

No. 86-572

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

SERGIO STINCER,
Respondent.

On Writ of Certiorari to the
Supreme Court of the Commonwealth of Kentucky

BRIEF OF AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT..	2
ARGUMENT	7
I. ASSUMING DEFENDANTS HAVE A RIGHT TO PERSONALLY CONFRONT ADVERSE WITNESSES IN PRETRIAL HEARINGS TO DETERMINE THE COMPETENCY OF WIT- NESSES TO TESTIFY, IT MAY BE DIS- PENSED WITH WHEN NECESSARY TO PROTECT CHILD VICTIMS OF SEXUAL ABUSE FROM SUBSTANTIAL, IDENTIFI- ABLE TRAUMA	7
II. BECAUSE SCIENTIFIC DATA REGARDING THE EFFECTS ON CHILD VICTIMS OF SEXUAL ABUSE OF CONFRONTING THEIR ALLEGED ABUSERS IN THE COURTROOM ARE SPARSE AND INCONCLUSIVE, CASE- BY-CASE DETERMINATION OF THE EF- FECTS ON INDIVIDUAL CHILDREN IS MOST APPROPRIATE	15
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	Page
<i>Berger v. California</i> , 393 U.S. 814 (1969)	9
<i>California v. Green</i> , 399 U.S. 149 (1970)	3, 4, 8, 9, 11
<i>California v. McMartin</i> , Grand Jury Indictment A750900, Preliminary Hearing A753005 (L.A. Mun. Ct. 1985)	20
<i>Capps v. Commonwealth</i> , 560 S.W.2d 559 (Ky. 1977)	12
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	3, 9, 10
<i>Delaware v. Fensterer</i> , 106 S.Ct. 292 (1985)	7
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965)	7, 8
<i>Dowdell v. United States</i> , 221 U.S. 325	11
<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	4, 10
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	5, 13
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	2, 5, 11, 16, 25
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970)	8, 10
<i>Lee v. Illinois</i> , 106 S.Ct. 2056 (1986)	8, 9
<i>Mattox v. United States</i> , 156 U.S. 237 (1895)	4, 8, 9
<i>Moll v. State</i> , 351 N.W.2d 639 (Minn. App. 1984) ..	5
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	3, 4, 8, 9, 10, 11, 12
<i>People v. Breitweiser</i> , 349 N.E.2d 454 (Ill. App. 1976)	5
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	7
<i>Rushen v. Spain</i> , 464 U.S. 114 (1983)	10, 13
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934) ..	5, 10, 11, 13
<i>State v. Taylor</i> , 704 P.2d 443 (N.M. App. 1985) ..	5
<i>United States v. Benfield</i> , 593 F.2d 815 (8th Cir. 1979)	8
<i>United States v. Gagnon</i> , 470 U.S. 522 (1985)	10, 13
MISCELLANEOUS:	
AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED (1985)	15
Berliner & Barbieri, <i>The Testimony of the Child Victim of Sexual Assault</i> , 40 J. SOC. ISSUES 125 (1984)	17, 21, 23, 24
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TABLE OF AUTHORITIES—Continued

	Page
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DeFrancis, <i>Protecting the Child Victim of Sex Crimes Committed by Adults: Final Report</i> , THE AMERICAN HUMANE ASSOCIATION (1969) ..	18
Dibner, <i>Ambiguity and Anxiety</i> , 56 J. ABNORMAL & SOC. PSYCHOLOGY 165 (1954)	21
Child Sexual Abuse Law Reform Project, National Legal Resource Center for Child Advocacy and Protection of the American Bar Association, <i>Evidentiary and Procedure Trends in State Leg- islation and Other Emerging Legal Issues in Child Sexual Abuse Cases</i> (1985)	7
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Melton, <i>Children's Testimony in Cases of Alleged Sexual Abuse</i> , to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich & Routh, eds., 1987)	15, 23
Melton, <i>Decision Making by Children: Psychologi- cal Risks and Benefits</i> , in CHILDREN'S COMPE- TENCE TO CONSENT (Melton, Koocher & Saks eds. 1983)	20
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Melton, <i>Sexually Abused Children and the Legal System: Some Policy Recommendations</i> , 13 AM. J. FAMILY THERAPY 61 (1985)	16

	Page
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J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW (1985)	22
Note, 98 HARV. L. REV. 806 (1985)	8, 22
Parker, <i>The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?</i> , 17 NEW ENG. L. REV. 643 (1982)	19
Rogers, <i>Child Sexual Abuse and the Courts: Preliminary Findings</i> , in SOCIAL WORK AND CHILD SEXUAL ABUSE (Conte & Shore eds. 1982)	22
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Whitcomb, <i>Child Victims in Court: The Limits of Innovation</i> , 70 JUDICATURE 90 (1986)	23
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INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA") is a voluntary nonprofit, scientific, and professional organization with more than 60,000 members. It has been the major association of psychologists in the United States since 1892, and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. Among APA's major functions are promoting psychological research, improving research methods, and promulgating information regarding human psychological behavior. A substantial number of APA's members are concerned with clinical and developmental psychology, including the collection of data, devel-

opment of research, and provision of therapy to child victims of sexual abuse.

