whatever those exceptions may be, the Court would only allow them when necessary to further an important public policy. Further, when the exception was not one firmly rooted in jurisprudence, the Court would require a particularized finding of necessity. The novelty of the Iowa statute's exception indicated that it was not so firmly rooted, and the lack of individualized findings that the victim witnesses needed special protection precluded a holding, under any conceivable exception to the literal right of confrontation, that the trial court had not violated defendant's right thereto.

In a concurring opinion, joined by Justice White, Justice O'Connor stressed her view that nothing in the Court's opinion necessarily doomed efforts by state legislatures to protect child witnesses. She noted that the Iowa provision authorizing the use of a screen was unique. She went on to note that a number of states have authorized the use of one- or two-way closed-circuit television or videotaped testimony, or both. Many of these procedures "may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant." As examples of the meaning of testimony in the presence of the defendant, Justice O'Connor cited two statutes providing for one-way closed-circuit television which require the defendant's presence in the same room as the witness, and two statutes providing for two-way closed-circuit television which require that the defendant's image be visible to the witness.

Justice O'Connor rejected any suggestion in the majority opinion that a defendant's right to a face-to-face confrontation with her or his accusers was absolute. She noted that the Court has stated that the right reflects a preference for a face-to-face meeting, but at the same time, it has expressly recognized that competing interests can overcome the preference if warranted. "That a particular procedure impacts the 'irreducible literal meaning of the Clause' . . . does not alter

169. *Id.* at 1021.
170. *Id.*
171. *Id.* (citations omitted).
172. *Id.*
173. *Id.* at 1023 (O'Connor, J., concurring).
174. *Id.*
175. *Id.* (citations omitted).
176. *Id.* (citations omitted).
177. *Id.* at 1025.
this conclusion.'\textsuperscript{178} Thus, Justice O'Connor would recognize exceptions to the right to a face-to-face meeting if the procedure was necessary to further an important public policy.\textsuperscript{179}

In her view and, she noted, in the view of a majority of state legislatures, the protection of child witnesses is an important public policy.\textsuperscript{180} Given the expression of this policy, the Justice noted that the reviewing court likely will focus primarily on whether the finding of necessity for use of the procedure is adequate.\textsuperscript{181} Only a case-specific finding of necessity will be adequate.\textsuperscript{182}

Like the majority opinion, Justice O'Connor's concurrence left certain questions unanswered. She did not go so far as to say that state statutes requiring the defendant to be out of sight and hearing of the child witness did not raise confrontation problems. The state statutes she offered as not raising substantial problems under the clause were those which required that the defendant be in the same room as the witness or that the defendant's image be visible to the witness.

After the \textit{Coy} decision, a number of state courts decided cases involving the respective state's statutes providing special means for taking the testimony of children. Some of the decisions dealt directly with the question the majority opinion in \textit{Coy} left open, i.e., whether any exceptions exist to the literal right to confront one's accusers at trial. Within this subset of cases, there were varying results.\textsuperscript{183}

(b) Maryland v. Craig

In its recent five to four decision in \textit{Maryland v. Craig},\textsuperscript{184} the Supreme Court answered the question it left open in \textit{Coy}. Justice O'Connor wrote the majority opinion which reflects the reasoning of her concurring opinion in \textit{Coy}.

In \textit{Craig}, the question before the Court was the constitutionality of Maryland's one-way closed-circuit television procedure. The statutory procedure permits a trial judge to receive by one-way closed-circuit television the testimony of a child witness who is the alleged victim of child abuse.\textsuperscript{185} Before the court can use the procedure, the judge must

\begin{itemize}
\item \textsuperscript{178} \textit{Id.} (quoting the majority opinion, 487 U.S. at 1021).
\item \textsuperscript{179} \textit{Id.} at 1025.
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{184} 110 S. Ct. 3157 (1990).
\item \textsuperscript{185} \textit{Id.} at 3160-61 (citation omitted).
\end{itemize}
first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."\textsuperscript{186} Once the court invokes the procedure, examination and cross-examination occur in a separate room, while a video monitor records and displays the child's testimony to the defendant in the courtroom.\textsuperscript{187} During this time, the child cannot see the defendant.\textsuperscript{188}

The Court of Appeals of Maryland found the confrontation clause does not require a face-to-face confrontation between the defendant and the defendant's accusers in all cases, but the court concluded that under the state statute, the emotional distress rendering the child unable to communicate must arise primarily from face-to-face confrontation with the defendant.\textsuperscript{189} The state court further concluded that unless prevention of face-to-face confrontation is necessary to obtain the child's trial testimony, the court cannot deny the defendant that right.\textsuperscript{190} The Maryland court held that the state's showing was insufficient to reach the high threshold that \textit{Coy} required before invoking the statutory procedure.\textsuperscript{191}

The Court, through Justice O'Connor, acknowledged its observations in \textit{Coy} that the confrontation clause guarantees the defendant a face-to-face meeting with his or her accusers and that the Court derives this interpretation from the literal text of the clause and its historical roots.\textsuperscript{192} The Court noted, however, that it has never held that the confrontation clause guarantees a criminal defendant the absolute right to a face-to-face meeting at trial with adverse witnesses.\textsuperscript{193} Thus, the Court reaffirmed the importance of face-to-face confrontation, but found, given its precedents regarding hearsay, that such confrontation was not an indispensable element of the sixth amendment's guarantee of confrontation.\textsuperscript{194} In conjunction with this finding, the Court, reiterating its suggestion in \textit{Coy}, made clear that a court can dispense with physical, face-to-face confrontation at trial only when its denial is necessary to further an important public policy and the court has otherwise assured the reliability of the testimony.\textsuperscript{195}

\begin{footnotes}
\footnotetext[187]{Id.}
\footnotetext[188]{Id.}
\footnotetext[189]{Id. at 3162 (citation omitted).}
\footnotetext[190]{Id. (citation omitted).}
\footnotetext[191]{Id. (citation omitted).}
\footnotetext[192]{Id.}
\footnotetext[193]{Id. at 3163.}
\footnotetext[194]{Id. at 3164-65.}
\footnotetext[195]{Id. at 3166.}
\end{footnotes}
Applying these legal principles, the Court ultimately held that if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.\textsuperscript{196}

The Court reasoned that with the exception of providing a face-to-face meeting between defendant and witness, Maryland’s statutory procedure preserved all of the other elements of the confrontation right—oath, cross-examination, and observation of the witness’s demeanor. Therefore, the Court deemed the procedure the functional equivalent of live, in-person testimony.\textsuperscript{197} Thus, the procedure did “not impinge upon the truth-seeking or symbolic purposes” of the clause.\textsuperscript{198}

Having reached the conclusion that the procedure did not impinge on the right of confrontation, the central question for the Court was whether the use of the procedure was necessary to further an important state interest.\textsuperscript{199} The Court concluded that the state does have an interest in the physical and psychological well-being of child abuse victims and that interest may be sufficiently important to outweigh a defendant’s right to face-to-face confrontation.\textsuperscript{200} In support of this conclusion, the Court cited several cases in which this interest outweighed other rights.\textsuperscript{201}

