

## **From on the Stand to on Tape: Why Recorded Child Victim Testimony is Safer, More Effective, & Fairer**

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## Introduction

One of the greatest difficulties for prosecutors of sexual assaults against children is balancing the defendants' 6th Amendment right to confrontation with the negative effects that testifying has on child victims. Requiring a child to testify in court about past sexual abuse in front of a room full of strangers, as well as his or her abuser can be painful, frightening, and difficult. Research shows that testifying in court is traumatizing for children, and that this trauma can diminish the quality and reliability of a child's testimony.<sup>1</sup> However, a child's testimony is often also essential to the prosecution's case, given the nature of the offense and the fact that there may be few, if any, other first-hand witnesses. Due in part to such issues, methods of interviewing child victims, particularly child sexual assault victims, have evolved significantly over the last few decades.

Forensic interviews have been one particularly important development.<sup>2</sup> These interviews are conducted by competently-trained professionals, unassociated with law enforcement, who employ techniques developed through years of research as part of a larger investigative process that greatly aids in the discovery of crucial facts.<sup>3</sup> When allowed in court, video recordings of these interviews into court provide a viable alternative to a child's live, in-court testimony.<sup>4</sup>

Video-recorded forensic interviews are now used throughout the United States.<sup>5</sup> Texas adopted Tex. Code Crim. Proc. Article 38.071, which

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<sup>1</sup> See Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y RES. CHILD DEV. i, v (1992) (finding that many child sexual assault victims experience negative emotional effects as a result of testifying and that children who appear afraid of the defendant have more difficulty answering questions when testifying); see also P.E. Hill & S.M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 831 (1987) (discussing how live testimony by children can be unreliable due to the psychological burdens of testifying in court and arguing that videotaped testimony improves the quality and reliability of children's testimony); David F. Ross et al., *Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 L. AND HUM. BEHAV. 553, 554 (1994) (noting that the goal of alternative testimony methods such as protective barriers in court or videotaped interviews is to minimize the trauma inflicted upon children who testify).

<sup>2</sup> See Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, JUV. JUST. BULL. (Sept. 2015), <http://www.ojjdp.gov/pubs/248749.pdf> at 2-3 (discussing the development of child forensic interviews and the processes involved).

<sup>3</sup> See *id.* at 2.

<sup>4</sup> See Hill & Hill, *supra* note 1, at 817.

<sup>5</sup> See Newlin et al., *supra* note 2, at 11.

provided alternatives to live in-court testimony by children.<sup>6</sup> However, in *Coronado v. State*, Section 2 of the statute, which specifically provided for the admissibility of pre-recorded forensic interviews, was found unconstitutional.<sup>7</sup> The Texas Court of Criminal Appeals held that forensic interviews, without live testimony and cross-examination, violated the defendant's 6th Amendment right to confront the witnesses against him.<sup>8</sup> In a subsequent case, *Bays v. State*, the court further limited the admissibility of videotaped interviews by holding that such recordings do "not fall within the statutory hearsay exception for outcry evidence."<sup>9</sup>

The Texas statute allowing for recorded forensic interviews of children to be played at trial in lieu of the child's live testimony should be reinstated in full. The psychological wellbeing of the child victim along with a desire to ensure defendants the fairest trial possible should be an utmost priority. Part one of this paper will discuss the numerous problems with having child victims testify in sexual assault trials and the heightened need for child testimony in such cases. Part two will consider forensic interviews in light of the exclusionary rule for hearsay and the 6th Amendment's Confrontation Clause. Finally, part three looks at a case study of the admissibility of forensic interviews in Texas. This case study demonstrates that *Coronado* and *Bays* should be overturned to reinstate Texas Article 38.071 and allow forensic interviews of child sexual assault victims to be played at trial instead of in-court testimony, particularly in light of the Supreme Court's ruling in *Ohio v. Clark*.<sup>10</sup>

## I. Pervasiveness of Childhood Sexual Abuse

Child sexual assault is undeniably prevalent in the United States. A 2014 study found that by age seventeen, 26.6 percent of girls and 5.1 percent of boys reported having experienced sexual abuse or sexual assault, either by an adult or a peer, in their lifetime.<sup>11</sup> Unfortunately, the actual rates of

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<sup>6</sup> TEX. CODE CRIM. PROC. ANN. § 38.071 (West 2011), *invalidated by Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011).

<sup>7</sup> *Coronado*, 351 S.W.3d at 316-17.

<sup>8</sup> *Id.* at 328-30.

<sup>9</sup> *Bays v. State*, 396 S.W.3d 580, 586 (Tex. Crim. App. 2013) (finding that a child's videotaped statement does not fall under the statutory hearsay exception for outcry evidence).

<sup>10</sup> *See Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015) (finding that when a child is unavailable to be cross-examined, statements the child made to teachers identifying his abuser did not violate the Sixth Amendment's Confrontation Clause because they were not testimonial).

<sup>11</sup> David Finkelhor et al., *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 J. OF ADOLESCENT HEALTH 329, 331 (2014).

childhood sexual assault and abuse may actually be higher due to some victims either not remembering the incident or feeling uncomfortable with disclosing it.<sup>12</sup> According to the National Child Abuse and Neglect Data System, an estimated 8.4 percent of the approximately 683,000 confirmed or substantiated child abuse and neglect cases in 2015 involved sexual abuse.<sup>13</sup> This equated to 57,286 child victims of sexual assault nationally for that year alone.<sup>14</sup>

Despite the vast number of child sexual assaults and the heinous nature of this crime, convictions are remarkably rare. According to the Rape, Abuse & Incest National Network (“RAINN”), less than one percent of sexual abusers ever spend time in prison.<sup>15</sup> For every estimated 1,000 sexual assaults committed against both children and adults in the United States each year, only 344 are reported to police.<sup>16</sup> Of those reported, sixty-three reports lead to arrest, with only thirteen actually referred to prosecutors.<sup>17</sup> Only seven of those thirteen referrals lead to a felony conviction, and only six of those seven are incarcerated.<sup>18</sup> Thus, according to the statistics provided by RAINN, only six out of every 1,000 rapists, or 0.6 percent, likely spend a day in prison.<sup>19</sup> As difficult as it is to bring those who sexually abuse adults to justice, it is even more burdensome when the victim is a child due to a severe lack of forensic evidence.<sup>20</sup>

Sexual assault of children occurs often and affects children of all ages. Between 2009 and 2013, Child Protective Services agencies throughout the United States “substantiated, or found strong evidence to

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<sup>12</sup> *Id.*

<sup>13</sup> CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERV., CHILD MALTREATMENT 2015, at ii, 46 (2017), <https://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf> [hereinafter CHILDREN’S BUREAU].

<sup>14</sup> *Id.* at 45.

<sup>15</sup> *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NATIONAL NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Mar. 22, 2018) [hereinafter *The Criminal Justice System: Statistics*].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See discussion infra* Part I Section A, “A Heightened Need for Child Testimony”; *see generally* U.S. Dep’t of Just., Raising Awareness About Sexual Abuse: Facts and Statistics, NAT’L SEX OFFENDER PUB. WEBSITE, [https://www.nsopw.gov/\(X\(1\)S\(ajlttjaoqvbbp54hkl0xcgse\)\)/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference](https://www.nsopw.gov/(X(1)S(ajlttjaoqvbbp54hkl0xcgse))/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference) (last visited Mar. 21, 2018). [hereinafter *Raising Awareness*].

indicate that, 63,000 children a year were victims of sexual abuse.”<sup>21</sup> This translates to a substantiated claim of child sexual abuse every eight minutes.<sup>22</sup> Thirty-four percent of child sexual assault victims are under the age of twelve.<sup>23</sup> This means that of the 63,000 substantiated child sexual assault claims each year, 21,420 of the victims were elementary school age or younger.<sup>24</sup> The other sixty-six percent of child sexual assault victims were twelve to seventeen years old,<sup>25</sup> which would account for 41,580 children over that same timespan.<sup>26</sup>

Nation-wide statistics are powerful, but child sexual assault statistics become even more ominous when broken down by county. In Texas alone in 2016, 31.3% of all reported sexual assaults were against children.<sup>27</sup> To break that down by county, Harris County had 2,490 sexual assaults against victims of all ages;<sup>28</sup> Dallas County had 2,012;<sup>29</sup> Lubbock County had 341;<sup>30</sup> and, Smith County had 150.<sup>31</sup> If that 31.3% figure is consistent across these Texas counties, that translates to over 1,560 reported child sexual assault cases in only one year for these four counties alone.<sup>32</sup>

#### A. A Heightened Need for Child Testimony

There is a heightened need for child testimony in child sexual assault cases because there is often a lack of physical evidence—it is just a child’s word against that of an adult.<sup>33</sup> “Detecting sex abuse, as well as convicting

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<sup>21</sup> *Scope of the Problem: Statistics*, RAPE, ABUSE & INCEST NATIONAL NETWORK, <https://www.rainn.org/statistics/scope-problem> (last visited Mar. 22, 2018) [hereinafter *Scope of the Problem: Statistics*]; see also CHILDREN’S BUREAU, *supra* note 13, at 45.