The APA has participated as *amicus* in many cases in this Court involving mental health and social science issues, including *Colorado v. Connelly*, 55 U.S.L.W. 4043 (Dec. 10, 1986) (behavioral effects of command hallucinations); *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) ("conviction-proneness" of "death qualified" juries); *Ford v. Wainwright*, 106 S.Ct. 2595 (1986) (competency assessments of condemned prisoners); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (indigent defendants' rights to assistance from mental health professionals); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion counseling by non-physicians); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (measurability of psychological harm in potential disasters). APA contributes *amicus* briefs only where it has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA wishes to inform this Court of the state of the current social science data regarding the effects of testifying in court generally, as well as in front of the defendant, on child victims of alleged sexual abuse.

Petitioner and Respondent have consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the complex question of the proper accommodation of two cardinal principles—the fundamental right of criminal defendants to personally confront adverse witnesses in preliminary judicial proceedings with the State's "compelling" interest in "safeguarding the physical and psychological well-being of . . . minor[s]." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Because the right to con-

frontation was asserted in this case in the context of a pretrial proceeding to determine a child's competency to testify, there is an initial question whether Respondent was entitled under either the Due Process Clause of the Fourteenth Amendment or the Confrontation Clause of the Sixth Amendment to be present at the preliminary proceeding and to personally confront the witnesses who would testify against him at trial. Assuming the right to face-to-face confrontation with adverse witnesses in such proceedings is guaranteed by the Sixth and Fourteenth Amendments,¹ this Court has established that the right to confront witnesses, although fundamental, is not absolute. Indeed, "competing interests, if 'closely examined,' . . . may warrant dispensing with confrontation" during criminal proceedings. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The primary interest protected by the Confrontation Clause is the integrity of the fact-finding process. This interest is secured through the right of cross-examination, the right to compel adverse witnesses to testify under oath, and the right to have witnesses testify in open court so that the jury or other factfinder may observe the witness' demeanor. See *California v. Green*, 399 U.S. 149 (1970). Over the years, the Court has identified various interests that compete with defendants' rights to confront witnesses against them, and various formula-

¹ *Amicus* expresses no view as to the applicability of the Sixth Amendment's Confrontation Clause, or the requirements of the Fourteenth Amendment's Due Process Clause, in the context of pretrial proceedings to determine the competency of adverse witnesses. *Amicus* seeks to inform the Court, should it determine that defendants are entitled to face-to-face confrontation in such preliminary proceedings with the witnesses who will testify against them at trial, of the extent to which current empirical and clinical mental health data support assumptions regarding the traumatic effects of such confrontation on child witnesses as a basis for dispensing with defendants' rights in these circumstances.

tions for weighing those interests against the core values served by the Confrontation Clause. Essentially, the formulations used to dispense with defendants' confrontation rights require an assessment of relevant "public policy" considerations and the "necessities of the case." *Ohio v. Roberts*, 448 U.S. at 64, quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895). So long as the testimony sought to be admitted bears sufficient "indicia of reliability" to provide the trier of fact with "a satisfactory basis for evaluating [its] truth," face-to-face confrontation at trial may give way to these competing interests. *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970). See also *Ohio v. Roberts*, 448 U.S. 56 (1980).

The "indicia of reliability" test is traditionally used to determine the constitutional admissibility of uncontroverted hearsay evidence where the witness is "unavailable." *Ohio v. Roberts*, 448 U.S. at 65-66. Because this case does not involve the admissibility of hearsay testimony by unavailable witnesses—indeed, the witnesses were examined, and cross-examined by Respondent's counsel, before the finder-of-fact—regarding the substantive allegations against the defendant, the "reliability" inquiry under the Confrontation Clause must be adapted to reflect these differences. Should the Court determine that the Confrontation Clause applies to these proceedings, the "reliability" inquiry is more appropriately directed to the process by which trial courts reach a competency determination than to the "reliability," or trustworthiness, of particular testimony by uncontroverted witnesses. Thus, the Respondent's ability to contribute, by his presence, to the reliability and accuracy of the court's determination of the witness' competency must be weighed against the extent to which his presence would affect adversely the reliability and accuracy of the competency determination.

Similarly, the Due Process Clause guarantees criminal defendants the right to be present at all stages of the

proceedings against them, even where they are not actually "confronting" witnesses or evidence against them, where their presence bears a "reasonably substantial [relation] to [the] opportunity to defend" and the defendants' absence "might frustrate the fairness of the proceedings." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). This, too, requires a balancing of relevant competing interests to assess the fairness of the proceeding. (Point I.)

This Court has recognized the safeguarding of the psychological well-being of minors as a "compelling" interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607. Many lower courts have dispensed with defendants' confrontation rights when necessary to facilitate the testimony of child victims of alleged sexual abuse and to protect child victims from the further psychological trauma of testifying in open court, in the presence of the alleged offender. See, e.g., *State v. Taylor*, 704 P.2d 443 (N.M. App. 1985); *Moll v. State*, 351 N.W.2d 639 (Minn. App. 1984); *People v. Breitweiser*, 349 N.E.2d 454 (Ill. App. 1976). *Amicus* submits that *only* in those circumstances where the risk of such trauma is documented, and its nature and potential duration are believed to be substantial, should the defendant's right to face-to-face confrontation with the child victim give way to the State's dual interests in securing the testimony of children who are frequently the only witnesses to the abuse and protecting child victims from the additional trauma of testifying before the alleged offender. Because of the fundamental importance of confrontation in our adversary system, and the tentative state of empirical and clinical findings regarding the effects on child sexual assault victims of confrontation with their alleged offenders, *amicus* further urges the Court to limit its holding regarding the proper weight to be ac-

corded the State's interest in protecting child victims to preliminary hearings to determine the child's competency.