In further support of its conclusion, the Court noted that a majority of states had enacted statutes to protect child witnesses from the trauma of giving testimony, thereby manifesting a widespread belief in the importance of such a public policy.\textsuperscript{202} The Court also noted that the impetus for the enactment of Maryland’s procedure was a governor’s task force report documenting an increase in investigations of child abuse.\textsuperscript{203} The report’s proposed legislation eventually became the Maryland statute. According to the report, the proposed legislation’s aim was to alleviate a child victim’s trauma from testifying in open court.\textsuperscript{204}

\textsuperscript{196} Id. at 3169.
\textsuperscript{197} Id. at 3166-67.
\textsuperscript{198} Id. at 3167.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id. (citations omitted).
\textsuperscript{202} Id. at 3167-68.
\textsuperscript{203} Id. at 3168 (quoting Wildermuth v. State, 310 Md. 496, 518, 530 A.2d 275, 286 (1987)).
\textsuperscript{204} Id. (quoting Wildermuth, 310 Md. at 517, 530 A.2d at 285).
Finally, the Court cited a portion of the Brief for the American Psychological Association (APA) as Amicus Curiae and the Goodman study as part of a "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."\(^{205}\) The APA, in that portion of its brief cited by the Court, argued that child victims *may be more likely* than adult victims to suffer substantial trauma as a result of testifying in the physical presence of the defendant.\(^{206}\) While acknowledging that adults too may suffer distress from legal involvement, the argument was that the development of adults is more complete, therefore the impact of such involvement may be less significant for adults than for children.\(^{207}\) For the Court, this body of literature buttressed the state's interest in protecting the welfare of children.\(^{208}\)

The Court set out the standards for the case-specific finding of necessity which a court must make in order for the state's interest in protecting children to outweigh a defendant's right to face-to-face confrontation. Essentially, a trial court must determine from the evidence that the prospect of testifying in the physical presence of the defendant would traumatize the particular child witness who seeks to testify beyond simply nervousness or excitement or reluctance to do so.\(^{209}\) Merely protecting the child from courtroom trauma generally would not justify denying the defendant's right of confrontation.\(^{210}\) However, the Court did not decide the minimum showing of emo-

205. *Id.* at 3168-69.

206. Brief for American Psychological Association as Amicus Curiae at 7, *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (No. 89-478) (emphasis added). For example, it was argued that the period of life during which a child sexual assault victim is involved in legal proceedings represents a time of special stress. *Id.* (citing G. Goodman, *supra* note 79). To illustrate the point, the APA stated that "[s]tressors in childhood can slow the course of normal cognitive and emotional development such that stressed children do not advance at the same pace as their unstressed peers." *Id.*

207. *Id.* at 8. Without comparative research, the APA's argument lacks validity. An individual continues to develop beyond childhood, and legal involvement can be equally disruptive, if not more so, during this period of life. For example, adult victims's legal involvement as witnesses in the prosecution of a sexual crimes against them can be so devastating emotionally as to affect their career path, marital relationship, or both.

Ultimately, the APA argued that the effect on a child victim witness of confronting the defendant face-to-face was dependent upon the personality of the particular child. *Id.* at 13. Similarly, it can be argued that the effect of confrontation on an adult victim witness is dependent upon the personality of the individual. Thus, for both child and adult victim witnesses, determining whether face-to-face confrontation with the defendant would have a negative impact so severe that it justifies invoking a special procedure involves predicting how a particular individual would react to such confrontation. For a discussion of the APA's views on the profession's ability to make such predictions, see *infra* notes 360-62 and accompanying text.


209. *Id.* at 3169.

210. *Id.*
tional trauma required for use of a special procedure. Rather, the Court simply stated that the Maryland statute, which requires a determination that the child witness will suffer serious emotional distress rendering the child unable to reasonably communicate, met constitutional standards.

Based upon all of the foregoing findings, the Court acknowledged the correctness of the Maryland Court of Appeals' holdings that face-to-face confrontation is not an absolute constitutional requirement and that a court can abridge such right when there is a case-specific finding that the child would suffer serious emotional distress if required to testify in court in the presence of the defendant.211

However, the Court found that Maryland's tribunal had gone too far in imposing two subsidiary requirements, and for that reason vacated the lower court's judgment. Specifically, the Court rejected the requirement that the proponent must question the child witness in the defendant's presence in front of the trial judge before the court can invoke the statutory procedure.212 The Court also rejected the state court's requirement that the court can use one-way closed-circuit television only after the trial judge has determined that two-way closed-circuit television will not protect the child sufficiently.213 Thus, the Court declined "to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure."214

The Court opined that based on the expert testimony placed into evidence the trial court could well have found that requiring the child witnesses to testify in court in the presence of the defendant would result in serious emotional distress to them such that they could not reasonably communicate.215 That testimony consisted of the following:

As to one child, the expert said that what "would cause him the most anxiety would be to testify in front of Mrs. Craig. . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she would probably stop talking and she would withdraw and curl up. With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the

211. Id. at 3170.
212. Id. at 3170-71.
213. Id.
214. Id. at 3171.
215. Id.
questions," while the other would "become extremely timid and unwilling to talk."\textsuperscript{216}

Given the Court's opinion on this point, it will be difficult for the Maryland Court of Appeals to uphold its reversal of the trial court's ruling permitting the use of the one-way closed circuit television procedure.

2. Florida Cases

The Florida Constitution contains its own confrontation clause. It provides that "[i]n all criminal prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses . . . ."\textsuperscript{217}

At about the same time as the decision in \textit{Coy v. Iowa}, the Florida Supreme Court decided two cases involving the constitutionality, under the federal and state confrontation clauses, of Florida's statutes providing special protection to child witnesses. In opinions issued simultaneously, the Florida Supreme Court upheld the constitutionality of section 90.803(23), Florida Statutes, which provides for the admission of hearsay statements of children regarding sexual abuse. In one of the cases, the court also found that the introduction at trial of a child victim's videotaped testimony under section 92.53, Florida Statutes, did not violate the defendant's right of confrontation.

In \textit{Perez v. State},\textsuperscript{218} the court rejected defendant's contention that section 90.803(23) was unconstitutional on its face. The state sought to introduce at trial the hearsay statements of an alleged child victim of sexual offenses to his mother and two police officers.\textsuperscript{219} The trial court found reliable, after an evidentiary hearing, the child victim's out-of-court statements. The trial court also found that the child was unavailable to testify, due to a substantial likelihood the child would suffer severe emotional or mental harm from testifying.\textsuperscript{220} The defendant entered a plea of nolo contendre and appealed the trial court's ruling. The district court of appeals affirmed.\textsuperscript{221}

In his appeal to the Florida Supreme Court, the defendant contended that section 90.803(23) violated the right of confrontation under the United States and Florida Constitutions. The court rejected his contention.