<sup>22</sup> *Children and Teens: Statistics*, RAPE, ABUSE & INCEST NATIONAL NETWORK, <https://www.rainn.org/statistics/children-and-teens> (last visited Mar. 22, 2018) [hereinafter *Children and Teens: Statistics*].

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*; see also *Scope of the Problem: Statistics*, *supra* note 21; CHILDREN’S BUREAU, *supra* note 13, at 38-41.

<sup>25</sup> *Children and Teens: Statistics*, *supra* note 22.

<sup>26</sup> See *id.*; see also *Scope of the Problem: Statistics*, *supra* note 21; CHILDREN’S BUREAU, *supra* note 13, at 38-41.

<sup>27</sup> See *Chapter 7: Sexual Assault*, TEX. DEP’T PUB. SAFETY 51, 53 (2016), <http://www.dps.texas.gov/crimereports/16/citCh7.pdf>.

<sup>28</sup> See *id.* at 56.

<sup>29</sup> See *id.* at 55.

<sup>30</sup> See *id.* at 57.

<sup>31</sup> See *id.* at 58.

<sup>32</sup> See *id.* at 53, 55-58.

<sup>33</sup> See Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1749-51 (1983) (discussing the unusual need for child

its perpetrators, is exceptionally difficult, due to the lack of witnesses and corroborative physical evidence, and to the reluctance or inability of the victim to testify against the defendant.”<sup>34</sup> The lack of corroborative physical evidence may be complicated by the fact that many important signs of sexual assault can be psychological and emotional rather than physical, and thus harder for adults to recognize.<sup>35</sup> For example, the Canadian Centre for Child Protection advises that in addition to physical indicators of abuse such as genital trauma and bleeding, children who have been sexually abused may exhibit changes in behavior such as becoming withdrawn and depressed, “clingy,” “aggressive,” or “self-destructive.”<sup>36</sup> They may also experience a “decline in school performance,” “disrupted sleep patterns,” “distress around a particular adult,” or “excessively [seek] time with a particular adult.”<sup>37</sup> Not only may these symptoms be difficult for adults to recognize, but they may also be attributable to issues other than sexual assault and abuse.<sup>38</sup> Even when “there is credible evidence that a child has been penetrated, only between 5 and 15% of those children will have genital injuries consistent with sexual abuse.”<sup>39</sup> Thus, in the 85-95% of cases where there is no physical evidence of penetration, a child victim must essentially either testify live in court or his abuser will be acquitted, because the testimony of the child is often the only evidence of the defendant’s guilt.<sup>40</sup>

Given how challenging and nerve-wracking testifying in court is for most people,<sup>41</sup> one can only imagine how those effects might be magnified when children must take the stand alone, in front of their abuser, and in a room full of strangers. Unfortunately, the trauma does not end for the victim

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testimony in child sex abuse cases and examining how various courts have applied the rules of hearsay to children’s out of court statements in these cases).

<sup>34</sup> *Id.* at 1745.

<sup>35</sup> See *Child Sexual Abuse: It Is Your Business*, CANADIAN CENTRE FOR CHILD PROTECTION 1, 5 (2014), [https://www.cybertip.ca/pdfs/C3P\\_ChildSexualAbuse\\_ItIsYourBusiness\\_en.pdf](https://www.cybertip.ca/pdfs/C3P_ChildSexualAbuse_ItIsYourBusiness_en.pdf) [hereinafter CANADIAN CENTRE FOR CHILD PROTECTION]; see also *Tip Sheet: Warning Signs of Possible Sexual Abuse in a Child’s Behaviors*, STOP IT NOW, <http://www.stopitnow.org/ohc-content/tip-sheet-7> [hereinafter STOP IT NOW].

<sup>36</sup> CANADIAN CENTRE FOR CHILD PROTECTION, *supra* note 35, at 5; see also STOP IT NOW, *supra* note 35.

<sup>37</sup> CANADIAN CENTRE FOR CHILD PROTECTION, *supra* note 35, at 5; see also STOP IT NOW, *supra* note 35.

<sup>38</sup> See U.S. Dep’t of Just., *supra* note 20.

<sup>39</sup> *Child Sexual Abuse Statistics*, NAT’L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last updated 2012).

<sup>40</sup> See *id.*; Yun, *supra* note 33, at 1750-51.

<sup>41</sup> See Goodman et al., *supra* note 1, at 1.

after stepping down from the witness stand.

A study conducted by researcher Gail S. Goodman, director of the Center for Public Policy Research at the University of California,<sup>42</sup> examined the harmful effects testifying has on children by interviewing child victims during various stages of trial preparation, trial, and after trial. This two-year study followed and interviewed 218 children who had been victims of sexual assault<sup>43</sup> and had reported the abuse to authorities between the ages of three and seventeen.<sup>44</sup> Over 55% of the subjects were under ten years of age when the abuse was first reported.<sup>45</sup> Data, including observations and questionnaires, were collected during an intake interview, before the judicial process, at three and seven months after the court proceedings, and when the case closed.<sup>46</sup> Children who testified in their cases were also observed during their testimony and administered a questionnaire immediately after they testified.<sup>47</sup>

The study found that “criminal court testimony is stressful for many children and often accompanied by dissatisfaction for children and caretakers.”<sup>48</sup> In general, the children in the study exhibited behavior indicative of “substantial levels of disturbance a time of entry into the criminal justice system.”<sup>49</sup> At three months after the conclusion of court proceedings, both the children who testified and those who did not seemed to have equal levels of improvement in their behavior and emotional well-being.<sup>50</sup> However, after seven months, the children who testified showed greater emotional disturbance and experienced less improvement in their behavior than the children who had not testified.<sup>51</sup> This was especially true for children who “took the stand multiple times, were deprived of maternal

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<sup>42</sup> Gail S. Goodman is the Director of the Center for Public Policy Research at the University of California, Davis, and has been involved in over 100 psychological studies involving both children and the criminal justice system. See *Center for Public Policy Research*, DEV. RESEARCH CTR., UNIV. OF CAL., DAVIS, <http://devresearch.faculty.ucdavis.edu/center-for-public-policy-research/> (last visited Mar. 22, 2018); *Publications*, DEV. RESEARCH CTR., UNIV. OF CAL., DAVIS, <http://devresearch.faculty.ucdavis.edu/publications/> (last visited Mar. 22, 2018).

<sup>43</sup> Goodman et al., *supra* note 1, at v.

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 18.

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 126.

