CRIMINAL DEFENDANT HAS SIXTH AMENDMENT RIGHT TO PHYSICALLY CONFRONT WITNESS AT VIDEO-TAPED DEPOSITION

United States v. Benfield, 593 F.2d 815 (8th Cir. 1979)

In *United States v. Benfield*[1] the Eighth Circuit Court of Appeals clarified the application of the sixth amendment's confrontation clause[2] to a Rule 15 video-taped deposition[3] used in lieu of deponent's personal appearance[4] at a federal criminal trial.

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1. 593 F.2d 815 (8th Cir. 1979).

2. U.S. CONST. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (emphasis added).

3. FED. R. CRIM. P. 15 provides in relevant part:

Depositions

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . .

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. . . . The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

. . . .

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. . . .

4. FED. R. CRIM. P. 15(e), *supra* note 3, also allows the use of a deposition at trial as sub-

The government charged Russell Benfield in a four-count indictment[5] with the federal crime of misprision of the kidnapping of Patricia Cady.[6] Several months after the kidnapping, but before the trial, Cady developed psychiatric problems resulting in her hospitalization and necessitating two trial continuances.[7]

Subsequently, the government filed a request to take a video-taped deposition of Cady's testimony and, at the hearing on that request, her psychiatrist testified that Cady's psychiatric problems were directly related to her kidnapping.[8] He urged that if she must testify, the surroundings be less stressful than those of a courtroom and that she not be required to face Benfield.[9] Granting the government's motion for a deposition, the trial court ordered that Benfield could be "present at the deposition but not within the vision of Mrs. Patricia Cady."[10] Benfield, without Cady's knowledge, monitored her deposition from a separate room and, by sounding a buzzer, was able to interrupt the questioning

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stantive evidence if "the witness gives testimony at the trial or hearing inconsistent with his deposition." This use of the deposition was not at issue in *Benfield* and the court did not discuss it. *But see* California v. Green, 399 U.S. 149, 159 (1970) (if witness testifies at trial, witness' prior statement is admissible even if not subject to confrontation when made, as long as defendant is assured of effective cross-examination at trial). *Accord,* Nelson v. O'Neil, 402 U.S. 622, 626-27 (1971). *See generally* Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607,* 75 MICH. L. REV. 1565 (1977).

5. 593 F.2d at 817.

6. *Id.* 18 U.S.C. § 4 (1976) provides:

Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

7. 593 F.2d at 817 & n.3. Following her rescue by law enforcement officers, Cady participated in a news conference and press interviews. Her subsequent illness, however, left her unable to cope with crowd situations or work. *Id.*

8. *Id.* at 817.

9. *Id.*

10. *Id.* FED. R. CRIM. P. 15(b), *supra* note 3, allows the trial court to fix the terms upon which the defendant may be present at the deposition if the defendant is not in custody. The court of appeals noted a possible equal protection problem because Rule 15(b) seems to allow greater restrictions upon the defendant's presence at a deposition when the defendant is not in custody than when he is in custody. Additionally, the trial court's conditional order for a deposition may have violated Rule 15(d), *supra* note 3, which provides that "the scope and manner of examination and cross-examination [at the deposition] shall be such as would be allowed in the trial itself." The court of appeals did not resolve these questions because the parties failed to argue them or sufficiently develop them in the appellate record. 593 F.2d at 820 n.7.

to confer with his counsel outside the deposition room.[11]

The trial court admitted the video-taped deposition as substantive evidence against Benfield and allowed it to be shown to the jury.[12] Benfield was convicted and sentenced to two years in prison.[13] The Court of Appeals for the Eighth Circuit reversed, remanded, and *held:* The sixth amendment's confrontation clause assures the active participation of the accused at all stages of his criminal trial, including at a deposition.[14] Accordingly, in the absence of either a face-to-face meeting between defendant and witness or a showing that defendant had waived, forfeited, or lost by necessity his constitutional right of confrontation, the procedure that limited defendant's participation to monitoring the video-taped deposition and conferring with his attorney outside the deposition room after sounding a buzzer, without the deponent's knowledge, was unconstitutional.[15]

The sixth amendment guarantees the criminally accused the right to confront the witnesses against him.[16] In *Mattox v. United States*[17] the

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11. 593 F.2d at 817. Benfield's lawyer was allowed to cross-examine Cady at the deposition. *Id.*