\textsuperscript{216} \textit{Id.} at 3161 (quoting \textit{Craig v. State}, 316 Md. 551, 568-69, 560 A.2d 1120, 1128-29 (1989)).

\textsuperscript{217} \textit{Fla. Const.} art. 1, § 16(a).

\textsuperscript{218} 536 So. 2d 206 (Fla. 1988), \textit{cert. denied}, 109 S. Ct. 3253 (1989).

\textsuperscript{219} \textit{Id.} at 207.

\textsuperscript{220} \textit{Id.} at 207-08.

\textsuperscript{221} \textit{Id.} at 208.
The court found two elements must exist to reconcile hearsay exceptions with the confrontation clause. First, because the clause prefers a face-to-face meeting, some necessity must be shown to justify the witness' failure to give live testimony, i.e., the witness must be shown to be unavailable.\textsuperscript{222} Second, once a party shows unavailability, the court will admit hearsay only if the hearsay is reliable.\textsuperscript{223} The law infers the reliability of a hearsay statement if it falls within a firmly rooted hearsay exception; but if the statement does not, the offering party must show the reliability of the statement with particularity.\textsuperscript{224}

The court found that section 90.803(23) followed the general approach that the United States Supreme Court established and, therefore, met the requirements of the confrontation clauses in the federal and state constitutions. Initially, the statute recognizes that the hearsay exception for statements of a child victim is not a firmly rooted exception.\textsuperscript{225} To overcome this condition and admit the statement of a child, the statute requires the court find that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability."\textsuperscript{226} If the child does not testify, the court must determine that she or he is unavailable, and that other corroborative evidence of the abuse or offense exists.\textsuperscript{227} Thus, there is a particularized guarantee of the trustworthiness of the statement.\textsuperscript{228}

The court also found that the statute was not unconstitutional as applied. A reviewing court will uphold the trial judge's finding regarding the likelihood of severe emotional or mental harm to the child from testifying at trial absent a showing of abuse of discretion.\textsuperscript{229} Absent such a showing, a court will also uphold the trial judge's determination that the out-of-court statements are sufficiently reliable.\textsuperscript{230}

The trial judge made specific findings of fact on the record that there was a substantial likelihood of severe emotional or mental harm to the child if the court required him to testify at trial.\textsuperscript{231} A mental health worker and the child's mother testified of such probable effects.\textsuperscript{232} Thus, there was no abuse of discretion in finding that testifying would harm the child.

\begin{itemize}
\item \textsuperscript{222} Id. (citation omitted).
\item \textsuperscript{223} Id. (citation omitted).
\item \textsuperscript{224} Id. at 209 (citation omitted).
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. (citation omitted).
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id. at 210.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id.
\end{itemize}
The trial court's determination that the child was unavailable triggered the statute's requirement for other corroborative evidence of abuse. The court found the defendant's admission of the offense to a police officer to be sufficient corroborative evidence of the offense.\textsuperscript{233} Again, this determination was not an abuse of discretion.\textsuperscript{234}

The Florida Supreme Court released its opinion in \textit{Glendening v. State}\textsuperscript{235} simultaneously with the \textit{Perez} decision. Among other things, defendant Glendening raised as issues the constitutionality of section 90.803(23), and the constitutionality of section 92.53, the videotape statute. The court disposed of the first issue by reference to its opinion in \textit{Perez}.\textsuperscript{236}

With respect to section 92.53, Glendening contended that the introduction at trial of the child victim's videotaped testimony violated his right of confrontation. The trial court granted the state's motion to videotape the child's testimony upon finding, pursuant to section 92.53, a substantial likelihood the child would suffer at least moderate emotional or mental harm from testifying in open court.\textsuperscript{237} The trial court required Glendening to view the child's testimony from behind a two-way mirror during videotaping.\textsuperscript{238} Thus, the court required him to view the testimony outside the child's presence.\textsuperscript{239} It is unclear from the supreme court's opinion whether the child could see the defendant or if the child knew the defendant could observe her.

Defendant further argued that the requirements of sections 92.53 and 90.803(23) are independent and that the requirements of each must be met. The trial court had made no finding regarding unavailability under section 90.803(23).\textsuperscript{240}

The opinion of the district court of appeal most clearly articulated the defendant's contention with respect to the necessity for independent findings. That court and the supreme court rejected this contention. For two reasons, the district court found that the trial court could not substitute its hearing on the state's motion to videotape the child's testimony for a hearing on unavailability under section 90.803(23). First, the trial court conducted the former hearing for a different purpose, and second, the standard for permitting videotaped

\begin{itemize}
  \item \textsuperscript{233} \textit{Id.}
  \item \textsuperscript{234} \textit{Id.}
  \item \textsuperscript{235} 536 So. 2d 212 (Fla. 1988), \textit{cert. denied}, 109 S. Ct. 3219 (1989).
  \item \textsuperscript{236} \textit{Id. at} 214.
  \item \textsuperscript{237} \textit{Id. at} 216.
  \item \textsuperscript{238} \textit{Id. at} 217.
  \item \textsuperscript{239} \textit{Id. at} 216.
  \item \textsuperscript{240} Glendening v. State, 503 So. 2d 335, 340 (Fla. 2d DCA 1987), \textit{aff'd}, 536 So. 2d 212 (Fla. 1988), \textit{cert. denied}, 109 S. Ct. 3219 (1989).
\end{itemize}
testimony is different. A court may allow videotaped testimony if there is a substantial likelihood the child will suffer at least moderate emotional or mental harm, whereas admission of a child's hearsay statement under section 90.803(23) requires a finding of substantial likelihood of severe emotional or mental harm.

Notwithstanding, the district court found it unnecessary for the trial court to make a finding of unavailability under section 90.803(23). The court held that for purposes of that section, the child's videotaped testimony was equivalent to her having testified in person. The trial court took the child's testimony with full participation by counsel for each side, and defendant had the opportunity to cross-examine the child.

The supreme court approved the district court's decision. The supreme court held that "application of section 92.53 to permit videotaping the child's testimony instead of requiring the child to testify in open court for purposes of admitting the child's out-of-court statements pursuant to section 90.803(23) does not violate the federal or Florida constitutional guarantee of the right of confrontation." Defendant had the opportunity to cross-examine the child, and the jury could view the child's demeanor as she testified. Thus, the court expressed the view that the child's videotaped testimony was the functional equivalent of live testimony at trial.

The fact that Glendening viewed the child's testimony from behind a two-way mirror did not alter the supreme court's conclusion. The parties made arrangements so that there was no interference with his opportunity to cross-examine the child. As noted above, however, it is unclear from the court's opinion whether the child could see the defendant or whether the child had any knowledge that the defendant could observe her.

The court found that the defendant's right of confrontation must yield to the "state's interest in sparing child victims the further trauma of in-court testimony." The court refused to alter this conclusion even after considering Coy v. Iowa.