To date, there is very little social science data to support the general proposition that face-to-face confrontation by child victims of sexual abuse with their alleged abusers has any more negative psychological effects than such confrontation has for adult victims. Indeed, there are some studies that suggest that child victims who testify before their alleged offenders experience the psychological benefits of vindication and regaining control over their lives. Although this area is currently the subject of ongoing studies by mental health professionals, it is too early to predict the results of these studies. Until we know more about the psychological effects on child victims, as a group, of testifying in open court before their alleged offenders to support valid assumptions about negative effects on such children, *amicus* urges the Court to require the government to make a preliminary showing of substantial psychological trauma to the individual child witness it seeks to protect. The trial court may then proceed, before dispensing with the alleged offender's rights under the Confrontation Clause and Due Process Clause, to evaluate, on a case-by-case basis, and with the assistance of expert testimony if necessary, the nature, extent and potential duration of the trauma to the child of testifying in the particular setting under review.² (Point II.)

² This approach is consistent with that suggested by the American Bar Association's National Legal Resource Center for Child Advocacy and Protection:

The choice of alternatives for taking a child's testimony should depend upon the needs and problems of a particular child. For some children, testifying in front of the defendant may not be as traumatic as sitting on the witness stand in a formal courtroom with an audience full of strangers and the press or with the jury present. A videotaped deposition with the defendant present may be the proper mechanism for such a child. In juvenile court child protection cases, children may be inter-

ARGUMENT

I. ASSUMING DEFENDANTS HAVE A RIGHT TO PERSONALLY CONFRONT ADVERSE WITNESS IN PRETRIAL HEARINGS TO DETERMINE THE COMPETENCY OF WITNESSES TO TESTIFY, IT MAY BE DISPENSED WITH WHEN NECESSARY TO PROTECT CHILD VICTIMS OF SEXUAL ABUSE FROM SUBSTANTIAL, IDENTIFIABLE TRAUMA.

The right to confrontation, secured by the Sixth and Fourteenth Amendments,³ ensures defendants the right, "[i]n all criminal prosecutions, . . . to be confronted with the witnesses against [them]." U.S. Const. amend. VI. The "main and essential purpose" of confrontation is to secure for the accused the opportunity to confront, or challenge, the witnesses against him or her in a face-to-face encounter⁴ in front of the trier of fact. *Dela-*

viewed in the judge's chambers (generally with the parent alleged to have committed the abuse present), providing a less formal setting in which the child may be examined and cross-examined. Other children may not be disturbed by testifying in the presence of the public or the jury, but terrified of facing the defendant. Still other children may only require an advocate, close friend or relative in order to feel less traumatized. Finally, some children may find testifying a helpful experience in dealing with the abuse and may not be traumatized at all.

Child Sexual Abuse Law Reform Project, National Legal Resource Center for Child Advocacy and Protection of the American Bar Association, *Evidentiary and Procedure Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases* (1985) at 10.

³ The Sixth Amendment's Confrontation Clause is made applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). See also *Douglas v. Alabama*, 380 U.S. 415 (1965).

⁴ Although recognizing the Court's usage in its early cases of the words "face-to-face" to describe the guarantees of the Confrontation Clause, some commentators suggest that this language merely

ware v. Fensterer, 106 S.Ct. 292 (1985). See *California v. Green*, 399 U.S. 149, 156 (1970); *Mattox v. United States*, 156 U.S. 237 (1895). See also *Lee v. Illinois*, 106 S.Ct. 2056 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980). This purpose is served primarily through cross-examination.

The Court has recognized that the right to confront and cross-examine adverse witnesses serves both symbolic and functional goals:

supports the right of cross-examination and does not require physical confrontation between the defendant and adverse witnesses. See, e.g., Note, 98 HARV. L. REV. 806, 823 (1985). The Court also has used the words "face-to-face" to refer to the confrontation between the adverse witness and the trier of fact (e.g., "compelling [the witness] 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." (Emphasis added)). *Mattox v. United States*, 156 U.S. at 242-43. See also *Douglas v. Alabama*, 380 U.S. 415, 418, 419 (1965) ("[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.").

If physical confrontation is not required, technological developments that permit cross-examination and credibility assessment by the factfinder without the witness' physical presence, such as closed circuit television, which could not have been anticipated by the Court in earlier times, may satisfy the guarantees of the Confrontation Clause. However, this analysis ignores the defendant's right, rooted in the Confrontation Clause, to be present during the "critical stages" of criminal proceedings—which clearly includes cross-examination of adverse witnesses during the trial—as well as the independent "reliability" value that defendants' presence, "face-to-face" against adverse witnesses, has on the testimony of those witnesses. See *Illinois v. Allen*, 397 U.S. 337 (1970). See also *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) ("The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.") (footnote omitted).

