

VERMONT RULE OF EVIDENCE 807 AND THE CONFRONTATION CLAUSE

INTRODUCTION

In recent years, reports of child sexual abuse have increased dramatically. A 1979 study determined that one in five women and one in eleven men were sexually victimized as children.¹ However, prosecution of child sexual abuse cases is difficult because children are often afraid or reluctant to testify and are easily confused on cross-examination.² Additionally, parents are frequently unwilling to press charges or to cooperate when the state presses charges.³ In 1985, Vermont joined the growing number of states that have legislatively enacted special provisions to facilitate prosecution in child sex abuse cases.⁴ These provisions focus special attention on the child victim's unique difficulties testifying in open court.

A new Vermont rule of evidence—Rule 807—addresses the problem of the child victim's court testimony.⁵ In particular, Rule 807(d) provides that the child victim's testimony may be taken outside the courtroom and presented to the fact finder on videotape or on closed circuit television. However, this procedure is available to the child only if the court finds that in-court testimony by the child "will present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify."⁶ The purpose of Rule 807 is twofold: first, to remove the child from the unfamiliar atmosphere of the courtroom, and second, to relieve the child of the trauma of facing the attacker.⁷ While Rule 807 represents a significant step toward the protection of child sexual assault victims, legislative concern for the defendant's right to confrontation has resulted in a rule that may be inadequate to fulfill its purpose.

1. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

2. *Id.* at 807.

3. *Id.*

4. See, e.g., COLO. REV. STAT. § 13-15-129 (Supp. 1984); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1984).

5. VT. R. EVID. 807.

6. VT. R. EVID. 807(c).

7. Interview with Will Hunter, Vermont State Senator, in South Royalton, Vermont (Aug. 28, 1985).

I. THE CONFRONTATION CLAUSE

The primary issue raised by Rule 807 is whether the procedure allowing a victim to testify out of court and on videotape violates the defendant's constitutional right to confrontation under the sixth amendment. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁸ The confrontation clause reflects the notion that face-to-face confrontation between the accuser and the accused both facilitates and enhances the truth-seeking process at trial.⁹

The United States Supreme Court has defined the purpose of the confrontation clause in various ways, beginning with its holding in *Mattox v. United States*.¹⁰ There, the Court stated that the function of the confrontation clause was to provide the accused with a personal examination of the witness so that "the accused has an opportunity . . . of testing the recollection and sifting the conscience of the witness . . ."¹¹ *Mattox* also established that a primary function of the clause is to allow the defendant and the jury the opportunity to assess a witness's credibility, but the Court stated that the defendant's right to confrontation must occasionally give way to "considerations of public policy and necessities of the case."¹²

Whether the right to confrontation is absolute was answered in *Chambers v. Mississippi*.¹³ There, the Court held that the right to confrontation must bow to other legitimate interests in a criminal trial, but the competing interests must be closely examined

8. U.S. CONST. amend. VI.

9. Note, *supra* note 1, at 910.

10. 156 U.S. 237 (1895). Two witnesses who testified against the defendant in a murder case died before the defendant appealed the judgement. On appeal, the defendant argued that the district court had infringed his right to confrontation by permitting the deceased witnesses' testimony to be read against him on appeal. The Court held the testimony of the deceased witnesses was admissible because the defendant had confronted them at trial and because the stenographic report of their testimony was competent evidence of their words.

11. *Id.* at 242.

12. *Id.* at 243.

13. 410 U.S. 284 (1973). After the defendant was arrested for a murder, another man who would later be a witness confessed to the crime. He then repudiated his confession. The defendant was convicted. On appeal he argued that his due process rights had been violated because he had not been allowed to cross-examine the witness who had confessed. The Court held that preventing the defendant from testing the recollection of the witness, probing into the details of his alibi, and allowing the jury to determine the witness's trustworthiness constituted a violation of the defendant's rights to due process.

before confrontation is sacrificed.¹⁴

In *Ohio v. Roberts*¹⁵ the Court adopted a two-part test to determine whether the introduction of out-of-court statements of a witness who would not testify at trial contravened the defendant's right to confrontation.¹⁶ The Court determined that first, the witness must be "unavailable."¹⁷ Second, the out-of-court statements must have "adequate indicia of reliability."¹⁸ Application of such a test was necessary because out-of-court statements, when offered to prove the truth of the matter asserted, constitute hearsay evidence. Hearsay evidence is generally inadmissible at trial because it prevents the defendant from observing the demeanor of the out-of-court declarant when he or she speaks, and thus violates the defendant's right to confrontation. In most hearsay and confrontation clause cases, the Supreme Court has emphasized the importance of cross-examination and the personal presence of the witness at trial.¹⁹ Thus, the hearsay rule and the confrontation clause were designed to protect similar values.²⁰

A child's out-of-court testimony on videotape or closed circuit television constitutes hearsay if the defendant or jury is barred from confronting the child as the child testifies. Hence, read literally, the sixth amendment would bar the admission of videotape testimony altogether unless the child testified at trial as well as on videotape. However, there are exceptions to the hearsay rule. They include the unavailability of the witness, exercise of privilege, and a witness's refusal to testify.²¹ In addition, as the *Chambers* Court stated, the defendant's right to confrontation must occasionally be sacrificed to important competing interests.²²

14. *Id.* at 295.