241. Id.
242. Id.
243. Id.
244. Id.
246. Id. (citations omitted).
247. Id.
248. Id.
249. Id. (quoting Chambers v. State, 504 So. 2d 476, 477-78 (Fla. 1st DCA 1987)).
250. Id. (discussing Coy v. Iowa, 487 U.S. 1012 (1988)). The Supreme Court issued the Coy opinion after oral arguments in Glendening.
The court gave two reasons why Coy would not alter its conclusion. First, the court distinguished the Coy decision by noting that the Supreme Court rejected Iowa’s argument that its statute established a necessity for an exception. The Iowa statute created a legislatively imposed presumption of trauma. The Court found such an exception was not firmly rooted. Therefore, the exception could not stand, because it did not require particularized findings that the witnesses needed special protection.251

The court contrasted the statute at issue in Coy with section 92.53, Florida Statutes. The latter requires an individualized determination that the use of videotaped testimony is necessary to prevent emotional or mental harm to the child. The trial court permitted the videotaping of the child’s testimony after holding a hearing at which it took testimony on the issue of harm to the child from the child’s mother, a guardian ad litem, a doctor, and a social worker.252 Thus, unlike the situation in Coy, there was a case-specific finding of necessity.253

Second, the court noted that the majority in Coy would permit the application of harmless error analysis to the denial of face-to-face confrontation.254 The court concluded that if it was error to deny face-to-face confrontation to Glendening, such error was harmless.255 The child’s videotaped testimony did not implicate the defendant, but in fact, was exculpatory. Defense counsel did not cross-examine the child, and the defense used the tape as part of its case.256

Since the defense did not raise Coy’s literal interpretation of the confrontation clause as an issue, the court did not address it. Nevertheless, the court did say that the fact that the defendant was outside the “presence” of the child behind a two-way mirror during the videotaping of the child’s testimony did not change its conclusion. Thus, the Florida Supreme Court did not address the issue that the majority and Justice O’Connor left open in Coy, regarding the constitutionality of a statute which prohibits a child witness from seeing the defendant during the videotaping of the child’s testimony. In Maryland v. Craig, however, Justice O’Connor found such statutes did not violate the right of confrontation under the federal constitution. In Florida, at least one district court of appeal had so held even before the Craig decision.257

251. Id. at 218.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
257. See Fricke v. Florida, 561 So. 2d 597 (Fla. 3d DCA 1990).
At least one commentator shares the court’s conclusion that videotaped testimony is equivalent to testimony given at trial. However, one must consider other factors before equating videotaped testimony with live testimony at trial. For example, the following issues affect such an equivalency determination: whether the videotape fully conveys the witness’ demeanor; whether other voices and images are on the tape, and if so, whether the videotape is clear and identifies them. Florida’s videotape statute does not address technical quality standards.

Notwithstanding district court of appeal and Florida Supreme Court holdings that videotaped testimony which satisfies section 92.53 is equivalent to live testimony, and therefore, not a hearsay statement under section 90.803(23), one cannot ignore the differences between the two statutes. The appellate court pointed out that the threshold for unavailability is different under each statute. Under the videotape statute, a child witness is unavailable when the child will suffer at least moderate emotional or mental harm; under the hearsay exception, the threshold is one of severe emotional or mental harm. Professor Graham has noted that these differing threshold requirements for unavailability are “probably based on the mistaken and inappropriate notion that the confrontation clause requirement of unavailability can vary depending on the trustworthiness of the testimony . . . .” Irrespective of the procedure, he believed “a showing of a substantial likelihood of severe emotional or mental harm is required” to establish unavailability.

In Maryland v. Craig, the Supreme Court, while not deciding the minimum showing of emotional trauma it requires for the use of a special procedure, found that the requirement under Maryland’s closed-circuit television statute met constitutional standards. To invoke Maryland’s procedure, the offeror must show that if the child witness testified in the presence of the defendant, the child would suffer serious emotional distress rendering the child unable to reasonably communicate.

261. Id.
263. Id.
265. Id. at 3161 n.1.
Despite the Perez and Glendening decisions, Florida’s special procedure statutes continue to generate legal controversy. In a number of cases since those decisions, the issue was whether the trial court met the statutory requirement for a case-specific finding of necessity on the record. In most of the cases, the district courts of appeal have held the findings inadequate.\textsuperscript{266}

In Leggett v. State,\textsuperscript{267} the Florida Supreme Court gave some guidance regarding the kind of findings that the statutes require. The court issued the Leggett opinion shortly after the decision in Maryland v. Craig.\textsuperscript{268} The Leggett trial court permitted the alleged victim of aggravated child abuse to give videotape testimony rather than personally appearing in court, pursuant to section 92.53. The court allowed the defendant to view the child victim through a two-way mirror as the child testified.\textsuperscript{269}

There were two principal issues on appeal. The first issue was whether the evidence was sufficient to admit the videotaped testimony. The second was whether the trial judge followed the statutory requirements in authorizing the procedure.\textsuperscript{270}

With respect to the first issue, an experienced clinical social worker was the only witness to testify. She had counseled the child weekly for about a year. At trial, she testified as follows:

A. At this point in time having seen the child approximately weekly, he is terrified of facing his uncle. When a child is alleging
that they have been abused and they are a child victim, the most
terrifying thing and the most traumatic thing they ever have to do is
face their offender face to face. Eventually, I would hope that would
be possible, but at this point in time it would be damaging to him
emotionally to have to do that and I think it would make a behavior
change, it would put back his school work, academically, mentally.
It just would not be good at this point.

Q. Okay. And basically if you can tell us, on what do you base
those conclusions that it would be harmful for him to confront his
uncle at this time?

A. Basically on what the child tells me as well as his performance
in school, his behavior, emotionally, and his home placement.

Q. Okay. Is it your opinion, then, that to have him come into
open court and testify in the presence of his uncle would be harmful
to him mentally or emotionally.

A. Yes, it is my opinion.271

The court found that while the witness' testimony began with a
statement that it is damaging generally for a child abuse victim to tes-
tify in front of the accused, she did state specifically that it would be
harmful mentally for the child in the instant case to testify in the de-
fendant's presence.272 The court further found that although the wit-
ess never spoke words tracking the language of section 92.53 that the
harm would be "at least moderate," she did state specific areas in
which the child would suffer.273 Given these statements, the court re-
fused to conclude that there was insufficient evidence for the trial
judge to determine that the child would suffer at least moderate emo-
tional or mental harm.274 However, the court cautioned that "mere
discomfort or even fright, without more, does not meet the statutory
criterion."275

With respect to the second issue, the court noted that the trial
judge's only basis for permitting the procedure was his statement that
it would be in the best interest of everyone to have the child's testi-
mony videotaped.276 The court held that such a statement failed to
comply with the statutory requirements:277