[Confrontation and cross-examination] contribute[] to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.

[In addition,] [t]he right to confront and to cross-examine witnesses [serves] [the] primar[y] functional [goal of] promot[ing] reliability in criminal trials.

Lee v. Illinois, 106 S.Ct. at 2062. The reliability or truthfinding goal of confrontation is advanced by: 1) ensuring that adverse witnesses give their statements under oath; 2) forcing adverse witnesses to submit to cross-examination; and 3) "compelling [adverse witnesses] to stand face to face with the jury in order that they may look at [the witnesses,] and judge by [their] demeanor upon the stand and the manner in which [they] give [their] testimony whether [the witnesses are] worthy of belief." *Mattox v. United States*, 156 U.S. at 242-43. See also *California v. Green*, 399 U.S. at 158.

Although the absence of these safeguards "calls into question the ultimate 'integrity of the fact-finding process[,]'" *Ohio v. Roberts*, 448 U.S. at 64, quoting *Chambers v. Mississippi*, 410 U.S. at 295, quoting *Berger v. California*, 393 U.S. 314, 315 (1969), the Court has held that the right to confront adverse witnesses is not absolute. The rights of confrontation and cross-examination, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. at 243. See also *Ohio*

v. Roberts, 448 U.S. at 64, quoting *Chambers v. Mississippi*, 410 U.S. at 295 ("competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial.").

The competing interest that courts have recognized most often as sufficient to warrant dispensing with confrontation at trial in appropriate circumstances is the government's interest in effective law enforcement and prosecution. See, e.g., *Ohio v. Roberts*, 448 U.S. at 64; *Snyder v. Massachusetts*, 291 U.S. 97 (1934). For example, the right to confrontation has given way to the government's law enforcement interest to allow into evidence hearsay statements bearing "adequate indicia of reliability" by witnesses who are unavailable or for whom the utility of trial confrontation is remote. See *Ohio v. Roberts*, 448 U.S. at 65-66 & n.7; *Dutton v. Evans*, 400 U.S. 74, 89 (1970). In addition, the government's interest in the "proper administration of criminal justice" in the courtroom has been held to outweigh an unruly and disruptive defendant's Sixth Amendment right to be present during his trial and to personally confront the witnesses against him. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (waiver of Sixth Amendment rights and removal from courtroom justified by defendant's disruptive behavior).⁶

The Court long ago recognized that these exceptions to the right to confrontation and cross-examination are "not . . . static, but may be enlarged from time to time

⁶ The right to be present at trial is implicit in the defendant's right to confront adverse witnesses. *United States v. Gagnon*, 470 U.S. 522 (1985); *Illinois v. Allen*, 397 U.S. at 338. The defendant's presence serves the Confrontation Clause's reliability goals by permitting more effective cross-examination by defendant's counsel and by "mak[ing] it more difficult [for adverse witnesses] to lie against . . . [the] accused" *Ohio v. Roberts*, 448 U.S. at 64, n.6. See also *Rushen v. Spain*, 464 U.S. 114, 129-30, n.8 (1983) (Stevens, J. concurring). See generally n.4, *supra*.

if there is no material departure from the reason of the general rule." *Snyder v. Massachusetts*, 291 U.S. at 107. "[A]ll that the Sixth Amendment demands [is] 'substantial compliance with the purposes behind the confrontation requirement.'" *Ohio v. Roberts*, 448 U.S. at 69, quoting *California v. Green*, 399 U.S. at 166 (footnote omitted). Although the applicability of the Sixth Amendment's Confrontation Clause to pretrial determinations of an adverse witness' competency is far from clear,⁶ assuming *arguendo* that the Confrontation Clause does apply to such proceedings, the state's interest in "safeguarding the physical and psychological well-being of . . . minor[s]", recognized by this Court as "compelling,"⁷ should provide a sufficient basis for an exception

⁶ The Confrontation Clause guarantees the right to be present and to participate in the cross-examination of adverse witnesses in criminal proceedings. Whether that right extends to pretrial competency examinations of adverse witnesses where no testimony relating to the substantive allegations against the defendant is heard has not been decided by this Court. Indeed, the Court in *Snyder* suggested that the Confrontation Clause is limited to the stages of the criminal proceedings where factual testimony bearing on the accused's guilt or innocence is elicited:

Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals. Confusion of thought will result if we fail to mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source, either expressly or by implication, in the federal constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. "[Confrontation] was intended to prevent the conviction of the accused upon depositions of ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."

291 U.S. at 107, quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (citations omitted).

⁷ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

to confrontation if there is a substantial and demonstrated threat to the well-being of a minor witness and the underlying values of confrontation are preserved. See generally *Ohio v. Roberts*, 448 U.S. at 66.