<sup>49</sup> *Id.* at 47-48.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 50-51.

support, and lacked corroboration of their claims.<sup>52</sup> Notably, corroborating evidence was only “available in [thirty four percent] of the cases.”<sup>53</sup>

A common fear articulated by the children in this study was facing the defendant.<sup>54</sup> Researchers observed that during testimony, the “more frightened the child was of the defendant,” the less likely they were to give full, coherent answers to questions posed by the attorneys, even during direct examination by the prosecutors who are advocating for the child.<sup>55</sup> This could have a negative effect on the outcome of the case since it is more difficult for juries and judges to make accurate factual findings without clear, complete, and truthful answers from the children. While it can be difficult for children to respond even to prosecutors on the stand, it is even more difficult to interact with the defense attorney who often seeks to discredit the child victim. Even though there are resources for attorneys such as articles advising attorneys on how to best question child witnesses,<sup>56</sup> it is extremely difficult to advocate for the defendant’s innocence without appearing to intimidate or inappropriately challenge the child. For example, one teenager in Goodman’s study, when asked about his perceptions of the defense attorney after trial, said, “I can’t stand him. He made me mad. He kept trying to, he’d say, ‘Didn’t you say this?’ and I didn’t. He kept trying to make me lie.”<sup>57</sup>

Further, even after the cases were closed, the children that testified were more likely to say that the specific act of testifying had negatively affected them.<sup>58</sup> At the conclusion of trial, children made statements to the researchers such as the experience being “worse than I thought—like a nightmare.”<sup>59</sup> When asked specifically about facing the defendant in the courtroom, one child made the following statement: “I was scared. I didn’t look at [the defendant]. If I would have looked at him, I would have freaked.”<sup>60</sup> Another child reported that seeing the defendant during trial

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<sup>52</sup> *Id.* at v.

<sup>53</sup> *Id.* at 19.

<sup>54</sup> *Id.* at 101.

<sup>55</sup> *Id.* at 121.

<sup>56</sup> See, e.g., Colin H. Murray, *Child Witness Examination*, GPSOLO MAGAZINE (Sept. 2005),

[https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/childwitness.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/childwitness.html) (advising how to build rapport with, interview and examine child witnesses in both civil and criminal cases).

<sup>57</sup> Goodman et al., *supra* note 1, at 100.

<sup>58</sup> *Id.* at v.

<sup>59</sup> *Id.* at 100.

<sup>60</sup> *Id.* at 101.

“brought the memory all back again.”<sup>61</sup> In fact, after a harsh sentence was imposed on one of the defendants in this study, the child victim later reported that the severe sentence only worsened his fear of the defendant saying, “If he was to get out in the future, I don’t know if I could live a normal life without being scared.”<sup>62</sup> Such a response is consistent with the belief that the defendant will be more angry or vengeful because of the child’s testimony and cooperation with prosecutors, which leads the child to naturally fear retaliation by the defendant upon his or her release from prison. The study revealed that forcing children to give live testimony in court hinders their ability to fully answer questions and explain what happened to them and affects them negatively even long after the trial is over.<sup>63</sup> The researchers concluded that “these findings lend support to recent efforts to shield child witnesses from the defendant via close-circuit television or videotaped testimony. . . .”<sup>64</sup>

There is no doubt that testifying in court is challenging for all victims,<sup>65</sup> but it is likely even more difficult for children. Not only are juries less likely to get full, accurate answers from children who are anxious and afraid of both the experience of testifying and encountering their abuser,<sup>66</sup> but the child is further traumatized by having to relive those horrible events and talk about them in a room full of strangers and the person who victimized them.<sup>67</sup> This trauma and the resulting lifelong behavioral issues could lead to fewer and fewer children testifying in these types of trials. When children do not testify in court—whether it be because of fear, sickness, caregivers deciding to not have them testify, embarrassment, etc.—their alleged abusers will likely be acquitted if videotaped forensic interviews, which can provide vital testimony in these cases, are excluded from evidence.

The difficulties unique to child sexual assault cases have important ramifications. The National Institute of Justice reports that the five main reasons sexual assault survivors do not come forward are: “self-blame or guilt;” “shame, embarrassment, or desire to keep the assault a private matter;” “humiliation or fear of the perpetrator or other individual’s perceptions;” “fear of not being believed or of being accused of playing a

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 69.

<sup>63</sup> *See id.* at v.

<sup>64</sup> *Id.* at 121.

<sup>65</sup> *Id.* at 1.

<sup>66</sup> *See id.* at 121.

<sup>67</sup> *Id.* at 7-8.

role in the crime;” and “lack of trust in the criminal justice system.”<sup>68</sup> This reluctance to come forward is evident in the fact that less than 1% of sexual abusers will be convicted as felons and spend a single day in prison.<sup>69</sup> For our justice system to work victims must come forward, but how can we ask them to take such a brave stand when doing so will only cause further trauma and is unlikely to result in a conviction?<sup>70</sup>

A predominate goal of our criminal justice system is to punish the guilty and protect the innocent. When sexual abuse occurs, the child victim is often the only witness, which raises the issue of whether the child’s statements about the sexual abuse can be trusted.<sup>71</sup> Credibility of the child can be even more crucial than in other cases because there is often so little evidence.<sup>72</sup> But forcing children to either testify or let their abuser be acquitted does not protect the innocent, either psychologically or emotionally, nor does it help further the goals of our criminal justice system.

## II. Proposed Solution & Potential Barriers

Solutions have been proposed to remedy these identified concerns. One such solution is to utilize a forensic interviewer who is trained to illicit truthful information from the child. This information can then be used in the prosecution of their abuser without contributing to further traumatization. Forensic interviewers are specifically trained to conduct interviews in a way that ensures that the child answers truthfully, avoids false memories, and is not further traumatized.<sup>73</sup> Forensic interviewers and their methods came about as a part of a movement to change the way in which child victims of crime are interviewed after botched questioning manipulated children into having false memories of sexual assaults in the McMartin Preschool trial.<sup>74</sup>

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<sup>68</sup> *Reporting of Sexual Violence Incidents*, NAT’L INST. OF JUST. PROGRAMS (Oct. 26, 2010), <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx>.

<sup>69</sup> *The Criminal Justice System: Statistics*, *supra* note 15.

<sup>70</sup> *See id.*

<sup>71</sup> *See* Robert Giles, *Behind the Net: Technology and the Forensic Interview*, NAT’L DIST. ATTORNEYS’ ASS’N 1, 2 (2012), [http://www.ncdsv.org/images/NDAA\\_BehindTheNetTechnologyAndTheForensicInterview\\_2012.pdf](http://www.ncdsv.org/images/NDAA_BehindTheNetTechnologyAndTheForensicInterview_2012.pdf) (discussing misconceptions around child witnesses and how to incorporate technology into forensic interviews).

<sup>72</sup> *See* Yun, *supra* note 33, at 1750-53; *see also* Goodman et al., *supra* note 1, at 2.

<sup>73</sup> *See* Newlin et al., *supra* note 2.

<sup>74</sup> Doug Linder, *The McMartin Preschool Abuse Trial: A Commentary*, FAMOUS TRIALS (2003), <http://www.famous-trials.com/mcmartin> (providing the history of the McMartin Preschool case and its aftermath).

In 1983, Judy Johnson called police to report her son's alleged sexual abuse by an aide at McMartin Preschool.<sup>75</sup> However, her son could not identify the alleged abuser, and there were no signs of sexual abuse.<sup>76</sup> Johnson then claimed that the owner was involved in Satanic rituals including the beheading of a baby, sodomy, and drinking blood.<sup>77</sup> After these initial allegations, Kee MacFarlane, a children's advocate from the Children's Institute International, questioned roughly 400 children about these events by using leading questions and offering rewards for desired answers.<sup>78</sup> Children denied any abuse initially, but eventually surrendered and told her what she wanted to hear.<sup>79</sup> This idea of remembering events that never actually occurred yet believing them to be true is known as False Memory Syndrome.<sup>80</sup> By the end of her interrogations, 384 students claimed abuse, and seven workers at the preschool were indicted with 208 counts of sexual abuse.<sup>81</sup> Eventually after two mistrials, the charges were dropped, but the defendants each spent up to five years in jail for crimes they likely never committed.<sup>82</sup> This disaster triggered a massive movement to change how children were interviewed, which contributed to creating the role of forensic interviewers who are specifically trained to avoid situations like McMartin.<sup>83</sup>

#### A. *The Development of Forensic Interviews*

To help prevent a similar disaster from occurring in the future, scholars worked to create a better model for interviewing children. After approximately 20 years of practice, research, and experimentation, professionals in the fields of child psychology and child development "have gained significant insight into how to maximize children's potential to accurately convey information about their past experiences,"<sup>84</sup> referred to as forensic interviewing. Forensic interviewing as "a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. The forensic

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *False Memory Syndrome*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/false-memory-syndrome> (last visited Mar. 22, 2018).

<sup>81</sup> See Linder, *supra* note 74.