12. *Id.* at 817, 822. FED. R. EVID. 804(a)(4) (applicable to FED. R. CRIM. P. 15 deposition proceedings through Rule 15(e), *supra* note 3) defines "unavailability as a witness" to include situations in which the witness "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Benfield argued that the video-taped deposition's admission was improper because the government had failed to demonstrate the unavailability of Cady at the time of trial. *See* Brief for Appellant at 39-42. The court of appeals conceded that the government's showing of Cady's unavailability at trial was "marginal" because the government had relied passively on the failure of Cady's psychiatrist to inform it of an improvement in Cady's condition. Nevertheless, the court did not reverse Benfield's conviction on this ground, commenting that "[a]n additional showing of the witness' mental condition and availability on the trial date would have been a much better practice." 593 F.2d at 817 n.4. *See also* note 41 *infra.*

13. 593 F.2d at 816-17.

14. *Id.* at 821.

15. *Id.* at 817, 820-22.

16. *See* note 2 *supra.* The Supreme Court declared the right of confrontation fundamental and applicable to the states in Pointer v. Texas, 380 U.S. 400 (1965), *overruling* Stein v. New York, 346 U.S. 156, 195-96 (1953), *and* West v. Louisiana, 194 U.S. 258, 264 (1904). For analyses testing rules of evidence by the standard of due process of law, see Chambers v. Mississippi, 410 U.S. 284, 294-303 (1973); Dutton v. Evans, 400 U.S. 74, 96-100 (1970) (Harlan, J., concurring); Greene v. McElroy, 360 U.S. 474, 506-08 (1959); *In re* Oliver, 333 U.S. 257, 273 (1948). *See generally* Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials,* 6 CONN. L. REV. 529 (1974); Griswold, *The Due Process Revolution and Confrontation,* 119 U. PA. L. REV. 711 (1971); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978); Note, *The Burger Court and the Confrontation Clause: A Return to the Fair Trial Rule,* 7 J. MAR. J. PRAC. & PROC. 136 (1973).

Supreme Court noted that although the defendant's right of confrontation normally includes a face-to-face meeting with the witness and an opportunity to subject the witness to cross-examination,[18] these constitutional safeguards must on occasion yield to "considerations of public policy and the necessities of the case."[19] After balancing the interests of the defendant and the public, the Court held that the testimony of a now-deceased witness at defendant's earlier trial on the same charge was admissible at defendant's retrial.[20]

Following *Mattox*, the Court repeatedly defined the essential elements of the confrontation clause as physical confrontation and cross-examination.[21] In *Douglas v. Alabama*,[22] however, the Court expressly stated that physical confrontation is not an indispensable part of the constitutional right.[23] Thereafter in *California v. Green*,[24] the Court omitted physical confrontation from its list of attributes of the confrontation clause.[25] The most recent decisions of the Supreme Court inter-

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17. 156 U.S. 237 (1895).

18. "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244.

19. *Id.* at 243. *See* notes 38-42 *infra* and accompanying text.

20. 156 U.S. at 243-44.

21. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) ("the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment"); Dowdell v. United States, 221 U.S. 325, 330 (1911) (right of confrontation was "intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him"); Kirby v. United States, 174 U.S. 47, 55 (1899) (defendant has trial right to confront witnesses "upon whom he [the accused] can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases").

22. 380 U.S. 415 (1965).

23. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418. *See also* Bruton v. United States, 391 U.S. 123, 127-28 (1968); Brookhart v. Janis, 384 U.S. 1, 3 (1966); Pointer v. Texas, 380 U.S. 400, 406-07 (1965).

24. 399 U.S. 149 (1970).

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

Id. at 158.

The Supreme Court has alluded to the demeanor aspect of confrontation on several occasions. *See, e.g.*, Barber v. Page, 390 U.S. 719, 725 (1968); Mattox v. United States, 156 U.S. 237, 242-43 (1895). *But see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 115 (1970) (in light of the

preting the confrontation clause dwell on the defendant's right to effective cross-examination[26] and refer to physical confrontation only incidentally.[27]

Despite the Court's conflicting statements about the requisites of confrontation,[28] it has emphasized the importance of the constitutional

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holding in *California v. Green* allowing the admission into evidence of prior recorded testimony of a witness testifying at trial, and the consequent denial of the factfinder's opportunity to observe the witness' demeanor when he was giving his earlier testimony, "the factfinder's observation of the witness' confrontation with the defendant is not constitutionally required" (citations omitted)).