In the context of pretrial proceedings to determine a child's competency, where there is no substantive testimony regarding the allegations against the accused, the "reliability" values of the Confrontation Clause are more appropriately served by identifying the factors that will ensure a reliable or accurate determination by the court of the child's competency, rather than the trustfulness of the child's testimony. Thus, whether child witnesses are placed under oath seems to be less significant in this context than whether the factfinder is able to observe their demeanor while testifying. It is highly doubtful that the absence of an oath will render the child witness' testimony less solemn or truthful than it otherwise would be. Assuming that the questioning by the court and counsel refers to background factual information about the witness, e.g., birthday, the name of school and teachers, understanding of the difference between the truth and falsehoods, and belief as to the consequences of not telling the truth,^{*} and does not refer to the substantive allegations against the accused, there is little incentive for the child to lie, either to protect or to punish the accused. Indeed, false statements by the witness in response to such questioning would work to the accused's advantage by undermining the child's competence as a witness, thereby preventing the child from testifying at trial about the substantive allegations.

^{*} In Kentucky, as in most states, the standard for determining a child's competency to testify is "whether the child is sufficiently intelligent to observe, recollect and narrate the facts and has a moral obligation to speak the truth." *Capps v. Commonwealth*, 560 S.W.2d 559 (Ky. 1977).

Similarly, at least in some circumstances, cross-examination by the accused's counsel *with the accused present*, will assist the court in making a reliable determination of a child's competency. Those circumstances include those similar to the case *sub judice*, in which the accused lives with the child witness and may have some special knowledge of the child's intellectual and moral capacities which bears on the child's competency.

Unlike the Confrontation Clause, the Due Process Clause guarantees criminal defendants the right to be present during proceedings where they are not actually confronting witnesses or evidence against them if such proceedings are "critical" to the outcome of the trial. *Rushen v. Spain*, 464 U.S. 114, 117 (1983). See *United States v. Gagnon*, 470 U.S. 522 (1985). The standard articulated by the Court for assessing the "criticalness" of the proceeding is whether a "fair and just hearing would be thwarted by [the accused's] absence" or whether the accused's presence "bear[s] a relation, reasonably substantial, to his opportunity to defend" against the criminal charges against him. *Snyder v. Massachusetts*, 291 U.S. at 108, 106. See also *United States v. Gagnon*, 470 U.S. 522 (1985); *Faretta v. California*, 422 U.S. 806 (1975). Thus, as with the inquiry under the Confrontation Clause in these circumstances, the determination of the accused's right to be present during competency evaluations of adverse child witnesses requires a balancing of the accused's role in assisting the court to reach an accurate and reliable determination of the child's competence as a witness, against the risk of identifiable and substantial injury to the child witness from the presence of the accused at the proceeding.

Although it may be argued that competency determinations which bear no relation to the charges against the defendant, and are committed to the judgment of the court, are purely legal determinations, as noted above, in circumstances where the defendant may have intimate knowledge of the witness' intellectual and moral capaci-

ties, the ability to be present and assist counsel in cross-examining the child may have a sufficient impact on the outcome of the trial to render the pretrial competency evaluation a "critical stage" of the proceedings. Moreover, apart from any special knowledge the defendant may have of the child witness, because frequently the child witness is the only prosecution witness in such cases, and because the accused may be able to raise sufficient doubt at the competency evaluation about the child's ability to testify truthfully and accurately to warrant a finding of incompetency—thereby removing the chief adverse witness—the preliminary competency hearing in such cases may, in fact, constitute a "critical stage" of the proceedings for the accused.

Assuming Respondent was entitled under either the Confrontation Clause or the Due Process Clause to be present during the preliminary competency evaluations of the child witnesses in this case, and assuming further that Respondent's presence would have had little or no effect on the reliability or accuracy of the court's competency determinations and little or no bearing on the fairness of the proceedings or Respondent's opportunity to defend himself, the critical question for the Court is whether the State had a legitimate competing interest that outweighed Respondent's right to be present at the proceeding. In the case *sub judice*, there was no finding that the particular child witnesses would be traumatized by the presence of Respondent in the judge's chambers during their testimony. Because, as *amicus* will demonstrate below, there is insufficient social science data at this time to support a *general* presumption of psychological trauma in child victims of sexual assault in such circumstances, a specific finding that there is a risk of substantial identifiable psychological trauma to the child witness should be necessary before dispensing with an accused's rights.

Because the trial court may not have been aware that the view that child victims of sexual assault are subjected

to substantial emotional and psychological trauma when forced to testify in the presence of their alleged abusers, although generally held, is not supported by relevant social science data, *amicus* urges this Court, if it finds that Respondent had a constitutional right to be present during the competency hearing, to remand this case for a specific determination of the effects on the witnesses of Respondent's presence during the hearing.

II. BECAUSE SCIENTIFIC DATA REGARDING THE EFFECTS ON CHILD VICTIMS OF SEXUAL ABUSE OF CONFRONTING THEIR ALLEGED ABUSERS IN THE COURTROOM ARE SPARSE AND INCONCLUSIVE, CASE-BY-CASE DETERMINATION OF THE EFFECTS ON INDIVIDUAL CHILDREN IS MOST APPROPRIATE.