<sup>82</sup> *Id.*

<sup>83</sup> See Newlin et al., *supra* note 2, at 3.

<sup>84</sup> *Id.* at 2.

interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.”<sup>85</sup> Put simply, a forensic interview is an interview method designed to elicit truthful responses from children while taking special care to avoid planting false memories or ideas in the impressionable minds of children. There are multiple interview models for the interviewer to select from and tailor to each child’s individual needs. In selecting a model, the interviewer considers the age and development of the child since that will “influence his or her perception of an experience and the amount of information that they can store in long-term memory.”<sup>86</sup>

Although there are various interview models, several key aspects remain consistent throughout each approach. All of the methods used by forensic interviewers have three stages in common: the rapport-building phase, the substantive phase, and the closure phase.<sup>87</sup> In the rapport-building phase, there are age- and context-appropriate discussions of “the importance of telling the truth” (truth vs. lie), instructions for the interview, practice giving narrative answers, and an explanation of how the interview is being recorded.<sup>88</sup> The substantive phase seeks to get the facts and a narrative description of events using open-ended questions, various detail-seeking strategies, clarification of any inconsistencies or other issues, and testing of alternative hypotheses or theories of the case when appropriate.<sup>89</sup> Finally, the closure phase focuses on the socio-emotional needs of a child by providing “a respectful end to a conversation that may have been emotionally challenging for the child.”<sup>90</sup> However, each phase is always uniquely tailored to meet the needs of the child at that time and can change during subsequent interviews as needed.<sup>91</sup> As with other types of videos offered as evidence during trial, such as police body camera or store surveillance footage, the attorneys and the judge may limit what is shown in the trial to the segments which are relevant to the elements of the crime, possible defenses, mitigating evidence, etc. This detailed and deliberate process stands in glaring contrast to the manipulative methods used to elicit information from the McMartin Preschool children.

An essential factor used to determine the approach the forensic

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<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 3, 8.

<sup>89</sup> *See id.* at 9-10.

<sup>90</sup> *Id.* at 10.

<sup>91</sup> *See id.* 4-6, 11.

interviewer will use is the age of the child.<sup>92</sup> Children of all ages can contribute to interviews.<sup>93</sup> For example, though infants and toddlers cannot yet translate their early memories into words, they can convey experiences based on their behavioral reactions to people, objects, and environments.<sup>94</sup> However, even as they age and begin to develop their language skills, “young children are less able to make sense of unfamiliar experiences” and express them with words.<sup>95</sup> This is amplified by children’s limited vocabularies, which can make explaining events extremely difficult.<sup>96</sup> Forensic interviews are valuable in discovering the truth because they take all of the information about each specific child into account, rather than repeating the same leading questions until the child is eventually pressured into giving the answer the adult wants.<sup>97</sup>

This individualized technique reduces the chances of the child giving false statements or developing false memories.<sup>98</sup> As children develop, “their attention span improves and they are better prepared to comprehend, notice unique elements, and describe their experiences verbally.”<sup>99</sup> “This, in turn, allows them to store more information and also allows them to discuss remembered events with others.”<sup>100</sup> While these developments allow forensic interviewers to more easily get information from older children, there are still challenges. Children, regardless of their age, are more likely to recall details from the actual event rather than peripheral details, such as the time on a nearby clock, background noises, scents, etc.<sup>101</sup> Effectively interviewing children is an exceptionally difficult task that requires the specialized training that forensic interviewers possess.

Forensic interviewers help thousands of child sexual assault victims voice’s be heard each year. The Children’s Advocacy Centers of Texas (“CACTX”) is an example of such a center that provides child forensic interview services.<sup>102</sup> CACTX’s seventy-one centers serve an estimated

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<sup>92</sup> *Id.* at 3.

<sup>93</sup> *See id.* at 3-4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 6.

<sup>98</sup> *See id.* at 8.

<sup>99</sup> *Id.* at 4.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Local Centers, CHILDREN’S ADVOC. CTR. TEX.*, <https://www.cactx.org/local-centers> (last visited Jan. 20, 2018).

47,000 children each year.<sup>103</sup> Of those children, seventy-one percent, or 33,370, were victims of sexual abuse, and twenty-five percent, or 11,750 children, were too young to attend kindergarten.<sup>104</sup> Taken together, these statistics mean that an estimated 8,342 child sexual assault victims helped by a CACTX center were under the age of five.<sup>105</sup>

Forensic interviews are crucial to address the lack of adequate vocabulary, shorter attention spans, risk of developing false memories, and other similar concerns that arise in cases involving child victims.<sup>106</sup> Modern developments in child psychology and behavior allow specially trained individuals to question child victims in a way that teachers, parents, police officers, and attorneys cannot, even if they truly mean well. While some may argue that police officers and attorneys can complete the same training as forensic interviewers, this is extremely impractical unless these professionals specialize in cases involving children. When a person's liberty is at stake, especially due to such a serious allegation as sexual assault of a child, society must have the most well-equipped and well-trained professionals interviewing these children.

### B. Addressing Hearsay Concerns

Forensic interview videos are typically excluded from evidence due to hearsay concerns. Hearsay is any out of court statement offered for the truth of the matter asserted,<sup>107</sup> and it is typically inadmissible at trial.<sup>108</sup> This "rule against hearsay"<sup>109</sup> comes from the presumption that hearsay is generally unreliable since it is not subject to "oath, personal appearance at trial, and cross-examination" like normal in-court testimony.<sup>110</sup> However, "courts have long allowed the admission of statements falling within a firmly rooted hearsay exception"<sup>111</sup> on the basis that there are some

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<sup>103</sup> *Home*, CHILDREN'S ADVOC. CTR. TEX., <https://www.cactx.org> (last visited Jan. 20, 2018).

<sup>104</sup> *Child Abuse in Texas*, CHILDREN'S ADVOC. CTR. TEX., <https://www.cactx.org/child-abuse-in-texas> (last visited Jan. 20, 2018).

<sup>105</sup> *Id.*

<sup>106</sup> See Newlin et al., *supra* note 2, at 4.

<sup>107</sup> FED. R. EVID. 801.

<sup>108</sup> FED. R. EVID. 802.

<sup>109</sup> *Id.*

<sup>110</sup> *Smith v. State*, 88 S.W.3d 652, 658 (Tex. App. 2002) (holding that a child's videotaped statements were sufficiently trustworthy and reliable to support their admission into evidence at trial).

<sup>111</sup> *Lilly v. Virginia*, 527 U.S. 116, 125 (1999) (holding that admission of a co-defendant's statements against penal interest was not within a firmly rooted exception to the hearsay

categories of hearsay “whose conditions have proven over time ‘to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath’ and cross-examination at a trial.”<sup>112</sup> The Federal Rules of Evidence enumerate a number of such hearsay exceptions, including present sense impressions,<sup>113</sup> excited utterances,<sup>114</sup> and recorded recollections.<sup>115</sup> For example, when a declarant is deemed to be unavailable, statements made against the declarant’s interests may be admissible.<sup>116</sup> The rationale for this exception is that no rational person would make the decision to lie in order to harm himself.<sup>117</sup> If a statement “has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule,” it satisfies the Confrontation Clause.<sup>118</sup>

Under the rules of hearsay, forensic interview recordings are often deemed inadmissible because the children’s statements were not made in court and are being offered to prove that the defendant sexually assaulted the child.<sup>119</sup> Despite this trend, the legal history of the United States and the numerous exceptions<sup>120</sup> discussed above demonstrate that in certain situations, hearsay assertions are likely reliable enough and important enough to be admitted into evidence despite the general prohibition against hearsay. However, even if forensic interviews were to fall within a hearsay exception, the application of the Confrontation Clause in criminal cases creates another hurdle to admissibility.<sup>121</sup>

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rule).

<sup>112</sup> *Id.* at 126 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

<sup>113</sup> FED. R. EVID. 803(1).

<sup>114</sup> *Id.* at 803(2).

<sup>115</sup> *Id.* at 803(5).

<sup>116</sup> FED. R. EVID. 804(b)(3).

