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Criminal Law - Right of Confrontation - Admission of Pre-Trial Videotaped Testimony of Sexually Abused Child Pursuant to Article 38.071, Section 2, Texas Code of Criminal Procedure Violates Right of Confrontation and Due Process Case Note.

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CRIMINAL LAW—Right Of Confrontation—Admission Of Pre-Trial Videotaped Testimony Of Sexually Abused Child Pursuant To Article 38.071, Section 2, Texas Code Of Criminal Procedure Violates Right Of Confrontation And Due Process

Long v. State
No. 867-85 (Tex. Crim. App. July 1, 1987)(Westlaw, Texas Cases library)

James Edward Long was indicted for the sexual abuse of a twelve-year-old girl.[1] At Long's trial, the state entered into evidence a pre-trial videotaped interview conducted between the allegedly abused child and the assistant director of the Dallas Rape Crisis Center.[2] The video was taped pursuant to article 38.071, section 2, of the Texas Code of Criminal Procedure.[3] Long objected on the grounds that admission of the videotape violated his right of confrontation under article I, section 10, of the Texas Constitution, and the

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1. *See* Long v State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library). Long was convicted under section 21.10 of the Texas Penal Code. *See id.* at screen 1; *see also* TEX. PENAL CODE ANN. § 21.10 (Vernon 1974)(repealed and recodified at TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon 1987)). Under this section, a person commits the offense of sexual abuse of a child if, "with the intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and the child is younger than 17 years." *Id.*

2. Long, at screen 2. Prior to Long's trial, the District Attorney's office asked the Assistant Director of the Dallas Rape Crisis Center to conduct a videotaped interview with the child. *Id.* at screen 3. During the interview, the child stated that Long was her mother's boyfriend and that he had lived with her and her mother for a long period of time. The child used anatomically correct dolls to illustrate the sexual conduct which allegedly took place between she and Long. These practices, which included both anal and oral sex, allegedly began when the child was five years old and continued to occur from two to seven times a day until the child was approximately nine years old. *Id.* at screen 3.

3. TEX. CRIM. PROC. CODE ANN. art. 38.071(2) (Vernon Supp. 1987). The statute applies to sex abuse victims who are twelve years old or younger. *See id.* The statute provides that videotaped statements of the child made before the proceeding begins may be admitted into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the opera-

sixth amendment to the United States Constitution.[4] The trial court overruled Long's objection, admitting the videotape into evidence.[5] After the jury viewed the videotape and the state rested its case, Long testified as to the falsity of the allegations made against him on the tape.[6] The prosecution next called the child as a rebuttal witness.[7] After the state completed its redirect examination,[8] the counsel for Long briefly cross-examined the child before both sides rested and closed.[9] The 265th Criminal District Court of Dallas County convicted Long of sexual abuse of a child.[10] Long appealed to the Dallas Court of Appeals, again contending that the admission of the pre-trial videotape, as authorized by article 38.071, was a violation of his constitutional right to confrontation.[11] The court of appeals agreed, holding that

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tor of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

Id.

4. Long v. State, 694 S.W.2d 185, 187 (Tex. App.—Dallas 1985), *aff'd*, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library). Long argued that the introduction of the videotape, pursuant to article 38.071, denied him his right of confrontation because the statute's purpose was to place the witness in an environment calculated to induce the witness to give specific and detailed responses that would otherwise not be given in the presence of a jury. *See id.*

5. *See* Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 5). After the videotape was played for the jury the state called several witnesses, including the child's mother, before resting its case. *See id.* at screen 5.

6. *See id.* at screen 5 (Long denied having anal and oral intercourse with child).

7. *See id.*

8. *See id.* When the prosecution asked the child to discuss the sexual acts which allegedly took place, Long objected on grounds that it was improper rebuttal. The objection was overruled. The child's testimony in court was essentially repetitive of that given in her pre-trial interview, and Long objected on grounds that it was improper bolstering; this objection was also overruled. *See id.*

9. *See id.* at screen 6.

10. *See* Long v. State, 694 S.W.2d 185, 186 (Tex. App.—Dallas 1985), *aff'd*, No. 867-85 (Tex. Crim. App. July 1, 1987). Long was assessed the maximum punishment under the statute at the time: twenty-years imprisonment and a ten-thousand dollar fine. *See id.*

11. *See id.* Criminal defendants are guaranteed the right to be confronted with those witnessing against them, and this right is secured in the United States Constitution and in most state constitutions, including the Texas Constitution. *See* U.S. CONST. amend. VI. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the evidence against him . . . ." *Id.*; *see also* Pointer v. Texas, 380 U.S. 400, 403 (1965)(sixth amendment right to confrontation is fundamental right binding

article 38.071, facially, and as applied to Long's prosecution, violated both the United States and Texas Constitutions.[12] The Texas Court of Criminal Appeals granted the state's petition for discretionary review to resolve the conflict between lower courts of appeals' opinions on the Texas statute.[13] Held—*Affirmed*. Admission of pre-trial videotaped testimony of an allegedly sexually abused child pursuant to article 38.071, section 2, of the Texas Code of Criminal Procedure violates the right of confrontation and due process under both United States and Texas Constitutions.[14]

The sixth amendment to the United States Constitution guarantees, in part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[15] This portion of the amendment, commonly referred to as the confrontation clause, bars under certain circumstances the admission of hearsay at trial.[16] Hearsay consists of any out-of-court statement which is offered in evidence at trial to

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upon states through fourteenth amendment due process clause). The right to confrontation under article I, section 10, of the Texas Constitution arguably confers more rights than its counterpart in the United States Constitution "because it is framed, not in terms of rights granted, but in terms of clear mandate that the accused 'shall be confronted.' " Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.017, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1681 (1986). However, Texas courts interpret the clause in essentially the same way as federal courts interpret the sixth amendment. *Id.*

12. *See* Long v. State, 694 S.W.2d at 192. The court of appeals found that the Texas provision authorizing the defendant to cross-examine the child at trial was insufficient to outweigh the prejudice created by the prior introduction of the videotape to the jury. *See id.* Furthermore, the infringement on Long's right to confrontation posed by the videotape procedure did not advance a substantial state interest. The statute was additionally held unconstitutional because it compelled Long to make an election between his right to remain passive and his right to confront and cross-examine the witnesses against him. *See id.* at 193.

13. *See* Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 1). *Compare* Amescua v. State, 723 S.W.2d 266, 273 (Tex. App.—San Antonio 1986, no pet.)(38.071 held constitutional) *and* Jolly v. State, 681 S.W.2d 689, 697 (Tex. App.—Houston [14th Dist.] 1984, pet. granted)(upholding constitutionality of article 38.071) *with* Buckner v. State, 719 S.W.2d 644, 650 (Tex. App.—Fort Worth 1986, no pet.)(38.071 held unconstitutional violation of defendant's right to confrontation and due process) *and* Romines v. State, 717 S.W.2d 745, 753 (Tex. App.—Fort Worth 1986, no pet.)(held 38.071 unconstitutionally violated defendant's due process and confrontation rights).