271. Id. at 317 (emphasis in the original).
272. Id.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
There was no finding that there was a substantial likelihood that the child would suffer at least moderate psychological or mental harm, as required by subsection 92.53(1). Further, there was a failure to comply with subsection 92.53(7) by making specific findings of fact on the record with respect to the nature of the ruling.278

For the court, the failure to make such findings was more than a technical error. Citing *Maryland v. Craig*,279 the court stated that "[b]y requiring specific findings, the statute ensures that the judge has made an individualized determination employing the proper standard."280 Given the trial judge's statement, there simply was no way to tell whether he had employed the proper standard. Further, if the supreme court relied solely on the sufficiency of the evidence for its decision, it would be ignoring the plain language of the statute, and it would be construing the statute in a manner that could render it unconstitutional under *Coy v. Iowa*.281

While *Craig* and *Leggett* answer certain questions regarding Florida's statutory special procedures, they also raise new issues. For example, *Craig* does not clarify whether Florida's videotape and closed-circuit television procedures meet constitutional standards, since under each, the trial judge need only find that the child will suffer moderate emotional or mental harm before invoking the procedure. Further, under *Craig* and *Leggett* all that a court really needs to invoke one of the special procedures is the speculative, albeit educated, prediction of an expert that testifying in the presence of the defendant will harm the child to a certain degree. Presumably, for a defendant to refute such a prediction and to retain his literal right of confrontation, he must obtain his own expert to interview the child, and that expert must make a stronger contrary prediction. While such repeated interviewing in itself may be traumatic for the child, that may be necessary to protect the defendant's constitutional right of confrontation. Finally, there is no answer to the question of what level of technical quality of videotaped or closed-circuit televised testimony is the functional equivalent of live testimony.

3. Other Jurisdictions

The analysis of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Bergstrom*282 presents reasoning which defendants

278. *Id.*
280. 565 So. 2d at 317.
281. *Id.* at 318.
could use to challenge anew the statutes providing special protection to child witnesses. Further, the analysis of the Massachusetts court reveals some of the implications of bills that were before the Florida Legislature in 1989 and 1990\textsuperscript{283} which would have made the special protections currently available only to children available to the elderly and the disabled.

\textit{Bergstrom} involved the constitutionality of a one-way closed-circuit television procedure under which the court allowed the transmission of the testimony of two child witnesses from a separate room to the courtroom. The court invoked the procedure pursuant to state statute. The court decided \textit{Bergstrom} after oral argument in \textit{Coy} but before the Court issued its opinion in that case.

In \textit{Bergstrom}, only the defendant and the jury were present in the courtroom when the court took the children's testimony via closed-circuit television.\textsuperscript{284} The judge, counsel, the children's grandmother, and a video technician were in a separate room.\textsuperscript{285} No one explained the process to the children. The children did not know the defendant would be observing and listening to them, and neither child knew she was giving testimony against the defendant in a court of law.\textsuperscript{286} The jury was unaware of the grandmother's presence in the room when each child testified.\textsuperscript{287}

The defendant claimed the procedure violated his right to confrontation under the federal and state constitutions. The court decided the case solely on the basis of the confrontation clause in the Massachusetts state constitution.\textsuperscript{288} The state constitution provides that an accused has the right "to meet the witnesses against him face-to-face."\textsuperscript{289}

The state statute provides the circumstances under which the court can use a closed-circuit television procedure:

\begin{quote}
If, after a pretrial hearing, the judge finds by "a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the presence of the defendant," or as a result of doing both, the judge shall enter
\end{quote}

\textsuperscript{283} See infra text accompanying notes 343-48 and notes 356-59 for a discussion of the bills.
\textsuperscript{284} 402 Mass. at 539, 524 N.E.2d at 370.
\textsuperscript{285} \textit{id.}, 524 N.E.2d at 370.
\textsuperscript{286} \textit{id.} at 540, 524 N.E.2d at 370.
\textsuperscript{287} \textit{id.} at 539, 524 N.E.2d at 370.
\textsuperscript{288} \textit{id.} at 535, 540 n.8, 524 N.E.2d at 367, 370 n.8.
\textsuperscript{289} \textit{id.} at 541, 524 N.E.2d at 371 (quoting MASS. DECLARATION OF RIGHTS art. 12).
specific findings allowing use of the statutory alternatives [including closed-circuit television].

The statute further provides that the defendant has a right to be present during the use of a statutory alternative, unless the offering party shows that the witness is likely to suffer trauma as a result of testifying in the presence of the defendant.

The court found that the plain meaning of the language in the state constitution guaranteed the right to a direct confrontation between the witness and the accused. An interpretation that the provision’s language only gives the defendant the right to see and hear the witness would render superfluous the words “to meet” and “face-to-face.”

The court recognized limited exceptions to the requirements of confrontation. These exceptions included the unavailability of the witness, acknowledged exceptions to the literal right to confrontation such as public records or dying declarations, and certain unique interests. However, the court pointed out that “[t]he recognized exceptions to the right of direct confrontation at trial are not crime specific.” Furthermore, the court found that “[f]or constitutional purposes, no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment.” Thus, the Massachusetts court held that because the Massachusetts’ Declaration of Rights’ confrontation clause does not distinguish among categories of crime or classes of witnesses, the state statute “creates a rule of witness protection that is too broad to pass constitutional muster.”

The Massachusetts court noted that during oral argument in Coy, the State of Iowa conceded the principle of exempting child witnesses from direct confrontation is applicable to other categories of witnesses. At oral argument in Coy, Justice Stevens asked counsel for the state whether its argument for special protection of child witnesses, if sound, would not “apply to older, equally traumatized witnesses, such as 85 year old robbery victims.”

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290. Id. at 537, 524 N.E.2d at 369 (quoting Mass. Gen. L. ch. 278 § 16D(b)(1) (1985)).
291. Id. at 537, 524 N.E.2d at 369.
292. Id. at 541-42, 524 N.E.2d at 371.
293. Id. at 542, 524 N.E.2d at 371.
294. Id. at 545, 524 N.E.2d at 373.
295. Id. at 546, 524 N.E.2d at 374.
296. Id. at 546-47, 524 N.E.2d at 374.
297. Id. at 547, 524 N.E.2d at 374.
298. Id. at n.13, 524 N.E.2d at 374 n.13.
asked if the principle would apply to a fifty-five year old. Counsel for the state responded that the principle would apply in both cases.

While the Massachusetts court was aware that courts in other states had reached a different conclusion, it disagreed with the reasoning of those opinions. For example, it pointed out that some courts which employed balancing tests in determining the constitutionality of a particular procedure failed to consider or explain how to distinguish the state’s interest from any other. The court expressed its willingness to consider the validity of new techniques for the preservation and presentation of evidence at a criminal trial on a case-by-case basis, but it was unable to uphold broad categorical exemptions from constitutional mandates.