15. 448 U.S. 56 (1980). A witness in a forgery case testified against the defendant in a preliminary hearing. At the defendant's subsequent criminal trial, the witness did not appear despite subpoenas ordering her appearance. The state offered a transcript of her testimony given at the preliminary hearing. The Court held that the introduction into evidence of her recorded testimony was constitutionally permissible because she was absent and her prior testimony at the hearing bore adequate indicia of reliability.

16. *Id.* at 66.

17. *Id.*

18. *Id.*

19. E. CLEARY, MCCORMICK ON EVIDENCE § 252 (3rd ed. 1984) at 752.

20. *Id.*

21. *Id.* at 753-755.

22. *Chambers*, 410 U.S. at 295.

II. LEGISLATIVE HISTORY OF RULE 807

The Vermont Supreme Court has stated that the right to confront witnesses is a "fundamental right" that would be binding on the state even if the Vermont Constitution did not require it.²³ The legislative history of Rule 807 reveals the struggles undertaken by the Vermont legislature in its efforts to aid the child victim of sexual assault while not contravening the defendant's right to confrontation.²⁴

This legislative history includes two key developments that indicate increasing concern for the defendant's rights. First, the requirement of a finding of substantial trauma, which must be made by the court before the child can testify on videotape or closed circuit television, was not present in the original Senate bill.²⁵ This test was created by a conference committee, at least two members of which felt that the rights of a defendant should not be sacrificed for the "trendy subject of child abuse."²⁶ The drafter of the test states that its language "developed out of thin air."²⁷ The test was added to avoid confrontation clause issues that might arise if the child were allowed unrestricted freedom to testify out of the courtroom.

Second, Rule 807(f) now requires that the child see and hear the defendant as the child testifies out of court, unless to do so would present the child with a substantial risk of trauma that would substantially impair the child's ability to testify. The original Senate bill provided that the defendant should be able to see

23. *State v. Berard*, 132 Vt. 138, 147, 315 A.2d 501, 507 (1974). Defendant was convicted in trial court for murder. The state's key witness testified concerning the events at the scene of the crime. Defendant claimed on appeal that the trial court improperly restricted the scope of examination of the witness and thus violated his right to confrontation. The court held that the right to confront witnesses and cross-examine them is not absolute, but rather is covered by common law exceptions.

24. Unpublished legislative history is voluminous. In its original form, S. 49 required no finding of trauma on the part of the victim to allow him or her to testify on videotape or closed circuit television. Additionally, the legislature did not address whether the child should see the defendant while the child testified out of court. Vermont Legislative Counsel Janet Ancel reports that she was instructed to redraft the rule to include a trauma test after the defender general of Vermont presented confrontation clause issues to the House Judiciary Committee. State Senator Will Hunter and other sources indicate the current rule represents months of negotiations between the "pro-child" and "pro-defendant" factions.

25. 1985 Vt. Acts 82.

26. Telephone interview with Vincent Illuzzi, Vermont State Senator and former Conference Committee member (Sept. 6, 1985).

27. Telephone interview with Janet Ancel, Legislative Counsel (Sept. 5, 1985).

and hear the child while the child was testifying, but that the child would neither see nor hear the defendant. Thus, the great weight assigned to the defendant's right to confrontation by the legislature is reflected in the rule's final form.

Rule 807 seems to apply directly to the requirement promulgated in *Ohio v. Roberts* that a witness who testifies out of court be "unavailable." The finding of trauma required to permit the child to testify out of the courtroom could be construed as a ruling that the child is "unavailable" to testify. However, legislatures of Vermont and other states view videotape testimony as the functional equivalent of in-court testimony, thus bypassing the availability issue altogether.²⁸

Two arguments support this notion. First, in cases where the Supreme Court has treated past testimony as ordinary hearsay, it has done so either because the defendant had no opportunity for cross-examination in the preliminary hearing or because the defendant had no way of knowing the victim did not intend to testify, and thus may have failed to conduct vigorous cross-examination.²⁹ Second, the provision preserves the essential elements of confrontation: the oath by the witness, the opportunity to cross-examine, and the opportunity to assess the witness's credibility.³⁰ To preserve the defendant's right to confrontation, the Vermont legislature added to subsection (c) the right to cross-examine, and to subsection (d) the defendant's right to confer with his or her attorney.³¹

Given the purposes of the confrontation clause, it is clear that Rule 807 was altered from its original state to provide the defendant with the right to confront his or her accuser. The defendant is required by the rule to watch the victim as the victim testifies out of court, even if the victim "passes" the trauma test and is released from the obligation to observe the defendant. The defendant's right to confrontation seems guaranteed. The remaining question is whether Rule 807, in particular subsection (f), satisfies the societal and legislative policy of protecting the child victim as well as

28. Vt. R. Evid. 807, Reporter's Notes (citing J. Bulkeley, *State Legislative Reforms and Suggested Future Policy Directions to Improve Legal Intervention in Child Sexual Abuse Cases*, National Legal Resource Center for Child Advocacy and Protection, American Bar Association).