14. Long, at screen 51.

15. U.S. CONST. amend. VI (confrontation clause).

16. *See* California v. Green, 399 U.S. 149, 155 (1970)(confrontation clause and hearsay rules often afford similar protection by excluding hearsay evidence); *see also* Note, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 645 (1985)(confrontation clause intended to exclude inadmissible hearsay from trial). Although the confrontation clause and hearsay rules guard similar values, the overlap between the two is not complete. *See* Green, 399 U.S. at 156 (evidence may be admitted under recognized hearsay exception and still violate confrontation clause).

prove any matter asserted within the statement.[17] Admission of hearsay evidence is precluded because of the belief that out-of-court statements are characterized by untrustworthiness and inaccuracy.[18] The confrontation clause was designed to both minimize the possibilities of injustice resulting from the admission of hearsay evidence and ensure reliability of evidence used to prosecute the accused.[19]

To effectuate reliability of evidence admitted at trial, the confrontation clause seeks to guarantee an accused the right to subject all statements made against him to cross-examination.[20] The United States Supreme Court has consistently interpreted the confrontation clause to require that the accused be given adequate opportunity to effectively cross-examine witnesses against him in open court, and in view of the jury.[21] The interrelated guarantees of

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17. *See* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 584 (2d ed. 1972). "Hearsay evidence is testimony in court, or written evidence of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." *Id.* As stated in the Federal Rules, "[H]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

18. *See* Chambers v. Mississippi, 410 U.S. 284, 298 (1973)(longstanding hearsay rule traditionally excluded out-of-court statements because of need to keep untrustworthy evidence from jury); Green, 399 U.S. at 154 (out-of-court statement deemed unreliable because declarant not under oath nor subject to cross-examination at time of statement). The judicial practice of excluding hearsay statements was established in the late seventeenth century to guard against admission of untrustworthy and erroneous evidence. *See* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 3 (1974).

19. *See* Chambers, 410 U.S. at 295 (confrontation clause demands evidence admitted into trial be first subjected to cross-examination to guarantee accurate verdict); Dutton v. Evans, 400 U.S. 74, 89 (1970)(confrontation clause advances accuracy of decisions in criminal trials by guaranteeing reliability of evidence admitted for evaluation).

20. *See* Davis v. Alaska, 415 U.S. 308, 315-16 (1974)(primary purpose of confrontation clause is to guarantee accused opportunity to cross-examine witnesses against him); Pointer v. Texas, 380 U.S. 400, 406-07 (1965)(main purpose underlying right to confrontation is to extend to defendant right to cross-examine witnesses against him). *See generally* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 28 (1974) (discussing opportunity of cross-examination as essential and primary purpose of confrontation).

21. *See, e.g.*, Pennsylvania v. Ritchie, __ U.S. __, __, 107 S. Ct. 989, 999, 94 L. Ed. 2d 40, 53 (1987)(confrontation clause requires that defendant be given opportunity to effectively cross-examine witness, which includes right to demonstrate bias of witness or exaggerated testimony); Bruton v. United States, 391 U.S. 123, 124-25 (1968)(defendant's right to confrontation violated when no opportunity given to cross-examine co-defendant whose confession used to convict him); Douglas v. Alabama, 380 U.S. 415, 418 (1965)(primary benefit extended by confrontation clause to accused is right to adequate opportunity to cross-examine). The Supreme Court has strictly construed the right to confrontation, going so far as to say that if a criminal defendant is denied cross-examination without first waiving this right, it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1965). This reflects the Court's position that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial . . . ."

face-to-face confrontation and cross-examination operate as important vehicles through which the reliability of evidence is promoted.[22] The sixth amendment, literally construed, absolutely bars the admission of all hearsay evidence.[23] However, the Supreme Court has declined to interpret the confrontation clause as literally mandating the exclusion of all hearsay evidence,[24] instead acknowledging that competing state interests may

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Ohio v. Roberts, 448 U.S. 56, 63 (1980). The Court has asserted that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." Green, 399 U.S. at 157. These views of the Supreme Court have remained consistent, and it has historically been the Court's position that the essential purpose of the Confrontation Clause is:

> to prevent depositions or ex-parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 572 (1978)(confrontation clause allows defendants to confront witnesses who testify as to determinative issues of guilt or innocence).

22. *See* Green, 399 U.S. at 158 (confrontation clause assures reliability of witness' statement by requiring witness to be under oath and subject to cross-examination when statement made, allowing jury to judge the demeanor of witness while making statement). *See generally* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1676 (1986)(main concern of confrontation clause is reliability of evidence procured through either cross-examination or confrontation). The right to confrontation is based upon the belief that face-to-face confrontation in open court increases the veracity of a witness' testimony. *See* Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U.L. REV. 193, 193 (1983).

23. Roberts, 448 U.S. at 63 (literal interpretation of confrontation clause would result in exclusion of all statements by individual absent from trial); *see also* Mattox, 156 U.S. at 243 (accepted interpretation of confrontation clause does not accord with literal meaning of clause). *But see* Green, 399 U.S. at 175 (Harlan, J., concurring). In his concurring opinion in *Green*, Justice Harlan observed that "simply as a matter of English the clause may be read to confer nothing more than a right to meet face-to-face all those who appear and give evidence at trial." *Id.*

24. *See* Roberts, 448 U.S. at 63. The *Roberts* Court observed that if the confrontation clause were construed literally, then all hearsay exceptions would be barred, a result the Court has continually declined to support. *See id.*; *see also* Mattox, 156 U.S. at 243. In holding that the dying declaration of a witness was admissible despite the fact that the defendant was given no opportunity to confront or cross-examine the witness at trial, the Court stated that, "[t]o say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent." *Id.* at 243. *See generally* Note, *The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma*, 14 HOFSTRA L. REV. 261, 272-73 (1985)(contending that framers of Constitution did not intend strict and extreme interpretation of confrontation clause).

sometimes warrant an infringement upon an accused's fundamental right of confrontation.[25]

Although the United States Supreme Court has expressly declined to delineate a definitive test by which the admissibility of all hearsay evidence may be determined,[26] it has recognized that certain exceptions exist under which hearsay may be admitted without violating the confrontation clause.[27] In formulating these exceptions, the Court has stated that both public policy considerations and the legitimate need of a state to conduct an effective criminal justice system may sometimes override a defendant's right to confrontation.[28] Underlying these exceptions is the belief that some forms of hearsay are of sufficient trustworthiness that to admit them would not amount to a significant abridgment of the values protected by the confrontation clause.[29] For example, when a hearsay declarant is available at trial and

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25. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973). Although a defendant's right to confrontation is not absolute, denial of the right requires close examination of the competing interests. *Id.* Despite the important safeguards these constitutional protections afford the accused, they must occasionally be subordinated to interests of public policy and effective criminal law enforcement. Mattox, 156 U.S. at 243.

26. *See* Green, 399 U.S. at 162. The Court in *Green* noted that it had no intent to create a bright line rule that would measure the constitutionality, under the confrontation clause, of all hearsay exceptions allowing into evidence out-of-court statements. *See id.*

27. *See, e.g.*, Roberts, 448 U.S. at 64 (right to confrontation may be overridden by state interests in effective law enforcement)(citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); Parker v. Randolph, 442 U.S. 62, 74-75 (1979)(denial of right to confrontation may be harmless error); Pointer v. Texas, 380 U.S. 400, 407 (1965)(dying declarations of witness did not violate confrontation clause). *See generally* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 826 (1987). The Court will permit a denial of confrontation in a number of situations. *See id.* The right of confrontation may be subject to waiver, its refusal may be considered harmless error, or it may be subordinated to weighty state interests. *See id.*

28. *See* Roberts, 448 U.S. at 64. A significant interest exists in every jurisdiction to effectively enforce the law and to construct definitive rules of evidence to be used in criminal trials. *Id.* The Supreme Court has held that the right to confrontation and cross-examination is not absolute and may in certain cases be overridden by other valid interests in the criminal justice system. *See* Chambers, 410 U.S. at 295. Hearsay exceptions to a defendant's right to confrontation are predicated upon substantial state interests in the use of relevant evidence to prosecute the accused. *See* Comment, *Testing the Reliability of Co-conspirators' Statements Admitted Under Federal Rule of Evidence 801(d)(2)(E): Putting the Claws Back In the Confrontation Clause*, 30 VILL. L. REV. 1565, 1593 (1985). The Federal Rules of Evidence provide for many exceptions to the hearsay rule, such as statements arising from a startling event (rule 803(2)); business records made during a regularly conducted business transaction (rule 803(b)); and public records and reports of public office (rule 803(8)). *See* FED. R. EVID. 803(2), (6), (8).