While the court did not rule out the taking of testimony outside of the presence of the defendant, it did find, for additional reasons, that the trial court used inadequate procedures. First, the quality of the television transmission was poor and did not allow the jury properly to observe the witness’ demeanor or to view the interaction between the witness and others who were present. Second, a party must show a compelling need for the use of the procedure by more than a mere preponderance of the evidence:

Such a compelling need could be shown where, by proof beyond a reasonable doubt, the recording of the testimony of a child witness outside the courtroom (but in the presence of the defendant) is shown to be necessary so as to avoid severe and long lasting emotional trauma to the child.

Finally, the court was particularly troubled that the statutory procedure allowed the witness to testify outside of the presence of the defendant and the jury without making the witness aware that she was giving testimony against the accused in a court of law.

Recognizing the reasoning in Bergstrom, the lack of a constitutional basis for special treatment of one category of witnesses over any other category such as the elderly or the handicapped similarly troubled the
Illinois Supreme Court when it held its videotape statute unconstitutional. Indeed, one could argue that there is no apparent justification for limiting special protection to any category or categories of witnesses.

C. The Disabled and the Elderly

A limited number of states which make evidentiary special protections available to children also make protections available to others. The statutes of six states make reference to affording the elderly or disabled adults, or both, the special protections available to children. Three of the six states specifically extend special evidentiary protection to the developmentally disabled. Two states have broadly worded statutes which a court may interpret as providing special protection to the aged and the disabled. One state affords special protection only to child victims of certain crimes, but some of the crimes referenced can have either elderly or child victims.

California, Minnesota, and Michigan specifically provide special evidentiary protection to the developmentally disabled or mentally impaired. California permits the prosecution to request that the testimony of a victim taken at a preliminary hearing be recorded on videotape, if the victim is fifteen years of age or less or is developmentally disabled as a result of mental retardation. The videotape can be admitted at trial, if the court finds that further testimony by the victim would cause the victim emotional trauma to such an extent as to make him or her unavailable. California also has a procedure for taking testimony via closed-circuit television, but it is available only to child witnesses.

Minnesota extends its hearsay exception, and arguably its videotape procedure, to the mentally impaired. The state's closed-circuit television procedure, however, is not available to the mentally impaired. This latter procedure, like the California closed-circuit procedure, is available only to child witnesses.

Minnesota's hearsay statute, subdivision 3 of section 595.02, provides

An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6 alleging, explaining, denying, or describing any act of

311. Id.
312. Id. § 1347 (West Supp. 1989).
sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence . . . ."\textsuperscript{313}

The statute defines mentally impaired to mean "that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration."\textsuperscript{314}

Although the language of subdivision 3 is not precisely parallel, presumably, the hearsay exception applies to out-of-court statements relating to sexual contact or penetration, or to physical abuse, made by children or the mentally impaired.

Arguably, a videotaped statement of a mentally impaired person is admissible under the Minnesota law. "For purposes of [subdivision 3], an out-of-court statement includes video, audio, or other recorded statements."\textsuperscript{315} Because subdivision 3 provides for the admission of certain out-of-court statements by children under ten or the mentally impaired, the videotaped statement of a mentally impaired person would be an out-of-court statement which a court could admit under the provision.

However, language in subdivision 4 of the same section casts doubt on the conclusion that a videotaped statement of a mentally impaired person would be admissible under subdivision 3. Subdivision 4 provides that a court may order a child's testimony be taken by closed-circuit television or recorded for later showing to the jury:

In a proceeding in which a child less than ten years of age is alleging, denying, or describing an act of physical abuse or an act of sexual contact or penetration performed with or on the child by another, the court may, upon its own motion or upon the motion of any party, order that \textit{the testimony of the child} be taken in a room other than the courtroom or in the courtroom and televised at the same time by closed-circuit equipment, or recorded for later showing to be viewed by the jury in the proceeding.\textsuperscript{316}

The provision only refers to the testimony of a child, and not to that of a mentally impaired person. The failure to reference the mentally impaired militates against the conclusion that their videotaped statements would be admissible under the statute.

\textsuperscript{313} Minn. Stat. § 595.02 subdiv. 3 (1988).
\textsuperscript{314} Id. § 609.341 subdiv. 6 (1988).
\textsuperscript{315} Id. § 595.02 subdiv. 3 (1988).
\textsuperscript{316} Id. § 595.02 subdiv. 4 (1988) (emphasis added).
With respect to the taking of testimony via closed-circuit television, the language of subdivisions 3 and 4 preclude the use of this procedure for the mentally impaired. There is no reference to closed-circuit television in subdivision 3, and subdivision 4 makes no reference to the mentally impaired.

Michigan law provides for the admission at a court proceeding of a videotaped deposition of a witness who is psychologically or emotionally unable to give live testimony at the proceeding. Under certain circumstances, a witness may give testimony via closed-circuit television. A witness, for purposes of either provision, is a person under fifteen years of age or a person fifteen years of age or older with a developmental disability. The statute defines developmental disability as an impairment of general intellectual functioning or adaptive behavior which meets the following criteria: it originated before the person became eighteen; it has been or can be expected to be continuous; it is a substantial burden to the person’s ability to perform normally in society; and it is attributable to mental retardation or some similar condition.

Two states, South Carolina and Montana, have broadly worded statutes that may make one or more of the special protections available to the elderly or disabled. South Carolina’s bill of rights for victims and witnesses provides that “[v]ictims and witnesses who are very young, elderly, who are handicapped or who have special needs, have a right to special recognition and attention by all criminal justice... agencies.” The court is to treat these special witnesses sensitively, “using closed or taped sessions when appropriate.” The Supreme Court of South Carolina has interpreted the statute to permit the admission of the videotaped testimony of a three year old criminal sexual assault victim.

The South Carolina law is the only state statute to make reference to the elderly. To date no case has decided what, if any, specific special protections are applicable to the aged under that law. Similarly, no case has decided what protections apply to the “handicapped” or to those “who have special needs.” South Carolina has a separate

318. Id. § 600.2163a(12)(a).
319. Id. § 600.2163a(1)(b)(i)-(iii).
320. Id. § 600.2163a(1)(a)(i)-(iv).
322. Id.
statutory hearsay exception for the statements of a victim of abuse or neglect, but it only applies to the statements of a child victim.\textsuperscript{324}

Montana has a very broadly worded statute providing for the admissibility of videotaped testimony. The statute provides that for the prosecution of certain sexual offenses, "the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial."\textsuperscript{325} The prosecution may present such testimony at trial and the court must receive it into evidence.\textsuperscript{326} The victim need not be present when the court admits the videotape into evidence.\textsuperscript{327} Thus, a victim of one of the named crimes, regardless of age or disability, can give testimony by means of videotape. This author found no reported cases that interpret this provision.

Texas has both videotape and closed-circuit television procedures.\textsuperscript{328} These procedures are available only to the child victim of certain enumerated offenses.\textsuperscript{329} The enumerated offenses include the offenses of section 22.04, Texas Penal Code.\textsuperscript{330} Section 22.04 makes it a criminal offense to intentionally or negligently cause bodily injury to a child who is fourteen years of age or younger or to an individual who is sixty-five years of age or older.\textsuperscript{331} Thus, Texas has specifically chosen to make videotape and closed-circuit television procedures available only to a child victim of a crime under section 22.04, even though the same act also is a crime under the same statute when an elderly person is the victim.