26. *See, e.g.,* Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973).

27. *See, e.g.,* Davis v. Alaska, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' " (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

28. *See* notes 17-27 *supra* and accompanying text. The result of the Court's conflict is exemplified by the confusion within the Fifth Circuit. *Compare* Canal Zone v. P. (Pinto), 590 F.2d 1344, 1352 (5th Cir. 1979) ("cross-examination is the essential right secured by the confrontation clause"), *with* United States v. Amaya, 533 F.2d 188, 190 (5th Cir. 1976) ("[t]he primary object of the confrontation clause is to permit personal examination and cross-examination of the witness by the defendant"), *cert. denied*, 429 U.S. 1101 (1977).

The documentary history of the sixth amendment sheds little light on the exact meaning of the confrontation clause. *See generally* California v. Green, 399 U.S. 149, 174-79 (1970) (Harlan, J., concurring) and sources cited therein.

Some commentators believe that the confrontation clause was designed to prevent the kind of abuse that characterized the trial of Sir Walter Raleigh in England in 1603. Raleigh was convicted and later executed for treason, based upon depositions and ex parte affidavits, with no opportunity to call his own witnesses or cross-examine those adverse to him. *See* United States v. Payne, 492 F.2d 449, 457-65 (4th Cir.) (concurring and dissenting opinion), *cert. denied*, 419 U.S. 876 (1974); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-06 (2d ed. 1969); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 216-29 (1926); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333-37 (1883); Stephen, *The Trial of Sir Walter Raleigh*, in 2 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 172-87 (4th ser. 1919); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959).

Before the Bill of Rights was added to the Constitution, a delegate at the Massachusetts convention objected to the lack of protections afforded the criminally accused. The nature of his arguments ultimately proved persuasive:

> Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.
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> It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not . . . .
>
> The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.
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> These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges . . . .
>
> On the whole, when we fully consider this matter, and fully investigate the powers

right as a whole by limiting the exceptions thereunder.[29] *Diaz v. United States*[30] announced one such exception. On two occasions during his trial for homicide, defendant Diaz voluntarily left the courtroom, expressly consenting to the trial's continuation in his absence.[31] While Diaz was away, two adverse witnesses testified against him and were cross-examined by his attorney.[32] In ruling that the trial court did not err in permitting the trial to proceed despite the defendant's absence, the Court explained that a defendant could affirmatively waive his right to confront witnesses against him.[33]

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granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

(emphasis in original). 2 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-11 (reprint 1974) (1st ed. 1836). *See also* 1 B. SCHWARTZ, THE BILL OF RIGHTS 505-10 (1971).

Many state constitutions or statutes expressly guarantee face-to-face meetings between defendant and the witnesses against him, thereby resolving any ambiguity that might otherwise exist concerning the physical aspect of confrontation. *See, e.g.,* ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; HAWAII REV. STAT. § 801-2 (1976); ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. BILL OF RIGHTS § 10; MASS. CONST. pt. 1, art. 12; MASS. ANN. LAWS ch. 263, § 5 (Michie/Law. Co-op 1968); MICH. COMP. LAWS § 763.1 (1970); MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.D. CENT. CODE ANN. § 29-01-06 (1974); OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TENN. CODE ANN. 40-2405 (1975); WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

29. *See* notes 30-42 *infra* and accompanying text.

Consider the related problem of determining under what circumstances the right of confrontation is *not invoked*, whereby the question of the scope of the exceptions to confrontation is not reached. *See, e.g.,* Snyder v. Massachusetts, 291 U.S. 97, 114 (1934) (defendant not entitled to accompany jury at view of crime scene); Dowdell v. United States, 221 U.S. 325, 330-31 (1911) (notes of trial judge and clerk pertaining to conduct of trial and supplementing appellate record not subject to confrontation); Meadows v. New York, 426 F.2d 1176, 1184 (2d Cir. 1970) (right of confrontation does not entitle accused to discovery of evidence that is not ultimately introduced by prosecution at trial), *cert. denied*, 401 U.S. 941 (1971); United States v. Polisi, 416 F.2d 573, 579 (2d Cir. 1969) (right of confrontation does not compel prosecution to call particular witnesses); Eberhart v. United States, 262 F.2d 421, 422 (9th Cir. 1958) (same); United States v. Johnson, 129 F.2d 954, 959 (3rd Cir. 1942) (defendant may be excluded from courtroom during argument on question of law), *aff'd on other grounds*, 318 U.S. 189 (1943); Curtis v. Rives, 123 F.2d 936, 938 (D.C. Cir. 1941) (right of confrontation does not compel prosecution to call particular witnesses).