29. *See* Chambers, 410 U.S. at 298-99. Exceptions to the hearsay rule have developed over time to "allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." *Id.* For example, although a literal interpretation of the confrontation

the defendant is given an adequate opportunity to cross-examine the declarant, admission of the declarant's out-of-court statement does not violate the confrontation clause because cross-examination affords the defendant sufficient opportunity to test the validity of the hearsay statement.[30] Conversely, when the hearsay declarant is unavailable for cross-examination at trial, the hearsay statement can be admitted only if the prosecution demonstrates both that the declarant is unavailable[31] and that the statement possesses sufficient indicia of reliability.[32] In the Court's opinion, the foregoing requirements operate conjunctively to safeguard the values furthered by the confrontation clause.[33] Unavailability must be predicated upon more than the mere absence of a witness from the court room;[34] it requires the prosecution to make

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clause would require the exclusion of dying declarations, courts have admitted them because of the long-established belief in their reliability and trustworthiness. Mattox, 156 U.S. at 243-44.

30. *See* Green, 399 U.S. at 164. In *Green*, the defendant's right to confrontation was not violated when prior inconsistent statements of a hearsay declarant were admitted where declarant was available to testify at trial and subject to cross-examination at a previous hearing. *See id.* In holding that the admission of out-of-court testimony of an unavailable witness was a violation of the defendant's right to confrontation when the defendant had no prior opportunity to cross-examine the witness, the Court in *Green* stated that the ruling would be different had the witness' testimony been elicited at a trial at which the defendant's counsel had been afforded an adequate opportunity to cross-examine. *See id.*

31. *See* Roberts, 448 U.S. at 65. In all cases where hearsay evidence is proffered, including those where pre-trial cross-examination took place, the state must either produce, or prove the unavailability of, the witness whose statement it wants to use against the accused. *Id.*; *see also* Motes v. United States, 178 U.S. 458, 471 (1899)(when government negligence responsible for hearsay declarant's absence from trial, out-of-court statement inadmissible despite fact that defendant cross-examined declarant at time of statement).

32. *See* Roberts, 448 U.S. at 65. When a hearsay declarant is unavailable for cross-examination in court and the judge has found the witness to be legally unavailable, the witness' statement will be admitted only if it presents adequate "indicia of reliability." *Id.*

33. *See id.* at 66. The requirements of unavailability and reliability reflect the underlying purpose of the confrontation clause—the preference for face-to-face confrontation, and the assurance of trustworthy evidence being used against the accused. *See id.*

34. *See* Barber v. Page, 390 U.S. 719, 723 (1967)(unavailability requirement unsatisfied when prosecution makes no attempt to obtain witness' presence in court). *Compare* Illinois v. Allen, 397 U.S. 337, 347 (1969)(Court upheld trial court's decision to ban disruptive defendant from courtroom) *with* Motes v. United States, 178 U.S. 458, 471 (1899)(unavailability requirement not satisfied when government conduct responsible for witness' absence from trial). The Federal Rules of Evidence define unavailability of a witness to include those situations where the declarant

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
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> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
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> (3) testifies to a lack of memory of the subject matter of his statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
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> (5) is absent from the hearing and the proponent of his statement has been unable to

a "good faith" effort to produce the witness.[35] Once the unavailability requirement has been satisfied, the prosecution must still demonstrate that the hearsay evidence possesses a sufficient indicia of reliability.[36] Reliability is presumed when the evidence falls within a traditional exception to the hearsay rule.[37] If no well-accepted exception exists, however, hearsay evidence will only possess the requisite amount of reliability if the defendant was given adequate opportunity to cross-examine the witness when the statement was made.[38] The dispositive question in confrontation clause analysis, and one that has not been provided a definitive answer by the Supreme Court, is whether the Constitution allows the hearsay statement of a witness who is available at trial, but was not cross-examined at the time the out-of-court statement was made, to be admitted at trial.[39]

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procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

FED. R. EVID. 804(a).

35. *See* Barber, 390 U.S. at 724-25. A witness is not "unavailable" unless a good faith effort has been made to secure his presence at trial. *See id.*; *see also* Roberts, 448 U.S. at 74-75. In holding the prosecutor's attempt to find a witness by inquiring of witness' parents and sending five subpoenas to witness' home sufficient to meet good-faith requirement, the Court in *Roberts* stated that "if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution." *Id.*; *cf.* Mancusi v. Stubbs, 408 U.S. 211, 212 (1971)(witness moving to foreign country was sufficient evidence to establish unavailability).

36. Roberts, 448 U.S. at 66. The primary concern of the Supreme Court in its dealings with hearsay evidence has been to guarantee that statements of a hearsay declarant absent from trial be accompanied by adequate indicia of reliability before being introduced against a defendant. Mancusi, 408 U.S. at 213. "The Court has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " Roberts, 448 U.S. at 66.

37. *See* Roberts, 448 U.S. at 66. The Supreme Court has stated that: "[r]eliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception." *Id.* For example, although dying declarations are a classic example of hearsay evidence, "from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility." Mattox v. United States, 156 U.S. 237, 243 (1895).

38. *See* Pointer v. Texas, 380 U.S. 400, 407 (1965)(defendant's right to confrontation violated when witness' statement admitted without being subject to cross-examination by defendant at time of statement's making); Mattox, 156 U.S. at 242 (admission of witness' testimony given at previous trial upheld because cross-examination of witness had occurred).

39. *See* California v. Green, 399 U.S. 149, 161 (1970). In *Green* the United States Supreme Court maintained that no logical basis existed upon which to conclude that subsequent cross-examination at trial is less truth evocative than contemporaneous cross-examination, so as to be repugnant to the confrontation clause. *See id.* at 161. However, this conclusion should be considered in view of the unique factual context of the *Green* case. *Id.* at

Confusion as to whether the confrontation clause requires contemporaneous cross-examination or allows belated cross-examination persists in the courts of appeals in Texas.[40] The conflict arises from varying interpretations of article 38.071, section 2, of the Texas Code of Criminal Procedure,[41] which provides that pre-trial videotaped statements may be admitted into evidence if neither party's counsel was present during the taped interview[42] and "the child is available to testify" at trial.[43] Texas courts which have

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172 (Harlan, J., concurring). In *Green*, the witness against the accused was subject to cross-examination at the time of the out-of-court statement, since the statement was made at a preliminary hearing; the witness was further available for cross-examination at trial. *Id.* at 151. Justice Harlan, in his concurring opinion, recognized the limited context in which the decision was rendered, observing that the "precise holding of the Court [was] that the Confrontation Clause of the Sixth Amendment does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross examination, to prove the truth of the matter asserted therein, when the declarant is available as a witness at trial." *Id.* at 172. The ambiguities surrounding the *Green* holding were propogated by the Court's later decision to disregard a state supreme court's failure to follow the language in *Green*. *See* Roberts, 448 U.S. at 70. *Green* has been interpreted as only applicable when the out-of-court statement was made at a preliminary hearing and subject to contemporaneous cross-examination at both the pretrial hearing and at trial. *See* Romines v. State, 717 S.W.2d 745, 750 (Tex. App.—Fort Worth 1986, no pet.). In *Romines* the court held that the great amount of time between the child's pretrial testimony and the trial was sufficient evidence to support a finding that the belated cross-examination was an unconstitutional substitute for cross-examination contemporaneous with the making of the pre-trial statement. *See id.* at 753. The court in *Romines* indicated that it declined to rely on *Green* as controlling because the *Green* holding represented the proposition that only when a witness' pre-trial testimony and testimony at trial is subject to cross-examination, will the admission of the pre-trial testimony be in conformity with the confrontation clause. *See id.* at 750.