In summary, California, Minnesota, and Michigan provide special protection to the developmentally disabled. Minnesota is the only state providing a hearsay exception for the out-of-court statements of the disabled. In two states, California and Michigan, the videotape procedure available to children is also available to those who have mental disabilities. It is uncertain whether Minnesota's videotape procedure is available to the mentally impaired. Michigan is the only state in which the closed-circuit television procedure is available to the developmentally disabled. None of these states accords any of its special protections to the elderly.

\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} TEX. CODE CRIM. PROC. ANN. art. 38.071 §§ 3-4 (Vernon 1989).
\textsuperscript{329} Id. at art. 38.071 § 1.
\textsuperscript{330} Id.
\textsuperscript{331} Id.
Two states, South Carolina and Montana, have broadly worded statutes providing special protections. South Carolina has the only statute which makes reference to the elderly. To date no case law in either state has extended to the elderly or the developmentally disabled a specific special protection. Finally, Texas' statutory scheme makes videotape and closed-circuit television procedures available to a child victim of certain enumerated offenses, but not to an elderly victim of the same offenses.

IV. PROPOSED LEGISLATION

Legislators introduced bills providing special protection to the elderly and to disabled adults during the 1989 and 1990 Regular Sessions of the Florida Legislature. There is no empirical evidence to support the enactment of such legislation.

In 1988, the Attorney General of Florida received a federal grant to create a task force to investigate and identify the impact of crime against the elderly. Between October 1988 and February 1989, the task force held several public hearings around the state.

In its report, the task force made a number of findings. It found that while the elderly are the most fearful of crime, statistically they are, for the most part, the least likely victims of crimes. Elderly women are the most fearful of crime, but the least likely to suffer from criminal acts. An exception to the pattern of lower crime rates for the elderly are crimes involving personal larceny with contact. However, the rate of these crimes against the elderly is not statistically different from that of other age groups.

The task force also noted the phenomena of exploitation, abuse, and neglect of the elderly by family members, home care-givers, and institutional personnel. The report contained no statistics on the magnitude of these problems.

Despite the lack of empirical data showing disproportionate rates of crimes against the elderly, or even an increasing trend in such crime rates, the task force recommended legislation to protect the elderly

332. ATTORNEY GENERAL'S TASK FORCE ON CRIMES AND THE ELDERLY: FINAL REPORT at 6 (1989) [hereinafter TASK FORCE].
333. Id. at 58-62.
334. Id. at 8-15.
335. Id. at 10.
336. Id. at 15.
337. Id. at 9.
338. Id. (citation omitted).
339. Id. at 18-21.
and the mentally or physically disabled from the stress of testifying at trial. Specifically, the task force recommended an amendment to chapter 92, Florida Statutes, to provide for videotaping the testimony of the elderly and of disabled adults for use at trial.\footnote{340}

The task force made the recommendation, in part, because such protection is available to children who are alleged victims of abuse.\footnote{341} The analogy is misleading. The enactment of special protections for child victims of sexual abuse was, in part, a reaction to a significant increase in the reporting of such crimes.\footnote{342} There are no empirical data showing a corresponding increase in reported incidents of criminal sexual abuse of the elderly or of disabled adults that would bolster the argument for special protection at trial for this group.

A 1989 Senate bill embodied the task force's recommendation to amend chapter 92. The bill would have created a new section establishing the circumstances under which aged or disabled persons could testify on videotape.\footnote{343} The bill had no House companion and died in the Senate Committee on Judiciary-Civil.\footnote{344} There was no comparable bill for consideration during the 1990 Regular Session.

Legislators also introduced House and Senate bills at the 1989 Regular Session which would have amended all three of the protections available to children, i.e., the hearsay exception, the videotape provision, and the closed-circuit television provision, to make them available to "aged persons" and "disabled adults."\footnote{345} The sponsor of the House bill was a member of the task force.\footnote{346} The House passed the bill, but it died in Senate committee.\footnote{347} The Senate bill died without a committee hearing.\footnote{348}

During the interim between the 1989 and 1990 Regular Sessions, the President of the Senate directed staff of the Florida Senate Committee on Judiciary-Civil to study the Senate bills relating to evidence the President had referred to that committee, but which the committee did not hear. The President anticipated that sponsors would file simi-
lar bills for consideration during the 1990 Regular Session. Among the Senate bills the staff studied were the two 1989 Senate bills.

For two reasons, staff concluded that such legislation was premature. First, such proposals lacked an empirical basis. Staff noted that there was even less empirical research to support the need for expanding the protections afforded to children to the disabled and the elderly than there was to support providing special protection to children in the first instance. Second, the unsettled state of the case law with respect to state statutes providing special protection to children further militated against expanding such protections to other categories of witnesses. Based upon these recommendations, the Committee agreed not to present such legislation as a Committee Bill at the 1990 Regular Session.

During the 1989-1990 interim, the Senate Judiciary-Civil Committee also requested The Florida Bar Standing Committee on Code and Rules of Evidence to review the two 1989 Senate bills. The bar committee voted unanimously to oppose each of them.

As anticipated, lawmakers filed a bill to extend the three protections to aged persons and disabled adults in each house for consideration during the 1990 Regular Session. Each bill had the same sponsor as the previous year. Again, the House passed the bill but it died in Senate committee. Again, the Senate bill died without a hearing.


351. Id. at 45-47.

352. Id. at 216-218.

353. See Letter from Clint Smawley, Staff Dir., Fla. S. Comm. on Judiciary-Civ. to Sen. Jean Malchon, Dem., St. Petersburg (Feb 13, 1990) (available at Fla. Dep’t of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). Sen. Malchon sponsored the 1989 and 1990 Senate Bills, SB 668 and SB 134, respectively, which would have expanded the protections to the aged and the disabled.


357. Id. (Rep. Gordon and Sen. Malchon, respectively).


359. Id., History of Senate Bills at 38, SB 134.
V. Conclusion

Lawmakers filed bills in both the 1989 and the 1990 Regular Sessions of the Florida Legislature to make available to aged persons and disabled adults the special procedures available under Florida law for taking the testimony of an alleged child victim of abuse. One can understand the ramifications of these proposals only in the context of the history of, and the legal controversy surrounding, the special procedures available to children.

The origin of the movement in the legal community to enact special procedures for taking the testimony of children dates back at least to 1969. The movement culminated in the mid-1980s with the enactment of laws in a number of states providing a hearsay exception for the statements of an alleged child victim and permitting an alleged child victim to testify at trial by videotape or via closed-circuit television. Florida enacted such laws.

In general, states enacted these statutes in response to a reported increase in the number of incidents of sexual assault on children. Their enactment coincided with a general movement to protect victims of crime.