<sup>117</sup> FED. R. EVID. 804(b)(3) notes of advisory committee on rules; *see also* *Hileman v. Nw. Eng’g Co.*, 346 F.2d 668, 670 (6th Cir. 1965) (holding that to satisfy the hearsay exception for declarations against interest, the declaration must state facts which are against the declarant’s interest and the declarant must be unavailable at trial).

<sup>118</sup> *Lilly v. Virginia*, 527 U.S. 116, 122 (1999) (citing *White v. Illinois*, 502 U.S. 346, 356 (1992)).

<sup>119</sup> *State v. Henderson*, 284 Kan. 267, 280-81 (2007) (finding that a child’s videotaped statement was testimonial and admitting it into evidence violated the defendant’s right to confrontation).

<sup>120</sup> More than twenty hearsay exceptions are enumerated in the Federal Rules of Evidence. *See e.g.*, FED. R. EVID. 803.

<sup>121</sup> *See Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) (finding that the right to confrontation is a procedural guarantee that the reliability of testimony will be tested by cross-examination, and that admission into evidence of a statement made by the defendant’s wife violated the defendant’s right to confrontation).

### C. Admissibility and the Confrontation Clause

The Confrontation Clause of the 6th Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>122</sup> In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause applies not only to in-court testimony, but also to out-of-court statements introduced at trial that are testimonial in nature.<sup>123</sup>

Admitting out-of-court statements at trial can pose a number of problems because the defendant is unable to cross-examine that person as is provided by the 6<sup>th</sup> Amendment Confrontation Clause.<sup>124</sup> However, the right to confrontation does not prohibit all hearsay statements, particularly those within the hearsay exceptions, because this right is not unlimited.<sup>125</sup>

In *Lilly v. Virginia*, the Supreme Court of the United States noted that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing.”<sup>126</sup> Cross-examination allows the defendant to test a witness’ statements and tell his side of the story by pointing out inconsistencies in the witness’ statements, as well as emphasizing points that benefit his defense and his innocence.<sup>127</sup> The cross-examination element of the Confrontation Clause accomplishes this goal in the following three ways:

(1) a witness who testifies under oath will be impressed with the seriousness of the matter and the possibility of a penalty for perjury; (2) cross-examination, which has been described as “the greatest legal engine ever invented for the discovery of truth,” is available for testing the credibility of the witness; and (3) the demeanor of the witness can be considered by the jury in assessing credibility.<sup>128</sup>

Forensic interviews are designed to satisfy the Confrontation Clause in many of the same ways as cross-examination. Forensic interviewers

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<sup>122</sup> U.S. CONST. AMEND. VI.

<sup>123</sup> See *Crawford*, 541 U.S. at 50-51.

<sup>124</sup> See U.S. CONST. AMEND. VI.

<sup>125</sup> Consider the numerous hearsay exceptions in the Federal Rules of Evidence, for example. See FED. R. EVID. 803.

<sup>126</sup> *Lilly v. Virginia*, 527 U.S. 116, 123 (1999) (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)).

<sup>127</sup> See *Smith v. State*, 88 S.W.3d 652, 658 (Tex. App. 2002) (citing *California v. Green*, 399 U.S. 149, 158 (1970); *Lee v. Illinois*, 476 U.S. 530, 540 (1986)).

<sup>128</sup> *Id.* (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

stress the importance of telling the truth over lies during the rapport-building phase.<sup>129</sup> The truth versus lie discussion that occurs in all forensic interviews is essentially an age-appropriate equivalent of a perjury warning because it explains the importance of telling the truth without confusing the child with legal terms or scaring an already vulnerable child with threat of jail. Thus, the Court's concern about witnesses understanding the seriousness of the situation and the consequences of lying<sup>130</sup> is satisfied with a forensic interview.

The Court's second concern, that of discovering truth, is also satisfied. Although the defendant and his attorney will rarely be involved during the initial forensic interview, provisions can be made to allow the defense to submit questions to the forensic interviewers that are used to elicit the information needed for the defendant's defense, such as testing credibility.<sup>131</sup> The main reason for cross-examination is to verify the truth of the evidence being offered.<sup>132</sup> Allowing the defense to submit questions to a trained, neutral forensic interviewer allows the defendant, and later the jury, to receive information necessary to determine the truth of the child's statements. This method will also benefit the defendant by getting more truthful and complete answers without the defense attorney appearing sinister as he or she challenges a small child's testimony on the stand, especially if it results in making the child cry on the stand.

Finally, the third policy concern, that of evaluating the witness's demeanor as a factor in determining his credibility<sup>133</sup> is also satisfied because the jury not only still sees the child's demeanor on the video recording, but it can also replay the video during deliberations. Thus, forensic interviews accomplish the goals of both the Confrontation Clause and cross-examination and alleviate the main hearsay concerns the Supreme Court articulated.

The Confrontation Clause is very short, and the language does not lay out any specific or alternate criteria for application to a small child's testimony. However, in the 2015 case *Ohio v. Clark*, the United States Supreme Court, looking at statements made by a child when first telling a teacher of abuse, unanimously held that "statements by very young children will rarely, if ever, implicate the Confrontation Clause."<sup>134</sup> The Court noted

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<sup>129</sup> See Newlin et al., *supra* note 2, at 7.

<sup>130</sup> See *Smith*, 88 S.W.3d at 658.

<sup>131</sup> See TEX. CODE CRIM. PROC. ANN. art. 38.071 § 2(b) (West 2011).

<sup>132</sup> See *Smith*, 88 S.W.3d at 658.

<sup>133</sup> *Id.*

<sup>134</sup> *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015).

that at the time the 6th Amendment was written, hearsay statements by children about their sexual abuse would have been allowed in cases where the child was unavailable because they were too young to understand the oath to only tell the truth.<sup>135</sup> In reaching the conclusion that the child's statements in this case were not testimonial and thus not hearsay, the court considered "all the relevant circumstances," including whether there was an ongoing emergency situation, whether "the primary purpose of the conversation was to gather evidence for [the] prosecution," and the age of the child involved.<sup>136</sup> However, there is currently no bright-line rule establishing a set age limit for when these special considerations apply to children's statements.

### III. A Texas Case Study

Texas courts had been hesitant to admit recordings of forensic interviews into evidence because of hearsay concerns. To reduce this concern, Texas passed Article 38.071 of the Texas Code of Criminal Procedure (herein after "Article 38.071") as a specific exception to the rule against hearsay that went into effect on September 1, 2011. This section helped address issues such as the lack of physical evidence and the reliability of the child's testimony that arise in many child sexual assaults.<sup>137</sup>

This article applied to children younger than 13 years old who are the victims of specific crimes including indecency with a child,<sup>138</sup> sexual assault,<sup>139</sup> aggravated sexual assault,<sup>140</sup> prohibited sexual conduct,<sup>141</sup> and sexual performance by a child.<sup>142</sup> This age limit is significant because it applied to thousands of Texas children. According to the Texas Department of Public Safety's data for 2016, there were approximately 5,000 substantiated sexual assault victims between ages 10-14, approximately 3,000 substantiated child victims between ages 5-9, and approximately 1,250 substantiated child victims age 4 or younger.<sup>143</sup> Thus, Article 38.071 could have potentially protected thousands of Texas children from the

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> TEX. CODE CRIM. PROC. ANN. art. 38.071 (West 2011).

<sup>138</sup> *Id.* § 1(5).

<sup>139</sup> *Id.* § 1(6).

<sup>140</sup> *Id.* § 1(8).

<sup>141</sup> *Id.* § 1(11).

<sup>142</sup> *Id.* § 1(13).

<sup>143</sup> See *Chapter 7: Sexual Assault*, *supra* note 27, at 52.

traumatic effects of live testimony at trial each year.

Recordings of the child's statements during these interviews could then be used when the "court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter."<sup>144</sup> This section was likely referring to individuals such as forensic interviewers. Then the statute dictates that both parties could submit questions to be asked to the child by the forensic interviewer.<sup>145</sup> The answers would then be reviewed, and both parties could ask additional questions until all were satisfied.<sup>146</sup>

When the child was "unavailable" to testify, both the original video and the subsequent videos could be submitted together and deemed admissible as an exception to the rule against hearsay.<sup>147</sup> Unavailability would be determined by considering: "the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because of psychological harm resulting from the child's involvement."<sup>148</sup>

Article 38.071 was a well-written exception to the traditional rules of testimony, confrontation, and hearsay that would allow for fair, deposition-style cross-examination of child witnesses while protecting the child from undue trauma and distress. Our judicial system is designed to seek the truth, to weigh the evidence, and then find the truth. The most accurate and efficient way to obtain the truth when it comes to child witnesses is for neutral, specially trained forensic interviewers to illicit testimony from the children.