40. *Compare* Long v. State, 694 S.W.2d 185, 191-92 (Tex. App.— Dallas 1985)(holding statute allowing admission of pre-trial videotaped testimony and giving defendant belated opportunity to cross-examine witness unconstitutional since did not condition admissibility of videotape on contemporaneous in-court testimony and cross-examination of witness). *aff'd*, Not. 867-85 (Tex. Crim. App. July 1, 1987) *with* Jolly v. State, 681 S.W.2d 689, 695 (Tex. App.—Houston [14th Dist.] 1984, pet. granted)(defendant's failure to cross-examine child whose pre-trial testimony was admitted pursuant to article 38.071, section 2, was waiver of confrontation right).

41. TEX. CODE CRIM. PROC. ANN. art. 38.071(2) (Vernon Supp. 1987).

42. *See id.* § 2(a)(1).

43. *Id.* § 2(a)(8). *Compare* Pierce v. State, 724 S.W.2d 928, 929 (Tex. App.—Austin 1987, no pet.)(constitutionally of article 38.071, section 2, upheld on grounds that confrontation clause does not require contemporaneous cross-examination) *and* Alexander v. State, 692 S.W.2d 563, 566-67 (Tex. App.—Eastland 1985, pet. granted)(constitutionally of article 38.071, section 2, upheld because defendant allowed to cross-examine child at trial) *with* Buckner v. State, 719 S.W.2d 644, 650 (Tex. App.—Fort Worth 1986, no pet.)(article 38.071, section 2, violates defendant's right to confrontation because defendant not given adequate opportunity to cross-examine) *and* Long v. State, 694 S.W.2d 185, 187 (Tex. App.—Dallas 1985)(article 38.071, section 2, held to be violation of confrontation clause because defendant denied right to contemporaneous cross-examination).

upheld article 38.071, section 2, as giving sufficient protection of a defendant's right to confrontation and cross-examination have relied upon the United States Supreme Court's statement in *California v. Green*[44] that "the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance so long as the defendant is assured of full and effective cross-examination at the time of trial."[45] Those courts holding article 38.071, section 2, unconstitutional have contended that the confrontation clause guarantees a defendant the right to contemporaneous cross-examination of witnesses against him at the time of the witness' original statement and that section 2 abrogates this right.[46] To resolve the conflict between lower courts of appeals' interpretations of the Texas statute, and address the respective rights between child victims and the accused's right to confrontation, the Texas Court of Criminal Appeals granted the state's petition in *Long v. State*.

In *Long v. State*,[47] the Court of Criminal Appeals addressed the constitutionality of article 38.071, section 2, of the Texas Code of Criminal Procedure, which authorized the admission of a pre-trial videotape of a child sex-abuse victim without the defendant's prior cross-examination if the defendant had the opportunity to cross-examine the child at trial.[48] The court held

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44. 399 U.S. 149 (1970).

45. *Id.* at 159. The Court in *Green* prefaced its conclusion upon the observation that when the witness testifies at trial, the usual hearsay concerns are eliminated since the witness is "present and subject to cross-examination and there is ample opportunity to test him as to the basis of his former statement." *Id.* at 155 (quoting 3 J. WIGMORE, EVIDENCE § 1018 (Chadbourne rev. 1970)); *accord* Tolbert v. State, 697 S.W.2d 795 (Tex. App.—Houston [1st Dist.] 1985, pet. granted) (confrontation clause does not require that defendant be given opportunity to cross-examine child during videotaping); Jolly v. State, 681 S.W.2d 689, 695 (Tex. App.—Houston [14th Dist.] 1984, pet. granted)(statute's provision requiring availability of child at trial for cross-examination adequately protects defendant's sixth amendment confrontation rights).

46. *See* Romines v. State, 717 S.W.2d 745, 752 (Tex. App.—Fort Worth 1986, no pet.). The court in *Romines* opined that because the child's memory fades during the interim between videotaping and trial, belated cross-examination must be considered a constitutionally inadequate substitute for contemporaneous cross-examination. *See id.* at 753; *see also* Long v. State, 694 S.W.2d 185, 191 (Tex. App. - Dallas, 1985), *aff'd*, No. 867-85 (Tex. Crim. App. July 1, 1987). In *Long*, the court of appeals held article 38.071 unconstitutional because it neither requires the child to testify in court, nor allows the defendant to cross-examine the child during the state's case-in-chief. *See id.*; *see also* Buckner, 719 S.W.2d at 650 (opportunities to cross-examine child at trial not adequate substitute for opportunity to cross-examine child contemporaneously with videotaping). Other jurisdictions are struggling with the constitutionality of child videotaping statutes. *See* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 817-18 (1987). Within the last decade a large number of states have adopted legislation allowing a child's pre-trial videotaped testimony to be introduced at trial. *See id.* at 818.

47. No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library).

48. *See id.* at screen 30-31.

that article 38.071, section 2, violated a defendant's right to face-to-face confrontation[49] and due process as guaranteed under both Texas and federal law.[50] The court concluded that the statute could be upheld only if it were narrowly drawn to effect a compelling state interest.[51] Although the court recognized that the prevention of undue trauma to child sex abuse victims was a compelling state interest,[52] it nevertheless held that article 38.071 was unconstitutionally overbroad in its attempt to protect this interest.[53] The court's holding was predicated upon its determination that a compelling state interest may diminish a defendant's right to confrontation only when the significance of the state interest is demonstrated in each case.[54] Article 38.071 must fail, the court stated, because it assumed that confrontation in

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49. *See id.* at screen 31. The court in *Long* recognized that the requirement of face-to-face confrontation can only be suspended by a "well-recognized exception to the hearsay rule" or by the witness' unavailability to testify and an adequate indicia of reliability of the prior testimony. *Id.* The court maintained that no well-recognized exception existed in the instant case, and that furthermore, "unavailability is obviously not a consideration and the idea of acquiring the testimony in a 'neutral, safe environment', absent cross-examination is certainly not indicative of the testimony having an indicia of reliability." *Id.*

50. *See id.* at screen 52. Judge Duncan held that article 38.071, both facially and as applied in Long's case, was an unconstitutional deprivation of Long's right to confrontation under the sixth and fourteenth amendments to the United States Constitution and article I, section 10, of the Texas Constitution; to due process under the fourteenth amendment to the United States Constitution; and to due course of law under article I, section 19, of the Texas Constitution. *See id.* at screen 30.