30. 223 U.S. 442 (1912).

31. *Id.* at 453.

32. *Id.*

33. *Id.* at 455. *Accord,* Taylor v. United States, 414 U.S. 17, 20 (1973). Earlier Supreme Court opinions had implied that no aspect of a criminal trial could be held in a defendant's absence. *See, e.g.,* Lewis v. United States, 146 U.S. 370, 372 (1892) ("in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial"); Hopt v. Utah, 110 U.S. 574, 579 (1884) ("[t]hat which the law makes essential in

The Supreme Court went further in *Illinois v. Allen*.[34] During his trial for robbery, Allen continually disrupted the trial despite judicial warnings to behave.[35] The Court held that defendant, as a result of his misconduct, forfeited[36] his right of confrontation and that the decision to remove him and proceed with the trial in the presence of his attorney

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proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused").

Cf. Brady v. United States, 397 U.S. 742, 748 (1970) ("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" (footnote omitted)); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). *See also* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (accused may waive right of confrontation by pleading guilty); Williams v. Oklahoma, 358 U.S. 576, 583-84 (1959) (when defendant admitted truth of state attorney's statements of details of crime and of defendant's criminal record, defendant implicitly waived right of confrontation on those statements); United States v. Martin, 489 F.2d 674, 678 (9th Cir. 1973) (defendant may stipulate to admission of evidence and thus waive right to confront source of evidence), *cert. denied*, 417 U.S. 948 (1974).

34. 397 U.S. 337 (1970).

35. *Id.* at 339-41. Allen was readmitted to the courtroom on several occasions, and the judge offered Allen the option of remaining at the trial if Allen would promise good behavior. Allen replied, "I'll promise you shit." Appendix to Petition for Certiorari at 38, Illinois v. Allen, 397 U.S. 337 (1970), *cited in The Supreme Court, 1969 Term, supra* note 25, at 91 n.6.

36. *Compare* Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 U. COLO. L. REV. 171, 173 (1964) (arguing that repeated misconduct by defendant after warning amounts to voluntary waiver), *with* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, ADVISORY COMMITTEE NOTE TO FED. R. CRIM. P. 43(b) (1978) (discussing proposed change in language concerning exceptions to requirement that defendant be present at every stage of his criminal trial:

> Subdivision (b) is amended so as to deal with the situations included therein in terms of forfeiture rather than waiver. Although waiver terminology is commonly found in the cases, a defendant who absents himself or who engages in disruptive conduct does not really "agree" to be tried in his absence or "intentionally relinquish" his right to be present. Rather he loses or forfeits his right to be present by way of a penalty for violating certain obligations or conditions. This is more than a matter of semantics. In *Illinois v. Allen*, holding that a disruptive defendant may be excluded from his trial, the Court did not conclude that the defendant had waived his right to be present, but rather than [*sic*] he "lost his right" by virtue of his behavior "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." [397 U.S. at 346.] The court of appeals had reached the opposite result by analyzing the case in terms of waiver and concluding that so long as Allen insisted upon his right to be present, which he clearly did, he could not be held to have waived it because "the insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver." 413 F.2d 232[, 235] (7th Cir. 1969)).

(citations omitted).

See also Note, Illinois v. Allen: *The Unruly Defendant's Right to a Fair Trial*, 46 N.Y.U.L. REV. 120, 132-34 (1971); 22 S.D. L. REV. 447 (1977); 28 U. PITT. L. REV. 443, 455 (1967).

was proper.[37]

The Supreme Court elucidated the final exception to the right of confrontation—the necessity exception—in *Mancusi v. Stubbs*.[38] Defendant Stubbs claimed that a Tennessee court, in retrying him for murder, had violated his constitutional right of confrontation by admitting the testimony of a witness at his previous trial.[39] The government argued that the witness, who had moved to Sweden before the retrial, was unavailable. Holding that the witness' testimony at the first trial bore "sufficient indicia of reliability,"[40] the Supreme Court ruled that the Tennessee court, after finding that the witness was, in fact, unavailable[41] to testify at the second trial, had properly admitted the testimony