#### A. *Texas' Short-Lived Solution*

On September 14, 2011, only 14 days after Article 38.071, Section 2 went into effect, the Texas Court of Criminal Appeals in *Coronado v. State* ruled Article 38.071, Section 2 unconstitutional.<sup>149</sup> The defendant in *Coronado v. State* had been sentenced to life in prison for touching and

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<sup>144</sup> TEX. CODE CRIM. PROC. ANN. art. 38.071 § 2(a) (West 2011).

<sup>145</sup> *Id.* § 2(b).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* § 8(a).

<sup>148</sup> TEX. CODE CRIM. PROC. ANN. art. 38.071 (West 2011).

<sup>149</sup> *See Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011).

penetrating the child victim's genitals.<sup>150</sup> In accordance with Article 38.071, the child was declared unavailable to testify at trial because of her therapist's testimony that the live testimony and cross-examination would cause further psychological trauma to her.<sup>151</sup> Two forensic interviews were played at trial instead.<sup>152</sup> The defendant appealed the conviction, arguing his 6th Amendment right to confrontation had been violated as he could not actively cross-examine a video recording.<sup>153</sup> The court ruled that the videos were testimonial for Confrontation Clause purposes and inadmissible absent the child's live testimony.<sup>154</sup>

The recordings were found to be testimonial because the objective purpose of these interviews was to question the child about past events and the child's statements in the recorded interviews were likely to be relevant in a future criminal proceeding.<sup>155</sup> As such, the court held that the recordings would be inadmissible unless the child testified or the defendant had a prior opportunity to cross-examine him/her.<sup>156</sup> The court explained that there must be a meaningful and effective cross-examination to satisfy the Confrontation Clause requirements, which included the opportunity for full personal adversarial cross-examination by the defendant, including attacks on credibility. Consequently, the provision in Article 38.071 allowing for a list of written interrogatories from the defense that the forensic interviewer could then ask the child in an interview was not a sufficient substitute.<sup>157</sup> The court reasoned that since the forensic interviewer is a neutral party with different motivations than the defendant and the defendant was not physically present during the interviews, these questions could not be considered meaningful and effective cross-examination.<sup>158</sup> Finally, the court concluded that the age of the victim does not lessen the 6th Amendment protection afforded to the defendant, so there cannot be a special deprivation of the defendant's rights merely because the victim is young.<sup>159</sup>

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<sup>150</sup> *Id.* at 318.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 317.

<sup>153</sup> *Id.* at 319.

<sup>154</sup> *Id.* at 325.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 328.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

### B. *Coronado Reasoning & the Confrontation Clause*

However, the reasoning in *Coronado* is flawed for several reasons: young children's statements rarely trigger the Confrontation Clause because they are typically non-testimonial,<sup>160</sup> the court ignored clear evidence of the trauma the testimony would cause the child, the court disregarded past exceptions that have been made for similar situations, and the court discounted the efficacy of the defense's deposition-style questions to the child victim.

First, the United States Supreme Court held in *Ohio v. Clark* that "statements by very young children will rarely, if ever, implicate the Confrontation Clause", because they are unlikely to be testimonial in nature.<sup>161</sup> Article 38.071 is a very limited exception which coexists with the holding in *Ohio v. Clark* because it is restricted to young children.<sup>162</sup> The young children making these statements to forensic interviewers often lack the foresight and knowledge of the criminal justice system to anticipate that their statements will be used to help convict the defendant. However, even if the age range in Article 38.071 were deemed too broad, the correct remedy would be to lower the age requirement rather than strike the entire article. Because the United States Supreme Court has recognized that the age of the victim witness matters when determining applicability of the Confrontation Clause,<sup>163</sup> Texas should do the same.

Second, the psychological effects on the child would be severe. In *Coronado*, the child's psychologist, a qualified expert witness, testified that the child was afraid of retaliation by the defendant, and would often sob when asked about the abuse.<sup>164</sup> She also testified that the child was likely to forget the abuse because it happened when she was so young.<sup>165</sup> However, if she were required to testify, she would essentially be forced to relive it at an older age where the chances of the events being forgotten is drastically lower, and be traumatized by the experience.<sup>166</sup>

The psychologist then stated that testifying about the abuse would be almost as damaging to the little girl as the abuse itself.<sup>167</sup> This testimony was not enough to satisfy the court in *Coronado*, and these details

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<sup>160</sup> *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015).

<sup>161</sup> *Id.*

<sup>162</sup> TEX. CODE CRIM. PROC. ANN. art. 38.071 § 1 (West 2011).

<sup>163</sup> *See Clark*, 135 S. Ct. at 2182.

<sup>164</sup> *Coronado*, 351 S.W.3d at 332 (Keller, P.J., dissenting).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

concerning the effects testifying would have on the child were completely omitted from the majority's analysis. While defendants have the Constitutional right to confront the witnesses testifying against them,<sup>168</sup> this goal can still be accomplished through the use of forensic interviews that protect both the child's psychological wellbeing and the defendant's legal rights.

Third, exceptions exist for virtually every Constitutional right. Consider the hearsay exceptions in the Federal Rules of Evidence, for example. There are more than twenty,<sup>169</sup> yet these exceptions draw no qualms from the courts as they are not regarded as offending the Constitution. The *Coronado* dissent relies heavily on *Maryland v. Craig*. In *Craig*, a statutory exception allowed the child victim to testify in a separate room, with the testimony being played in the courtroom via a one-way, closed-circuit television system where the judge, jury, and defendant could watch it in accordance with a state statute.<sup>170</sup> The United States Supreme Court held that

where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.<sup>171</sup>

The statutory exception in *Craig* was held to be constitutional because the right to face-to-face confrontation is not absolute, and the goals of the Confrontation Clause were satisfied by the fact that the child witnesses "testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified . . . ."<sup>172</sup> In fact, the Court even went as far as to say that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the

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<sup>168</sup> U.S. CONST. AMEND. VI.

<sup>169</sup> FED. R. EVID. 803.

<sup>170</sup> *Maryland v. Craig*, 497 U.S. 836, 840 (1990) (ruling that when the trial court had made a specific finding that allowing a child victim to testify by one-way closed-circuit television was necessary to protect the child from the trauma of testifying in the defendant's presence, the procedure did not violate the Confrontation Clause).

<sup>171</sup> *Id.* at 857.

<sup>172</sup> *Id.*

Confrontation Clause's truth-seeking goal."<sup>173</sup> It observed that the State has both a "traditional and 'transcendent interest in protecting the welfare of children,'" and that there is a "growing body of academic literature documenting the psychological trauma suffered by abuse victims who must testify in court."<sup>174</sup>

The dissent in *Coronado* argues that *Craig* and *Crawford* can coexist because *Crawford* addresses when the Confrontation Clause is implicated<sup>175</sup> while *Craig* addresses what procedures the Confrontation Clause requires.<sup>176</sup> While *Craig* has received minor negative treatment on state law grounds,<sup>177</sup> it has never been overruled and is still binding on lower courts, including Texas courts. Although *Craig* involved a statute allowing for closed circuit television rather than recorded forensic interviews, the Confrontation Clause concerns the Court addressed in *Craig* are virtually identical to those raised by Article 38.071. While it is certainly ideal for the defense to be able to cross-examine witnesses live and in-person, this right is not absolute, and is diminished when it harms the victim.<sup>178</sup>

Finally, not only are the questions submitted by the defense under Article 38.071 of the exact same type and scope that would be allowed at trial,<sup>179</sup> but they can be even more effective because they are asked by a trained forensic interviewer.<sup>180</sup> The child's same answers to the same questions would have been perfectly admissible at trial, and the defense had the same motives when submitting these questions as they would have had during the live trial. The defense attorney can even watch behind mirrored glass and submit additional questions to get clarification.<sup>181</sup> While it can be argued that the defense's motives may evolve throughout the investigation and trial, Article 38.071 put no deadline on when or how close to trial the last forensic interview may take place. In *Coronado*, the child was questioned by a forensic interviewer named Brandi Johnson.<sup>182</sup> The defense attorney even acknowledged the effectiveness of Johnson's ability to

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 855.