51. *Id.* at screen 34. The court, citing *Roe v. Wade*, 410 U.S. 113 (1973), stated that when a statute limits a defendant's fundamental right to confrontation, the statute must be supported by a compelling state interest. *See id.* Furthermore, even when a compelling state interest supports the statute infringing upon a defendant's right to confrontation, the statute must still be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at screen 34-35.

52. *See id.* at screen 34. The court made note of both the increasing number of child sex abuse cases and the fact that, in some instances, trauma will result when the child is forced to testify in open court in the presence of the defendant. *See id.* The court acknowledged that the interest furthered by the statute was to prevent this trauma by allowing the state to introduce the testimony of a child sex-abuse victim without having to call the child as a witness. *See id.* at screen 30. Judge Duncan stated, however, that article 38.071's requirement that either party be allowed to call the child to testify and the defendant be allowed to cross-examine, appeared to subvert the statute's purpose of preventing trauma in the child. *See id.*

53. *See id.* at screen 38.

54. *See id.* at screen 36-37. The court stated "[u]nquestionably, in specific cases a compelling state interest will exist to a degree sufficient to create a necessity that requires a diminution of a defendant's right of confrontation. But, this necessity must be the practical equivalent of a witness' unavailability." *Id.* at screen 36. The court noted that in such a case article I, section 10, of the Texas Constitution and the sixth amendment of the United States Constitution would not be violated. The court stated, however, that a state's interest in preventing trauma to the child does not override a defendant's fundamental right to confrontation in every case, "for it is clear that the circumstances of the particular case may affect the significance of that interest." *Id.* at screen 37.

every case would produce unnecessary trauma in the child.[55] The court further asserted that even assuming confrontation in every case would pose a sufficient threat to the child's welfare so as to render the child unavailable, the videotaped testimony lacked the requisite indicia of reliability because the statute did not afford the defendant adequate opportunity to cross-examine the child.[56] The court observed that the provision in the statute allowing the defendant to call and cross-examine the child operated to violate the defendant's right to due process and a fair trial[57] by forcing the defendant to choose between exercising his fundamental right of cross-examination or his constitutional right to a fair and impartial trial.[58] Upon observing that Long, by calling the child to the stand, risked intensifying the jury's sympathies toward the child to the extent that a fair verdict could not be rendered, the court concluded that "[d]ue process [would] not condone such a monumental abuse."[59]

Judge Teague focused in his concurring opinion upon the due process problems implicated by the statute.[60] Judge Teague brought attention to the principle that due process requires the state to prove beyond a reasonable doubt every element of the crime with which a defendant is charged.[61] Judge Teague argued that due process forbids a state to meet this require-

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55. *See id.* at screen 36-38. The court, relying upon *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), held that a trial court must determine, on a case-by-case method, whether the child's welfare overrides the defendant's right to confrontation. *See id.*

56. *Id.* at screen 39-41. In holding that the defendant's opportunity to cross-examine the child at trial was insufficient to confer reliability on the child's prior testimony, the court distinguished *Green*, arguing that in *Green* the defendant was given an opportunity to cross-examine the witness at the time the pre-trial statement was made. *See id.* at screen 41-42.

57. *See id.* at screen 42-43. The court recognized that "a fair trial in a fair tribunal is a basic requirement of due process." *Id.* at screen 43 (quoting *In re* Murchison, 349 U.S. 133, 136 (1965)). The court then noted that the accused has never been required to call the witness against him in order to exercise his fundamental right to cross-examination. *See id.* at screen 46. The court reasoned that if the defendant chose to call the child, he not only risked inflaming the jury but also would advantage the prosecution by allowing it a second opportunity to present the videotape to the jury. *See id.* at screen 45-47. The court concluded that "[a] risk of this nature does not comport with the concept of due process." *Id.* at screen 45.

58. *Id.* at screen 45. The court reasoned that the procedure allowed the state to introduce its case-in-chief twice, resulting in the bolstering of facts favorable to the state's case. *See id.* The court concluded that the procedure destroyed the fairness of the proceeding to the extent that it violated the defendant's right to due process. *Id.* at screen 49.

59. *Id.* at screen 49.

60. *See id.* at screen 63-64 (Teague, J., concurring). Judge Teague found the primary issue to be whether a statute can be upheld which permits the state "to introduce into evidence during its case-in-chief an ex-parte out-of-court hearsay statement of a witness, that was recorded pre-trial on a videotape, at which appellant was not given the opportunity to be present and cross-examine the witness, and where the witness was available and willing to testify against the defendant during the state's case-in-chief." *Id.* at screen 55.

61. *See id.* at screen 63.

ment by introducing into evidence, during its case-in-chief, the pre-trial testimony of a child who is available to testify at trial but whom the defendant was unable to cross-examine.[62]

Concurring and dissenting, Judge Campbell stated that although he believed Long was not denied his right to cross-examination,[63] the manner in which the statute provided for the exercise of this right violated due process.[64] Judge Campbell further argued that the statute unconstitutionally compelled a defendant to elect between his right to remain passive and his right to cross-examine.[65]

Judge McCormick, dissenting, asserted that the majority's holding was representative of the faulty proposition that only contemporaneous cross-examination would suffice to fulfill confrontation clause requirements.[66] Judge McCormick argued that the majority ignored both past United States Supreme Court precedent[67] and the Texas rules of evidence,[68] which maintain that the statements of a hearsay declarant, available at trial and subject to cross-examination, are not hearsay. Judge McCormick further stated that no confrontation clause problems were triggered from the face of the statute, and thus any collateral due process problems created by its operation could

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62. *Id.* at screen 64. Judge Teague concluded that the statute could be upheld only if the court chose to ignore the traditional safeguards extended to the accused by the American criminal justice system. *See id.*

63. *Id.* at screen 68 (Campbell, J., concurring and dissenting). Judge Campbell asserted that Long was given an opportunity to cross-examine the child and did, in fact, cross-examine the child. *See id.*

64. *See id.* Judge Campbell stated that the statute was unconstitutional in failing to require that the state call the child to testify after the videotape is introduced. *See id.* Judge Campbell further asserted that a defendant's right to cross-examination compels the state to attempt to procure its evidence at trial before it can resort to the use of hearsay, videotaped statements. *See id.* at 68-69.

65. *See id.* at screen 68. Judge Campbell contended that a defendant's constitutional right to remain passive stems from the language in the fifth amendment to the United States Constitution and article I, section 10, of the Texas Constitution, which provide that every person has the right to be free from coerced self-incrimination. *See id.* at screen 69.

66. *See id.* at screen 70 (McCormick, J., dissenting). Judge McCormick observed that an analysis of the majority opinion made it "apparent that no future statute [would] be allowed to survive absent a procedure which allows contemporaneous cross-examination to be made at the time the child was interviewed on tape." *Id.*

67. *See id.* at screen 72. Judge McCormick opined that the majority failed to follow the holding in *Green*, which, he argued, clearly established that the mere opportunity to cross-examine a hearsay declarant at trial about the out-of-court statements is all that the right to cross-examination guarantees. *Id.* at screen 71-72.