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37. 397 U.S. at 343. With its strong emphasis on defendant's misbehavior, the forfeiture exception to the right of confrontation has been limited to extreme cases of misconduct by the accused. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 158 (1878) (defendant who voluntarily keeps a witness from testifying cannot insist on right of confrontation); United States v. Carlson, 547 F.2d 1346, 1359-60 (8th Cir. 1976) (witness' prior grand jury testimony held admissible despite absence of confrontation with defendant because defendant's intimidation of witness caused witness' unavailability at trial), *cert. denied*, 431 U.S. 914 (1977); United States v. Mayes, 512 F.2d 637, 648-51 (6th Cir.) (defendant who brings about denial of confrontation in furtherance of his own interests may not complain of violation of his constitutional rights), *cert. denied*, 422 U.S. 1008 (1975); *cf.* Parker v. Gladden, 385 U.S. 363 (1966) (per curiam) (bailiff's misconduct violated defendant's right of confrontation); Douglas v. Alabama, 380 U.S. 415, 418-20 (1965) (prosecutor's misconduct violated defendant's right of confrontation); State v. Collins, 265 Md. 70, 78-79, 288 A.2d 163, 168 (1972) (defendant's absence, through no fault of his own, at deposition of witness violated defendant's sixth amendment right of confrontation); Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 CRIM. L. BULL. 293 (1973) (if prosecutor refers to evidence outside the record in his summation, burden should be on prosecution to establish that error was harmless). *See also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 139 (1972) ("[a] defendant who murders a witness ought not be permitted to invoke the right of confrontation to prohibit the use of his accusation").

38. 408 U.S. 204 (1972).

39. *Id.* at 209. This case arose after Stubbs was convicted of a felony in a New York state court. In his habeas corpus petition, Stubbs alleged that because his earlier Tennessee conviction was unconstitutional, the New York state court could not use the Tennessee conviction as a predicate for a harsher punishment under New York's second offender laws. *Id.* at 205.

40. The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans* . . . [400 U.S. 74, 89 (1970)], and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green* . . . [399 U.S. 149, 161 (1970)]. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability" referred to in *Dutton*.

408 U.S. at 213.

41. *Compare* United States v. Rogers, 549 F.2d 490, 498-502 (8th Cir. 1976) (witness who testified to memory lapse and invoked fifth amendment privilege was not "unavailable" at trial),

into evidence at Stubb's retrial.[42]

The necessity exception to confrontation is reflected in Rule 15 of the Federal Rules of Criminal Procedure.[43] Under Rule 15 deposition evidence is admissible at trial[44] if the deponent is unavailable to testify.[45]

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cert. denied, 431 U.S. 918 (1977), *with* United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976) (witness who testified to lack of memory concerning material portion of subject matter of his prior testimony was "unavailable" at trial), *cert. denied*, 429 U.S. 1101 (1977), *and* United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971) (declarant who refused to take oath and made it clear that he would not testify was "unavailable" at trial), *cert. denied*, 410 U.S. 984 (1973).

See generally FED. R. EVID. 804(a), defining "unavailability as a witness" as including situations in which the witness

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of his statement; or
> . . . .
> (5) is absent from the hearing and the proponent of his statement has been unable to 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.

But see Barber v. Page, 390 U.S. 719, 722-25 (1968) (state must make good-faith effort at obtaining attendance of witness at trial before court may declare witness unavailable); Motes v. United States, 178 U.S. 458, 467-74 (1900) (witness' prior testimony inadmissible because negligence of prosecution caused declarant's absence at trial); United States v. Lynch, 499 F.2d 1011, 1022-23 (D.C. Cir. 1974) (party offering out-of-court statement carries burden of demonstrating unavailability of declarant); *but cf.* United States v. Bell, 500 F.2d 1287, 1290 (2d Cir. 1974) (trial court's unavailability ruling reviewable only for abuse of discretion).

See generally Symposium on the Proposed Federal Rules of Evidence: Part I, 15 WAYNE L. REV. 1076, 1101-06 (1969); Note, *The Unavailability Requirement for Exceptions to the Hearsay Rule*, 41 MO. L. REV. 404 (1976); 55 IOWA L. REV. 477 (1969).