<sup>175</sup> See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>176</sup> See *Craig*, 497 U.S. at 860.

<sup>177</sup> For example, the Illinois Supreme Court declined to follow *Craig* on state law grounds in *People v. Fitzpatrick*, 633 N.E.2d 685 (1994).

<sup>178</sup> See *Craig*, 497 U.S. at 857.

<sup>179</sup> *Coronado v. State*, 351 S.W.3d 315, 343 (Tex. Crim. App. 2011).

<sup>180</sup> See *Newlin et al.*, *supra* note 2, at 12.

<sup>181</sup> See TEX. CODE CRIM. PROC. ANN. art. 38.071 § 3(a) (West 2011).

<sup>182</sup> *Coronado*, 351 S.W.3d at 333 (Keller, P.J., dissenting).

question the child when he said on the record, “‘I don’t have a problem with Mrs. Johnson using her professional judgment in questioning a five-year-old child. She’s better at it than I am, I’m sure.’”<sup>183</sup> He was then allowed to write questions for Johnson to ask the victim in this case.<sup>184</sup> Thus even the defense attorney recognized the effectiveness of forensic interviewers in these situations.

### C. Subsequent Narrowing of the Outcry Exception to Hearsay

Prosecuting child sexual assaults in Texas after the *Coronado* ruling is much more difficult. Shortly after deciding *Coronado*, the Texas Court of Criminal Appeals severely limited the outcry exception in *Bays v. State*.<sup>185</sup> The outcry exception is a statutory “hearsay exception for a child-complainant’s out-of-court ‘statements’ that ‘describe the alleged offense,’ so long as those statements were made ‘to the first [adult] person . . . to whom the child . . . made a statement about the offense.’”<sup>186</sup> The court in *Bays* held that the hearsay exception for outcry statements does not allow the playing of forensic interviews at trial.<sup>187</sup> Instead, that exception only allows the forensic interviewer to testify about what was said in the interview if the forensic interviewer was the first person that the child told about the abuse.<sup>188</sup> As discussed previously, even if abused children had access to these forensic interviewers to make an outcry about sexual abuse, some children are unlikely to talk about abuse unless there is some precipitating event or they are specifically asked about it.<sup>189</sup> Without a viable outcry exception or the specific Article 38.071 provision, the remaining options for prosecutors are essentially to either have the child testify at trial or let the defendant be acquitted. However, a child’s live in-court testimony is not only extremely traumatizing, as previously discussed, but it can also be detrimental to the defendant’s case.

It is true that the defendant’s 6th Amendment rights are satisfied in a more conventional way when child victims are forced to testify at trial. Nevertheless, what the defendant gains by having the child’s physical presence, he loses tenfold with the jury’s perception of his case, as a jury is

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<sup>183</sup> *Id.* at 334.

<sup>184</sup> *Id.*

<sup>185</sup> See *Bays v. State*, 396 S.W.3d 580, 581 (Tex. Crim. App. 2013).

<sup>186</sup> *Id.* at 585 (quoting Tex. Code Crim. Proc. Art. 38.072 §2(a)(1)-(3)).

<sup>187</sup> *Bays*, 396 S.W.3d at 592.

<sup>188</sup> *Id.* at 588.

<sup>189</sup> See Newlin et al., *supra* note 2, at 6.

far more likely to convict when the child victim testifies during the trial.<sup>190</sup> This may be due to the fact that “testifying live in court [can make] the child seem more credible and makes jurors sympathize more with [the] child.”<sup>191</sup> Thus it seems that when the child is more removed from the courtroom, such as through the use of a recorded forensic interview, the jury may be more objective and less influenced by sympathy, leading to a fairer trial for the defendant and lower rates of false conviction for defendants.

#### D. Live Testimony Creates a Less Fair Trial

In one controlled experiment conducted by David F. Ross from the University of Tennessee at Chattanooga,<sup>192</sup> mock jurors watched a videotaped simulation of a child sexual abuse trial with a 10-year-old victim.<sup>193</sup> The mock jurors saw the child testify in one of three manners: in court while directly confronting the defendant, in court with a protective shield between her and the defendant, or outside the courtroom with the testimony shown to the jury on a video monitor.<sup>194</sup> After watching the entire trial, the jurors judged the defendant’s guilt.<sup>195</sup> All testimony and evidence were the same regardless of the method used to present it, so the only difference was the manner in which the testimony was delivered to the jury.<sup>196</sup> There was no deliberation between the conclusion of the mock trial and the mock juror’s votes.<sup>197</sup> When listening to the same questions with the same answers and the same emotions exhibited by the actors, the mock jurors were most likely to find defendant guilty when open court testimony was used, with 51% believing he was guilty.<sup>198</sup> When the video was

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<sup>190</sup> See Ross et al., *supra* note 1, at 563-65.

<sup>191</sup> See Gail S. Goodman et al., *Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions*, 30 L. & HUM. BEHAV. 363, 393 (2006) [hereinafter *Hearsay Versus Children's Testimony*] (examining how the presentation of children’s hearsay impacted jurors’ perceptions of the child witness’s credibility and the defendant’s guilt).

<sup>192</sup> The study was led by David F. Ross, who has three degrees in Legal Psychology, including his PhD, is a professor of psychology at the University of Tennessee at Chattanooga, and has over 30 years of experience researching jury behavior and courtroom dynamics. See David F. Ross, PhD, ROSS TRIAL CONSULTING, LLC, <http://rosstrialconsulting.com/about/david-ross-phd/> (last visited Mar. 23, 2018).

<sup>193</sup> See Ross et al., *supra* note 1, at 555.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 556-57.

<sup>197</sup> *Id.* at 562.

<sup>198</sup> *Id.* at 558.

streamed into the courtroom, 49% believed he was guilty.<sup>199</sup> However, when a protective shield was used, only 46% believed he was guilty.<sup>200</sup>

Next a different group of mock jurors watched the exact same trial, but this time the child was the only witness to take the stand, leading to a much more significant impact on the jurors' decisions.<sup>201</sup> Again, there was no deliberation between the conclusion of the mock trial and the mock juror's votes.<sup>202</sup> Jurors were still most likely to find the defendant guilty when the child used open court testimony, with the percent who found him guilty increasing to 76.7%.<sup>203</sup> Jurors were still less likely to find defendant guilty when the video method was used, with only 60.8% voting guilty.<sup>204</sup> Finally, when a protective screen was used, 65% voted guilty.<sup>205</sup> These results show that having a child sexual assault victim testify live at trial and be cross-examined by the defense leads to more convictions than other methods when the questions and answers are exactly identical. Thus in child sexual assault cases, the defendant's right to confrontation is actually hurting rather than helping the defendant when the jurors cast their votes.

A different study conducted by Gail S. Goodman investigated the effects of the presentation of children's out-of-court statements on jurors' perceptions of witness credibility and defendant guilt.<sup>206</sup> During elaborate mock trials involving mock jurors, children's testimony was presented either live, on videotape from the social worker's interview, or via a social worker's testimony that conducted a mock forensic interview.<sup>207</sup> The analysis found that the testimony format directly influenced jurors' perceptions of child and social worker's credibility. Children were perceived as less likely to provide false statements if they testified live.<sup>208</sup> It also influenced jurors' sympathy toward the child, with the mock jurors being more likely to sympathize with the child as the visibility of the child increased with the different testimony methods used.<sup>209</sup> These two perceptions then predicted jurors' confidence in the defendant's guilt.<sup>210</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 563.

<sup>202</sup> *Id.* at 562.

<sup>203</sup> *Id.* at 563.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Hearsay Versus Children's Testimony, *supra* note 191, at 369-70.

<sup>207</sup> *Id.* at 369.

<sup>208</sup> *Id.* at 383-84, 390.

<sup>209</sup> *Id.* at 386.