68. *See id.* at screen 73-74. Judge McCormick asserted that the majority incorrectly disregarded Rule 801(e)(1)(D) of the Texas Rules of Evidence, which provides that a prior statement made by a witness is not hearsay "if the witness testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is taken and offered in accordance with Article 38.071 . . . ." *Id.*

be rectified by an amended construction which would require the child to testify prior to admitting the videotape.[69]

Increased public awareness of the rising occurrence of child sexual abuse,[70] coupled with the difficulties in prosecuting perpetrators,[71] have given rise to a number of state statutes[72] designed to facilitate efficient disposition of child sex abuse cases, while also protecting the psychological well-

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69. *See id.* at screen 73-74. McCormick noted that if the majority was troubled with due process implications in the operation of the statements, then it "is a simple matter to require the State to call the child declarant before playing the videotape, thus preserving what the majority views as the defendant's right to remain passive as well as any and all far-flung right of confrontation." *Id.*

70. *See, e.g.*, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 7 COLUM. L. REV. 1745, 1745 (1983)(citing statistical evidence indicating dramatic growth of child sex abuse cases in recent years); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806 (1985)(asserting that media has focused increased attention on growing statistics of child sex abuse); Note, *Videotaping Children's Testimony: An Empirical View*, 4 MICH. L. REV. 809, 809 (1987)(increasing number of reported instances of child sexual abuse). Additionally, child sexual abuse is a grossly underreported crime. *See* Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L.J. 279, 283 (1986)(statistics of known victims do not adequately reflect true extent of problem); Note, State v. McCafferty: *The Conflict Between a Defendant's Right to Confrontation and the Need for Children's Hearsay Statements in Sexual Abuse Cases*, 30 S. DAK. L. REV. 663, 663-64 (1985)(problems in reporting are compounded by fact that child, as only witness, may say nothing because lack of awareness that anything is wrong); Note, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 640 (1985)(statistics indicating only six percent of child sex abuse cases are reported).

71. *See* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1671 (1986). In arguing that the criminal justice system is unable to effectively prosecute such crimes, one commentator has noted that the only evidence of sexual abuse is often the child's testimony and that, "elapsed time, courtroom pressures, and the necessity to face the offender (often a loved one), [make] preservation of the testimony almost impossible." *Id.* Additional problems encountered in prosecuting child sex abuse cases include the common inability of children to recall crucial details, the reluctance of parents to press charges and force the child to endure a painful ordeal in the courtroom, and the fact that the child is often the only witness. *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985).

72. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1986); N.Y. CRIM. PROC. LAW § 190.32 (McKinney Supp. 1987); *see also* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 818-19 (1987)(in effort to protect child sex abuse victims from undue trauma, twenty-five states have passed legislation allowing introduction of child's videotaped testimony at trial). Many state legislatures have responded to the need to protect children from trauma and effectively prosecute child sex abuse cases by passing various hearsay exceptions and videotaping procedures. *See* Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L.J. 279, 280-81 (1986).

being of the child victim.[73] Indeed, the Texas legislature enacted article 38.071 to achieve this very purpose.[74]

In addressing the constitutionality of article 38.071, the court in *Long* was required to reconcile the conflict between the state's need to protect child witnesses and the defendant's right to confrontation and cross-examination.[75] Although the United States Supreme Court has not yet directly addressed this issue,[76] it has developed general principles to measure the extent to which legislation enacted to protect child witnesses can permissibly infringe upon a defendant's right to confrontation.[77] The court in *Long* correctly adhered to these principles by requiring that (1) a necessary predicate for the admission of a child sex abuse victim's pre-trial testimony is a demonstration of the child's legal unavailability;[78] and (2) the opportunity for contemporaneous cross-examination, or an effective substitute, be afforded the defendant.[79]

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73. *See* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 818-19 (1987). Numerous state statutes have been enacted, the bulk of which attempt to reduce the trauma which may be suffered by child witnesses in criminal cases. *Id.* at 819 n.31. *See generally* Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L.J. 279, 280-81 (1986)(to facilitate effective prosecution of child sex-abuse perpetrators and protect child from traumatizing in court testimony, many state legislators have passed videotaping statutes).

74. *See* Tex. Senate Jurisprudence Comm. Minutes, 68th Leg. 1-3 (Apr. 19, 1983), *reprinted in* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1671 (1987)(article 38.071 adopted to facilitate effective prosecution of child sex abuse cases).

75. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-09 (1982); State v. Reid, 559 P.2d 136, 149 (Ariz. 1976)(in criminal trial defendant's right to confrontation must be weighed against particular needs of witness); State v. Melendez, 661 P.2d 654, 656-57 (Ariz. Ct. App. 1982)(weighing defendant's right to confrontation against state's need to present videotaped testimony); *see also* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 818-19 (1987)(state statute enacted to diminish trauma experienced by child witness must be balanced against a defendant's right to confrontation). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985)(discussing balancing right to confrontation with state interests).

76. Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 819 (1987). The United States Supreme Court has not struck a definitive constitutional balance between state attempts to protect child witnesses and a defendant's right to confrontation. *See id.*

77. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980)(citing Barber v. Page, 390 U.S. 719, 722 (1968), and Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972)). The Court in *Roberts* stated that before a hearsay declarant's statement will be used the declarant must be unavailable at trial. *See id.* at 65. The Court further held that before the hearsay declarant would be deemed unavailable, the prosecution must first make a good-faith effort to produce the declarant. *See id.* at 74.

78. Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987) (WESTLAW, Texas Cases Library, screen 38).

79. *See id.* at screen 39.

The *Long* court's holding that unavailability be demonstrated in each case is reflective of the preference expressed by legislatures and in judicial precedent for face-to-face confrontation between the alleged child victim and the accused.[80] This constitutional right of the defendant to literally confront the child witness before the trier of fact heightens the reliability of the child's testimony[81] and enhances the overall "integrity of the fact finding process."[82] Because face-to-face confrontation before the jury serves an independent truth-evocative function, courts should be willing to dispense with it only upon demonstration, in each case, of an overriding compelling state interest.[83] Such a compelling interest may well exist when a child, called to the witness stand, becomes overwhelmed with fear at the prospect of recounting the details of the sexual abuse in front of the alleged perpetrator and a crowded courtroom.[84] Indeed, evidence suggests that testimony

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80. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 814 (1985)(citing statutes explicitly requiring defendant's presence and opportunity for cross-examination at videotaping); Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 819 (1987)(many state statutes allowing videotaped testimony require defendant to be present at the videotaping). This preference for face-to-face confrontation is shared by the judicial system as well. *See* California v. Green, 399 U.S. 149, 157 (1970). It is the "literal right to confront the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *Id.* at 157; *see also* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979)(defendant's sixth amendment rights include right to face-to-face confrontation at all stages of trial). A defendant's right to confrontation under Texas law has been interpreted to require that the state's witness be present at the defendant's trial or at least viewed in the defendant's presence and available for cross-examination by the defendant. Kemper v. State, 63 Tex. Crim. 1, 48, 138 S.W. 1025, 1038, *overruled on other grounds*, 63 Tex. Crim. 216, 142 S.W. 533 (1911).

81. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895)(face-to-face confrontation before jury enhances reliability of witness' testimony); United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). The Court in *Benfield* observed that "[m]ost believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." *Id.* Open court testimony of the witness against the defendant is more reliable if the defendant is present and given the opportunity to cross-examine. Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U.L. REV. 193, 193 (1983).

82. Chambers v. Mississippi, 410 U.S. 284, 295 (1973)(quoting Berger v. California, 393 U.S. 314, 315 (1969)).

83. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-09 (1982)(denial of defendant's fundamental right to confrontation requires weighing of state's compelling interest in protecting child victims from trauma on case-by-case basis).