29. Note, *supra* note 1, at 823.

30. *Id.*

31. Ancel interview, *supra* note 27.

the defendant, during testimony that is often painful and traumatic for the child.

III. INSUFFICIENT PROTECTION FOR THE CHILD

In balancing the defendant's right to confrontation with the child's right to justice and the judicial need for uninhibited, truthful testimony, the Vermont legislature has created a difficult situation for the child victim. Now, the victim must "pass" the trauma test twice: once, to testify on videotape or closed circuit television,³² and a second time, to avoid having to look at the defendant while testifying on videotape or closed circuit television.³³ Rule 807(f) provides that unless the child passes the trauma test two times, the defendant's image must be transmitted to the child who testifies on closed circuit television.³⁴ This provision seems especially harsh: given most children's symbiotic relationship with television, it seems particularly horrifying that the child must confront his or her molester's face on a TV screen.

Read superficially, the finding of trauma required by Rule 807 seems to be a difficult threshold test to meet. However, more thoughtful consideration suggests that *any* child who has been sexually molested will be traumatized by having to view his or her assailant, and that such trauma will inevitably impair the child victim's ability to testify about the incident.

Ironically, it is possible that the psychological evaluation by defense and prosecution experts to which the child would be subjected would contribute to the very harm Rule 807 was designed to prevent. Although not specified in the provision, the drafters of Rule 807 intended that each party would call an expert witness to evaluate the victim's mental state and determine if he or she would be traumatized by testifying in open court.³⁵ While the purpose of removing the child from the courtroom is fulfilled by Rule 807, encountering two expert witnesses, each of whom seeks a different result from the child's testimony, presents a traumatic situation to the child almost equivalent to the child seeing the defendant while testifying. The defense expert will attempt to establish that the potential for trauma is low or nonexistent. The effects of the al-

32. VT. R. EVID. 807(c).

33. VT. R. EVID 807(f).

34. *Id.*

35. Illuzzi interview, *supra* note 26.

leged assault will have to be underplayed. This tactic could adversely affect the child's psychological recovery because it encourages denial of the event. On the other hand, the expert for the prosecution will be intent on finding a significant potential for trauma and will be determined to enhance the effects of the assault. The result of these two conflicting attempts will confuse the child about the natural and proper response to a sexual assault, and this confusion may retard the recovery of an already traumatized child.

Instead, the finding of trauma, if it is to be made at all, should be made by the judge without expert testimony. Significantly, the Rule does not require or even suggest that expert witnesses be used to determine the finding of trauma. While the overall vagueness of Rule 807 is beyond the scope of this development note,³⁶ it is nonetheless relevant to point out that a judge would not need a degree in psychology to determine a finding of trauma in the context of a child's testimony.

A further problem with Rule 807 is that it does not specify the type of recording equipment to be used or the size of the screen to be viewed by the jury.³⁷ The Rule requires that the equipment used be both visual and aural,³⁸ and that it be capable of accurate recording.³⁹ The operators must be competent,⁴⁰ and each voice on the recording must be identified.⁴¹ However, the Rule does not address the size of the screen on which the images are to be shown to the jury. If an ancillary function of the confrontation clause is to "compel the witness to stand face to face with the jury that they may look at him and judge by his demeanor whether his testimony is worthy of belief,"⁴² then the video screen must be large enough, and the recording accurate enough, to allow the jury to assess the

36. Other points of vagueness for future study may include: absence of standards in the Rule to define trauma; absence of specifications regarding gender of the victim and the offender (one observer reports that at least one judge is construing the rule to apply only to male defendants and female victims); absence of age specifications (the same observer reports that one judge is construing the rule to apply only when the offender is over eighteen years of age); and the absence of a provision specifying the method of cross-examination of the victim.

37. Interview with Will Hunter, Vermont State Senator, in South Royalton, Vermont (Sept. 8, 1985).

38. VT. R. EVID. 807(d)(1).

39. VT. R. EVID. 807(d)(2).

40. *Id.*

41. VT. R. EVID. 807(d)(3).

42. *Mattox*, 156 U.S. at 243.

victim's facial expressions and vocal nuances. The Rule should specify the size of screen to be utilized in order to ensure that the jury sees the most faithful representation of the victim possible.

CONCLUSION

Vermont Rule of Evidence 807 effectively preserves the defendants' right to confrontation as guaranteed under the sixth amendment, but this emphasis may defeat the goal of protecting the child victim. A better balance of the interests of defendant and victim might be struck by prohibiting the use of experts in the preliminary trauma hearing and by specifying the size of the screen on which the images are to be shown to the jury. Recommendations concerning necessary changes in the trauma test itself are outside the scope of this note. However, an express requirement that experts not be involved in the determination of trauma and additional specifications in the equipment provisions of Rule 807 would achieve a better balance of defendants' rights with the child victim's special needs in the courtroom environment.

Carol Marks