With the incidence of reported cases of sexual abuse of children increasing, courts and legislatures have begun to develop innovative procedures governing the testimony of child victims, particularly in criminal proceedings. These procedures are premised largely on the view that child victims of sexual abuse are extremely fragile and vulnerable and are highly traumatized emotionally and psychologically by their participation in the criminal justice system. See, e.g., *Child Victim Witness Protection Act of 1985: Hearings on S. 1156 Before the Subcommittee on Juvenile Justice of the Senate Comm. on Judiciary*, 99th Cong., 1st Sess. (1985); AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED (1985); Whitcomb, Shapiro & Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors*, NATIONAL INSTITUTE OF JUSTICE (1985). "Thus far, [however,] no compelling case has been made that sexually abused children as a class are sufficiently different from other witnesses to justify abrogation of [the] longstanding attributes of [our] adversary system." Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*,

to be published in *ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS* (Wolraich & Routh, eds, 1987). See generally Melton & Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child Witness Research*, to be published in *CHILDREN'S EYEWITNESS MEMORY* (Ceci, Toglia, & Ross eds. *in press*) at 28 ("It is not self-evident that child victims of sexual abuse, for example, are at a substantially greater risk from testimony under conventional procedures than other child victims, child witnesses of violent offenses, adult victims of sexual offenses, or even witnesses in general.").

The view that children are especially vulnerable in legal proceedings is based much more on emotion, intuition and commonly held assumptions about what children are like than on analyses of reliable scientific data in this area. For example, the assumption by the dissenters in *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 618, n.7, and others, that "certainly the [traumatic] impact of [trial procedures] on children must be greater" than on adult victims of sexual offenses sounds plausible. Commenting on this assumption, one social scientist agrees that children "are less likely than adults to have the cognitive and emotional resources for understanding the experience, and legal authorities [who are] not used to communicating with children may find it difficult to allay their concerns." Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 *AM. J. FAMILY THERAPY* 61, 64-65 (1985) (citations omitted). But these assumptions fail to take into account alternative theories about the impact of trial procedures on children:

[P]articularly for young children, it is equally plausible that children's responses are less severe on average than those of adults. Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be

cathartic; it provides an opportunity for taking control of the situation, achieving vindication, and symbolically putting an end to the episode.

Id.

To date, the "research" on the effects on child victims of sexual assault of testifying in courts consists primarily of anecdotal and clinical reports from special projects. For a critique of these reports, see generally Melton & Thompson, *Getting Out of a Rut*, *supra*; Whitcomb, *et al.*, *When the Victim is a Child*, *supra*; Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 *J. SOC. ISSUES* 125 (1984); Goodman, *The Child Witness: Conclusions And Future Directions For Research And Legal Practice*, 40 *J. SOC. ISSUES* 157 (1984). Because assumptions about these psychological issues underlie much of the public, legislative and judicial response to the problems of child testimony in child sex abuse cases, *amicus* believes it is important to inform the Court about the current limits of social science knowledge in this area.

Amicus is aware of no social science studies that have focused exclusively on the psychological effects on child victims of sexual assault of testifying in the presence of their alleged offenders. Until those studies have been performed, however, it is possible to extrapolate, with some qualifications, from the few existing studies on child victims' reactions to their involvement in the legal process, including testifying in court. Essentially, those studies suggest that although involvement in the legal process is harmful to some children, it is beneficial to others. The significance of these findings for the issues raised by this case is two fold: first, these studies show that children's reactions to involvement in the legal process in general, and testifying in courts in particular (without regard to the presence of the alleged offender in the courtroom), are complex and variable; second, these studies suggest that previously widely held assumptions about the effects on child victims who participate as witnesses in the legal process are not supported by the scientific data. Thus,

existing studies in this area, both by their results and by their example, caution courts and policymakers concerned with the effects on child victims of testifying in front of their alleged abusers, to proceed slowly and to avoid generalized assumptions in this area.

For example, one of the earliest studies of child victims of sexual abuse in New York City found that parents often believed their children to have been adversely affected by the experience of cross-examination by defendant's counsel⁹ and, on that basis, concluded that the legal process was stressful for both children and their families. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults: Final Report*, THE AMERICAN HUMANE ASSOCIATION (1969).¹⁰ The results of this study are questionable, however, because the primary method used to obtain the data was parent interviews and not direct observation of the children, and, in addition, the researchers failed to use a control group of children whose cases were not brought to trial. An earlier study reported that child sex victims who were involved in court proceedings experienced greater trauma than those who were not; however, because the researchers admitted that it was probably the more severe cases of abuse that ended up in court, the source of the victims' greater trauma is ambiguous. Gibbens & Prince, *Child Victims of Sex Offenses*, THE INSTITUTE FOR THE STUDY OF TREATMENT AND DELINQUENCY (1963). Other commentators have suggested that children experience

⁹ Although this study did not isolate the defendant's presence as a factor to be analyzed separately, presumably at least some of the defendants were present during the cross-examination of the children and their presence contributed to the parents' perceptions of stress.

¹⁰ Parents were reported often to have perceived defense attorneys as "vile and contemptible, especially when . . . imply[ing] that the child, and not the offender, was responsible for the occurrence." *Protecting the Child Victim of Sex Crimes Committed by Adults: Final Report*, at 194.

emotional trauma as a result of repeated questioning by police and attorneys and of repeated court appearances,¹¹ but little scientific data has been gathered on this point.