84. *See id.* at 607 (protection of child sex abuse victims from psychological trauma resulting from in-court testimony is compelling state interest); State v. Melendez, 661 P.2d 654, 656 (Ariz. Ct. App. 1982)(expert's corroboration of child witness' expression of fear in testifying sufficient to allow child not to testify). *But see* State v. Gilbert, 326 N.W.2d 744, 749 (Wis. 1982)(no precedent found to support proposition that child may be excused from testifying on basis of personal fear or emotional harm). *See generally* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53

under such circumstances not only may severely traumatize the child,[85] but also casts doubt upon the reliability of what little testimony may be procured as a result.[86] Therefore, the state's need to both protect the child and present some evidence[87] may be sufficiently compelling to override the defendant's rights to confrontation by admitting the child's pre-trial videotaped testimony.[88] However, this balancing between a defendant's right to confrontation and a state's compelling interest must, as the *Long* court correctly decided, take place on a case-by-case basis.[89]

FORDHAM L. REV. 995, 998 (1985)(discussing potential trauma arising from child's fear of confrontation with sexual abuser).

85. *See* State v. Sheppard, 484 A.2d 1330, 1342 (N.J. Super. Ct. Law Div. 1984). The court in *Sheppard* acknowledged that children who testify "may be more damaged by their traumatic role in the court proceedings than they were by their abuse." *Id.* at 1342. The following factors have been identified as contributing to the stress facing a child called to recount sexual abuse in court: "repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative." Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969).

86. *See* Sheppard, 484 A.2d at 1333. The *Sheppard* court observed that a child sex abuse victim may develop such severe anxiety by the prospect of having to testify in the presence of the accused that he/she will lack the capacity to articulate anything about the crime. *See id.* It is generally believed that child victims make poor witnesses, and that their testimony becomes increasingly suspect when given in child sex-abuse cases. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985). Additionally, research indicates that typical trial procedures frustrate attempts to obtain accurate and complete testimony from child witnesses. *See* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 816 (1987).

87. *See* Mattox v. United States, 156 U.S. 237, 243 (1895)(even when confrontation has not occurred the prosecution may be allowed to present some hearsay evidence as opposed to no evidence at all). The state may be allowed to introduce hearsay evidence which is otherwise reliable when unable to adduce any non-hearsay evidence. *See* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH. L. REV. 1669, 1677 (1986).

88. *See* Melendez, 661 P.2d at 656-57 (child witness' fear of testifying coupled with probability that child would become unable to speak if called as witness creates compelling interest sufficient to override defendant's confrontation right); *see also* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 819 (1985). It has been suggested that "if, having been called to testify, the child proves too frightened or inarticulate to allow any meaningful examination, then a finding of unavailability would be justified, and the child's hearsay statements should be admitted if properly corroborated." *Id.* It has similarly been argued that a child's fear which makes testimony impossible is a special circumstance which requires "flexibility in the application of confrontation clause requirements - especially the requirement of face-to-face meeting of the victim and the alleged abuser - to the use of videotaped child testimony." Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 828 (1987).

89. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-08 (1982). In *Globe*, the United States Supreme Court addressed the constitutionality of a Massachusetts statute

The court in *Long* further found that article 38.071 unconstitutionally deprived a defendant of an adequate opportunity to cross-examine the witnesses against him.[90] Although the court properly decided that article 38.071 deprived Long of adequate opportunity to cross-examine, its decision leaves ambiguous the question of whether the confrontation clause requires, in every case, contemporaneous cross-examination at the time the prior statement was made.[91] The court addressed the United States Supreme Court's decision in *Green*, which held that the confrontation clause does not require the defendant to be given contemporaneous opportunity to cross-examine the witness at trial.[92] Distinguishing *Long* from *Green*, the majority in *Long* observed that contemporaneous cross-examination during the prior testimony had taken place in *Green*, but was not present in *Long*.[93]

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requiring "under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial." *Id.* at 602. The state argued that the statute furthered a compelling state interest in protecting the child victim from psychological harm at trial. *See id.* at 607. The Supreme Court agreed that this was a compelling state interest, but nevertheless it did not warrant a mandatory closure rule since the significance of that interest would vary from case to case. *Id.* at 608. The Court in *Globe* held that a trial court may determine on an individualized basis whether closure in a specific case is necessary to further the state's interest in protecting the child's welfare. *Id.* at 608. The mere potential for trauma must never be allowed to completely foreclose a defendant's right to confrontation. *See* Vasquez v. State, 167 S.W.2d 1030, 1032 (Tex. Crim. App. 1942)(child's fear of testifying insufficient to relieve state of duty to call her at trial). Nonetheless, it may be argued that, although some trauma is necessarily involved with child testimony, "it cannot justify depriving the defendant of a fundamental aspect of his right to a fair trial." Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 819 (1985).

90. Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 51-52).

91. *See id.* at screen 39. The majority in *Long* opined that, even assuming that the child could be classified as unavailable, the videotaped testimony could be deemed reliable only if the defendant was given an opportunity for cross-examination. *See id.* It remains unclear whether the majority intended by this statement to require that cross-examination take place during the videotaping or following the admission of the videotape at trial. The majority's attempt to distinguish *Green* and the dissent's opinion that the majority's holding will compel future statutes to include a provision requiring that contemporaneous cross-examination be made at the time of the videotaping, appear to support the former conclusion. *See id.* at screen 40-42; *id.* at 70 (McCormick, J., dissenting). In support of the latter conclusion is the failure of the majority to state that the belated opportunity to cross-examine was insufficient because the confrontation clause requires contemporaneous cross-examination. Instead, the majority held that the belated cross-examination was insufficient because the method by which it was to be exercised worked to violate the defendant's right to due process. *See id.* at screen 42-46.

92. *See* California v. Green, 399 U.S. 149, 159 (1970). The Supreme Court stated that it could not "share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination with the original statement." *Id.*

93. Long, at screen 41-42.

Despite this distinction, the court's holding in *Long* appears to have rested primarily upon a determination that the videotaped testimony lacked sufficient indicia of reliability because its admission was not conditioned upon the defendant's simultaneous right to cross-examine the child at trial, rather than the fact that cross-examination did not occur at the time of the videotaping.[94] The court concluded that article 38.071, by allowing Long to call the child to the stand only after the videotape had been admitted and the state had rested its case, placed Long "in the untenable position of either requiring the child to testify and thereby run the very real risk of incurring the wrath of the jury" or relinquish the right to cross-examine the child.[95] This conclusion is consistent with the assumption, well-established by Supreme Court precedent, that the confrontation clause guarantees a defendant an adequate opportunity to cross-examine.[96] Because article 38.071 permitted cross-examination of the child only after admission of the videotape and resting of the state's case, it failed to provide the defendant a constitutionally adequate opportunity to cross-examine the witnesses against him.[97]

A statutory solution to the problem addressed by the court in *Long* should require that confrontation and cross-examination take place at the videotaping session.[98] Under these circumstances, the reliability of the evidence would be greatly enhanced because the testimony would be: (1) fresh;[99]

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94. *See id.* at screen 39. The majority prefaced its invalidation of the statute with the observation that the child's testimony could possess a necessary indicia of reliability only if it were first subject to cross-examination. *See id.* Thus, because cross-examination did not take place during the videotaping, nor was an adequate opportunity to cross-examine afforded the defendant at trial, the testimony lacked the requisite reliability needed to meet confrontation clause requirements. *Id.*

95. *Id.* at screen 47.