42. 408 U.S. at 216.

43. *See* note 3 *supra*.

44. *See, e.g.,* United States v. King, 552 F.2d 833, 840-41 (9th Cir. 1976) (rejecting contention that confrontation clause prohibits use of witness' deposition at criminal trial), *cert. denied*, 430 U.S. 966 (1977); United States v. Ricketson, 498 F.2d 367, 374 (7th Cir.) (same), *cert. denied*, 419 U.S. 965 (1974); United States v. Singleton, 460 F.2d 1148, 1152-53 (2d Cir. 1972) (same), *cert. denied*, 410 U.S. 984 (1973). *See* 19 N.Y.L.F. 198 (1973); 1973 UTAH L. REV. 839. *See generally* Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 18-19 (1969).

45. FED. R. CRIM. PROC. 15(e), *supra* note 3. *See* notes 12, 41 *supra*.

The Supreme Court has stated that the right of confrontation is not a mere codification of the hearsay rule and its exceptions. *See, e.g.,* Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.") (footnotes omitted); California v. Green, 399 U.S. 149, 155 (1970); Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). *But cf.* Salinger v. United States, 272 U.S. 542, 548 (1926) (purpose of confrontation clause is to preserve the common-law right and its exceptions). *See also*

Moreover, with recent technological advances in the field of electronics, depositions by video tape are gaining recognition at federal criminal

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Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (if testimony is critical to defense, "hearsay rule may not be applied mechanistically to defeat the ends of justice").

Nevertheless, the policies underlying the necessity exception to confrontation and the exceptions to the hearsay rule are similar. *See, e.g.*, Dutton v. Evans, 400 U.S. at 80-83 (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); California v. Green, 399 U.S. at 165 (alternative holding) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness if defendant had opportunity to cross-examine that witness at time of recording); Delaney v. United States, 263 U.S. 586, 590 (1924) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); Mattox v. United States, 156 U.S. 237, 244 (1895) (allowing admission at criminal trial of prior recorded testimony of now-unavailable witness because defendant had opportunity to cross-examine at time of recording); Mattox v. United States, 146 U.S. 140, 151 (1892) (allowing admission at criminal trial of dying declaration); United States v. Martinez, 573 F.2d 529, 533 (8th Cir. 1978) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy); McLaughlin v. Vinzant, 522 F.2d 448, 450-51 (1st Cir.) (allowing admission at criminal trial of spontaneous utterance), *cert. denied*, 423 U.S. 1037 (1975); United States v. Snow, 521 F.2d 730, 734-36 (9th Cir. 1975) (allowing admission at criminal trial of declaration by co-conspirator in furtherance of conspiracy), *cert. denied*, 423 U.S. 1090 (1976); United States v. Lipscomb, 435 F.2d 795, 802-03 (5th Cir. 1970) (allowing admission at criminal trial of entries in the regular course of business), *cert. denied*, 401 U.S. 980 (1971); Hanley v. United States, 416 F.2d 1160, 1167-68 (5th Cir. 1969) (same), *cert. denied*, 397 U.S. 910 (1970); United States v. Kelly, 349 F.2d 720, 770-71 (2d Cir. 1965) (allowing admission at criminal trial of recorded past recollection), *cert. denied*, 384 U.S. 947 (1966); Reed v. Beto, 343 F.2d 723, 724 (5th Cir. 1965) (allowing admission at criminal trial of public records of routine character). *But see, e.g.*, Barber v. Page, 390 U.S. 719, 722-25 (1968) (expanding "unavailability" concept beyond its traditional hearsay definition); Kirby v. United States, 174 U.S. 47, 53-56 (1899) (denying admission at criminal trial of record of conviction of thieves to prove that property received by defendant had been stolen); Phillips v. Neil, 452 F.2d 337, 343-48 (6th Cir. 1971) (refusing admission at criminal trial of entry in the regular course of business), *cert. denied*, 409 U.S. 884 (1972).