However, at the time of these statutes' enactment, there were no empirical studies which attempted to document that, in fact, testifying in open court traumatizes child victims. Since the enactment of these laws, Goodman's study has attempted to empirically show this. She found that testifying adversely affected a subset of children who testified. However, it is not unlikely that testifying adversely affects a subset of any category of victim witnesses. Moreover, there are no comparative studies, then or now, which document that the negative effects on certain child victims who testify are any greater than the negative effects on certain other victims who fall within a particular category of victim witnesses.

The circumstances surrounding the proposals in Florida to make the procedures available to the elderly and to disabled adults are much the same as they were in the early stages of the movement to provide special procedures to children. There are no empirical studies documenting that testifying in open court particularly traumatizes aged or disabled victims. Similarly, there are no comparative studies showing that testifying traumatizes victim witnesses in either category more than others.

The legislation recently proposed in Florida would make all three of the special procedures currently available to children available to the aged and the disabled. These proposals are related to the recommendation of a Florida Attorney General's task force for enactment of such legislation. The task force made that recommendation despite a
lack of data showing a disproportionate rate of crime against either category. In contrast, the enactment of special procedures for children was at least coincidental with a reported increase in sexual offenses involving children.

To date, no state clearly makes its special procedures available to the elderly. Only three states make available to the disabled one or more of the special procedures that the particular state makes available to children.

Irrespective of the lack of empirical support for making Florida's special procedures available to the aged or the disabled, expanding the use of such procedures raises both legal and practical questions. These arise from recent case law.

Given the United States Supreme Court decision in *Maryland v. Craig*, Florida's special procedures for children would seem secure against a challenge that they violate a defendant's constitutional right of confrontation. However, in light of the opinion of the Massachusetts Supreme Judicial Court in *Bergstrom*, the statutes may be subject to challenge on other grounds.

Noting the questions Justices Stevens and Scalia posed at the oral argument in *Coy* regarding the potential for application of the Iowa statute to elderly persons, the Massachusetts court in *Bergstrom* reasoned that the state's videotape statute was unconstitutional because it applied only to children and was crime specific. The application of Florida's statutes is limited similarly. The statute in Texas illustrates the incongruity of such a limitation. That law provides special procedures for taking the testimony of a child victim of certain enumerated criminal statutes, but one of the enumerated statutes makes it a crime to injure a person who is fourteen years of age or younger or a person who is sixty-five years of age or older.

The legislation proposed in Florida would add the aged and the disabled to the list of those to whom the special procedures are available. While this proposal addresses the incongruity that the Texas statute illustrates, it does not fully recognize the reasoning of the Massachusetts court in *Bergstrom*. Thus, one could argue that the special procedures should be available not only to aged persons and disabled adults who are alleged victims of certain crimes. Rather, they should be available to any alleged victim of any crime.

However, a broader application of the special procedures, whether the procedures become available to the elderly and the disabled or to any witness, calls for even closer scrutiny of the showing *Craig* requires to invoke a special procedure. Under *Craig*, a trial court may invoke a special procedure only after it has received evidence and made a case-specific finding that the procedure is necessary because
testifying in the presence of the defendant would adversely affect the child victim.

In *Leggett*, the Florida Supreme Court indicated that the testimony of a single social worker to the effect that testifying would emotionally damage the alleged child victim and put him back in his school work was sufficient evidence to invoke Florida's videotape procedure. However, the substance of the social worker's testimony amounts to no more than a prediction that testifying in the presence of the defendant would cause the child to react in certain ways after so testifying. This is a different and more speculative prediction than the requirement of the Maryland statute which the United States Supreme Court upheld. Under the Maryland statute, the required prediction is that testifying in the presence of the defendant will result in serious emotional distress such that the alleged child victim cannot reasonably communicate.

Regardless of which of these predictions the court requires, the ability of social workers, psychologists, or psychiatrists to make such predictions accurately is unknown. With respect to the field of psychology, the APA, in its amicus brief in *Craig*, acknowledged this inability when it stated that "research data concerning the factors that predict high stress and/or lasting distress for child-victim witnesses is still being developed ..." The APA noted that due to ethical and practical constraints, systematic field research in this area is extremely difficult to conduct. Thus, at best it will be a long time before empirical data demonstrate that psychologists accurately can predict whether a child would be so affected by confronting the defendant face-to-face that the child should be permitted to testify in an alternative manner. Given that no research currently is testing the ability of psychologists to make similar predictions with respect to other categories of witnesses such as the elderly or the disabled, empirical data demonstrating that the profession is capable of making such predictions with respect to these categories of witnesses will be even longer in coming, if at all.

360. *Id.* n.28.
361. *Id.* n.28.
362. Until such data can be developed for child victim witnesses, the APA argued that "clinical data and psychological theory provide a framework from which conclusions about [the] question [of predicting high stress and/or lasting stress] may be drawn." *Id.* In support of this argument, the APA offered an untested theoretical model recently postulated by two academics. The theory was offered as a "framework for analyzing the emotional consequences of a possible face-to-face encounter between the child victim-witness and a defendant known to the child."
Other than by producing expert testimony to the contrary, a defendant has no way of exercising the literal right of confrontation. Should this result in a battle of experts in such cases, the procedure would do a disservice to the child victim by repeatedly bringing up a painful subject. The procedure could further burden an already overwhelmed criminal court system because the law would require it to spend more time holding hearings to determine the necessity for such procedures. Making Florida’s special procedures available to other categories of witnesses would only exacerbate these potential problems.

The Florida Legislature carefully should consider these legal and practical questions before deciding to expand the use of the special procedures for taking the testimony of children. If it decides to expand their use, these questions should be considered in deciding to whom it should make such procedures available. Only by such careful deliberation can the Legislature be fully cognizant of the ramifications of enacting such laws.

Id. at 15.

The theory consists of four factors: “traumatic sexualization,” “betrayal,” “powerlessness,” and “stigmatization.” Traumatic sexualization describes a process of shaping a child’s sexuality in developmentally inappropriate ways. Id. at 15. The second factor, betrayal, occurs when a child learns that he or she has been misled into submitting to sexual activities by kindness and affection and that such activities are wrong. Id. (footnote omitted). A sense of powerlessness occurs because the abuse subverts the will and desires of the child. Id. at 16 (footnote omitted). Finally, stigmatization refers to the negative connotations, e.g., badness, shame, and guilt, that are communicated to the child as a result of the sexual abuse experience and that are later incorporated into his or her self-image. Id. (footnote omitted). Under the theory, confrontation may arouse each of these factors and thereby adversely affect the child. Id. at 15-16.

It can be argued that the usefulness of these factors in predicting whether a particular child would be traumatized by confronting the defendant face-to-face assumes that the defendant, in fact, committed the crime. Thus, at least from the defense counsel’s point of view, the use of a special procedure based upon the expert testimony of a psychologist that the alleged child victim witness is afflicted by one or more of these factors prejudices the defendant.