A more recent clinical study of the psychological responses of child and adolescent victims of sexual assault and their families to participation in the legal process, including testifying in court, revealed the following reactions in some of the individuals as a result of their participation: 1) preoccupation with the assault and ensuing legal process which precluded returning to normal activities; 2) psychological recapitulation of the assault, and additional fear and confusion, induced by numerous detailed investigations and court appearances; 3) anger, anxiety, or confusion resulting from skepticism in others about their story and suspicion about their veracity; and 4) betrayal by people they previously considered to be supportive in their lives. Burgess & Holmstrom, *Rape: The Victim and the Criminal Justice System*, in 3 VICTIMOLOGY: A NEW FOCUS 31-48 (1975). Although these reactions are obviously not unique to child victims, because young children generally possess less developed abilities to organize and rationalize their experiences, and in addition have problems in communicating their needs to adult authority figures, some researchers report that child victims may experience these reactions more intensely than their adolescent and adult counterparts. *Id.* See also Melton, *Psycholegal Issues in Child Victims' Interaction with the Legal System*, 5 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 274-84 (1982). *Amicus* is aware of no attempt to date, however, to identify, in advance, certain categories—by backgrounds of the child, relationship to the abuser, or nature of the assault—of children who are at risk for these traumas.

¹¹ Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643-717 (1982); KATZ & MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* (1979).

Concern about the potential trauma to child victims of sexual assault who are "revictimized" during the legal process has led to the premature development of assumptions by courts and legislatures about the nature and degree of the "revictimization." Confrontation by the defendant and defense counsel has been perceived by these and other clinical observers as particularly traumatic. Although *amicus* does not wish to minimize the risks of trauma that have been present in a few highly sensationalized cases in which child victim/witnesses are reported to have been badgered,¹² both psychological theory and clinical experience suggest that the emphasis on "protecting" child victims from testifying and other aspects of participation in the legal process may be misplaced.

Social psychological research and theory regarding adult participants in legal proceedings indicate that control is a significant factor in determining perceptions of justice. Adult litigants and witnesses tend to perceive adversary procedures as fairest, apparently because such procedures permit each side to control the presentation of its case. See, e.g., Thibaut & Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541-66 (1978). Some researchers in the area of children and the law have argued that these findings are likely to be generalizable at least to older children and adolescents. See, e.g., Melton, *Decision Making by Children: Psychological Risks and Benefits*, in CHILDREN'S COMPETENCE TO CONSENT 21-40 (Melton, Koocher & Saks eds. 1983); Melton & Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 64-83 (Melton ed.

¹² See, e.g., *California v. McMartin*, Grand Jury Indictment A750900, Preliminary Hearing A753005 (L.A. Mun. Ct. 1985) (During pretrial proceedings, 10-year-old child, who was only one of several children called to testify, was on the witness stand every day for over one week; his testimony included cross-examination by seven defense attorneys.).

1982). For these older children, the experience of testifying in court, even if stressful at the time, with adequate preparation and follow-up, is likely to heighten their sense of control and perception of justice, and provide some psychological closure to their victimization.¹³ Similarly, excluding children, or "protecting" them, from the adversary process may have negative effects. It is well-established that ambiguity fosters anxiety and that children may be more troubled by what they think is happening in courtrooms from which they are excluded than by what they would experience if they were direct participants in the process. See generally Dibner, *Ambiguity and Anxiety*, 56 J. ABNORMAL & SOC. PSYCHOLOGY 165-74 (1954).

This view is supported by clinical experience. Clinicians at two recent demonstration projects on child sex abuse found that children often feel empowered by the opportunity to tell their story. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125-37 (1984). One group noted that "the experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled

¹³ See, e.g., Melton & Thompson, *Getting Out Of A Rut*, *supra* at 23:

Given the unpleasantness of the circumstances that compel exercise of the authority of the legal system, the serious and somewhat unpredictable consequences of testimony, and the evaluation of performance attached to the task of testimony, a lack of anxiety would be surprising, regardless of the age of the witness. However, distress, especially if transient, does not necessarily reflect dissatisfaction. The awesome nature of the courtroom and the adversariness of the procedure—the opportunity for all parties to have a say—may be more important subjectively than the discomfort experienced. Over the long term, the child's perception of being treated fairly may be more significant than the level of anxiety experienced.

guilty, that they did not have an opportunity to be heard in court." *Id.* at 135. Similar observations were made by the second group of clinicians:

[T]he court proceeding can have beneficial outcomes for the child. Children, like adults, often have strong feelings regarding their victimization and want the offender to be punished for his wrongdoing. Court proceedings are the only way that the victim can legally seek retribution against the perpetrator. Older children in particular often have a strong sense of social responsibility and will choose to proceed with prosecution even though it may be stressful in the belief that they are helping to protect other children from being victimized. In many instances, court proceedings also serve to enhance the child's sense of personal vindication—others are treating the child's victimization as a serious matter [and]; are tangibly expressing their trust and faith in the child's story.

Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, in *SOCIAL WORK AND CHILD SEXUAL ABUSE* 145-53, 150 (Conte & Shore eds 1982). But these studies, and others like them, may be criticized because they result from clinical rather than empirical research.¹⁴

Two current empirical studies are focusing specifically on the effects on child victims of testifying in court. In neither study is the presence of the alleged offender in the courtroom isolated as a separate factor; however, the offender is present in most of the courtroom settings examined by the researchers and thus, is subsumed as a contributing factor to the effects noted. Although the data from these two studies are still very preliminary, initial judgments gleaned from impressions of the data

¹⁴ Clinical studies often rely on interviews by mental health professionals. They may not contain adequate control groups and other procedures used by experimental social scientists to ensure that the study is performed with methodological rigor. See, J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW*, 33-81 (1985).

suggest a wide range of reactions in such children, from extreme anxiety to increased sense of control.¹⁵ Researchers and clinicians still do not know why court appearances are harmful for some children and beneficial for others, or which circumstances lead to trauma and which to catharsis. There is some support for the view that strong family support, adequate preparation for the process,¹⁶ and careful follow-up and management during the child's participation in the legal process are the most effective means of reducing the stress inherent in testifying, and thereby increasing the likelihood of a positive experience. See, e.g., Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, *supra*; Berliner & Barbieri, *Legal Testimony By Child Victims of Sexual Assault*, *supra*.

Some commentators and clinicians have raised concerns about the effects on child victims of seeing the de-

¹⁵ One of the studies compares child victims of sexual assault who testify in criminal proceedings with a matched sample of child victims who do not testify. This study, by Professor Goodman at the University of Colorado, preliminarily suggests that the wide range of reactions in the children may be a function of the levels of support from their families. The second study is an ongoing study by Professor Runyan at the University of North Carolina, the preliminary data from which suggest that child victims who testify in family court proceedings show disproportionate gains in psychological adjustment. However, the non-equivalence between the testifying and nontestifying groups in functioning at intake leaves some ambiguity about whether the substantially greater improvement of children who testified resulted from the testimony or simply the passage of time. Copies of these preliminary data may be obtained from *amicus*.

¹⁶ Such preparation might include enhancing the child's communication skills through dolls, artwork and simplified vocabulary, briefing the child on the roles of the courtroom personnel, introducing them to the judge, taking them on a tour of the courtroom, and allowing them to sit in the witness chair and speak into the microphone. Whitcomb, *Child Victims in Court: The Limits of Innovation*, 70 JUDICATURE 90 (1986).

fendant in the courtroom setting. Although there are no systematic studies which have isolated this factor, there is anecdotal support for the view that many child victims of sexual abuse do fear seeing the alleged offender again. See, e.g., Whitcomb, Shapiro & Stellwagen, *When the Victim Is A Child*, *supra* at 17-18:

Most [professionals who work with child victims in counseling or in the court room] stressed that children's abilities to cope with the judicial process varied a great deal, depending on age and circumstances. There were many common themes, however. The most frequently mentioned fear was facing the defendant. That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and the experience of being in close proximity to the defendant can be overwhelming.

See generally Berliner & Barbieri, *Testimony of the Child Victims of Sexual Assault*, *supra*. For some children, e.g., those who have been threatened with death or bodily harm to themselves or loved ones if they tell what happened, it is reasonable to assume that the fear may rise to a level of terror.

There are equally plausible reasons, however, based on existing studies, to suppose that children may benefit from testifying before their alleged offenders. For example, just as testifying may engender in children an enhanced sense of control over their lives, testifying before their alleged offenders may produce a sense of vindication by facilitating the resolution of conflicting feelings about the abuse, encouraging the children to see that the abuse was not their fault, and allowing children to experience the satisfaction, from their willingness to confront their abuser, of having contributed to an appropriate resolution of the case. In addition, the demonstrated role that adequate preparation plays in reducing the stress and trauma experienced by child witnesses sug-

gests that testifying in front of the alleged offender during preliminary competency hearings in the judge's chambers—a more informal and less awesome setting than the courtroom—may serve to lessen the trauma for the child who is found competent who will eventually testify in front of the offender at trial.

Because so little is known at this point about the effects on child victims of sex abuse of testifying in front of their alleged offenders, and indeed, social scientists may discover that generalizations about all children are invalid, *amicus* urges the Court to refrain from making any broad generalizations about the trauma experienced by child victims in these circumstances. Rather, *amicus* respectfully suggests that case-by-case determinations of the effects on individual children be made before defendants' rights are infringed or courtroom procedures are otherwise modified. In this way, modifications may be tailored to fit the needs of the particular child witness at issue, balanced against the defendant's interests in presence and confrontation in those circumstances, and thereby prevent overbroad infringement of the defendant's rights.

Such determinations readily could be made in preliminary proceedings, upon the government's motion to exclude the defendant or otherwise modify the trial procedure. In these proceedings the court would determine whether such modifications were necessary in light of "the minor[']s . . . age, psychological maturity and understanding, the nature of the offense, the desires of the [witness], . . . the interests of parents and relatives[,] and any expert testimony by qualified mental health professionals regarding the nature, degree and duration of potential injury to the child from testifying. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608. *Amicus* respectfully urges that because of the nature of the rights at stake and the tentative state of the social science data to support the experience of trauma in child

witnesses, the showing of potential trauma required by the state in order to override defendants' rights be specific and substantial.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court, should it find that Respondent was constitutionally entitled to be present and confront the accusing child witnesses during their competency evaluations, to remand to the trial court for a determination of whether the interests of the child outweighed Respondent's rights in these circumstances.

Respectfully submitted,

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