See generally Baker, *supra* note 16; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Griswold, *supra* note 16; Read, *The New Confrontation—The Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *supra* note 16; Younger, *Hearsay and Confrontation, Or, What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay*, 2 NAT'L J. CRIM. DEF. 65 (1976); Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense*, 56 GEO. L.J. 939 (1968); Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360 (1968); Note, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965); Note, *Hearsay and Confrontation: Can the Criminal Defendant's Rights Be Preserved Under a Bifurcated Standard?*, 32 WASH. & LEE L. REV. 243 (1975); 38 LA. L. REV. 858 (1978); 40 MO. L. REV. 150 (1975); 13 U.C.L.A. L. REV. 366 (1966); 31 VAND. L. REV. 682 (1978); 75 YALE L.J. 1434 (1966).

See also C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 252 (2d ed. 1972); J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE at ¶ 800 [04] (1977); 5 WIGMORE, EVIDENCE §§ 1365, 1395-1400 (Chadbourn rev. 1974).

trials.[46]

46. *See, e.g.*, United States v. King, 552 F.2d 833, 841 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *cf.* Hendricks v. Swenson, 456 F.2d 503, 505-07 (8th Cir. 1972) (allowing admission at criminal trial of video-taped confession by defendant).

FED. R. CIV. P. 30(b)(4) (applicable to criminal trials through FED. R. CRIM. P. 15(d), *supra* note 3, provides:

> The court may upon motion order that the testimony at a deposition be recorded *by other than stenographic means*, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(emphasis added).

See State v. Reid, 114 Ariz. 16, 27-29, 559 P.2d 136, 147-49 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by non-key witness), *cert. denied*, 431 U.S. 921 (1977); People v. Moran, 39 Cal. App. 3d 398, 410, 114 Cal. Rptr. 413, 420 (1974) (allowing admission at criminal trial of video-taped testimony by main prosecution witness; "[v]ideo tape is sufficiently similar to live testimony to permit the jury to properly perform its function"); Hutchins v. State, 286 So.2d 244, 245-46 (Fla. Dist. Ct. App. 1973) (allowing admission at criminal trial of video-taped testimony by expert witness); State v. Hewett, 86 Wash. 2d 487, 490-94, 545 P.2d 1201, 1203-05 (1976) (en banc) (allowing admission at criminal trial of video-taped testimony by victim).

In Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (en banc), the Supreme Court of Missouri sustained, as consistent with the confrontation clause, the use of closed circuit television in the examination of an absent witness at a criminal trial. The city's expert witness testified from the crime laboratory while the judge, parties and counsel watched from the courtroom. As noted by the Supreme Court of Missouri, the two-way closed circuit television system causes the transmission of pictures and voices to be instantaneous. *Id.* at 337. In contrast, a video-taped deposition is not a present event, but a record of a past event. *See* Weis, *Electronics Expand Courtrooms' Walls*, 63 A.B.A. J. 1713, 1715 (1977). The distinction might be significant in light of the requirement that a witness be unavailable at a federal criminal trial before the trial court may admit a deposition by that witness as substantive evidence against the accused. *See* FED. R. CRIM. P. 15(e), *supra* note 3. When using closed circuit television, because the witness is testifying at the time of the trial, it might be unnecessary to show that the witness is unavailable to testify in the courtroom. *But see* 44 U.M.K.C. L. REV. 517 (1976) (arguing that due to the unique characteristics of closed circuit television, its use at a criminal trial, unlike the use of video tape, violates the defendant's right of confrontation).

A wealth of material discussing the use of video tape at various stages of the trial process exists; most commentators advocate its use in the courtroom. *See generally* Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Bermant & Jacoubovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 HASTINGS L. J. 999 (1975); Cunningham, *Videotape Evidence: Technological Innovation in the Trial Process*, 36 ALA. LAW. 228 (1975); Doret, *Trial by Videotape—Can Justice Be Seen to Be Done?*, 47 TEMP. L.Q. 228 (1974); Kennelly, *The Practical Uses of Trialvision and Depovision*, 1972 TRIAL LAW. GUIDE 183; Kornblum & Rush, *Television in Courtroom and Classroom*, 59 A.B.A.J. 273 (1973); Leibson, *How and When to Use Video Tape Depositions*, 42 KY. BENCH & B. 30 (Apr. 1978); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463 (1973); Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45 (1972); Morrill, *Enter—The Video Tape Trial*, 3 J. MAR. J. PRAC. & PROC. 237 (1970); Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. L. & SOC. PROBS. 363 (1973); Note, *Nebraska Faces Videotape: The New Video Technology in Perspective*, 6 CREIGHTON L. REV. 214 (1972); Note, *Video-Tape Trials: A Practical*