<sup>210</sup> *Id.*

The study concluded that due to the child's greater visibility and the increased perceptions of the child "that child witnesses who testify live will have a stronger influence in convincing jurors of the defendant's guilt."<sup>211</sup> Thus the sympathy jurors feel for children who testify live in court is an extremely powerful catalyst for convincing the jury of the defendant's guilt and justifying a guilty verdict.

The research in this area is still developing as we continue to learn more about child cognitive and developmental functions. What is clear though, is that when children testify in live, open court, the results do not favor the defendant—juries are far more likely to convict.<sup>212</sup> In fact, the more removed the child is, either by recording or some other method, the more likely the defendant is to receive a not guilty verdict. Although the vast majority of perpetrators of sexual assault go unpunished,<sup>213</sup> every defendant deserves to have a fair trial. Perhaps allowing forensic interviews to be played in lieu of a child's live testimony at trial would encourage more victims to report their sexual assaults, and thus not only help bring justice to the victims but also provide defendants with a fairer trial.

While jurors may perceive children to be more reliable when testifying in a courtroom setting, research shows that the opposite is actually true. A study examined how 37 children, between the ages of seven and nine, who attended two sessions with their parents responded to questions in different settings.<sup>214</sup> In the first session, they saw videotapes of a conversation between a grumpy man and girl who had just returned from school, and in the second session, the children were asked about the videotape in either a private setting similar to ones used for forensic interviews or in a formal courtroom setting.<sup>215</sup> The findings showed that the quality and reliability of children's testimony is significantly improved through the use of the smaller, more intimate environment versus the courtroom setting.<sup>216</sup> When compared with the children in the courtroom setting, the children answering questions in the small room tended to give more thorough answers to open-ended questions, "answer specific questions correctly more often," and "say 'I don't know' or give no answer . . . less often."<sup>217</sup> The study concludes that videotapes should therefore be

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<sup>211</sup> *Id.* at 393.

<sup>212</sup> See Ross et al., *supra* note 1, at 553-66; see also Hearsay Versus Children's Testimony, *supra* note 191, at 363-401.

<sup>213</sup> See *The Criminal Justice System: Statistics*, *supra* note 15.

<sup>214</sup> See Hill & Hill, *supra* note 1, at 814 n.19.

<sup>215</sup> *Id.* at 815-816.

<sup>216</sup> *Id.* at 814-15.

<sup>217</sup> *Id.* at 815.

used regularly to present children's testimony.<sup>218</sup> Given the benefits of recorded testimony, perhaps to combat the perception that children are less truthful when not interviewing live in court, attorneys should cover the topic of children's perceived credibility during voir dire to help ensure that a fair and impartial jury panel is chosen to hear the case.

The evidence from the studies discussed suggests that using videotape technology both reduces the emotional trauma to the child and maintains a fair trial for the defendant. When children are questioned in settings like the ones forensic interviewers use, their answers are more likely to be truthful and accurate than when they are asked the same questions in a courtroom setting. Further, jurors are less likely to rely on their sympathy and are less likely to convict when watching videotaped testimony, which helps avoid false convictions.

Thus prosecutors, defendants, child victims, and jurors alike must contend with a number of issues in the wake of *Coronado*. Multiple peer-reviewed studies performed over roughly twenty years agree that it is in all parties' best interests that child victim's testimony be as precise and correct as possible. Not only is the defendant far more likely to be found guilty after a live confrontation<sup>219</sup> of the child witness at trial, but the child is less likely to give truthful and descriptive answers.<sup>220</sup> This ultimately fails to aid the jury in being able to decipher what actually happened—the very results upon which our entire justice system and the 6th Amendment Confrontation Clause are centered. Overturning *Coronado* and *Bays* and allowing Article 38.071 to be reinstated can prevent many of these problems.

#### E. *The Consequences of Excluding Forensic Interviews*

The ruling in *Coronado v. State*<sup>221</sup> is troubling because it makes bringing the sexual abusers of children to justice even more difficult. Sexual assault in the United States is rampant, with children comprising a significant number of those who are assaulted each year. When these children are sexually assaulted, their trauma is just beginning. To bring their assaulter to justice, they must take the stand in front of a room full of strange adults and the very person who assaulted them and answer intimate questions about exactly what happened to them. Then they are subjected to interrogation about the assault by someone who is not advocating for them, someone who may even think that they maliciously concocted the entire

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<sup>218</sup> *Id.* at 822-23.

<sup>219</sup> See Ross et al., *supra* note 1, at 558, 563.

<sup>220</sup> See Hill & Hill, *supra* note 1, at 814.

<sup>221</sup> *Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011).

allegation. The children are less likely to provide a complete response because they are scared, and often times crying, which might increase sympathy from the jury or court but also makes comprehension more difficult. The trauma of testifying in court serves no real purpose when there are other alternatives that actually improve the judicial process.

Because of the difficulties associated with the ruling and concerns for the psychological wellbeing of the child victim, the decisions in *Coronado* and *Bays* should be overturned to reinstate Texas Article 38.071 and to allow the recorded forensic interviews to be played in court for the jury. Several important issues compel the conclusion that *Coronado* and *Bays* should be overturned. There is a compelling need for this type of evidence in these sensitive cases because children are often the only witnesses to these crimes, and there is rarely any physical evidence. However, the child victims are often re-traumatized during live trial testimony, leading them to suffer life-long effects including depression, drug abuse, PTSD, and other behavioral problems. Allowing recorded forensic interviews to be admitted into evidence advances the goal of a fair trial, and when the purposes and policies regarding hearsay exceptions and the confrontation clause are considered, admissibility is supported.

The current laws essentially require a child to testify in court and relay intimate details of the assault in a room filled with strange adults and the accused person. As this evidence is essential to convict child abusers, to avoid further traumatizing children in court Article 38.071 must be reinstated to allow the recorded forensic interviews of children to be played at trial as nontestimonial evidence. The exception specifically carved out in 38.071 is the perfect solution because it allows young children to be shielded from further traumatization on the stand while protecting the defendants' right to a fair trial.

There are exceptions for almost every law. For example, hearsay has excited utterance and declarant unavailable exceptions.<sup>222</sup> Also consider the holding by the U.S. Supreme Court in *Maryland v. Craig* that the defendant's right to confrontation is not absolute, especially if it harms the victim.<sup>223</sup> While published in 1990, fourteen years before that Court's decision in *Crawford*, *Craig* has not been overruled and, thus, still constitutes binding authority.<sup>224</sup> Exceptions exist for these laws, and virtually every other existing law, because one size does not fit all. Some

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<sup>222</sup> FED. R. EVID. 803.

<sup>223</sup> See *Maryland v. Craig*, 497 U.S. 836, 857 (1990); see also *Coronado*, 351 S.W.3d 315 (Tex. Crim. App. 2011).

<sup>224</sup> *Craig*, 836 U.S. at 857.

situations call for special accommodations and recorded forensic interviews in child sexual abuse cases is one such situation.

Article 38.071 does not violate the Confrontation Clause because the defense is able to ask questions to extract the same information as it would if the child were to take the stand. Further, the information solicited is superior when asked by forensic interviewers, because they are specifically trained to elicit truthful information from the child without influencing the child's answers or recreating McMartin.<sup>225</sup> Giving the interviewer questions to ask accomplishes the same goals as live adversarial cross-examination, while taking the child's age, mental abilities, emotions, and other factors into consideration. Additionally, using a recording aids the defendant's cause, by reducing the influence of emotion on a jury. Recordings will prevent the jury from witnessing a crying child on the stand being intimidated by defense counsel.

### **Conclusion**

In short, current Texas laws are negatively affecting both the child victims and the defendants in sexual assault cases. The criminal justice system simply cannot adequately obtain justice for child sexual assault victims under current laws. The difficulties that arise from limiting the admissibility of recorded forensic interviews only perpetuate the horrendous yet undeniable fact that less than 1% of sexual abusers ever spend a day in prison.<sup>226</sup> Accordingly, it is in the best interest of justice, both in Texas and nationwide, to allow Confrontation Clause exceptions like Texas Article 38.071 to apply in these types of unique, sensitive cases.

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<sup>225</sup> See Linder, *supra* note 74.

<sup>226</sup> *The Criminal Justice System: Statistics*, *supra* note 15.