96. *Id.* at screen 38-39.

97. *Id.* at screen 36-39, 44-49.

98. *See* Note, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 644 (1985). A procedure which allows the accused and his lawyer to be present and cross-examine the child permits the admission in court of what would otherwise be unobtainable, relevant evidence. *Id.* at 644. Statutes which do not allow the defendant to confront the child victim while the child testifies do not guarantee the trustworthiness of the evidence obtained. *See* Note, *The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma*, 14 HOFSTRA L. REV. 261, 290 (1985).

99. *See* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1751 (1983). Citing research, this author asserts that "since a child's memory fades rapidly over time, the account given closest in time to the actual event is the one more likely to be accurate." *Id.* at 1750. When the videotape is made immediately after the alleged abuse the child's memory is stronger and more detailed. Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 824 (1987). The "child's inability to recollect details is especially significant in light of the great lapse of time between the commission of the crime and the trial." *Id.*; *see also* United States v. Jones, 477 F.2d 1213, 1216-17 (D.C. Cir. 1973)(more than eight months between sexual abuse and trial); People v.

(2) elicited in an atmosphere more conducive to reliability;[100] and (3) available for later review by the trier of fact.[101] Article 38.071 fails to achieve all but the last of these objectives, and further thwarts its asserted purpose of minimizing the trauma experienced by a child required to testify in court by allowing the child to be called as a witness at trial.[102]

The legislature has recently amended article 38.071 in an attempt to respect both the confrontation rights of a defendant and the special needs of a child sex abuse victim.[103] The amended version provides that the pre-indictment videotaped testimony of an alleged child sex abuse victim may be admitted into evidence only if the trial court determines that the child is unavailable to testify at trial.[104] If a videotape is made under section 2(a) of the article, as amended, section 2(b) requires both attorneys to be allowed to develop written interrogatories for presentment to the child by a neutral individual, and recorded under similar circumstances as the original videotape.[105] A videotape made under section 2(a) may not be admitted unless a videotape under section 2(b) is simultaneously admitted.[106] If the trial court finds the videotape admissible under section 2 of the new statute, the child

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Debrezeny, 253 N.W.2d 776, 778 (Mich. Ct. App. 1977)(twenty months passed in interim between defendant's arrest and beginning of his trial).

100. *See generally* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 815-17 (1987)(videotaping child sex abuse victim's testimony in non-traditional courtroom setting is more conducive to reliability of evidence).

101. *See* United States v. Binder, 769 F.2d 595, 600-01 (9th Cir. 1985). The court in *Binder* asserted that videotaped testimony allows the jury to both hear the witness' testimony and observe the witness' demeanor while testifying. *See id.* at 600. The court in *Binder* went so far as to deem videotaped testimony "as the functional equivalent of a live witness." *Id. See generally* Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 832 (1987)(videotaping captures and preserves child's demeanor for later jury review).

102. *See* Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 31)(asserted purpose of statute to prevent trauma to child resulting from in-court testimony, however, statute expressly requires child's presence at trial and extends to defendant the right to call child as a witness).

103. Act of 1987, ch. 55, § 1, Tex. Sess. Law Serv. 365 (Vernon)(amending TEX. CRIM. PROC. CODE ANN. art 38.071(2) (Vernon Supp. 1987)). The purpose of the Act

> is to establish procedures for the taking of testimony of child complainants in certain criminal prosecutions, while preserving the constitutional rights of defendants . . . . The state interest concerns the children who are victims of sexual offenses and who are subjected to the intimidating nature of confronting the defendant and the pressures related to the ordinary participation of the victim in a courtroom trial . . . . By providing the changes included in this Act the legislature believes that the courts will have a sufficiently flexible system that properly protects the rights of defendants while reducing the deleterious effects of the criminal justice system on certain child sex crime victims.

Id. § 2, at 374-75.

104. *See id.* at 366.

105. *See id.*

106. *Id.* § 2(c), at 367.

cannot be required to testify at trial unless good cause in shown.[107] The amended version of article 38.071, by requiring that the trial court first find the child unavailable before admitting the pre-trial videotape, rectifies the overinclusiveness problem the *Long* court identified within article 38.071, which did not require such a finding.[108] Additionally, the new version redresses the due process problem by requiring simultaneous admission of the child's testimony and the defendant's cross-examination.[109] The article's requirement, however, that the attorneys submit pre-trial interrogatories in place of face-to-face confrontation fatally disregards the importance the Court of Criminal Appeals attaches to both face-to-face confrontation between the victim and the accused, and the accused's right to an opportunity for adequate cross-examination.[110]

The Texas Court of Criminal Appeals in *Long v. State* invalidated article 38.071 of the Texas Code of Criminal Procedure because it deprived a defendant of his fundamental right to confrontation and cross-examination. The majority's opinion confirmed that face-to-face confrontation serves an independent truth-seeking function at trial. The court's reluctance to allow intrusions upon a defendant's right to cross-examination furthers those values protected by the confrontation clause. It is not entirely clear from *Long*

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107. *Id.* § 6, at 373.

108. *See* Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 38). The *Long* court held article 38.071 unconstitutional because the statute did not require a demonstration of unavailability in each case, but rather authorized the prosecution to refrain from calling the child as a witness in every case. The amended version of the statute requires that the child be found by the trial court to be unavailable to testify before the videotaped testimony of the child will be admitted. *See* Act of 1987, ch. 55, § 1, Tex. Sess. Law Serv. 366 (Vernon)(amending TEX. CRIM. PROC. CODE ANN. art. 38.071(2) (Vernon Supp. 1987)).

109. *See* Long v. State, No. 867-85 (Tex. Crim. App. July 1, 1987)(WESTLAW, Texas Cases Library, screen 36-39, 44-49). The *Long* court concluded that article 38.071 operated to violate Long's right to due process by allowing Long to cross-examine the child only after he had called her to the stand, the videotape had been admitted, and the state had rested its case. The amended version of article 38.071, on the other hand, has no provision requiring the defendant to call the child as a witness and does not allow the admission of the child's videotaped testimony unless the defendant's cross-examination is simultaneously admitted. *See* Act of 1987, ch. 55, § 1, Tex. Sess. Law Serv. 367 (Vernon)(amending TEX. CRIM. PROC. CODE ANN. art. 38.071(2) (Vernon Supp. 1987)).

110. *See, e.g.*, Harris v. State, 642 S.W.2d 471, 480 (Tex. Crim. App. 1982)(en banc)(denial of opportunity for defendant to effective cross-examination of witness violates right to confrontation); Porter v. State, 578 S.W.2d 742, 745 (Tex. Crim. App. 1979)(en banc)(right to fair trial and due process encompasses defendant's right to confrontation and cross examination); Garcia v. State, 210 S.W.2d 574, 578 (Tex. Crim. App. 1948)(accused's right to confrontation means that prosecution's witnesses shall be present at trial and subject to cross-examination); Vasquez v. State, 167 S.W.2d 1030, 1032 (Tex. Crim. App. 1942)(fright of young sexual abuse victim not sufficient to excuse state from affording defendant his right of confrontation).

whether a statute which provides for less than contemporaneous cross-examination will satisfy the court. The court's decision, however, indicates that the legislature's latest attempt to preserve out-of-court testimony in child sex abuse cases is likely to fail. The extent to which the court will go to protect the defendant's rights of confrontation and cross-examination, and whether article 38.071, as amended, is "flexible" enough to accommodate them, are issues which the court itself may be required to address in the near future.

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